

No. _____

In the
Supreme Court of the United States

APPLE INC.,

Applicant,

v.

EPIC GAMES, INC.,

Respondent.

**APPENDIX TO APPLICATION DIRECTED TO THE
HONORABLE ELENA KAGAN TO STAY MANDATE OF THE UNITED
STATES COURT OF APPEALS FOR THE NINTH CIRCUIT
PENDING CERTIORARI**

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

APR 28 2026

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

EPIC GAMES, INC.,

Plaintiff-ctr-defendant -

Appellee,

v.

APPLE INC.,

Defendant-ctr-claimant -

Appellant.

No. 25-2935

D.C. No.

4:20-cv-05640-YGR

Northern District of California,

Oakland

ORDER

Before: S.R. THOMAS and M. SMITH, Circuit Judges, and McSHANE, Chief District Judge.*

Appellee Epic Games, Inc. (Epic) moved for reconsideration of our order staying the mandate pending Appellant Apple Inc.'s (Apple) filing of a petition for a writ of certiorari. Having considered the parties' briefing, Epic's motion for reconsideration is **GRANTED**. We **REVERSE** our April 6, 2026, order granting Apple's motion to stay the mandate (Dkt. 188). The mandate shall issue in its usual course.

Federal Rule of Appellate Procedure 41(d) requires that a party seeking to stay the mandate pending the filing of a petition for certiorari "must show that the

* The Honorable Michael J. McShane, United States Chief District Judge for the District of Oregon, sitting by designation.

petition would present a substantial question and that there is good cause for a stay.” FED. R. APP. P. 41(d)(1). The Supreme Court has explained that a party that wishes to obtain a stay of the mandate pending certiorari must show “a reasonable probability that four members of the Court would consider the underlying issue sufficiently meritorious for the grant of certiorari”; “a significant possibility of reversal of the lower court’s decision”; and “a likelihood that irreparable harm will result if that decision is not stayed.” *White v. Florida*, 458 U.S. 1301, 1302 (1982) (internal quotations omitted). *Accord, e.g., Maryland v. King*, 567 U.S. 1301, 1302 (2012).

We are persuaded by Epic’s arguments that Apple has not raised a substantial question for review that raises a “reasonable probability” that four justices will vote in favor of granting certiorari, nor a “significant possibility of reversal” of our decision. *White*, 458 U.S. at 1302. The Supreme Court previously denied certiorari on Apple’s challenges to the injunction’s scope, albeit before deciding *Trump v. CASA, Inc.*, 606 U.S. 831 (2025). *See Epic Games, Inc. v. Apple Inc.*, 144 S. Ct. 682 (2024). Our decision unanimously rejected Apple’s challenges to the injunction here considering *CASA*. The Supreme Court has also denied certiorari on the question whether courts may properly consider the “spirit” of an injunction when imposing sanctions in contempt proceedings. *See Sea Shepherd Conservation Soc’y v. Inst. of Cetacean Rsch.*, 576 U.S. 1005 (2015).

Apple does not convincingly argue that this case implicates a circuit split on that question.

Moreover, we are persuaded that Apple has failed to show good cause to sustain our prior stay order. Apple has not demonstrated that any proceedings on remand will cause it irreparable harm if our decision is not stayed. Instead, Apple argues that remand proceedings on the question of commission would be “premature.” Even if the Supreme Court agrees with Apple’s arguments, there would still be further proceedings on remand, particularly on the question of commission, and those proceedings are likely to look similar, if not the same, regardless of certiorari.

Accordingly, we conclude that Apple has failed to meet the requirements pursuant to Federal Rule of Appellate Procedure 41(d).

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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EPIC GAMES, INC.,

Plaintiff-ctr-defendant -

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Appellant.

No. 25-2935

D.C. No.

4:20-cv-05640-YGR

Northern District of California,
Oakland

ORDER

Before: S.R. THOMAS and M. SMITH, Circuit Judges, and McSHANE, Chief District Judge.*

Appellant Apple Inc.'s motion to stay the mandate pending the filing of a petition for writ of certiorari (Dkt. 187) is **GRANTED**. If, within that period, the Clerk of the Supreme Court advises the Clerk of this Court that a petition for certiorari has been filed, then the mandate shall be further stayed until the Supreme Court's final disposition.

* The Honorable Michael J. McShane, United States Chief District Judge for the District of Oregon, sitting by designation.

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EPIC GAMES, INC.,

*Plaintiff-ctr-defendant -
Appellee,*

v.

APPLE INC.,

*Defendant-ctr-claimant -
Appellant.*

No. 25-2935

D.C. No.
4:20-cv-05640-
YGR

OPINION

Appeal from the United States District Court
for the Northern District of California
Yvonne Gonzalez Rogers, District Judge, Presiding

Argued and Submitted October 21, 2025
San Francisco, California

Filed December 11, 2025

Before: SIDNEY R. THOMAS and MILAN D. SMITH,
JR., Circuit Judges, and MICHAEL J. MCSHANE, Chief
District Judge.*

Opinion by Judge Milan D. Smith, Jr.

* The Honorable Michael J. McShane, United States Chief District Judge
for the District of Oregon, sitting by designation.

SUMMARY**

Contempt / Sanctions

The panel (1) affirmed in part and reversed in part the district court's order imposing civil contempt sanctions on Apple Inc. for failing to comply with an injunction in an action brought by Epic Games, Inc.; and (2) declined to vacate the injunction.

After a bench trial, the district court enjoined Apple from certain anticompetitive business practices related to its App Store, and this court affirmed the injunction. Apple claimed to comply with the injunction, but it instead prohibited App Store developers from using buttons, links, and other calls to action without paying a prohibitive commission to Apple, and it restricted the design of the developers' links to make it difficult for customers to use them. The district court found Apple in contempt, and it issued an order to address Apple's violations of the injunction.

Affirming the district court's contempt findings, the panel held that the district court did not abuse its discretion by finding Apple in contempt. Addressing Apple's methodological arguments, the panel concluded that the district court did not improperly rely on the injunction's spirit. The district court did not err in considering evidence of Apple's bad faith and did not clearly err in finding that Apple acted in bad faith. And the district court properly considered materials that Apple contended were protected by the attorney-client privilege. Addressing the merits 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.

district court's contempt analysis, the panel concluded that Apple's civil contempt was shown by clear and convincing evidence. Under the injunction, Apple could not prohibit developers from including in their apps and their metadata buttons, external links, or other calls to action that directed customers to purchasing mechanisms outside of Apple's App Store. The panel concluded that charging a 27% commission had a prohibitive effect, in violation of the injunction. Apple also prohibited users from making purchases on developers' sites, in violation of the injunction, with its restrictions on link design. Two restrictions violated the strict letter of the injunction, and others violated the injunction's implicit command to refrain from action designed to defeat it.

The panel reversed and remanded in part the district court's imposition of civil contempt sanctions. The panel concluded that most of the six prescriptive restrictions that the district court imposed on Apple's conduct properly restated Apple's existing obligations under the injunction, but some parts of the restrictions were overbroad. In addition, a commission prohibition did not qualify as a civil contempt sanction in its present form. The panel modified part of the district court's order and remanded to the district court for further modifications. The panel concluded that the district court's order did not impose price controls requiring equitable abstention under California's Unfair Competition Law. The order did not violate the Takings Clause by forbidding Apple from charging a commission on linked-out purchases, and the order did not violate Apple's First Amendment rights. In addition, the district court did not deny Apple due process.

The panel rejected Apple's arguments that the injunction must be vacated. The panel concluded that a recent decision

from a California Court of Appeal did not conflict with the injunction. Apple argued that the Supreme Court's recent ruling on nationwide injunctions in *Trump v. CASA, Inc.*, 606 U.S. 831 (2025), clashed with the injunction, but the panel concluded that *CASA* did not undermine this court's prior analysis of the injunction's scope, and the district court's injunction was not an impermissible nationwide injunction.

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OPINION

M. SMITH, Circuit Judge:

Plaintiff-Appellee Epic Games, Inc. (Epic) sued Defendant-Appellant Apple, Inc. (Apple) for alleged antitrust violations related to Apple's App Store. After a bench trial, the district court enjoined Apple from certain anticompetitive business practices. Namely, Apple could not prohibit App Store developers from using buttons, links, or other calls to action to encourage customers to make purchases from the developers rather than Apple. We affirmed. Apple claimed to comply with the injunction, but it instead prohibited developers from using buttons, links, and other calls to action without paying a prohibitive commission to Apple, and it restricted the design of the developers' links to make it difficult for customers to use them.

The district court found Apple in contempt, and it issued an order to address Apple's violations of the injunction. We affirm the district court's contempt findings. We reverse and remand in part the district court's imposition of civil contempt sanctions, but we otherwise affirm that order. Separate from the contempt issues, Apple urges us to vacate the injunction, citing new cases from the California Court of Appeal and the U.S. Supreme Court. We reject its arguments. We also reject its request for a new district judge on remand.

FACTS AND PRIOR PROCEEDINGS

Epic develops video games, most notably *Fortnite*. It also runs the online Epic Games Store to distribute its own apps and apps belonging to other companies.

Apple developed the iPhone and iPad; the operating system, iOS; and the App Store. Apple licenses its intellectual property to developers (like Epic) so they can build iOS software applications (apps) and distribute them through the App Store. Developers can earn money off their apps using the In-App Purchase (IAP) system. With IAP, users can buy digital goods and services from developers in the App Store, and in doing so, users pay Apple, which remits 70% to the developers and keeps 30% for itself as a commission.¹

Five years ago, Epic sued Apple, alleging claims pursuant to the Sherman Act, in addition to California’s Cartwright Act and California’s Unfair Competition Law (UCL). Epic alleged that Apple could not require developers like itself to use Apple’s IAP for purchases of digital products within iOS apps. Epic also alleged that Apple could not ban developers from using “buttons, external links, or other calls to action [to] direct customers to purchasing mechanisms other than” IAP, which could allow them to avoid Apple’s commission.

After a bench trial, the district court reached a mixed result. It found in Apple’s favor with respect to the IAP requirement for purchases within iOS apps but in Epic’s favor with respect to Apple’s ban on developers directing customers to non-IAP purchasing mechanisms (*i.e.*, Apple’s “anti-steering” provisions). *See Epic Games, Inc. v. Apple Inc. (Epic I)*, 559 F. Supp. 3d 898, 1052–57, 1068–69 (N.D. Cal. 2021). It dismissed the antitrust claims but concluded that Apple’s anti-steering provisions violated the UCL by

¹ Users can also purchase physical goods from developers using IAP, although only digital goods and services are at issue here. There is no commission on purchases of physical goods.

“threaten[ing] an incipient violation of an antitrust law’ by preventing informed choice among users of the iOS platform.” *Id.* at 1055 (quoting *Cel-Tech Commc’ns, Inc. v. Los Angeles Cellular Tel. Co.*, 20 Cal. 4th 163, 187 (1999)). The district court explained its findings in a written order.

Based on those findings, the district court, in relevant part, “permanently restrained and enjoined” Apple “from prohibiting developers from . . . including in their apps and their metadata buttons, external links, or other calls to action that direct customers to purchasing mechanisms, in addition to [IAP].” This was memorialized in a separate document (the Injunction).

Both parties appealed to us, and we affirmed in part, reversed in part, and remanded. *See Epic Games, Inc. v. Apple, Inc. (Epic II)*, 67 F.4th 946, 973 (9th Cir. 2023), *cert. denied*, 144 S. Ct. 681–82 (2024). In particular, we affirmed the Injunction. *Id.* at 1002.

Prior to the Injunction, purchases made off the Apple platform (linked-out purchases) were not subject to a commission because Apple did not allow for such purchases. However, while appealing the Injunction, Apple contemplated whether to charge a commission on those purchases, given the Injunction requires Apple to allow for these transactions they had previously banned.

In May 2023, after our court ruled on the appeal, Apple examined two proposals. With Proposal 1, Apple would charge no commission but would restrict what links could say, what they could look like, and where they could be located. With Proposal 2, Apple would lift most of those restrictions but charge a 27% commission on linked-out purchases. Apple studied the potential revenue consequences of both proposals and eventually decided that

it would combine the commission from Proposal 2 with the restrictions from Proposal 1.

In conceiving the 27% commission, Apple took the 30% commission for the purchases through IAP and applied a “cost of payments discount” of 3%.² Importantly, however, Apple believed that the 3% discount was too small to lead to meaningful “developer adoption of link-out.” In a linked-out purchase, developers would pay more than 30% because they would pay 27% commission to Apple plus more than 3% to cover the external costs of processing payments. In a transaction using IAP, developers would pay only Apple’s 30% commission.

Apple also studied the effects of its link restrictions. It found that “when a link-out happens, there will be some breakage,” meaning a fraction of “customer[s] [will] drop[] off during the buy-flow process due to a less seamless experience” on the developer’s site compared to Apple’s IAP. Apple calculated that, if it could push breakage above a certain percentage, “developers reach a tipping point where they [would] lose more on linking out than they would make sticking with Apple [I]AP and [paying] the higher commission.”

Based on these analyses, Apple decided it would adopt certain restrictions on external links, which were incorporated into Apple’s “Link Entitlement” program. Such restrictions included:

1. External payment links had to follow the so-called “Plain Button style,” meaning the link

² The 27% commission would be applied to purchases made for a period of seven days after the consumer followed the link out of the app.

could not be enclosed in a visible shape. The link could be enclosed in a shape, but it would not be visible because “[t]he background surrounding the text must match the background of [the] app’s page.”

2. External payment links had to follow one of five templates and could not say anything else.
3. External payment links could not “be displayed on any page that is part of an in-app flow to merchandise or initiate a purchase using” IAP.
4. Each time a user clicked an external payment link, the user would be presented with a warning that they were “about to go to an external website”; that Apple was “not responsible for the privacy or security of purchases made on the web”; that “[a]ny accounts or purchases made” using the link would “be managed by the developer”; that the user’s “App Store account, stored payment method, and related features, such as subscription management and refund requests” would not be available; and that Apple could not “verify any pricing or promotions offered by the developer.”
5. External payment links had to be static, not dynamic, meaning the link could not identify the user or automatically log that user into their account after clicking the link.

6. External payment links could not be used by participants in Apple’s Video Partner Program (VPP) or News Partner Program (NPP).
7. External payment must “[b]e displayed no more than once in app, on no more than one app page the user navigates to . . . in a single, dedicated location on such page, and may not persist beyond that page[.]”

We will generally refer to these restrictions as “link design restrictions,” despite the fact that they restrict more than link design. In its App Review Guidelines, Apple determined that developers would be required to participate in the program if they intended “to include a link to the developer’s website that informs users of other ways to purchase digital goods or services.”

Apple put its plan (27% commission and Link Entitlement program) into action several months after our court issued its decision affirming the Injunction. The Supreme Court denied Apple’s certiorari petition on January 16, 2024, *see Apple Inc. v. Epic Games, Inc.*, 144 S. Ct. 681 (2024), and the plan went into effect later that same day. Apple filed a Notice of Compliance with the district court, which “summarize[d]” the changes that it made to comply with the Injunction. The Injunction went into effect the next day.

Two months later, Epic moved to enforce the Injunction, contending Apple was not in compliance. The district court then set an evidentiary hearing for May 2024. That hearing lasted six court days and involved testimony from seven witnesses. The district court “became increasingly

concerned that Apple was not only withholding critical information about its business decision for complying with the Injunction, but also that it had likely presented a reverse-engineered, litigation-ready justification for actions which on their face looked to be anticompetitive.”

In light of its concerns, the district court “ordered the production of all Apple’s documents relat[ed] to the decision-making process leading to the link entitlement program and associated commission rates.” Apple asserted privilege over many of those documents, but most of its privilege claims were eventually withdrawn or rejected. In September 2024, Apple filed a motion for relief from the Injunction pursuant to Fed. R. Civ. P. 60(b). After Apple’s document production concluded, the evidentiary hearing resumed in February 2025. The second hearing lasted three days and involved testimony from five witnesses.

On April 30, 2025, the district court issued an omnibus order (the April 30 Order). *See Epic Games, Inc. v. Apple Inc. (Epic III)*, 781 F. Supp. 3d 943 (N.D. Cal. 2025). It denied Apple’s motion to set aside the Injunction. *See id.* at 983–89. It granted Epic’s motion to enforce the Injunction and held Apple in civil contempt for noncompliance with the Injunction. *See id.* at 989–95. The district court noted that as of the May 2024 hearing, Apple provided no evidence of developer adoption rates, with no evidence that any large developer was willing to comply with Apple’s conditions to offer linked-out purchases. *See id.* at 982 & n.50. It permanently enjoined Apple from:

1. Imposing any commission or any fee on purchases that consumers make outside an app, and as a consequence thereof, no reason exists to audit, monitor, track or require

- developers to report purchases or any other activity that consumers make outside an app;
2. Restricting or conditioning developers' style, language, formatting, quantity, flow or placement of links for purchases outside an app;
 3. Prohibiting or limiting the use of buttons or other calls to action, or otherwise conditioning the content, style, language, formatting, flow or placement of these devices for purchases outside an app;
 4. Excluding certain categories of apps and developers from obtaining link access;
 5. Interfering with consumers' choice to proceed in or out of an app by using anything other than a neutral message apprising users that they are going to a third party-site; and
 6. Restricting a developer's use of dynamic links that bring consumers to a specific product page in a logged-in state rather than to a statically defined page, including restricting apps from passing on product details, user details or other information that refers to the user intending to make a purchase.

Id. at 1003–04 (footnote omitted). The district court also resolved some outstanding privilege disputes and other issues. *See id.* at 995–1002. Finally, it referred Apple and one of its officers for criminal investigation. *See id.* at 1005. Apple timely appeals from the April 30 Order.

STANDARD OF REVIEW

“This court reviews a district court’s contempt finding and imposition of sanctions for abuse of discretion.” *Stone v. City & Cnty. of San Francisco*, 968 F.2d 850, 856 (9th Cir. 1992), *as amended on denial of reh’g* (Aug. 25, 1992). However, “[w]e review a district court’s factual findings in connection with a contempt order for clear error.” *Coleman v. Newsom*, 131 F.4th 948, 956 (9th Cir. 2025). Our court has been less than clear about the standard of review applicable to privilege calls. *See Greer v. Cnty. of San Diego*, 127 F.4th 1216, 1222 (9th Cir. 2025). Because we would affirm the district court’s privilege analysis regardless of the standard of review, we will not resolve the apparent intra-circuit split over the correct standard of review. Finally, we review “the denial of a Rule 60(b) motion for relief from judgment” “for abuse of discretion.” *Marroquin v. City of Los Angeles*, 112 F.4th 1204, 1211 (9th Cir. 2024).

ANALYSIS

The district court found Apple in contempt for violating the Injunction, and in the April 30 Order, it issued specific restraints on Apple’s conduct pursuant to the Injunction. The district court did not abuse its discretion by finding Apple in contempt. The district court’s restrictions in the April 30 Order are affirmed in part and reversed and remanded in part. Despite Apple’s arguments to the contrary, most of the restrictions imposed by the district court align with the Injunction, although they are overbroad in some respects. However, the commission prohibition is not an appropriately cabined civil contempt sanction. Accordingly, the April 30 Order is reversed in relevant part and remanded to the district court. We otherwise affirm the April 30 Order.

Separately, Apple contends that the Injunction must be vacated in light of recent authority from the California Court of Appeal and the U.S. Supreme Court. These arguments lack merit. We also reject Apple’s request that a different district judge be assigned to the case on remand.

I. Jurisdiction

According to Apple, we have jurisdiction over this appeal pursuant to 28 U.S.C. § 1291. Apple explains that the April 30 Order is a final order for the purposes of § 1291 that disposes of the post-judgment contempt proceeding and Apple’s motion to set aside the judgment. Epic does not disagree. We conclude that we have jurisdiction over this appeal because the Injunction and April 30 Order were drafted as final orders, despite our remand in part of the April 30 Order to clarify some of its provisions, as detailed below. The outcome of the appeal does not change our jurisdictional status.

II. The District Court’s Contempt Findings and Analysis

Apple makes three methodological challenges to the district court’s contempt analysis. It contends that the district court improperly: (i) relied on the Injunction’s spirit; (ii) considered evidence of Apple’s bad faith; and (iii) considered privileged material in making its rulings. Each methodological challenge fails, and we affirm the contempt findings on the merits. The district court did not abuse its discretion by finding Apple in contempt.

A. The Injunction’s Spirit

“Civil contempt . . . consists of a party’s disobedience to a specific and definite order by failure to take all reasonable steps within the party’s power to comply.” *In re Dual-Deck*

Video Cassette Recorder Antitrust Litig., 10 F.3d 693, 695 (9th Cir. 1993). “In contempt proceedings[,] . . . a decree will not be expanded by implication or intendment beyond the meaning of its terms,” but those terms must be “read in the light of the issues and the purpose for which the suit was brought.” *Terminal R.R. Ass’n of St. Louis v. United States*, 266 U.S. 17, 29 (1924).

In *Institute of Cetacean Research v. Sea Shepherd Conservation Society (Sea Shepard)*, 774 F.3d 935 (9th Cir. 2014), we determined that because “it is proper to observe the objects for which the relief was granted,” courts can “find a breach of the decree in a violation of the spirit of the injunction, even though its strict letter may not have been disregarded.” *Id.* at 949 (quoting *John B. Stetson Co. v. Stephen L. Stetson Co.*, 128 F.2d 981, 983 (2d Cir. 1942)).

Thus, pursuant to *Sea Shepard*, the district court did not err in concluding that courts “look to the spirit of the injunction when a litigant applies a dubiously literal interpretation of the injunction, particularly where that interpretation is designed to evade the injunction’s goals.” *Epic III*, 781 F. Supp. 3d at 990–91. Apple resists this conclusion, arguing that *Sea Shepard* “does not apply when . . . the injunction’s plain terms do not proscribe the conduct at issue, and there is no contention of aiding and abetting.” The first argument fails because, in the above-quoted part of *Sea Shepard*, we assumed that the strict letter of the injunction was not violated. *See Sea Shepard*, 774 F.3d at 949. The second argument fails because, although *Sea Shepard* was an aiding-and-abetting case, the above-quoted portion says nothing about aiding and abetting. Indeed, courts must prevent defendants from evading injunctions even when they have not enlisted an aider or abettor. In

short, *Sea Shepherd* means what it says: parties may be held in contempt for violating the spirit of an injunction.

Sea Shepard's holding makes practical sense. Were “narrow literalism . . . the rule of interpretation, injunctions w[ould] spring loopholes, and parties in whose favor injunctions run w[ould] be inundating courts with requests for modification in an effort to plug the loopholes.” *Schering Corp. v. Ill. Antibiotics Co.*, 62 F.3d 903, 906 (7th Cir. 1995) (internal citations omitted).

Next, Apple argues that the district court violated Fed. R. Civ. P. 65(d)(1). Pursuant to that rule, “[e]very order granting an injunction . . . must . . . state its terms specifically; and . . . describe in reasonable detail—and not by referring to the complaint or other document—the act or acts restrained or required.” Fed. R. Civ. P. 65(d)(1)(B), (C). The district court complied with this rule. The Injunction was filed as a separate docket entry, and it does not reference another document, including the district court’s opinion evaluating liability. Instead, it merely notes that the Injunction is “consistent with its findings of fact and conclusions of law.” The Injunction also stated its terms specifically and in reasonable detail: it enjoined Apple, in relevant part, “from prohibiting developers from . . . including in their apps and their metadata buttons, external links, or other calls to action that direct customers to purchasing mechanisms, in addition to In-App Purchasing.” It did not exhaustively enumerate the ways that Apple might design the App Store to prohibit those calls to action, but Rule 65 does not require it to do so.

Apple’s position also breaks down because Rule 65(d) regulates only the “contents and scope of every injunction and restraining order.” Fed. R. Civ. P. 65(d) (citation

modified). It does not purport to limit what materials courts may consider during contempt proceedings to interpret the plain terms of the Injunction. In fact, it says nothing about contempt. Even if district courts holding contempt proceedings could consider only the materials identified in Rule 65, that would make no difference here. Rule 65 applies to “orders granting injunctions,” not just the injunctions themselves.

B. Apple’s Bad Faith

Apple first disputes that its bad faith was legally relevant to the court’s contempt determination and then argues that the district court erred by finding that it acted in bad faith. The district court did not err in deciding that it could consider evidence of Apple’s bad faith, nor did it clearly err in finding that Apple acted in bad faith.

Beginning with the first challenge, Apple cannot obtain reversal because “[t]he doctrine of invited error prevents a defendant from complaining of an error that was his own fault.” *United States v. Magdaleno*, 43 F.4th 1215, 1219 (9th Cir. 2022) (quoting *United States v. Myers*, 804 F.3d 1246, 1254 (9th Cir. 2015)). In opposing Epic’s motion to enforce the Injunction, Apple argued that Epic was required to prove “that Apple did not make good-faith efforts to substantially comply with the Injunction,” arguing that “Epic ha[d] not adduced any relevant evidence to that effect” and “the undisputed evidence establishe[d] Apple’s good-faith compliance with the Injunction.” Having put its good faith at issue, it cannot fault the district court for considering it.

Even if Apple had preserved the point, there was no error. The standard for evaluating contempt “is generally an *objective* one,” in that “a party’s subjective belief that she was complying with an order ordinarily will not insulate her

from civil contempt if that belief was objectively unreasonable.” *Taggart v. Lorenzen*, 587 U.S. 554, 561 (2019) (emphasis in original). However, there is a “narrow” exception: a party should not be held in contempt if “[their] action appears to be based on a good faith and reasonable interpretation of (the court’s order).” *Sea Shepard*, 774 F.3d at 953 (quoting *Vertex Distrib., Inc. v. Falcon Foam Plastics, Inc.*, 689 F.2d 885, 889 (9th Cir. 1982)). Because this exception rises and falls on an objective inquiry (*i.e.*, whether a defendant’s interpretation is “reasonable”), the exception is not helpful for Apple, which based its conduct on an objectively unreasonable interpretation of the Injunction. *See id.* That being said, the exception shows that good faith can be relevant to a court’s contempt evaluation, refuting Apple’s argument that its “subjective motivations ha[ve] no bearing on whether Apple can be held in civil contempt.”

Good faith, when coupled with an objectively reasonable interpretation of a court’s order, can be enough to avoid a contempt finding. Here, even assuming that Apple’s interpretation of the Injunction is reasonable (it is not), evidence of Apple’s bad faith negates a good-faith defense. In any case, the Supreme Court has acknowledged that “civil contempt sanctions may be warranted when a party acts in bad faith.” *Taggart*, 587 U.S. at 561–62.

Apple offers three reasons that the district court clearly erred in its April 30 Order in finding that Apple acted in bad faith, “unfairly impugn[ing] its motives when responding to the original injunction.” None of them is persuasive.

First, the district court noted that Apple “hid its decision-making process from the Court,” *Epic III*, 781 F. Supp. 3d at 960, but Apple argues that it filed a “transparent ‘Notice of

Compliance” about its compliance plans. Apple further argues that it was not required to provide additional details about its compliance plan because Epic did not seek discovery prior to the first evidentiary hearing. However, as Epic counters, Apple has ignored the district court’s finding that Apple “attempted to mislead” in its Notice of Compliance and May 2024 hearing with “pretextual” justifications. *See Epic III*, 781 F. Supp. 3d at 971–72.

Second, the district court noted that, “[u]ltimately, Apple’s 2024 response to the Injunction was the most anticompetitive option” among those options that Apple considered. *Id.* at 962. Apple argues that the district court “penalized Apple for choosing what [it] understood to be the most advantageous option for its business and shareholders,” which is not evidence of bad faith. But the district court did not find Apple in contempt because it picked the most advantageous of several purportedly compliant options. Instead, it found that “at every step Apple considered whether its actions would comply, and at every step Apple chose to maintain its anticompetitive revenue stream over compliance.” *Epic III*, 781 F. Supp. 3d at 992. It also found that Apple “opted to construct a program that nullified the revenue impact of the Injunction by prohibiting any viable alternative.” *Id.* at 991.

Third, the district court found that the Analysis Group’s “recommendation of a commission rate on link-out transactions as the basis for [Apple’s] commission determination [was] entirely manufactured, and Apple’s reliance thereon [was] a sham.” *Id.* at 993. According to Apple, Apple hired the consulting firm Analysis Group, which started in the spring of 2023, to explore how Apple might “fairly charge for the value that it provides to developers . . . while implementing a linkout to allow [users]

to purchase from the web.” Yet, the district court found that the “report did not materially factor into Apple’s decision-making process.” *Epic III*, 781 F. Supp. 3d at 993. This factual finding is not clearly erroneous given that, as the district court explained, the record suggests that Apple picked its commission rate in July 2023, and the report is dated January 2024. *See id.* at 967–968.

Regardless, the district court found Apple in contempt for other reasons. Specifically, it found that Apple “*willfully* chose to ignore the Injunction, *willfully* chose to create and impose another supracompetitive rate and new restrictions, and thus *willfully* violated the Injunction.” *Id.* at 992.

C. Apple’s Allegedly Privileged Materials

Apple’s last methodological challenge to the district court’s contempt findings is part legal and part factual. On the law, Apple argues that the district court applied the wrong test for assessing communications that involve both legal and business advice. We disagree.

We held in *In re Grand Jury*, 23 F.4th 1088 (9th Cir. 2021), “that the primary-purpose test applies to attorney-client privilege claims for dual-purpose communications.” *Id.* at 1092. “Under the ‘primary purpose’ test, courts look at whether the primary purpose of the communication is to give or receive legal advice, as opposed to business or tax advice.” *Id.* at 1091. However, *Grand Jury* left open whether legal advice must be “*the* primary purpose” or just “*a* primary purpose.” *Id.* at 1094 (emphases in original). The latter test was adopted by the D.C. Circuit in *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754 (D.C. Cir. 2014). According to Apple, we should apply the *Kellogg* test to dual-purpose communications, as those at issue here.

We decline Apple’s invitation to apply *Kellogg* in this case. As in *Grand Jury*, we find “no need to adopt or apply the *Kellogg* formulation of the primary-purpose test here.” 23 F.4th at 1095. First, although one can “see the merits of the reasoning in *Kellogg*,” Apple cites nothing to change our court’s conclusion that “[n]one of [its] other sister circuits have openly embraced *Kellogg* yet.” *Id.* at 1094. Second, the “*Kellogg* test would only change the outcome of a privilege analysis in truly close cases, like where the legal purpose is just as significant as a non-legal purpose.” *Id.* at 1095.

On these facts, Apple has not presented a close privilege call, even reviewing de novo. Apple’s briefing addresses only two documents in any detail. First, the district court relied on an “internal presentation” that “proposed two options for achieving compliance with the Injunction” entitled “Proposed responses to Epic injunction.” Second, the district court relied on a June 2023 presentation titled “Epic Injunction Implementation Proposal.” While some of these documents contained some privileged communications, those communications were redacted.

Among what remains, legal advice was not the primary purpose of the communications. Rather, the communications largely relate to Apple’s business personnel, and their consideration of how the company could offer linked-out purchases without losing revenue. Apple contends that these documents “were ‘prompted by a Court order.’” But whether *Kellogg* applies or not, Apple must do more than show the “dual-purpose communication was made ‘because of’ the need to give or receive legal advice.” *Grand Jury*, 23 F.4th at 1092. The fact that the Injunction prompted, or caused, these communications is not enough.

Next, Apple argues that one of these documents contained a slide with a screenshot of the Injunction and the other contained a slide listing some “[r]equirements” and “[k]ey elements under consideration” from the Injunction. But neither slide shows that receiving legal advice was even *a* primary purpose, much less *the* primary purpose. Both slides were at the beginning of the presentation, and in the following slides, Apple analyzed how various compliance options would affect its revenue, not the strength or risk of its legal positions. In context, these initial slides were merely an introduction to the bulk of the presentation. Because the unredacted parts of the following slides consisted of classic business advice regarding business risks, there was no error in the district court’s privilege analysis.

D. The District Court’s Contempt Findings

Having resolved Apple’s methodological arguments, we turn to the merits of the district court’s contempt analysis. Civil contempt must be shown by clear and convincing evidence. *See In re Dual-Deck*, 10 F.3d at 695. Under the Injunction, Apple could not “prohibit[] developers from . . . including in their apps and their metadata buttons, external links, or other calls to action that direct customers to purchasing mechanisms” outside of Apple’s App Store. Ultimately, the parties’ dispute turns on the meaning of the key word “prohibit,” which can be interpreted to mean “[t]o prevent, preclude, or severely hinder.” *Prohibit*, Black’s Law Dictionary (12th ed. 2024).

i. Apple’s 27% commission

The first question is whether charging a 27% commission has a prohibitive effect, in violation of the Injunction. We agree with the district court that it does. On purchases made through IAP, Apple charges 30%

commission. On linked-out purchases, it charged 27%. However, Apple knew that processing linked-out purchases would cost developers more than 3%. As the district court found, “Apple willfully set a commission rate that in practice made all alternatives to [its platform] economically non-viable.” *Epic III*, 781 F. Supp. 3d at 992. The district court found no evidence that any developer chose to direct customers to their own purchasing mechanisms and pay Apple’s 27% commission in doing so. *See id.* at 982.

Apple is not the first litigant to try burdening what it could not prohibit. Two hundred years ago, Congress created the Bank of the United States, and the state of Maryland tried to tax it. *See M’Culloch v. Maryland*, 17 U.S. 316, 317–18 (1819). The Supreme Court saw through this ploy: Maryland could not tax the bank because “the power to tax involves the power to destroy[.]” *Id.* at 431. In the same way, Apple has demonstrated that charging commissions on linked-out purchases gives it the power to prohibit them. “An unlimited power to tax involves, necessarily, a power to destroy; because there is a limit beyond which no institution and no property can bear taxation.” *Id.* at 327. Once Apple’s commission on those transactions was large enough, no rational developer would offer them. The Injunction prohibits that kind of conduct.

Apple responds that the Injunction says nothing about commissions. But Apple does not “have an immunity from civil contempt because the plan or scheme which [it] adopted was not specifically enjoined.” *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 192 (1949). Having “experiment[ed] with disobedience of the law,” *id.*, it must now bear the burden of being found in contempt. If Apple was correct that “[c]ivil contempt [could be] avoided today by showing that the specific plan [it] adopted . . . was not

enjoined,” the district court would have to enter “a new” injunction targeting Apple’s “particular plan.” *Id.* “Thereafter,” Apple could “work out a plan that was not specifically enjoined” and “once more obtain[]” “[i]mmunity . . . because the new plan was not specifically enjoined.” *Id.* at 192–93. By doing so, “a whole series of wrongs [would be] perpetrated and [the Injunction would] go[] for naught.” *Id.* at 193.

Apple emphasizes that, in its view, the district court expressly permitted it to charge a commission on linked-out purchases. *See Epic I*, 559 F. Supp. 3d at 1042. Apple overreads the district court’s decision. The language that Apple quotes from the district court’s liability opinion is pulled from its discussion of in-app purchases and alternatives to IAP that would still allow Apple to collect a commission.³ The district court did not mention a commission for linked-out purchases, presumably because linked-out purchases were not permitted at that time. The same is true of our previous opinion. *See generally Epic II*, 67 F.4th 946.

³ In *Epic I*, the district court assessed the market “for in-app purchases of in-app content.” 559 F. Supp. 3d at 1042. Epic argued that “Apple [should] be barred from restricting or deterring in any way ‘the use of in-app payment processors other than IAP.’” *Id.* The district court rejected this argument because “IAP is the method by which Apple collects its licensing fee from developers,” and “[e]ven in the absence of IAP, Apple could still charge a commission on developers”; “[i]t would simply be more difficult for Apple to collect that commission.” *Id.* The court explained that, “in such circumstances[,] [] Apple may rely on imposing and utilizing a contractual right to audit developers annual accounting to ensure compliance with its commissions, among other methods.” *Id.* at 1042 n.617. This discussion was aimed at the practical reality of using IAP versus another commission method for in-app purchases of in-app content.

That being said, it would be difficult to say that *all* commissions violate the Injunction, and, as discussed below, we decline to do so.⁴ However, Apple did not charge *any* commission; it charged a prohibitive commission. The district court did not abuse its discretion for finding Apple in contempt for imposing it.

ii. Apple’s link design restrictions

The next question is whether Apple prohibited users from making purchases on developers’ sites, in violation of the Injunction, with its restrictions on link design in the Link Entitlement Program. There are several restrictions at issue, and although we address each separately, all violate the Injunction. The first two restrictions violate the strict letter of the Injunction. For the remaining restrictions, we will assume *arguendo* that Apple did not violate the strict letter of the Injunction. Even so, these restrictions violated the Injunction’s “implicit command to refrain from action designed to defeat it.” *NLRB v. Deena Artware, Inc.*, 361 U.S. 398, 413 (1960) (Frankfurter, J., concurring).

First, the Injunction requires Apple to allow developers to use both “links” and “buttons.” Apple did not allow buttons: it allowed developers to use something it calls a “plain button,” but the “plain button” is no button at all. A plain button “may not be enclosed in a shape that uses a contrasting background fill”; instead, the “background surrounding text must match the background of [the] app’s page.” Thus, the alleged “button” is invisible. Because the

⁴ In its April 30 Order, the district court seems to indirectly acknowledge that the Injunction allows Apple to charge some commission on linked-out purchases, but it explains that Apple lost the “opportunity” to “valu[e] its intellectual property” given its “retroactive[] justifi[ca]tion of its[] desired end result.” *Epic III*, 781 F. Supp. 3d at 993.

Injunction requires Apple to permit both “buttons” and “links,” merely making the link, not the button, visible does not comply with the Injunction; the Injunction contemplates *both* “buttons” and “links,” not one of the two.

Second, beyond “buttons” and “links,” the Injunction requires Apple to permit “other calls to action.” Apple did not do so. Developers can use only five different templates, and these templates are essentially links. Each contains a single phrase like “Lower price offered” or “Buy for \$X.XX” and the link itself. Whether these templates are characterized as “buttons” or “links,” the Injunction permits developers to use “other calls to action.” By limiting developers to particular, limited templates, Apple violated the Injunction.

Third, Apple requires that external purchase links “[n]ot be displayed on any page that is part of an in-app flow to merchandise or initiate a purchase using in-app purchase.” For example, according to the district court, “if an app has an item shop where a user could purchase a digital product . . . nowhere in that shop could the external purchase link appear.” *Epic III*, 781 F. Supp. 3d at 971. As a result, external purchase links never appear where users naturally expect to see their purchase options and would find them most useful: at the time of purchase. In practical effect at least, this restriction prohibited linked-out purchases.

Fourth, Apple deployed a so-called “scare screen.” Before users could use an external purchase link, they would be warned in large, bold font that they were “about to go to an external website” and that “Apple is not responsible for the privacy or security of purchases made on the web.” The record confirms that Apple designed the scare screen to prevent external purchases. It chose the phrase “external

website” because it “sounds scary.” It used the developer’s name, rather than the app name, to make the screen “even worse.” It discussed how to make the screen “scarier” and how to “scare’ users a bit.” By engineering this screen to prevent users from completing linked-out purchases, Apple engaged in conduct designed to defeat the Injunction.

Fifth, Apple required developers to use static URLs rather than dynamic URLs. Clicking dynamic links can automatically log a user into their account; with static links, the user must log in manually. Yet again, the record shows that Apple designed the purchasing experience to make external links as hard to use as possible. This flies in the face of the Injunction’s spirit. As the district court found, “Apple’s sensitivity analyses of breakage reveal that Apple was modeling precisely the amount of friction needed in a transaction to ensure that link-out transactions were not viable for a developer.” *Epic III*, 781 F. Supp. 3d at 994. It created “an ensemble of requirements that significantly reduces developers’ ability to steer consumers to any competitive, favorable alternatives.” *Id.*

Apple responds that it adopted all these restrictions to advance users’ privacy and security. This is irrelevant to the contempt analysis here. Whatever the Injunction prohibited, Apple must not do.⁵ In any event, the district court found that Apple’s privacy and security justifications are pretextual, and there was no clear error in its ruling. *See Epic III*, 781 F. Supp. 3d at 972. For example, one of Apple’s

⁵ Indeed, for contemnors like Apple who “are not unwitting victims of the law” but “took a calculated risk when under the threat of contempt,” and “where as here the aim is remedial and not punitive, there can be no complaint that the burden of any uncertainty in the decree is on [Apple’s] shoulders.” *McComb*, 336 U.S. at 193.

witnesses testified that he could think of no other reason to use a plain, link-style “button” other than to stifle competition. *See id.* at 973. As another example, Apple claimed that dynamic links were dangerous because they could be used to pass along private information, but Apple allows developers to set up dynamic links for purposes other than linked-out purchases. *See id.* at 979. Apple offers no credible reason for its restrictions on external purchase links.

Accordingly, the district court did not abuse its discretion by holding Apple in contempt for imposing its link design restrictions.

III. The District Court’s Contempt Sanctions

The April 30 Order imposes sanctions for Apple’s contempt by listing six proscriptive restrictions on Apple’s conduct. Most of them restate (albeit more specifically) Apple’s existing obligations under the Injunction. That being said, some parts of the April 30 Order’s restrictions are overbroad, and the commission prohibition does not qualify as a civil contempt sanction in its present form. As outlined below, we modify part of the April 30 Order and remand to the district court for further modification.

We reject the rest of Apple’s challenges. Excluding the reversed portions of the April 30 Order, some of Apple’s challenges should have been, but were not, raised when Apple appealed the Injunction. Moreover, to the extent that they are not waived, those challenges fail on the merits. The district court also did not deprive Apple of due process. We therefore affirm the balance of the April 30 Order.

A. The April 30 Order’s Permanent Restriction on Apple’s Link Design Restrictions

The court frames its April 30 Order as a civil contempt order. *See Epic III*, 781 F. Supp. 3d at 1002–04. However, Apple argues that “[t]he district court [improperly] imposed a new and far broader injunction . . . under the guise of exercising its civil contempt power.” According to Apple, the April 30 Order’s “new” prohibitions are unjustified. It argues that “[t]he[] new restrictions are inherently punitive and cannot be imposed using the non-punitive civil contempt power, no matter the court’s findings.” We agree with Apple only in part. We begin with the April 30 Order’s restrictions related to Apple’s link design restrictions, which we conclude largely do no more than coerce Apple to comply with the Injunction, and thus, do not abuse the district court’s discretion.

When a defendant is in contempt, a district court can “coerc[e] the defendant to do’ what a court had previously ordered [it] to do.” *Turner v. Rogers*, 564 U.S. 431, 441 (2011) (first alteration in original) (quoting *Gompers v. Buck’s Stove & Range Co.*, 221 U.S. 418, 442 (1911)). “District courts have broad equitable power to order appropriate relief in civil contempt proceedings.” *Sec. & Exch. Comm’n v. Hickey*, 322 F.3d 1123, 1128 (9th Cir. 2003), *amended on denial of reh’g*, 335 F.3d 834 (9th Cir. 2003). Even so, we “review the court’s exercise of that power for an abuse of discretion.” *Id.*

Applying these standards, we review the restrictions from the April 30 Order. First, the district court enjoins Apple from “[r]estricting or conditioning developers’ style, language, formatting, quantity, flow or placement of links for purchases outside an app.” *Epic III*, 781 F. Supp. 3d at

1003. The district court did not necessarily abuse its discretion with this restriction. Prohibiting Apple from limiting developers to “plain buttons” and to the five templates is necessary to coerce compliance with the Injunction, by ensuring that developers can place their buttons, links, and other calls to action in the purchase flow.

However, part of this restriction is too broad. As Apple argues, if there are no limits to developer links, “developers [can] create link-out mechanisms that so elevate the external link over Apple’s IAP mechanism—e.g., by putting the external link in large and noticeable font and the IAP link in small or near-unreadable font—as to trample Apple’s right to offer IAP entirely.” Under the Injunction, Apple cannot undermine developers’ right to offer linked-out purchases, but that does not mean that developers can trample Apple’s payment option either. Even under the district court’s broad equitable power, allowing developers to muzzle Apple’s messaging is not necessary to protect or give life to the Injunction. After all, the Injunction was intended to eliminate barriers “prevent[ing] [users] from making informed choices.” *Epic I*, 559 F. Supp. 3d at 1055.

Accordingly, we modify the April 30 Order so that, where both Apple and a developer offer a purchase option, Apple may restrict the developer from placing its buttons, links, or other calls to action in more prominent fonts, larger sizes, larger quantities, and more prominent places than Apple uses for its own buttons, links, or other calls to action. But Apple must let developers place their buttons, links, or other calls to action in at least the same fonts, sizes, quantities, and places as Apple’s own, and the district court’s prohibition on “language” restrictions must not include Apple’s typical restrictions (if any) to ensure that its general

content standards are upheld by limiting offensive language and similar portrayals.

Second, Apple cannot “[p]rohibit[] or limit[] the use of buttons or other calls to action, or otherwise condition[] the content, style, language, formatting, flow or placement of these devices for purchases outside an app.” *Epic III*, 781 F. Supp. 3d at 1003. This restriction is nearly identical to the previous one, except that it applies to “buttons” and “other calls to action,” rather than “links.” Because the Injunction applies equally to “buttons,” “links,” and “other calls to action,” we modify this restriction the same way as the previous one.

Third, Apple cannot “exclud[e] certain categories of apps and developers from obtaining link access.” *Epic III*, 781 F. Supp. 3d at 1003. In effect, this restriction means that Apple cannot exclude developers in the VPP and NPP programs.⁶ However, the district court found in the April 30 Order that excluding these developers “does not itself constitute a violation of the Injunction.” *Id.* at 994 n.67. Although the district court found that this exclusion “highlight[ed] Apple’s all-or-nothing approach,” *id.*, it did not find that allowing VPP and NPP developers to use external links is necessary to enforce the Injunction, *see id.* at 993–995, 1002–04. Without more, imposing this restriction was an abuse of discretion. This problem, however, may be cured if the district court finds against Apple on either of the two issues that it did not consider: whether the exclusion violated the Injunction, or whether enjoining it was necessary to protect and give life to the

⁶ Developers in these programs have a standard commission rate of 15% rather than Apple’s standard 30% IAP commission.

Injunction. We remand to allow the district court to modify the April 30 Order (or not) depending on its findings.

Fourth, Apple is prohibited from “[i]nterfering with consumers’ choice to proceed in or out of an app by using anything other than a neutral message apprising users that they are going to a third-party site.” *Id.* at 1003. Such conduct is prohibited by the Injunction. Apple’s “scare screen” is, at best, designed to evade that rule.⁷ *See supra* Section II.D. The district court permitted Apple to use a neutral message apprising users that they are leaving the App Store, meaning that the only banned messages are those that would effectively prohibit linked-out purchases. Thus, this fifth restriction is limited to coercing compliance with the Injunction.

Fifth, Apple cannot “[r]estrict[] a developer’s use of dynamic links that bring consumers to a specific product page in a logged-in state rather than to a statically defined page[.]” *Epic III*, 781 F. Supp. 3d at 1004. Because Apple’s static-link restriction violates the Injunction, this restriction does nothing more than more specifically enjoin what the Injunction already generally enjoined. *See supra* Section II.D.

B. The April 30 Order’s Permanent Restriction on Apple’s Ability to Charge a Commission

We review the sixth restriction (the commission prohibition) pursuant to a separate analysis. Under the April 30 Order, Apple cannot “[i]mpos[e] any commission or any fee on purchases that consumers make outside an app[.]”

⁷ As the district court noted, Apple “does not require developers selling *physical* goods to display any warning at all before users proceed to make a payment with a third-party payment solution.” *Id.* at 974.

Epic III, 781 F. Supp. 3d at 1003. Apple argues that “[t]he district court’s sweeping new zero-commission rule . . . is not tailored to Epic’s claimed harm[and] improperly imposes a punitive sanction.” We agree.

In our view, as the April 30 Order is written, it is more like a punitive criminal contempt sanction than a civil contempt sanction or modification of the Injunction. The biggest problem with the commission prohibition is that it permanently prohibits the compensation that Apple can receive for linked-out purchases of digital products, regardless of whether the commission is itself prohibitive.

“To determine whether contempt sanctions are civil or criminal, we examine ‘the character of the relief itself.’” *Parsons v. Ryan*, 949 F.3d 443, 455 (9th Cir. 2020) (quoting *Int’l Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 828 (1994)). “Civil as distinguished from criminal contempt is a sanction to enforce compliance with an order of the court or to compensate for losses or damages sustained by reason of noncompliance.” *McComb*, 336 U.S. at 191.

“The difference between criminal and civil contempt is in the intended effects of the court’s punishment.” *United States v. Powers*, 629 F.2d 619, 627 (9th Cir. 1980). A contempt remedy is “punitive and criminal if it is imposed retrospectively for a ‘completed act of disobedience,’ such that the contemnor cannot avoid or abbreviate the confinement through later compliance.” *Bagwell*, 512 U.S. at 828–29 (citation modified) (quoting *Gompers*, 221 U.S. at 443); see also *Powers*, 629 F.2d at 627 (“[Criminal contempt] serves to vindicate the authority of the court and does not terminate upon compliance with the court’s order. The punishment is unconditional and fixed.”).

On the other hand, a remedy is civil—and may be imposed without a jury trial or proof beyond a reasonable doubt—if it is meant to coerce the contemnor into complying with an order or compensate someone else for losses caused by the contempt. *See Bagwell*, 512 U.S. at 827, 829. Civil contempt sanctions “are . . . avoidable through obedience, and thus may be imposed in an ordinary civil proceeding upon notice and an opportunity to be heard.” *Id.* at 827.

Here, to be a civil contempt sanction, the commission prohibition must either: (i) compensate Epic for Apple’s willful noncompliance with the Injunction; or (ii) coerce Apple into complying with the Injunction moving forward. The commission prohibition is clearly not compensatory. In fact, it is unlikely that any sanction could compensate Epic for Apple’s noncompliance here; there is no way to quantify the number of developers who would have implemented external links to Epic’s Games Store, or the number of consumers who would have purchased digital content using those links, had Apple not prohibited them. However, neither is the commission prohibition coercive. Rather than coercing Apple to comply with the spirit of the Injunction with a reasonable, non-prohibitive commission, the district court used blunt force to ban all commissions, abusing its discretion.

Apple must be able to purge its civil contempt by complying with the Injunction. *See Bagwell*, 512 U.S. at 829 (“Where a fine is not compensatory, it is civil only if the contemnor is afforded an opportunity to purge.”). It is true, as discussed above, that the power to charge commissions on linked-out purchases is effectively the power to prohibit those purchases. *See supra* Section II.D. But it is not true that the Injunction enjoins *any* commission and *any* fee. It bars only *prohibitive* commissions or fees. The district

court's commission prohibition goes too far by denying Apple any way to purge its contempt by, for example, imposing a non-prohibitive, reasonable commission or fee to ensure security and privacy for users.⁸ This was an abuse of the district court's discretion. While the April 30 Order's restrictions related to link design are also permanent, those restrictions are more closely tied to the strict terms and spirit of the Injunction that Apple has violated, and more easily affirmed as a clarification of that Injunction.

The district court could have fashioned this prohibition to be conditional. For example, the prohibition would have been conditional if the district court had banned any commission or any fee for linked-out purchases until Apple proposed, and the district court approved, a reasonable, non-prohibitive commission that was supported with analysis by an independent, court-appointed individual or firm. It also would have been conditional if the district court banned any commission or any fee for linked-out purchases until Apple proposed a "reasonable fee" for linked-out purchases based on Apple's "actual costs" to "ensure user security and privacy." See, e.g., *In re Google Play Store Antitrust Litig.*,

⁸ In its April 30 Order, the district court cites *H.I.S.C., Inc. v. Franmar Int'l Importers, Ltd.*, 2022 WL 104730 (S.D. Cal. Jan. 11, 2022), for its authority to impose civil contempt sanctions by clarifying the terms of a permanent injunction. See *Epic III*, 781 F. Supp. 3d at 1003. However, in that case, the district court's clarifications to the permanent injunction were tailored to the initial harm (trademark infringement). See *Franmar*, 2022 WL 104730 at *6. In contrast, here, the district court went beyond the underlying UCL violation in ordering relief. Recall that the underlying UCL violation was that Apple's anti-steering provisions "'threaten[ed] an incipient violation of an antitrust law' by preventing informed choice among users of the iOS platform." *Epic I*, 559 F. Supp. 3d at 1055 (quoting *Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co.*, 20 Cal. 4th 163, 187 (1999)).

147 F.4th 917, 945 (9th Cir. 2025). Instead, the district court permanently prohibited all commissions and fees.

We reverse and remand this portion of the April 30 Order. There are two avenues that the district court could, in theory, take on remand to resolve its error: (i) it could modify the commission prohibition to be a conditional civil contempt sanction; or (ii) rather than imposing a contempt sanction, the district court could restrict Apple from imposing a prohibitive commission by modifying the Injunction.⁹ On remand, the district court should amend the April 30 Order’s commission prohibition as either a purgeable civil contempt sanction or properly tailored modification of the Injunction, as we consider in more detail below.

In sum, having reviewed all six restrictions in the April 30 Order, we modify the April 30 Order as follows: (i) where

⁹ If the district court chooses to modify the Injunction to enjoin commissions for linked-out purchases, the district court must tailor the Injunction modification to the underlying UCL violation. *See Lamb-Weston, Inc. v. McCain Foods, Ltd.*, 941 F.2d 970, 974 (9th Cir. 1991) (“Injunctive relief, however, must be tailored to remedy the specific harm alleged.”). However, the UCL violation, which resulted in an informational harm, does not require that *all* commissions and *all* fees be prohibited: the spirit of the Injunction contemplates the *prohibitive* commissions, and the text of the Injunction does not address commissions at all. The presence or absence of a commission does not alter consumers’ access to information about purchase options. All else being equal, the 27% commission here violated the Injunction not because it was a commission; it violated the Injunction because it was prohibitive, and consequently, developers did not opt into Apple’s Link Entitlement program, effectively stripping consumers of access to information about other purchase options. The district court must be mindful of the threshold upon which commissions become “prohibitive.”

both Apple and a developer offer a purchase option, Apple may restrict the developer from placing its buttons, links, or other calls to action in more prominent fonts, larger sizes, larger quantities, and more prominent places than Apple uses for its own buttons, links, or other calls to action; (ii) Apple may restrict developers from using language that violates its general content standards, if such standards exist; (iii) Apple is not specifically enjoined from excluding developers participating in the VPP and NPP programs from simultaneously obtaining link access; and (iv) as clarified below, Apple is not enjoined from imposing a commission or fee on purchases that consumers make in an app utilizing iOS outside Apple's App Store (a linked-out purchase) as permitted by the district court on remand. The Injunction and April 30 Order should otherwise remain in full effect.

We remand to the district court for the following: (i) to consider whether Apple's exclusion of VPP and NPP developers violated the Injunction, or whether it was necessary to protect or give life to the Injunction; and (ii) to amend the April 30 Order's commission prohibition as either a purgeable civil contempt sanction or properly tailored clarification or modification of the Injunction.

We recommend some possible courses of action to the district court regarding an appropriate commission or fee limitation on remand. Apple should be able to charge a commission on linked-out purchases with the following in mind: (a) Apple should be able to charge a commission on linked-out purchases based on the costs that are genuinely and reasonably necessary for its coordination of external links for linked-out purchases, but no more. We refer to these costs as "necessary costs."; (b) In making a determination of Apple's necessary costs, Apple is entitled to some compensation for the use of its intellectual property

that is directly used in permitting Epic and others to consummate linked-out purchases. In deciding how much that should be, the district court should consider the fact that most of the intellectual property at issue is already used to facilitate IAP, and costs attributed to linked-out purchases should be reduced equitably and proportionately; (c) Apple should receive no commission for the security and privacy features it offers to external links, and its calculation of its necessary costs for external links should not include the cost associated with the security and privacy features it offers with its IAP¹⁰; (d) Apple should not be able to charge any commission for linked-out purchases until such time as the district court has approved an appropriate fee, but both parties should be encouraged to reach agreement and/or seek the court's approval of its proposed fee expeditiously; and (e) The district court may determine how best to make the referenced determination but one possibility includes inviting the parties to provide expert testimony based upon which it would determine the appropriate fee or commission to be chargeable for Apple's actual costs of providing services for linked-out transactions. The district court might also consider whether to establish a "Technical Committee" somewhat like what was done in *In re Google*, 147 F.4th 917, to aid it in determining a reasonable fee and/or commission that Apple can charge for linked-out purchases. *See id.* at 954–55.

¹⁰ According to Apple, its app review process includes "meticulous review by human experts to 'protect against fraud, privacy intrusion, and objectionable content beyond levels achievable by purely technical measures.'"

C. Apple’s Miscellaneous Challenges to the April 30 Order

We next evaluate Apple’s other miscellaneous challenges to the district court’s contempt sanctions in the April 30 Order. We start by noting Apple’s waiver. “When a party could have raised an issue in a prior appeal but did not, a court later hearing the same case need not consider the matter.” *United States v. Nagra*, 147 F.3d 875, 882 (9th Cir. 1998). To the extent that the April 30 Order merely restates the Injunction’s restrictions in a more specific manner, these restrictions originate in the Injunction, not the April 30 Order. Thus, where the district court’s April 30 Order enjoined Apple from conduct that was already enjoined, Apple waived its challenges to the April 30 Order on equitable abstention Takings Clause, and First Amendment grounds. We now turn to these arguments on their merits, to the extent that the April 30 Order is not subsumed by the Injunction. We reject them all.

i. Equitable abstention

Apple argues that the April 30 Order’s commission prohibition is “judicial ratemaking that is not permitted under the UCL.” Courts “will abstain from employing the remedies available under [California’s UCL] in appropriate cases[.]” *Willard v. AT&T Commc’ns of Cal., Inc.*, 204 Cal. App. 4th 53, 59 (2012) (internal quotation omitted). This “equitable abstention is appropriate” when a UCL claim “would drag a court of equity into an area of complex economic or similar policy.” *Id.* (citation modified) (internal quotation omitted).

For example, in *California Grocers Association v. Bank of America*, 22 Cal. App. 4th 205 (1994), a California court determined that it could not resolve “whether service fees

charged by banks are too high and should be regulated.” *Id.* at 218. That is “a question of economic policy” reserved for legislatures and regulators. *Id.* Federal banking regulators “decided that all charges to customers should be arrived at by each bank on a competitive basis.” *Id.* at 218–19 (citation modified) (quoting 12 C.F.R. § 7.8000(a)).

In *Willard v. AT&T Communications of California, Inc.*, 204 Cal. App. 4th 53 (2012), a California court also determined that it was not an abuse of discretion for a trial court to determine that it could not “judicial[ly] review . . . AT & T’s fees for nonpublished service and unlisted service.” *Id.* at 60. The court explained that “[t]he administrative agency charged with responsibility over the challenged fees ha[d] expressly taken [the] industry from regulation to deregulation, after concluding the complex market forces in play were sufficient to avoid abuse.” *Id.* at 60–61 (citing Cal. Pub. Util. Code § 2893(e)). Thus, although the plaintiffs had not “alleg[ed] the market [wa]s less competitive now than it was [when the agency deregulated], [they were] asking the judiciary to reregulate fees which the [agency] determined should be deregulated.” *Id.* at 61.

This case is not comparable to *California Grocers* or *Willard*. Apple can point to no statute or regulation subjecting commissions for linked-out purchases to unrestricted market forces. Without that, Apple has given no reason to hold that “[i]t is primarily a legislative and not a judicial function” to apply the UCL here. *See Cal. Grocers*, 22 Cal. App. 4th at 218 (quoting *Max Factor & Co. v. Kunsman*, 5 Cal. 2d 446, 454–55 (1936), *aff’d sub nom., Pep Boys v. Pyroil Sales Co.*, 299 U.S. 198 (1936)). In any case, the district court did not attempt to “regulat[e] . . . pricing via injunction on an ongoing basis.” *Id.* (quoting

Beasley v. Wells Fargo Bank, 235 Cal. App. 3d 1383, 1391 (1991)). It did not set a price; it instead enjoined Apple from charging a commission at all (albeit improperly). Thus, the April 30 Order did not impose price controls requiring equitable abstention under the UCL.

ii. Regulatory taking

Apple also argues that the April 30 Order violated the Takings Clause by forbidding it from charging a commission on linked-out purchases. According to Apple, the commission prohibition is problematic because it will not receive the compensation that it claims for its intellectual property. We conclude that even if Apple has not waived this challenge, the April 30 Order was not a regulatory taking.

Judicial decisions “contraven[ing] the established property rights” of a person may violate the Takings Clause. *Stop the Beach Renourishment, Inc. v. Fla. Dep’t of Env’t Prot.*, 560 U.S. 702, 733 (2010). “[S]everal factors . . . have particular significance” in deciding whether a taking has occurred, *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978), and those factors do not favor Apple.

First, the “character of the governmental action” matters, and takings are “more readily . . . found when the interference with property can be characterized as a physical invasion by government.” *Id.* There is no physical taking here. Second, courts consider “[t]he economic impact of the regulation on the claimant.” *Id.* Here, while the April 30 Order would deprive Apple of “its anticompetitive revenue stream,” see *Epic III*, 781 F. Supp. 3d at 952, Apple is hardly otherwise uncompensated for its efforts to create the iOS and App Store. It may, for example, charge consumers for iOS devices and for commissions on in-app purchases. Third, an

action is more likely a taking if it “interfere[s] with distinct investment-backed expectations.” *Penn. Cent.*, 438 U.S. at 124. Here, Apple had no expectation that it would be able to charge commissions, much less anticompetitive commissions, on linked-out purchases when investing into its iOS system because it previously prohibited such transactions.

iii. First Amendment

Apple next argues that the April 30 Order’s “prohibitions are so broad that they violate Apple’s First Amendment rights.” We likewise reject this argument. Sometimes, “ordering a party to provide a forum for someone else’s views implicates the First Amendment.” *Moody v. NetChoice, LLC*, 603 U.S. 707, 728 (2024). However, this is true only if “the regulated party is engaged in its own expressive activity, which the mandated access would alter or disrupt.” *Id.*

The April 30 Order (and the Injunction) may alter or disrupt Apple’s ability to effectively prohibit consumers from completing linked-out purchases, but it has not interfered with Apple’s own expressive activity. Apple claims that its speech has been limited because it cannot restrict developers’ style, language, formatting, or quantity of links for purchases outside an app or otherwise condition the content, style, or language for purchases outside an app. But that restriction describes the developers’ expressive activity, not Apple’s expressive activity. Apple claims that without such restrictions, it will be effectively compelled to engage in expressive activity by allowing developers to engage in speech that it may not agree with, such as offensive speech.

Apple’s argument proves too much. If Apple is correct, a regulated party’s expressive activity is implicated whenever it cannot restrict someone else’s speech on a forum it runs. If so, ordering a party to provide a forum for someone else’s views will always alter or disrupt expressive activity. That absolute rule is inconsistent with *Moody*. Ultimately, Apple is unlike “the editors, cable operators, . . . parade organizers[, and] . . . social-media platforms” that can take advantage of *Moody*. 603 U.S. at 738. Unlike them, it has not shown it is “in the business . . . of combining ‘multifarious voices’ to create a distinctive expressive offering.” *Id.*

D. Due Process

According to Apple, “[i]f the district court believed that Apple’s new commission violated the UCL, it could have instituted proceedings to modify the injunction consistent with due process.” We disagree with Apple that the district court violated due process here. “Before issuing injunctive relief, the court must provide the affected party with notice and an opportunity to be heard.” *Armstrong v. Brown*, 768 F.3d 975, 979–80 (9th Cir. 2014). The district court could not have run afoul of this rule to the extent that it did not impose new or modified injunctive relief. But to the extent it did, or to the extent that the district court imposed civil contempt sanctions, Apple received notice and an opportunity to be heard.

Apple received notice because Epic requested the alleged modifications. It challenged: the 27% commission; Apple’s restrictions on the language, look, and location of developers’ links; the “scare screen”; the ban on dynamic links; and the restriction to “plain buttons.” Even when the “district court d[oes] not provide the defendant with formal

notice of a possible injunction,” it may impose “injunctive relief . . . [if] the defendant was aware of the potential injunction based on various filings by the parties.” *Armstrong*, 768 F.3d at 980 (summarizing *Penthouse Int’l, Ltd. v. Barnes*, 792 F.2d 943, 950 (9th Cir. 1986)).

Apple also had the opportunity to be heard. The district court held an evidentiary hearing over several days, and Apple was able to call witnesses and cross-examine Epic’s witnesses. Apple does not argue that its presentation of evidence or arguments supporting its Link Entitlement program would have been different if the district court had detailed its relief earlier. *See id.* (determining that there is “no merit” to a due process challenge based on a “district court’s modification to [an] injunction . . . made in response to a request by [the plaintiffs] to hold the [defendant] in contempt.”). The district court took every step necessary to afford Apple due process.¹¹

IV. Apple’s Request to Vacate the Injunction

Before the district court, Apple argued that, whether it violated the Injunction or not, the Injunction ought not to be enforced going forward. We disagree. First, although Apple argues that a recent decision from a California Court of Appeal conflicts with the Injunction, we find no conflict. Second, although Apple argues that the Supreme Court’s recent ruling on nationwide injunctions clashes with the Injunction, that ruling does not undermine our previous analysis of the Injunction’s scope.

¹¹ It is unlikely that the district court intended to impose criminal contempt sanctions with the commission prohibition here. *See supra* Section III.B.

A. Apple's Rule 60(b)(5) Motion

A party can obtain relief from a judgment if “applying it prospectively is no longer equitable[.]” Fed. R. Civ. P. 60(b)(5). “[I]t is appropriate to grant a Rule 60(b)(5) motion when the party seeking relief from an injunction . . . can show ‘a significant change either in factual conditions or in law.’” *Agostini v. Felton*, 521 U.S. 203, 215 (1997) (quoting *Rufo v. Inmates of Suffolk Cnty. Jail*, 502 U.S. 367, 384 (1992)). Here, Apple argues that the Injunction must be vacated in light of the California Court of Appeal’s recent decision in *Beverage v. Apple, Inc.*, 101 Cal. App. 5th 736 (2024), *review denied* (July 10, 2024).

There is no conflict between the judgment here and *Beverage*. In *Beverage*, the California Court of Appeal explained that its “decision [wa]s a narrow one.” 101 Cal. App. 5th at 755. That decision “is limited to situations typified by [*Beverage*], where the same conduct found immune from antitrust liability by the *Colgate* doctrine is also alleged to violate the ‘unfair’ prong of the UCL.” *Id.* Here, Apple has violated the “unfair” prong of the UCL, but Apple has not identified when its conduct was found immune from antitrust liability pursuant to the *Colgate* doctrine. In contrast, this court held that Epic’s antitrust claims “suffer[ed] from a proof deficiency, rather than a categorical legal bar” as in *Colgate. Epic II*, 67 F.4th at 1001 (citation modified).

Moreover, although Apple was the defendant in *Beverage*, the Court of Appeal did not hold that *Colgate* aided Apple. There, the plaintiffs abandoned part of their claim, and the court assumed without deciding that the plaintiffs’ allegations were legally insufficient under *Colgate*. See 101 Cal. App. 5th at 752. Instead, the court

focused on “whether [the plaintiffs] adequately alleged an ‘unfair’ act or practice under the UCL considering the trial court’s ruling that Apple’s practices constituted permissible unilateral conduct.” *Id.* Thus, *Beverage* never analyzed the question that Apple says was decided in its favor.

The opinion in *Beverage* also distinguished this court’s opinion, which undermines Apple’s claim that the decisions irreconcilably conflict. *Beverage* distinguished this court’s opinion because it did not “engage[] [in] a rigorous analysis of the *Colgate* doctrine and its effect on UCL claims” and was thus not “persuasive on the precise issue presented by th[e] appeal” in *Beverage*. *Id.* at 756 n.6 (emphasis added). That precise issue was whether the plaintiffs could sue under the UCL’s “unfair” prong assuming that *Colgate* immunized Apple. That issue is not presented here because, again, no court has held that *Colgate* immunized Apple.

Apple’s prior arguments also undercut its current position. Apple told the California Supreme Court that it should not review the Court of Appeal’s decision in *Beverage* because it did not conflict with this court’s prior opinion. See Answer to Petition for Review at *11–12, *Beverage v. Apple Inc.*, No. S285154 (Cal. June 18, 2024) (rejecting the argument that “the decision below [was] inconsistent with [the] decisions in a federal court lawsuit involving Epic Games”). Apple stated that “[t]he Ninth Circuit did not . . . address the applicability of the *Colgate* doctrine to the conduct challenged in that case.” *Id.* at *12.

B. Apple’s Argument Pursuant to *CASA*

In its reply brief and in a Rule 28(j) letter, Apple argues that the Injunction and “new injunction” (referring to the injunctive relief in the April 30 Order) must be vacated because they are impermissible nationwide injunctions. The

Supreme Court recently expressed its disapproval of “injunctions . . . broader than necessary to provide complete relief to each plaintiff with standing to sue.” *Trump v. CASA, Inc.*, 606 U.S. 831, 861 (2025). The test “is whether an injunction will offer complete relief to the plaintiffs before the court.” *Id.* at 852 (emphasis in original). If it does, it may also “advantage nonparties,” albeit “incidentally.” *Id.* at 851 (citation modified) (quoting *Trump v. Hawaii*, 585 U.S. 667, 717 (2018) (Thomas, J., concurring)).

Here, we previously determined that the Injunction is consistent with *CASA*’s underlying principle because its “scope is tied to Epic’s injuries” as a developer and games distributor, not to the other developers’ injuries. *Epic II*, 67 F.4th at 1003. The enjoined conduct, in relevant part, “harmed Epic by . . . preventing other apps’ users from becoming would-be Epic Games Store consumers.” *Id.* “Because Epic benefits in this second way from consumers of other developers’ apps making purchases through the Epic Games Store, an injunction limited to Epic’s subsidiaries would fail to address the full harm caused by the anti-steering provision.” *Id.* To the extent that Apple is challenging the original Injunction, the Injunction does nothing more than provide complete relief to Epic, and this court has already considered, and rejected, arguments to the contrary. That Epic opted out of a class action for developers does not change the result.

The April 30 Order does not fare differently under *CASA*. Apple argues that the April 30 Order is overbroad because it enjoins Apple’s conduct with respect to all developers, whether or not consumers are making a purchase using the Epic Game Store. Apple would have our court limit the April 30 Order to Epic and its subsidiaries alone, or to only gaming apps that seek to implement links out to the Epic

Games Store. Epic counters that limiting the April 30 Order in the manner proposed by Apple would not facilitate the competition necessary to grant Epic complete relief. We agree with Epic on this question.

Moreover, we are persuaded by our court’s discussion of *CASA* in *In re Google*.¹² In that case, we determined that “the scope of a permanent injunction following a finding of antitrust liability is hardly comparable to that of a preliminary injunction on a constitutional question.” 147 F.4th at 958. We further explained that “*CASA*’s holding about district courts’ authority under the Judiciary Act of 1789 has no bearing on whether the district court here exceeded its equitable powers under Section 16 of the Clayton Act,” and “[t]he nationwide prohibitions [in that case] fit squarely within the district court’s ‘large discretion’ to craft equitable antitrust remedies.” *Id.* (quoting *Ford Motor Co. v. United States*, 405 U.S. 562, 573 (1972)). While there is no antitrust liability here, the scope of a permanent injunction following an incipient antitrust violation pursuant to the UCL is also distinguishable from the injunction’s scope in *CASA*. Specifically, the complete relief here is molded to “the necessities of th[is] particular case,” which centers on anticompetitive conduct by Apple and aims to restore the information to consumers that is necessary to foster competition. *CASA*, 606 U.S. at 854 (quoting *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944)).

Thus, the Injunction and April 30 Order will continue to apply to all linked-out purchases and not just to Epic Games

¹² Google has petitioned the Supreme Court for a writ of certiorari. See *Google LLC v. Epic Games, Inc.*, No. 25-521 (Oct. 29, 2025).

or links out to the Epic Games Store. The underlying Injunction is not an impermissible nationwide injunction.

V. Apple’s Request for a New Judge

Apple argues that “[t]o the extent this Court determines that a remand is required . . . it should assign the case to a different district judge.” “We reassign only in ‘rare and extraordinary circumstances.’” *Planned Parenthood Great Nw. v. Labrador*, 122 F.4th 825, 844 (9th Cir. 2024) (quoting *Nat’l Council of La Raza v. Cegavske*, 800 F.3d 1032, 1045 (9th Cir. 2015), *overruled on other grounds by Ariz. All. For Retired Americans v. Mayes*, 117 F.4th 1165 (9th Cir. 2024)). Apple argues that the district judge “found that Apple and its executives had violated an earlier order,” “imposed a new injunction,” “assess[ed] . . . Apple’s subjective motives” using allegedly privileged documents, and referred Apple for a criminal investigation. In short, Apple seeks reassignment based solely on the district court’s rejection of its arguments and its determination that Apple willfully violated the court’s order. This argument lacks merit. Apple may disagree with those outcomes, but they supply no basis for reassignment.

CONCLUSION

We modify the April 30 Order as follows: (i) where both Apple and a developer offer a purchase option, Apple may restrict the developer from placing its buttons, links, or other calls to action in more prominent fonts, larger sizes, larger quantities, and more prominent places than Apple uses for its own buttons, links, or other calls to action; (ii) Apple may restrict developers from using language that violates its general content standards, if such standards exist; (iii) Apple is not specifically enjoined from excluding developers participating in the VPP and NPP programs from

simultaneously obtaining link access; and (iv) Apple is not enjoined from imposing a commission or fee on purchases that consumers make in an app utilizing iOS outside the Apple Store (a linked-out purchase) as permitted by the district court on remand. The Injunction and April 30 Order otherwise remain in full effect.

We remand to the district court for the following: (i) to consider whether Apple's exclusion of VPP and NPP developers violated the Injunction, or whether it was necessary to protect or give life to the Injunction; and (ii) to amend the April 30 Order's commission prohibition as either a purgeable civil contempt sanction or properly tailored clarification or modification of the Injunction.

AFFIRMED in part, REVERSED in part, and REMANDED. Each side shall bear its own costs on appeal.

United States District Court
Northern District of California

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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

EPIC GAMES, INC.,

Plaintiff and Counter-Defendant,

v.

APPLE INC.,

Defendant and Counterclaimant.

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

**ORDER GRANTING EPIC GAMES, INC.’S
MOTION TO ENFORCE INJUNCTION;

DENYING APPLE INC.’S MOTION TO SET
ASIDE JUDGMENT;

DENYING APPLE INC.’S MOTION UNDER
FEDERAL RULE OF EVIDENCE 502(D);

DENYING APPLE INC.’S MOTION FOR ENTRY
OF JUDGMENT ON ITS INDEMNIFICATION
COUNTERCLAIM WITHOUT PREJUDICE; AND

REFERRAL TO THE UNITED STATES
ATTORNEY RE CRIMINAL CONTEMPT**

Re: Dkt. Nos. 876, 897, 1018, 1198, and
1328.

I. OVERVIEW

For the reasons set forth herein, the Court **FINDS** Apple in willful violation of this Court’s 2021 Injunction which issued to restrain and prohibit Apple’s anticompetitive conduct and anticompetitive pricing. Apple’s continued attempts to interfere with competition will not be tolerated.

By way of background, after a May 2021 trial between Epic Games and Apple, this Court issued a 180-page order which, in part, enjoined Apple’s conduct impeding competition with

1 respect to in-app and out-of-app purchases. On April 24, 2023, in a 91-page order, the Ninth
2 Circuit affirmed. On January 16, 2024, the Supreme Court declined review. The next day, the
3 Injunction issued.

4 Apple's response to the Injunction strains credulity. After two sets of evidentiary hearings,
5 the truth emerged. Apple, despite knowing its obligations thereunder, thwarted the Injunction's
6 goals, and continued its anticompetitive conduct solely to maintain its revenue stream.

7 Remarkably, Apple believed that this Court would not see through its obvious cover-up (the 2024
8 evidentiary hearing). To unveil Apple's actual decision-making process, not the one tailor-made
9 for litigation, the Court ordered production of real-time documents and ultimately held a second
10 set of hearings in 2025.

11 To summarize: *One*, after trial, the Court found that Apple's 30 percent commission
12 "allowed it to reap supracompetitive operating margins" and was not tied to the value of its
13 intellectual property, and thus, was anticompetitive. Apple's response: charge a *27 percent*
14 *commission* (again tied to nothing) on off-app purchases, where it had previously charged nothing,
15 and extend the commission for a period of seven days after the consumer linked-out of the app.
16 Apple's goal: maintain its anticompetitive revenue stream. *Two*, the Court had prohibited Apple
17 from denying developers the ability to communicate with, and direct consumers to, other
18 purchasing mechanisms. Apple's response: impose *new* barriers and *new* requirements to increase
19 friction and increase breakage rates with full page "scare" screens, static URLs, and generic
20 statements. Apple's goal: to dissuade customer usage of alternative purchase opportunities and
21 maintain its anticompetitive revenue stream. In the end, Apple sought to maintain a revenue
22 stream worth billions in direct defiance of this Court's Injunction.

23 In stark contrast to Apple's initial in-court testimony, contemporaneous business
24 documents reveal that Apple knew exactly what it was doing and at every turn chose the most
25 *anticompetitive* option. To hide the truth, Vice-President of Finance, Alex Roman, outright lied
26 under oath. Internally, Phillip Schiller had advocated that Apple comply with the Injunction, but
27 Tim Cook ignored Schiller and instead allowed Chief Financial Officer Luca Maestri and his
28 finance team to convince him otherwise. Cook chose poorly. The real evidence, detailed herein,

1 more than meets the clear and convincing standard to find a violation. The Court refers the matter
 2 to the United States Attorney for the Northern District of California to investigate whether
 3 criminal contempt proceedings are appropriate.

4 This is an injunction, not a negotiation. There are no do-overs once a party willfully
 5 disregards a court order. Time is of the essence. The Court will not tolerate further delays. As
 6 previously ordered, Apple will not impede competition. The Court enjoins Apple from
 7 implementing its new anticompetitive acts to avoid compliance with the Injunction. *Effective*
 8 *immediately* Apple will no longer impede developers' ability to communicate with users nor will
 9 they levy or impose a new commission on off-app purchases.

10 **II. THE INJUNCTION AND PRIOR JUDICIAL FINDINGS**

11 After a full trial on the merits, this Court issued the Injunction. Key holdings of both this
 12 Court and the Ninth Circuit are summarized here.¹

13 **A. Trial, Judgment, and Injunction**

14 After a bench trial, this Court entered judgment on September 10, 2021, finding that
 15 certain of Apple's anti-steering rules violate the California Unfair Competition Law ("UCL")
 16 under its unfair prong. With respect to the issues raised in these contempt proceedings,² most
 17 relevant here are the Court's prior determinations regarding (i) Epic's standing, (ii) Apple's
 18 "unfair" practices, (iii) injunctive relief, (iv) Apple's commission rate, and (v) Apple's
 19 indemnification counterclaim. *See Epic Games, Inc.*, 559 F.Supp.3d at 1051–58, 1065–66. The
 20 Court addresses each.

21
 22 ¹ See Dkt. Nos. 812 and 813 (Rule 52 Order and Injunction), and 814 (judgment); *see also*
 23 *Epic Games, Inc. v. Apple Inc.*, 559 F.Supp.3d 898 (N.D. Cal. 2021) (Rule 52 Order), *aff'd in part,*
 24 *rev'd in part and remanded*, 67 F.4th 946 (9th Cir. 2023). As the Injunction concerns this Court's
 25 findings with respect to the UCL, the Court does not recite its findings with respect to Epic's other
 state and federal claims. For the Reader's Convenience, a table of contents is included as
 Attachment A.

26 ² On March 13, 2024, Epic filed a motion to enforce this Court's injunction because Apple
 27 "is in blatant violation of this Court's injunction." (Dkt. No. 897.) Epic requests that this Court
 28 "enter an order (1) holding Apple in contempt for violating the Court's Injunction; (2) requiring
 Apple to promptly bring its policies into compliance with the Injunction; and (3) requiring Apple
 to remove all anti-steering provisions" in its developer guidelines." (*Id.*)

1 **Standing.** As to standing, the Court explained that “Apple does not dispute Epic Games’
 2 standing as a potential competitor: Epic Games wanted to open a competing iOS game store and
 3 could not. Because Epic Games would earn revenues from a competing store, it has suffered an
 4 economic injury.” *Id.* at 1052. However, Apple challenged Epic’s standing as a consumer. While
 5 the UCL distinguishes between “consumer” and “competitor” suits, “[t]here is no specific third
 6 category for non-competitor business.” *Id.* Because “both parties’ experts agree that developers
 7 like Epic Games jointly consume Apple’s game transactions and distribution services together
 8 with iOS users,” the Court held that “Epic Games has standing to bring a UCL claim as a quasi-
 9 consumer, not merely as a competitor.” *Id.*

10 **Unfair Practices.** As to Apple’s “unfair” practices under the UCL, the Court explained
 11 that Epic could demonstrate unfairness under either a “tethering” test or a “balancing” test. *Id.* at
 12 1053. The “tethering” test required Epic to “show that Apple’s conduct (1) ‘threatens an incipient
 13 violation of an antitrust law,’ (2) ‘violates the policy or spirit of one of those laws because its
 14 effects are comparable to or the same as a violation of the law,’ or (3) ‘otherwise significantly
 15 threatens or harms competition.’” *Id.* at 1052 (quoting *Cel-Tech Commc’ns, Inc. v. Los Angeles*
 16 *Cellular Tel. Co.*, 973 P.2d 527, 544 (Cal. 1999)). While the Court held that Epic’s claims based
 17 on app distribution and in-app payment processing restrictions failed to state a claim of unfair
 18 practices, the Court held that Apple’s anti-steering provisions were severable and constituted
 19 unfair practices under the UCL. The core of the Court’s finding was summarized succinctly as
 20 follows:

21 **[T]he evidence presented showed anticompetitive effects and**
 22 **excessive operating margins under any normative measure. The**
 23 **lack of competition has resulted in decrease[d] information which**
 24 **also results in decreased innovation relative to the profits being**
 25 **made. The costs to developer are higher because competition is**
 26 **not driving the commission rate. As described, the commission**
 27 **rate driving the excessive margins has not been justified. . . .**

28 Apple’s own records reveal that two of the top three “most effective
 marketing activities to keep existing users coming back” in the United
 States, and therefore increasing revenues, are “push notifications”
 (no. 2) and “email outreach” (no. 3). Apple not only controls those
 avenues but acts anticompetitively by blocking developers from using
 them to Apple’s own unrestrained gain. As explained before, Apple
 uses anti-steering provisions prohibiting apps from including

1 “buttons, external links, or other calls to action that direct customers
2 to purchasing mechanisms other than in-app purchase,” and from
3 “encourag[ing] users to use a purchasing method other than in-app
4 purchase” either “within the app or through communications sent to
5 points of contact obtained from account registrations within the app
6 (like email or text).” Thus, developers cannot communicate lower
7 prices on other platforms either within iOS or to users obtained from
8 the iOS platform. Apple’s general policy also prevents developers
9 from informing users of its 30% commission.

10 . . .

11 In the context of technology markets, the open flow of information
12 becomes even more critical. As explained above, information costs
13 may create “lock-in” for platforms as users lack information about the
14 lifetime costs of an ecosystem. Users may also lack the ability to
15 attribute costs to the platform versus the developer, which further
16 prevents them from making informed choices. In these
17 circumstances, the ability of developers to provide cross-platform
18 information is crucial. While Epic Games did not meet its burden to
19 show actual lock-in on this record, the Supreme Court has recognized
20 that such information costs may create the potential for
21 anticompetitive exploitation of consumers. *Eastman Kodak*, 504 U.S.
22 at 473–75, 112 S. Ct. 2072.

23 *Id.* 1054–55 (footnotes omitted) (emphasis supplied).

24 The Court held that Apple’s anti-steering provisions constituted an incipient violation of
25 antitrust law by preventing informed choice among users of the iOS platform and violate the
26 “‘policy [and] spirit’ of these laws because anti-steering has the effect of preventing substitution
27 among platforms for transactions.” *Id.* at 1055–56 (alteration in original) (quoting *Cel-Tech*, 973
28 P.2d at 544).

The Court found that Epic likewise showed that Apple violated the UCL’s balancing test.
The “balancing” test, as contrasted to the tethering prong, “requires the challenged business
practice to be ‘immoral, unethical, oppressive, unscrupulous, or substantially injurious to
consumers’ based on the court’s weighing of ‘the utility of the defendant’s conduct against the
gravity of the harm to the alleged victim.’” *Id.* at 1053 (quoting *Drum v. San Fernando Valley
Bar Assn.*, 106 Cal. Rptr. 3d 46, 53 (Cal. Ct. App. 2010)). Thus the Court found:

In retail brick-and-mortar stores, consumers do not lack knowledge
of options. Technology platforms differ. Apple created a new and
innovative platform which was also a black box. It enforced silence
to control information and actively impede users from obtaining the
knowledge to obtain digital goods on other platforms. Thus, the
closer analogy is not American Express’ prohibiting steering towards
Visa or Mastercard but a prohibition on letting users know that these

1 options exist in the first place. Apple’s market power and resultant
 2 ability to control how pricing works for digital transactions, and
 3 related access to digital products, distinguishes it from the challenged
 4 practices in *Amex*. [See *Ohio v. Am. Express Co.*, 585 U.S. 529, 549
 (2018).] . . . **Apple has not offered any justification for the actions
 other than to argue entitlement. Where its actions harm
 competition and result in supracompetitive pricing and profits,**

5 *Id.* at 1056–57 (footnotes omitted) (emphasis supplied).³

6 ***Injunctive Relief.*** “[T]he primary form of relief available under the UCL to protect
 7 consumers from unfair business practices is an injunction.” *Id.* at 1057 (quoting *In re Tobacco II*
 8 *Cases*, 207 P.3d 20, 34 (Cal. 2009)). A private party seeking injunctive relief under the UCL may
 9 request public injunctive relief, and federal courts apply equitable principles derived from federal
 10 common law for equitable relief under the UCL. *Id.* The Court found equitable relief was
 11 warranted:

12 While Apple’s conduct does not fall within the confines of traditional
 13 antitrust law, **the conduct falls within the purview of an incipient
 antitrust violation with particular anticompetitive practices
 14 which have not been justified. Apple contractually enforces
 silence, in the form of anti-steering provisions, and gains a
 competitive advantage. Moreover, it hides information for
 15 consumer choice which is not easily remedied with money
 damages. The injury has occurred and continues and can best be
 16 remedied by invalidating the offending provisions.** In terms of
 17 balancing, Apple’s business justifications focus on other parts of the
 Apple ecosystem and will not be significantly impacted by the
 18 increase of information to and choice for consumers. Rather, this
 limited measure balances the justification for maintaining a cohesive
 19 ecosystem with the public interest in unclocking the veil hiding
 pricing information on mobile devices and bringing transparency to
 the marketplace.

20 *Id.* (emphasis supplied). Thus, because “Apple’s conduct in enforcing anti-steering restrictions is
 21 anticompetitive,” a “remedy to eliminate those provisions is appropriate. This measured remedy
 22 will *increase* competition, *increase* transparency, *increase* consumer choice and information while
 23 preserving Apple’s iOS ecosystem which has procompetitive justifications.” *Id.* at 1069 (emphasis
 24 supplied).

25
 26
 27 ³ Apple’s “entitlement” perspective and mantra persisted beyond the Injunction. For
 28 example, Apple’s Communications Director, Marni Goldberg, texted her colleague during the first
 evidentiary hearings, that “It’s Our F***ING STORE.” (CX-0244.38.) Not surprisingly (nor
 convincingly), she did not “recall” sending those messages. (Feb. 2025 Tr. 1817:5-9 (Goldberg).)

1 The Court also held that, irrespective of the appropriate market definition for Epic’s
2 antitrust claims, injunctive relief was warranted with respect to Apple’s anti-steering provisions as
3 to *all* apps, not just mobile gaming transactions. *See id.* at 1057–58.

4 Concurrent with the 180-page Rule 52 Order, the Court issued a one-page injunction that
5 enjoined Apple’s anti-steering provisions, and provided in relevant part:

6 Apple Inc. and its officers, agents, servants, employees, and any
7 person in active concert or participation with them (“Apple”), are
8 hereby permanently restrained and enjoined from prohibiting
9 developers from (i) including in their apps and their metadata buttons,
10 external links, or other calls to action that direct customers to
purchasing mechanisms, in addition to In-App Purchasing [(“IAP”)]
and (ii) communicating with customers through points of contact
obtained voluntarily from customers through account registration
within the app.

11 (Dkt. No. 813; *see also Epic Games, Inc.*, 559 F.Supp.3d at 1058.)

12 **Commission.** The Court explicitly found that “Apple’s initial [commission] rate of 30%
13 . . . has apparently allowed it to reap supracompetitive operating margins.” *Id.* at 992. The rate
14 was a historic relic not tied to intellectual property. Further, there was no actual commission
15 charged for link-out transactions, then or in the past. The Court focused on Apple’s anti-steering
16 provisions, finding as discussed above, that a “remedy to eliminate those provisions is
17 appropriate.” *Id.* at 1068. That remedy, notably, would “not require the Court to micromanage
18 business operations which courts are not well-suited to do as the Supreme Court has appropriately
19 recognized.” *Id.* at 1069. However, the Court warned that, with respect to Apple’s commission
20 rate, “Apple cannot hide behind its lack of clarity on the value of its intellectual property. Not all
21 functionality benefits all developers. Further, . . . **Apple has actually never correlated the value**
22 **of its intellectual property to the commission it charges.** Apple is responsible for the lack of
23 transparency and whole-cloth arguments untethered to its rates do not ultimately persuade.” *Id.* at
24 994 (emphasis supplied).

25 **The DPLA and Indemnification.** Apple asserted a counterclaim against Epic for a breach
26 of the Developer Product Licensing Agreement (“DPLA”) arising out of Project Liberty, the
27 “highly choreographed attack” by Epic on Apple and Google, Inc., that flouted the DPLA’s
28 obligations. *Id.* at 935–40, 1063. Epic admitted that it breached the DPLA and conceded that

1 Apple would be entitled to relief if the Court found that the DPLA was enforceable and did not
 2 violate antitrust laws or public policy. *Id.* The Court held that “[b]ecause Apple’s breach of
 3 contract claim is also premised on violations of DPLA provisions independent of the anti-steering
 4 provisions, the Court finds and concludes, in light of plaintiff’s admissions and concessions, that
 5 Epic Games has breached these provisions of the DPLA and that Apple is entitled to relief for
 6 these violation[s].” *Id.* at 1063–64.

7 Apple also asserted a counterclaim against Epic for indemnification of attorneys’ fees and
 8 costs defending this litigation and advancing counterclaims. *Id.* at 1065. Section 10 of the DPLA
 9 provides, in pertinent part, that Epic indemnify Apple for “any and all claims, losses, liabilities,
 10 damages, taxes, expenses and costs, including without limitation, attorneys’ fees and court costs
 11 . . . arising from or related to,” among other things, Epic’s “breach of any certification, covenant,
 12 obligation, representation or warranty in this Agreement.” *Id.* at 1065. However, under *Alki*
 13 *Partners, LP v. DB Fund Servs., LLC*, 209 Cal.Rptr.3d 151, 171 (Cal. Ct. App. 2016), this Court
 14 held that the DPLA lacked the “express language” required under *Alki* to find that the DPLA
 15 covered more than just third-party claims. *Id.* at 1065–66. As a result, Apple had “not shown that
 16 it [was] entitled to recover attorneys’ fees and costs from Epic Games pursuant to Section 10 of
 17 the DPLA.

18 **B. Ninth Circuit Affirmance in Part**

19 On April 24, 2023, the Ninth Circuit affirmed this Court’s holding with respect to the UCL
 20 and agreed that Epic had standing, Apple violated the “unfair” prong of the UCL, and injunctive
 21 relief was appropriate. *Epic Games, Inc. v. Apple Inc.*, 67 F.4th 946, 999 (9th Cir. 2023);
 22 Dkt. No. 852.⁴ The Ninth Circuit reversed this Court, however, as to Apple’s ability to recover
 23 attorneys’ fees under the DPLA.

24 ***Standing.*** As to standing, the Ninth Circuit held that while Epic no longer has apps on
 25

26 _____
 27 ⁴ The Court denied Apple’s motion to stay the Injunction pending Apple’s appeal to the
 28 Ninth Circuit. (Dkt. No. 830.) On December 8, 2021, the Ninth Circuit granted Apple’s motion to
 stay the Injunction pending appeal. (Dkt. No. 841.)

1 Apple’s app store,⁵ Apple’s anti-steering provisions caused injury to Epic via loss of its
 2 subsidiaries’ earnings. *Id.* at 1000. Further, “Epic is a competing game distributor through the
 3 Epic Games Store and offers a 12% commission compared to Apple’s 30% commission. If
 4 consumers can learn about lower app prices, which are made possible by developers’ lower costs,
 5 and have the ability to substitute to the platform with those lower prices, they will do so—
 6 increasing the revenue that the Epic Games Store generates.” *Id.*

7 **Unfair Practices.** As to the merits of Apple’s UCL violations, Apple did not directly
 8 challenge this Court’s application of the UCL’s tethering and balancing tests, instead arguing that
 9 (i) the UCL’s “safe harbor” doctrine insulates its liability because Epic failed to establish Sherman
 10 Act liability, and (ii) two principles from Sherman Act case law preclude UCL liability. *Id.* at
 11 1001–02. The Ninth Circuit rejected both. *First*, as to the safe-harbor doctrine, Apple failed to
 12 cite any case that “when a federal antitrust claim suffers from a *proof deficiency*, rather than a
 13 *categorical legal bar*, the conduct underlying the antitrust claim cannot be deemed unfair pursuant
 14 to the UCL.” *Id.* at 1001. *Second*, the Supreme Court’s decision in *Ohio v. Am. Express Co.*, 585
 15 U.S. 529, 549 (2018) is, simply put, distinguishable. *Id.* at 1002. Otherwise, Apple was incorrect
 16 that the UCL requires trial courts to conduct the “balancing” test within the relevant market. *Id.*

17 **Injunctive Relief.** With respect to injunctive relief, the Ninth Circuit held that this Court
 18 did not clearly err in finding that Epic’s injuries were irreparable and that monetary damages
 19 would be inadequate, nor did this Court abuse its discretion to apply the injunction against *all*
 20 developers. *Id.* at 1002–03.

21 **Commission Rate.** Again, while not a part of the Court’s UCL findings, the Ninth Circuit
 22 held that this Court did not clearly err in finding that Apple’s 30% commission was
 23 supracompetitive under step one of the Rule of Reason, stating in relevant part:

24 Apple attacks the supracompetitive-pricing finding on factual
 25 grounds by asserting that Apple charges a substantially similar
 26 commission as its competitors. That assertion is true as far as
 headline rates go, but the district court reasonably based its

27 ⁵ Apple declined to reinstate Epic’s developer account after this Court held in its Order that
 28 Epic had breached the DPLA. *See Epic Games, Inc.*, 67 F.4th at 999.

1 came into effect on January 17, 2024.

2 **C. Apple's Purported Compliance**

3 On January 16, 2024, Apple filed a notice of compliance with the Injunction. The major
4 components included:

5 1. New policy charging developers 27% on link-out purchases instead of IAP's 30%.

6 *See infra* Section II.A.

7 2. Various restrictions on the manner and mode of communicating with customers
8 which were distinctly less user-friendly than those otherwise allowed. *See infra*
9 Sections II.B–D.

10 3. Exclusions on the concurrent participation in other programs that offered
11 discounted commissions, like the Video Partner Program and the News Partner
12 Program. *See infra* Section II.E.

13 (Dkt. No. 871.)

14 **D. Epic's Motion to Enforce the Injunction and Evidentiary Hearings**

15 On March 13, 2024, Epic moved to enforce the injunction and hold Apple in civil
16 contempt, and the latest stage of this saga began.⁶ On April 23, 2024, the Court set a evidentiary
17 hearing commencing on May 8, 2024. (*See* Dkt. Nos. 925, 974.) Over the course of six days,
18 Epic called (i) Ned Barnes, Epic's expert witness; (ii) Matthew Fischer, Vice President, Head of
19 Worldwide App Store at Apple; (iii) Alex Roman, Vice President of Finance at Apple; (iv) Alec
20 Shobin, Director of Marketing at Epic; and (v) Benjamin Simon, CEO, president, and co-founder
21 at Down Dog, a mobile app developer. (*See* Dkt. No. 931.) Apple called (i) Carson Oliver, Senior
22 Director of Business Management, App Store; (ii) Philip Schiller, Apple Fellow; (iii) Alex
23 Roman; (iv) Matthew Fischer; and (v) Ned Barnes. (*See* Dkt. No. 932.)

24 As testimony unfolded, and Apple attempted to justify its response, the Court became
25

26 _____
27 ⁶ The Court also granted the filing of *amici curiae* briefs in support of Epic's motion to
28 enforce from Meta Platforms, Inc., Microsoft Corporation, X Corp., and Match Group, LLC
(Dkt. No. 904); Spotify USA Inc. (Dkt. No. 906); and Digital Content Next (Dkt. No. 908.)
(Dkt. No. 913.)

1 increasingly concerned that Apple was not only withholding critical information about its business
2 decision for complying with the Injunction, but also that it had likely presented a reverse-
3 engineered, litigation-ready justification for actions which on their face looked to be
4 anticompetitive. The Court immediately ordered Apple to produce all injunction-compliance
5 related documents (Dkt. No. 974), and referred all discovery matters to Magistrate Judge Thomas
6 S. Hixson (Dkt. No. 985.) Judge Hixson later set a deadline for substantial completion of
7 document production by September 30, 2024 (Dkt. No. 1008 at 2) and denied Apple’s request for
8 an extension (Dkt. No. 1017.)

9 Apple engaged in tactics to delay the proceedings. The Court later concluded that delay
10 equaled profits. By September 30, 2024, Apple represented that it had produced around 89,000
11 documents out of the 1.5 million it had reviewed and expected to produce a few thousand more by
12 October 7, 2024. (Dkt. No. 1024.) Apple, however, had asserted privilege over more than a third
13 of responsive documents. (*See* Dkt. Nos. 1056, 1095.)

14 Magistrate Judge Hixon largely found Apple’s privilege claims to be unsubstantiated after
15 reviewing eleven exemplar documents (characterized by Epic as evidence of Apple’s overreach).
16 (Dkt. No. 1056.)⁷ Apple used this decision to delay further and “offered” to re-review all 57,000
17 documents for which it claimed privilege in full or in part. Ultimately, Apple withdrew
18 approximately 42.1% of its privilege claims. Although Apple now tries to recast its re-review as
19 “of its own accord,” that framing belies the reality that the documents should have never been
20 withheld in the first instance. (Dkt. No. 1151 at 5–6.)⁸ Ultimately, Epic and Apple hired three
21 special masters to review Apple’s privilege claims after its re-review. (*See, e.g.*, Dkt. No. 1191.)

22 Apple’s production positions, after its dissembling at the evidentiary hearing, revealed that
23 delay worked to its advantage. On February 4, 2025, the Court ordered that the evidentiary hearing
24

25 ⁷ Later, on December 31, 2024, this Court upheld Judge Hixson’s findings in full.
26 (Dkt. No. 1095.)

27 ⁸ Including documents Apple identified as falling within Judge Hixson’s ruling on the 11
28 exemplar documents—for which Apple maintains its claims of privilege—that number jumps to
55.9% of documents downgraded from Apple’s original claims. (*Id.* at 6 & n.7.)

1 would resume on February 24, 2025, and that the special master review and production of non-
2 privileged documents to Epic would continue in parallel to the evidentiary hearing.

3 (Dkt. No. 1171 at 2.)⁹ The Court permitted the parties to designate priority documents for
4 immediate review, with Epic selecting the first 1,000 documents for immediate review. (*Id.*)

5 During the three days of testimony in February 2025,¹⁰ Epic called back to the stand Philip
6 Schiller and Carson Oliver, and called for the first time Rafael Onak, User Experience (“UX”)
7 Writing Manager at Apple; Kunnal Vij, Senior Manager of Finance at Apple Services; and Marni
8 Goldberg, Corporate Communications Director at Apple. (*See* Dkt. No. 1273.) Apple called no
9 witnesses. The evidentiary hearing preliminarily concluded on February 26, 2025.¹¹

10 The Court sets forth the evidence and findings revealed through the hearings and evidence
11 received.

12 **III. APPLE’S 2024 RESPONSE TO THE INJUNCTION: COMPONENTS**

13 Apple chose to comply with the Injunction with the following five categories of changes:

14 Apple imposed (A) a 27% commission on link-out purchases, (B) new external purchase
15 link placement and design restrictions, (C) requirements that induce purchase-flow friction,
16 (D) limitations on developers’ ability to use calls to action, and (E) exclusion of certain programs
17 utilized by large developers from the Link Entitlement.

18 The Court evaluates each in terms of whether Apple took reasonable steps to comply, and
19 in fact has complied, with the Injunction.

20
21
22 ⁹ At least as of January 31, 2024, the special masters upheld Apple’s privilege claims on
23 this reduced body of proposed redactions at a rate of approximately 89.1%, overruling in part as to
24 0.8%, and rejecting the balance as to 10.1%. (*Id.*)

25 ¹⁰ The transcripts of the hearing from May 2024 and February 2025 are consecutively
26 paginated and cited as “May 2024 Tr.” or “Feb. 2025 Tr.” throughout. (*See* Dkt. Nos. 976 (May 8,
27 2024), 977 (May 10, 2024), 978 (May 16, 2024), 979 (May 17, 2024), 980 (May 22, 2024), 981
28 (May 31, 2024), 1306 (February 24, 2025), 1307 (February 25, 2025), 1308 (February 25, 2025
(sealed portion)), and 1309 (February 26, 2025).)

¹¹ The Court left open the option of a further evidentiary hearing in the event the ongoing
document review revealed the need for further hearings.

1 **A. First Component: Commission on Linked-Out Purchases**

2 Prior to the Injunction, Apple did not allow “linked-out purchases” and, thus, did not
3 charge any commission for purchases made outside of, or off, its platform.¹² Now, it does.

4 In its most simple configuration, “linked-out purchases” after the Injunction are purchases
5 made off the Apple platform, but from which a consumer can leave the platform using a link on
6 the app. Now, under the revised Guidelines, Apple not only charges developers “a 27%
7 commission,” but also expanded the scope of the commission requirement by demanding a 27%
8 commission on digital goods and services transactions that take place on a developer’s website
9 upon immediate use of the link, *and* payment for any “digital goods and services transactions that
10 take place on a developer’s website within *seven days after a user taps through* an External
11 Purchase Link . . . to an external website.” (Dkt. No. 871-1, Declaration of Matthew Fischer
12 (“Fischer Decl.”) ¶ 33; *see also* CX-2, StoreKit External Purchase Link Entitlement Addendum for
13 US Apps § 5.1 (emphasis supplied).)

14 Apple hid its decision-making process from the Court only to have it uncovered at the
15 second evidentiary hearing in 2025:

16 ***Initial Discussions.*** Rolling the clock back, the Injunction issued Friday, September 10,
17 2021. On Monday, September 13, 2021, discussions began about the specific rate and under what
18 circumstances a commission on external purchases should be charged, if any. Notes of a meeting
19 that day describe three options for how to charge a commission and focused on linked-out
20 purchases already required in Korea:

- 21 • One: “Do nothing but allow the separate payment methods in”;
- 22 • Two: “Charge an alternative commission but audit”; and
- 23 • Three: “Charge on a different metric (downloads/redownloads) but cuts into

24 _____
25 ¹² *See* May 2024 Tr. 543:23–544:8 (Oliver) (“Historically, . . . we only commissioned the
26 sale of digital goods and services that were sold directly within apps that were distributed through
27 the App Store. For all other digital goods and services sold outside the App Store, there was no
28 commission. And the basic principle there was that if we provided a user to a developer, that we
were commissioned on those users that purchased . . . within the app, and where the developer was
able to guide a user outside of the store to a sale of the digital goods or service, they were
welcome to use that within their own app.”).

1 different set of developers than we do today”. (CX-202.1; Feb. 2025 Tr. 1399:2–18
2 (Oliver).)¹³

3 While the meeting was evidently focused on actions in Korea,¹⁴ the notes indicate that “YGR’s
4 opinion needs to be taken into account; charging for commission - is it fine to do?!” and “YGR’s
5 decision - are we in a different place? Commission is ok under YGR but decision stated to allow
6 Devs to link out to other payment methods.” (CX-202.1; Feb. 2025 Tr. 1400:13–22 (Oliver).)

7 Thus, the Court finds it was immediately apparent to the Apple working group that the
8 commission issue, including whether and how much, was core to compliance with the Injunction.
9 Given the nature, length, and content of the Injunction, on which Apple is on notice, both
10 constructive and actual, the working group’s view is hardly surprising.

11 Apple coded its activities relating to Injunction compliance as “Project Michigan.” (*E.g.*,
12 Feb. 2025 Tr. 1323:7–11 (Onak).) When the Ninth Circuit issued its stay of the Injunction on
13 December 8, 2021 (Dkt. No. 841), Apple appears to have ceased any compliance efforts. (*See*
14 CX-486.1 (December 9, 2021 Email: “Michigan is on hold for now”).) Once the Ninth Circuit
15 issued its decision affirming this Court’s ruling in relevant part on April 24, 2023, Apple renewed
16 its compliance efforts, this time under the codename “Wisconsin.” (Feb. 2025 Tr. 1142:2–11
17 (Schiller); *see also* Dkt. No. 852 (Ninth Cir. opinion).)¹⁵

18 That information was hidden from the Court and not revealed until the 2025 hearing.

19 **May 18, 2023 Meeting.** On May 18, 2023, Messrs. Fischer, Oliver, Schiller, and Vij,
20 among others, attended a meeting titled “Wisconsin Business Update.” (CX-488.1.) An internal
21 presentation proposed two options for achieving compliance with the Injunction. (CX-272.)
22

23 ¹³ As Mr. Oliver confirmed, this second option—under which “Apple would allow
24 alternative payments but seek a commission for the[ir] use”—is essentially the option Apple chose
in Korea, the Netherlands, and in the United States. (Feb. 2025 Tr. 1399:16–1400:7.)

25 ¹⁴ *See also* Feb. 2025 Tr. 1398:4–6 (Mr. Oliver: “I remember this specifically related to
26 one geography [Korea]. I don’t . . . know if this project was covering multiple geographies or just
one.”).

27 ¹⁵ On January 17, 2024, the Ninth Circuit’s mandate issued, after the Supreme Court
28 declined review. (Dkt. No. 879.)

1 *Proposal 1* would include *no* commission but would restrict the placement and appearance
2 of links in purchasing flows. (*See* CX-272.7.) The “Key Risks” identified with Proposal 1 include
3 that the proposal: “[d]iverges significantly from existing and future approaches”; “[c]reates new
4 in-app channel for developers without commission”; “[r]equires Apple to review against multiple
5 new policies and restrictions”; and that “[r]eview cannot prevent all policy evasion, but will allow
6 for remediation.” (*Id.*)

7 *Proposal 2*, by contrast, permitted display placement “[a]nywhere, including
8 merchandising page,” with “[n]o restrictions” on pricing language but *would* include a
9 “[d]iscounted commission” of 3% off its prior 30% rate, i.e., a 27% commission. (*See* CX-
10 272.11.) Key risks identified with Proposal 2 included that: the “[c]urrent approach to collections
11 is manual and will not scale”; and it was “[d]ifficult to estimate impacts of non-economic
12 developer rationales (e.g. value of direct customer relationship).” (*Id.*)

13 Documents revealed that Apple believed Proposal 1’s no-commission model would “be
14 very attractive to developers,” “cause a lot of developers to adopt the link[-]out options,” and
15 “would create competitive pressure on IAP,” which in turn “would drive . . . spend outside of the
16 app.” (Feb. 2025 Tr. 1456:15–1457:23 (Oliver).) Mr. Oliver acknowledged, and understood, that
17 creating this competitive pressure, which Apple identified as a key risk factor of Proposal 1, was
18 one of the goals of the Injunction. (Feb. 2025 Tr. 1457:19–23 (Oliver).)¹⁶

19 Apple also considered the revenue impact of the commission and no-commission models,
20 under various customer adoption scenarios. Under Proposal 1’s no-commission model, Apple
21 anticipated that most large developers and potentially many medium and small developers would
22 offer link-out purchases to their users. (Feb. 2025 Tr. 1467:8–15 (Oliver).) As a result, Apple
23 estimated a revenue impact of hundreds of millions to billions under the no-commission model for
24

25
26
27 ¹⁶ As to the risk that Option 1 “[d]iverges significantly from existing and future
28 approaches” (CX-272.7), Mr. Oliver acknowledged that this risk encompasses the concern that if
Apple adopted a no-commission approach on link-outs in the United States, it would be harder to
justify a commission elsewhere in the world (Tr. 1453:22–1454:5).

1 customer adoption ranging from 10% to 25%.¹⁷ (*See* CX-272.10, .14.) By contrast, and
 2 importantly, for Proposal 2, Apple anticipated that a linked-out option subject to a 27%
 3 commission, at most, might only be attractive to the largest developers. (Feb. 2025 Tr. 1468:21–
 4 1469:2 (Oliver).) Specifically, the presentation focused on potential adoption by only the top 10
 5 and 50 largest developers with 20% to 50% adoption, indicating potential revenue impact of tens
 6 of millions.¹⁸ (CX-272.14.)¹⁹ In short, Apple estimated, and both Messrs. Schiller and Oliver
 7 acknowledged, that as of May 2023 the revenue impact of a no-commission option with placement
 8 restrictions (Proposal 1) posed a significantly larger hit to Apple than the impact of a 27%
 9 commission option without placement restrictions (Proposal 2). (Feb. 2025 Tr. 1469:19–24
 10 (Oliver); *id.* at 1162:16–24 (Schiller).)

11 Ultimately, Apple’s 2024 response to the Injunction was the most anticompetitive option: a
 12 link entitlement program that included *both* the placement restrictions of Proposal 1 *and* the 27%
 13 commission from Proposal 2. (*E.g.*, Feb. 2025 Tr. 1162:25–1163:4 (Schiller).)

14 Further, in May 2023, Apple through Oliver and others received feedback from Bumble, a
 15 large, well-known developer on Apple’s and Google’s alternative billing programs. (*See* CX-
 16 246.2; Feb. 2025 Tr. 1409:5–1411:9 (Oliver).)²⁰ Bumble specifically advised Apple that
 17 “[p]ayment processing fees average out significantly higher than the 4% fee reduction currently
 18 offered by Google in the [user choice billing] program or [the] 3% fee in Apple’s . . . solution
 19 resulting in negative margin for developers.” (CX-246.11.)²¹ In other words, Bumble explained
 20

21 ¹⁷ More precisely, Apple estimated a revenue impact of [REDACTED] million to [REDACTED] billion.

22 ¹⁸ More precisely, Apple estimated a revenue impact of [REDACTED] million to [REDACTED] million.

23 ¹⁹ The slide presenting revenue impacts of a 27% commission focused on adoption by the
 24 top 10 and 50 developers, greying out the rows for top 200 developers and all developers because
 25 Apple expected that this option “would be only more attractive to the largest developers.” (Feb.
 2025 Tr. 1469:1–2; CX-272.13.)

26 ²⁰ While Mr. Oliver testified that he did not recall the document (Feb. 2025 Tr. 1410:12–24
 27 (Oliver)), the email reflects that Bumble’s slides were sent to him and at least 14 other members of
 Apple’s legal, business, and finance teams (CX-246.1.)

28 ²¹ Bumble proposed as solutions to (1) “[v]ary fee rates to match payment method basis
 (e.g. credit card [REDACTED], carrier billing [REDACTED])” or (2) “[r]evise 4% global ‘average’ closer to

1 to Apple that a “3% discount” was not economically viable for a developer because the external
2 cost of payments exceeds 3%. Apple’s own internal assessment from February 2023 reflects data
3 meriting the same conclusion—that the external costs of payments for developers on link-out
4 purchases would exceed Apple’s 3% discount if it demanded a 27% commission rate.²²

5 The evidence uncovered in the 2025 hearing demonstrated Apple’s knowledge and
6 expectation that the restrictions would effectively dissuade any real developer participation, to
7 Apple’s economic advantage.²³

8 **June 1, 2023 Meeting.** Two weeks later, on June 1, 2023, Apple executives, including
9 Messrs. Cook, Luca Maestri, Schiller, Fischer, and Oliver, held a meeting titled “Epic Injunction
10 Implementation.” (CX-485.1.) The presentation accompanying the meeting painted a clearer
11 picture. One chart estimated revenue impacts to Apple based on potential commission discount
12 (3%, 5%, 7.5%)²⁴ and link-out billings share (10–60%). (CX-859.32.) For the section of the chart
13 covering 3% and 5% discounts, no revenue impacts were listed. Notably, the chart simply notes
14 that it “[m]ight not be economically viable for developer to shift” at those rates, irrespective of the
15 link-out billings share.” (*Id.*; Feb. 2025 Tr. 1638:18–1639:7 (Vij).)²⁵

16 _____
17 developer’s actualized average (e.g. ██████). (CX-246.11.)

18 ²² Compare CX-246.11 (Bumble estimating developer’s actualized average costs at ██████
19 ██████), with CX-265.27 (Apple estimating external costs for “extra large developers” at ██████ and
external costs for “medium” sized developers at ██████); see also Feb. 2025 Tr. 1627:15–1628:10
(Vij).

20 At the time, Apple also knew of the virtually nonexistent adoption rates of the Netherlands
21 and Korea programs. Those, similar to the at-issue program, additionally suggested to Apple the
22 non-viable economics of the proposed program. See Feb. 2025 Tr. 1407:1–5 (“Q. [F]or example,
23 as of October 2022, ten months into the Netherlands program and four months into the Korea
program, only one developer had signed up for alternative payments across the two programs.
A. That seems roughly correct, yes.”) (Oliver).

24 ²³ Apple executive Alex Roman testified under oath that he did not look at comparables to
25 estimate the costs of alternative payment solutions that developers would need to procure to
facilitate linked-out purchases. That testimony is not believable. (May 2024 Tr. 266:22–267:11
(Roman).)

26 ²⁴ As throughout, each discount reflects a discount from a 30% commission, i.e., a 3%
27 discount results in a 27% commission, a 5% discount results in a 25% commission, and a 7.5%
discount results in a 22.5% commission. Feb. 2025 Tr. 1638:15–17 (Vij).

28 ²⁵ As to another option—Option 3, included in the presentation’s appendix and which

1 Crucially, at this point, Apple’s notes reflect uncertainty about whether it could in fact
 2 impose a commission without violating the Injunction. In one slide deck, Apple’s notes explain
 3 that “[i]f we decided *and had the ability* to charge a commission, we believe there would be very
 4 little developer adoption of link-out, assuming a scenario where we would give a cost of payments
 5 discount at 3%.” (CX-859.33 (emphasis supplied).) Those same notes indicate that Apple
 6 planned to “[c]ome up with a couple of models in the spectrum of what we think the judge will
 7 accept” but to “[s]tart with the minimum.” (CX-1104.1.)

8 Apple’s knowledge and consideration of these issues was hidden from the Court and not
 9 revealed until the 2025 hearing.

10 **June 13, 2023 Meeting.** Twelve days later, on June 13, 2023, the Project Wisconsin team
 11 met again, including Messrs. Fischer, Oliver, and Vij, this time to discuss three commission
 12 proposals. (CX-509.1; Feb. 2025 Tr. 1497:20–1498:3 (Oliver).) The meeting presentation
 13 indicated “[t]hree options for link-out pricing.” (CX-274.3.) Option A concerned the “Standard
 14 Commission Discount,” under which “Apple would discount the commission on link-outs based
 15 on cost of payments.” (*Id.* at .4.) Option B involved a “Time-limited, Discounted Commission,”
 16 where “Apple would charge a discounted commission for 1 year and then 0% thereafter.” (*Id.* at
 17 .5.) Finally, Option C proposed a “Flat Affiliate Fee,” where “Apple would charge a flat fee per

18
 19 _____
 20 would provide a commission on linking out and a 0% commission on in-app text communications
 21 —the speaker notes explain that “[w]e ran the commission option through our developer
 22 decisioning model as well but this will likely not make economic sense for the vast majority of
 23 developers with the 3% discount. However, we know that the model is economic in nature and
 24 does not capture softer elements like customer relationship and developers ability to monetize in
 25 others [sic] ways they don’t today with a transaction going through linking-out, hence we did a
 26 sensitivity.” CX-859.55.

23 Additionally, Apple witnesses occasionally noted that their models reflected a commission
 24 imposed “in perpetuity,” i.e., the look-back window for imposing a commission after a user clicks
 25 on a link is “perpetual,” instead of the seven-day look-back window Apple in fact adopted. (*See*,
 26 e.g., May 2024 Tr. 132: (“[T]o comply with the injunction, we have reduced the commission, you
 27 know, in the case of these larger developers, from 30 to 27, and added a seven-day [window]. So
 28 instead of having a 27 percent commission in perpetuity, it’s just a 27 percent commission for
 these seven days. . . . [W]e expect that many, many transactions will take place after that seven-
 day window which would in essence bring that 27 percent rate much lower to around 18 percent.”)
 (Fischer). The testimony in February 2025 adduced no evidence to support Apple’s contention
 that that it relied on a perpetual look-back window to consider its effective rate at 18%.

1 customer tap-through on an in-app link-out.” (*Id.* at .6.)

2 The presentation provided “Proposed Justifications” and “Considerations” of each option.
3 Most relevant here is Option A, the commission structure Apple ultimately deployed.

4 To justify Option A, advocates inside Apple claimed that the developer “will still benefit
5 from all of Apple’s tools, technologies, and services, and only have to cover payments themselves
6 at the end” and noted several reasons why Apple’s “30% commission [was] fair and defensible”
7 (*id.* at .4), even though this Court and the Ninth Circuit had already found the rate was
8 “supracompetitive.”²⁶ Apple personnel noted, for example, “Steam charges 20-30%, but does not
9 offer platform services” and “[t]he App Store is a premium, comprehensive, at-scale offering.”
10 (*Id.*)²⁷ The presentation final “consideration” notes did reveal that Apple believed “[d]evelopers
11 will claim that a small discount will not provide enough margin to compete on price i.e.
12 difficulties with Netherlands approach.” (*Id.*)²⁸

13 Additionally, notes of the meeting state that the team “need[ed] to come up with a session
14 time (~24-48hrs),” which refers to the lookback window that triggers a commission on a linked-
15 out purchase. (CX-251.2; Feb. 2025 Tr. 1512:16–18 (Oliver).)

16 Apple’s knowledge and consideration of these issues was hidden from the Court and not
17 revealed until the 2025 hearing.

18
19 _____
20 ²⁶ To remind: *see* quote, *supra*, at 9; *see also*, Injunction at 98 (“Apple’s initial rate of
21 30%, although set by historic gamble, has apparently allowed it to reap supracompetitive operating
22 margins.”); Injunction at 92 (“As an initial matter, as detailed above, the 30% commission was not
23 set by competition or the costs of running the App Store, but as a corollary to other gaming
24 commission rates”); Injunction at 119 (“As described above, Apple has not adequately justified its
25 30% rate. Merely contending that its commission pays for the developer’s use of the App Store
26 platform, license to Apple’s intellectual property, and access to Apple’s user base only justifies a
27 commission, not the rate itself. Nor is the rate issue addressed when Apple claims that it would be
28 entitled to its commission even for games distributed outside the App Store because it provides the
device and OS that brings users and developers together.”)

²⁷ The slide, at least, fails to provide a basis for the value of the App Store’s “premium,
comprehensive, at-scale offering,” other than that headline description.

²⁸ Mr. Oliver, for his part, could not recall any specific feedback from developers in this
vein, but acknowledged that it “seems to be the reading from the bullet” that developers in the
Netherlands complained about an insufficient price margin due to Apple’s commission rate. (Feb.
2025 Tr. 1504:13–17 (Oliver).)

1 **June 20, 2023 Meeting.** Seven days later, on June 20, 2023, Apple held another meeting
 2 regarding implementing the Injunction. (CX-489.1.) At that point, Apple’s go-live date for
 3 implementing the Injunction was July 5, 2023, only 15 days later. (Feb. 2025 Tr. 1176:2–5
 4 (Oliver); *see also* CX-223.1.)

5 Prior to the June 20 meeting, there were individuals within Apple who were advocating for
 6 a commission, and others advocating for no commission. (Feb. 2025 Tr. 1521:3–12 (Oliver).)
 7 Those advocating for a commission included Mr. Maestri and Mr. Roman. (*Id.* 1522:3–10
 8 (Oliver).) Mr. Schiller disagreed. (*Id.* 1521:13–18 (Oliver).) In an email, Mr. Schiller relayed
 9 that, with respect to the proposal for “a 27% commission for 24 hours,” “I have already explained
 10 my many issues with the commission concept,” and that “clearly I am not on team
 11 commission/fee.” (CX-224.1.)²⁹ Mr. Schiller testified that, at the time, he “had a question of
 12 whether we would be able to charge a commission” under the Injunction, a concern which he
 13 communicated. (Feb. 2025 Tr. 1177:24–1178:9 (Schiller).) Unlike Mr. Maestri and Mr. Roman,
 14 Mr. Schiller sat through the entire underlying trial and actually read the entire 180-page decision.
 15 That Messrs. Maestri and Roman did neither, does not shield Apple of its knowledge (actual and
 16 constructive) of the Court’s findings.

17 A businessperson at Apple explained the team’s current thinking in a June 15, 2023 email
 18 and reveals a core decision. Apple has chosen not to value its intellectual property (the opening
 19 allowed by the Court in its Order) and does not want to relinquish its hold on this revenue stream:

20 [T]he team has discussed variations on the commission options with
 21 lower rates, but we struggled to land on ironclad pricing rationales
 22 that would (1) stand up to scrutinizing comparisons with defenses of
 23 the commission and existing discounting approaches in other
 jurisdictions and (2) that we could substantiate solidly on a bottoms
 up basis without implicitly devaluing our IP / proprietary technology.

24 ...

25 All things being equal, . . . a lower commission rate option doesn’t
 represent a material improvement in the logical grounding relative to

26 _____
 27 ²⁹ Regardless of whether Mr. Schiller’s comment that he had a question of whether Apple
 28 could impose a commission under the injunction, this was only one of the “many issues” he
 alluded to. (*See* CX-224.1.)

1 the 27%, continues to place the lion's share of the financial risk and
2 calculus on Apple, and just makes us less money.

3 (CX-538.2–3; *see also* Feb. 2025 Tr. 1546:13–1550:20 (Oliver).)

4 Despite Mr. Schiller's concerns, the June 20, 2023 presentation forged ahead and identified
5 benefits to several different commission/fee options, one of which was a 27% commission on
6 transactions made within 24 hours of a customer's link-out. (CX-223.23.)³⁰ For that option, the
7 presentation identified that the proposal "[r]educes financial risk versus no-fee option," which
8 simply refers to the fact that Apple would generate more revenue under this option than a no-
9 commission option. (*See* CX-223.32.)

10 In fact, documents revealed that not only would Apple generate more revenue, it would
11 lose minimal to none: as Apple's earlier financial modeling had indicated, because developers'
12 external costs will exceed 3% when utilizing linked-out transactions, Apple's 27% commission on
13 linked-out transactions renders every linked-out transaction more expensive to a developer than an
14 IAP transaction at 30% commission. (*See* Feb. 2025 Tr. 1633:5–10 (Vij) ("As long as there is a
15 27 percent commission on a linked-out transaction, that linked-out transaction is going to be more
16 expensive to any developer and every developer based on this chart than an IAP transaction at 30
17 percent, correct? A. Yes, for that particular transaction.")) Ironically, the presentation then stated
18 that this option "[p]rovides more margin opportunity for developers compared to standard IAP
19 commission." (CX-223.32.)³¹ While literally true in one sense, likely the outward facing/public
20 sense—27% is less than 30%—Apple also knew that any such opportunity vanishes in the face of
21 external costs and thus was not viable for developers.

22 Despite the fact that the Court now has evidence that Apple investigated the landscape,
23 knew how it would harm developers, and understood it would not comply with the goal of the
24 Injunction, Apple nonetheless determined at the June 20, 2023 meeting that it *would* charge a

25 ³⁰ Apple also considered imposing a flat fee per link-out or a 20% commission for the first
26 year. CX-223.23.

27 ³¹ The identified "Risks" with the proposal were the same as previously described:
28 developers "may claim" that the 3% discount does not permit price competition; the proposal
diverges from planned alternative payment programs given its time duration; and there is a
significant collection risk if linking-out adoption scales. CX-223.32.

1 commission on link-out purchases, although it had not yet decided what that commission would
2 be. (Feb. 2025 Tr. 1227:16–23 (Schiller).)

3 Apple’s knowledge and consideration of these issues was hidden from the Court and not
4 revealed until the 2025 hearing.

5 **June 28, 2023 Meeting.** Seven days later, on June 28, Apple held another meeting
6 regarding “Epic Injunction Implementation,” this time attended by Mr. Cook, as well as
7 Messrs. Maestri, Schiller, Fischer, and Oliver, among others. (CX-532.1.) The presentation
8 accompanying the meeting indicates that the potential commission rate for linked-out purchases in
9 the United States could range from 20% to 27%. (CX-291.14.) In her notes dated June 26, two
10 days prior, Ms. Goldberg wrote, “[c]ommission[:] 20-23 percent,” but that “Luca [Maestri] wanted
11 to make it 27 percent.” (CX-399.1; Feb. 2025 Tr. 1797:5–1798:8 (Goldberg).)³²

12 Again, this was hidden from the Court and not revealed until the 2025 hearing.

13 **July 5, 2023 Price Committee Meeting.** One week later, on July 5, Apple held a Price
14 Committee meeting to prepare for potentially imminent Injunction compliance. (Feb. 2025
15 Tr. 1242:24–1243:2 (Schiller).) One purpose of this meeting was to settle on the commission rate
16 that Apple would charge and its associated tracking window. (*Id.* 1249:5–9 (Schiller).) At the
17 meeting, Apple settled on a 27% commission for linked-out purchases, a decision ultimately made
18 by Messrs. Cook, Maestri, and Schiller. (*Id.* 1202:15–1203:3 (Schiller).) As Mr. Schiller was not
19 advocating for a commission, and Mr. Maestri was fully advocating for the lucrative approach,
20 Mr. Cook was the tie-breaker. (*Id.* 1202:21–1203:12 (Schiller).) Commissions would be collected
21 on a seven-day window, even if those subsequent purchases on a developer’s website were made
22

23 ³² Ms. Goldberg does not clearly describe the context. (CX-399.) At any rate, she conceded
24 that “I view these notes as my attempt to record what was being said in whatever conversation I
was having.” Feb. 2025 Tr. 1794:23–1795:4.

25 While Ms. Goldberg’s opinions carry little to no weight, her real-time revelations provide
26 context for the environment in which these decisions were being made. For instance, Ms.
27 Goldberg showed her impressions of the potential bad press Apple may receive from charging a
28 commission, as well as messages among her and others in the “Communications” department
agreeing: “this is all very shaky to me” and that “the rationale and the defense for the commission
rate [20%–27%] and the time period, the seven days, was shaky.” See CX-0540.11; Feb. 2025
Tr. 1776:16–1777:1, 1856:8–11, 1858:11–24 (Goldberg).

1 on a device other than the user’s iPhone. (*Id.* 1136:24–1137:6 (Schiller), 1798:25–1799:13
2 (Goldberg).)

3 Thus, in response to the Injunction, Apple chose to impose a new commission representing
4 the most anticompetitive option considered (Primary and Overarching Finding No. 1).

5 Apple’s knowledge and consideration of these issues was hidden from the Court and not
6 revealed until the 2025 hearing.

7 ***Analysis Group Report.*** Apple hired the Analysis Group (“AG”) purportedly to conduct a
8 bottoms-up study, dated January 2024, which (1) “[e]stimate[d] the value of services provided by
9 the Apple ecosystem to developers,” (2) “[c]ompare[d] Apple’s commission with those of other
10 app stores and digital marketplaces,” and (3) “[p]rovide[d] an economic framework for
11 considering alternative pricing options.” (CX-14.3; *see also* CX-15.) No references to the study
12 appear in any of the materials upon which Apple relied in its meetings leading up to its July 5,
13 2023 decision to impose a 27% commission, although the presentation for that July 5, 2023
14 meeting does refer to an AG report.

15 Nonetheless, AG “estimated” that the value of Apple’s technology and services to
16 developers was precisely what the business groups had been debating. AG “concluded” that:
17 (1) Apple’s platform technology is worth up to 30% of a developer’s revenue, depending on other
18 services offered; (2) Apple’s developer tools and services are worth approximately 3%–16%;
19 (3) Apple’s distribution services are worth approximately 4%–14%; and (4) Apple’s discovery
20 services are worth approximately 5%–14%. (CX-0014.7.) The AG report also considered the
21 “[e]conomic framework for considering alternative pricing options,” i.e., “[h]ow to charge a
22 commission or fee for a purchase that happens after the user clicks a link that goes out of the app.”
23 (*Id.* at .38–39.) Further, the AG report identified affiliate programs and developer ad campaigns
24 as a relevant benchmark for referral fees and observed that the tracking windows in, e.g., first-
25 party affiliate programs ranged between 14 and 90 days. (May 2024 Tr. 589:8–24, 591:23–592:1,
26 596:12–16 (Oliver); CX-0014.39–.41.)³³

27
28 ³³ Epic argues that the AG’s report is flawed because, among other reasons, the report
relies on the Google Play store whose practices have been found in violation of antitrust law (*see*

1 Despite its own considerable evaluation, during the first May 2024 hearing, Apple
 2 employees attempted to mislead the Court by testifying that the decision to impose a commission
 3 was grounded in AG's report. (*See, e.g.*, May 2024 Tr. 544:16–24 (Oliver); *see also*
 4 Dkt. No. 1324, Apple Trial Brief at 12.) The testimony of Mr. Roman, Vice President of Finance,
 5 was replete with misdirection and outright lies. He even went so far as to testify that Apple did
 6 not look at comparables to estimate the costs of alternative payment solutions that developers
 7 would need to procure to facilitate linked-out purchases. (May 2024 Tr. 266:22–267:11
 8 (Roman).)

9 The Court finds that Apple *did* consider the external costs developers faced when utilizing
 10 alternative payment solutions for linked out transactions, which conveniently exceeded the 3%
 11 discount Apple ultimately decided to provide by a safe margin. (*See* CX-265.27 (Apple's
 12 estimates of external costs for developers); Feb. 2025 Tr. 1627:15–1628:10 (Vij) (discussing
 13 external costs).) Apple *did not* rely on a substantiated bottoms-up analysis during its months-long
 14 assessment of whether to impose a commission, seemingly justifying its decision after the fact
 15 with the AG's report.

16 Mr. Roman did not stop there, however. He also testified that up until January 16, 2024,
 17 Apple had no idea what fee it would impose on linked-out purchases:

18 Q. And I take it that Apple decided to impose a 27 percent fee
 19 on linked purchases prior to January 16, 2024, correct?

20 A. The decision was made that day.

21 Q. It's your testimony that up until January 16, 2024, Apple had
 22 no idea what -- what fee it's going to impose on linked
 purchases?

23 A. That is correct.

24 (May 2024 Tr. 202:12–18 (Roman).) Another lie under oath: contemporaneous business
 25

26 _____
 27 May 2024 Tr. 644:3–17 (Oliver)), and because Apple engaged in “creative accounting” that
 28 falsely implied Apple required external link commissions to make a fair return on the App Store,
 even though this Court has found that the App Store operates at a 75% margin (*see* May 2024
 Tr. 225:15–226:14 (Oliver); Dkt. No. 1325-2, Epic's Post-Hearing Findings of Fact at 16).

1 documents reveal that on the contrary, the main components of Apple’s plan, including the 27%
2 commission, were determined in July 2023.

3 Neither Apple, nor its counsel, corrected the, now obvious, lies. They did not seek to
4 withdraw the testimony or to have it stricken (although Apple did request that the Court strike
5 *other* testimony). Thus, Apple will be held to have adopted the lies and misrepresentations to this
6 Court.³⁴

7 **B. Second Component: Link Placement and Design**

8 Apple’s restrictions on link placement and design come in two flavors: (i) where Apple
9 limits placement of links for a linked-out purchase in the purchasing flow, and (ii) whether Apple
10 permits a “button”-style link.

11 *Initial Discussions.* As outlined earlier, in May 2023, Apple initially considered two
12 program proposals. Proposal 1 would include *no* commission but would restrict the placement and
13 appearance of links in purchasing flows. (*See CX-272.7.*) As far as link placement, this generally
14 means that if an app displays something for purchase, an IAP buy button could be placed next to
15 that item, but the link-out option would have to be placed on another page in the app. (Feb. 2025
16 Tr. 1451:18–22 (Oliver).) Proposal 2, by contrast, permitted display placement “[a]nywhere,
17 including merchandising page,” with “[n]o restrictions” on pricing language but *would* include a
18 27% commission. (*See CX-272.11.*)

19 On its face, the Court finds the juxtaposition of the two proposals indicates that Apple
20 considered imposition of a commission a trade off with the placement and appearance of a link.
21 During testimony, Apple pushed back on the “trade off” characterization. Mr. Schiller explained
22 that he didn’t “recall us linking these two styles specifically to the discussion of fee or no fee. I
23 recall us discussing them independently as what was the right thing to do and what’s allowed to
24 do.” (Feb. 2025 Tr. 1182:12–15 (Schiller).) Mr. Oliver similarly demurred that he “recall[ed]

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³⁴ The Court understands the technicality that a decision is not made until it is made, but
this was not a seat-of-the-pants decision. Considerable work and debate had occurred. The
evidence demonstrates that the decision had been made, and all things being equal, nothing would
change. To suggest otherwise was to manifest an intent to mislead, misdirect, and lie.

1 specifically discussions about the commission level and discussions about the features around
2 implementation of linking out. . . . I don't remember them being discussed linked." (Feb. 2025
3 Tr. 1888:13–16 (Oliver).)

4 Yet, the side-by-side proposals evidence that the link placement and restriction served as
5 an explicit offset to a lack of commission. Further, the June 1, 2023 presentation confirms that
6 connection: in discussing one proposal, Apple indicates that, "[s]ince we are charging a
7 commission, the link could be placed once per page, including alongside IAP." (CX-859.52
8 (emphasis supplied).) Notes of the meeting further confirm as much: "If you want to charge a
9 commission, you have to give them better placement," but "[i]f you don't charge a commission,
10 you need to lock it down to a plain url link and internet style 'button'." (CX-1104.2.) The notes
11 also indicate the business team was tasked "to define the 2-3 scenarios where we can limit the
12 ruling where Tim, Phil, and Legal are comfortable with." (*Id.* at .1.)

13 While Mr. Oliver claims he did not "exactly understand" what the notes "mean[] by 'limit
14 the ruling'" (Feb. 2025 Tr. 1493:11–21 (Oliver)), the Court finds that the obvious inference to
15 draw from these statements collectively is that, absent a commission, placement restrictions would
16 "lock [the app] down" to protect Apple from an anticipated loss of revenue which would naturally
17 spring from the competition the Injunction sought to stimulate. Mr. Schiller's lapse of memory on
18 the topic does not control.

19 **Revenue Impact.** The June 20, 2023 presentation evidenced, and thereby confirmed, the
20 same trade-off discussed above. Option 1 had no fee but included "more stringent restrictions on
21 style and placement," specifically, the link would be "[o]nce per page," "[n]ot on same page as
22 Apple IAP buy flow," and a "[p]lain link or button." (Feb. 2025 Tr. 1179:16–19 (Schiller);
23 CX-223.6.) Option 2, by contrast, imposed a "[c]ommission or flat fee" but permitted a
24 "[d]eveloper-styled link or button" and allowed the link to be on the same page as the Apple IAP
25 buy flow. (CX-223.6; Feb. 2025 Tr. 1183:10–13 (Schiller).)

26 As to Option 1, the presentation explains that the "share of billings linking-out . . . will
27 depend where is the text and language developers are allowed to use." (CX-224.16.) As
28 Mr. Schiller acknowledged, the more restrictive Apple became on its suggested placement, format,

1 and language of a link that a developer uses for a linked-out transaction, the less likely those links
2 would be seen and used. (Feb. 2025 Tr. 1213:10–15 (Schiller).) More to the point, the more
3 restrictive Apple’s rules about how developers can format links, the lower a developer’s link-out
4 share and adverse impact on Apple’s revenue. (See Feb. 2025 Tr. 1212:9–1213:22 (Schiller).)³⁵

5 Here again, Apple ultimately chose the most aggressive, *anticompetitive* option, namely to
6 take the more restrictive elements of both options: Apple charged a commission as in Option 2,
7 and it imposed the more restrictive link placement and design requirements of Option 1 (Primary
8 and Overarching Finding No. 2).

9 Friction in transactions matter. Apple modelled the revenue impact of a no-fee link-out
10 purchase scenario based on breakage (i.e., percentage of purchases where a user fails to complete a
11 link-out transaction) and the developer’s link-out share (i.e., percentage of purchases diverted
12 from IAP to a developer’s external payment system).³⁶ (See CX-224.16.) Specifically, Apple’s
13 sensitivity analysis projected revenue impact where breakage ranged from 0%–25% and where
14 link-out share ranged from 10%–50%. (*Id.*) The speaker notes indicate that, “[b]eyond █%”
15 breakage, “developers reach a tipping point where they lose more on linking out than they would
16 sticking with Apple IAP and the higher commission.” (*Id.*)

17 The sensitivity analysis projected that “[t]he range of impact on the low end with 25%
18 breakage and 10% billings shift . . . is more negligible at \$█. However on the other end with
19 0% breakage and 50% billings shift . . . , it’s closer to \$█ of U.S. revenue that Apple would
20 lose. A more middle ground scenario of 10% breakage and 30% billings shift would result in
21 \$█ of revenue loss, nearly █ of our U.S. App Store revenue.” (CX-224.16.) As to what
22

23 ³⁵ Mr. Schiller acknowledged this is true “[i]n theory.” (Feb. 2025 Tr. 1213:17–22.)
24 When pressed by the Court whether “if there is any other significant consideration, there will be
25 some writing about it,” Mr. Schiller speculated as to what Apple did *not* analyze, e.g., “whether
26 color or font size or specific page placement or frequency” had a particular impact. (Feb. 2025
Tr. 1213:24–1214:5 (Schiller).) As noted at the hearing, if the consideration was not pursued and
presented in the various meetings, or otherwise documented in the voluminous discovery
produced, then it bears to reason it was not a particularly important consideration.

27 ³⁶ In Apple’s words, breakage refers to when a “customer drop[s] off during the buy-flow
28 process due to a less seamless experience compared to Apple’s iAP [*sic*].” (CX-224.15; *see also*
Tr. 1631:20–22 (Vij).)

1 Apple expected an actual link-out share would be, the speaker notes explained that “we don’t have
2 great data points on what this will end up being,” but pointed to instances where developers
3 accomplished a █% (NetEase) and █% (Disney) shift in billings by offering discounted pricing
4 *outside* the app store. (*Id.*) Notably, when Epic itself offered their own payment option with
5 discounted pricing for a few weeks, Apple saw about █% of billings shift. (*Id.*)

6 As early as the July 5, 2024 price committee meeting, the evidence is compelling that
7 Apple had decided upon combining the most restrictive aspects of the June 20, 2023 proposal:
8 impose both a commission *and* restrictions on link placement and design. (Feb. 2025
9 Tr. 1245:23–1246:24 (Schiller).) The link entitlement required developers to adhere to the
10 following restrictions: “[l]anguage and design must follow templates”; “[o]ne URL per app”;
11 “[l]ink can only be displayed once in an app, on an app page user navigates to (not an interstitial,
12 modal, or pop up), and can’t persist when user leaves page”; “[l]ink can not be displayed on any
13 page that is part of an in-app flow to merchandise/initiate an IAP.” (CX-227.4; *see also*
14 Tr. 1497:7–19 (acknowledging Apple decided to “lock[] it down to a plain URL link and Internet-
15 style button” and “restrict[] placement to make it outside of the buy flow”) (Oliver).)
16 Messrs. Cook, Schiller, and Maestri were the ultimate decisionmakers “about what they felt was
17 [an] acceptable” level of risk to cabin the Injunction’s effect in terms of link placement and
18 design. (Feb. 2025 Tr. 1493:22–1494:3 (Oliver); *see also* Tr. 676:23–677:6 (Schiller).)³⁷

19 ***Link Placement Restrictions.*** Consistent with the July 5, 2023 price committee meeting
20 presentation, Apple’s final Link Entitlement program requires that an external link “[n]ot be
21 displayed on any page that is part of an in-app flow to merchandise or initiate a purchase using in-
22 app purchase.” (CX-2.4; May 2024 Tr. 221:23–25 (“Q. The developer may not put the purchase
23 link in their app anywhere near the purchase flow? A. That is correct.”) (Roman); *id.* at 727:11–
24

25 _____
26 ³⁷ May 2024 Tr. 676:23–677:6 (Schiller) (“Q. And were you the final decision-maker on
27 the details and contours of the response plan that Apple announced on January 16? [Mr. Schiller:]
28 I was one of the decision-makers, not the only one. Q. Who were the other final decision-makers
along with you? [Mr. Schiller:] Mr. Cook, Mr. Maestri, and there were other senior executives
who were involved in the meeting and provided input, but I would say we were the primary
approvers at the end.”).

1 15 (“Q. . . [T]he link must not be displayed on any page that is part of an in-app flow to
2 merchandise or initiate a purchase using in-app purchase, correct? A. Yes.”) (Schiller.)

3 That restriction presents serious problems for developers’ ability to compete with Apple’s
4 IAP and Apple knew it. Consider a concrete example: if an app has an item shop where a user
5 could purchase a digital product—e.g., an in-game outfit or currency—nowhere in that shop could
6 the external purchase link appear. (May 2024 Tr. 93:21–94:7 (Fischer).) Rather, the external
7 purchase link would have to be on some other page within the app. (*Id.* 94:8–13 (Fischer).)
8 Epic’s witness, app developer Ben Simon, represented that the inability to “present both options to
9 the user on the same screen, as we did on Android . . . very much inhibits our ability to give users
10 a choice in how to subscribe,” and “is also likely to lead to user confusion, as it suggests that the
11 two options are unrelated offerings.” (Dkt. No. 897-1, Simon Decl. ¶ 28.)

12 When asked to explain the business justification of this requirement, Mr. Fischer first
13 sidestepped by explaining that “the developer could easily, before they ever get to that page”—
14 e.g., the in-app item shop—“communicate to the user of benefits and pricing discounts.” (May
15 2024 Tr. 94:21–95:9 (Fischer).) When pressed further, Mr. Fischer alluded to “some concern
16 around user confusion with having lots of different purchase options all in one place,” but
17 otherwise admitted that the requirement would be more profitable for Apple and less profitable for
18 developers. (*Id.* 95:10–97:1 (Fischer).)

19 Additionally, based on his experience, Mr. Simon explained that “over two thirds of users
20 who subscribe in-app do so when the purchase page is presented as a ‘pop-up’ after they create
21 their account or after their trial has ended.” (Simon Decl. ¶ 29.) As Mr. Schiller acknowledged,
22 the most useful time for a user to know their purchase options is when the user is in the in-app
23 store reviewing prices. (May 2024 Tr. 732:23–733:4 (Schiller); *see also* Injunction at 164.)
24 However, that is precisely when Apple instructs developers that they *cannot* share alternative
25 purchase information with users. (May 2024 Tr. 733:5–7 (Schiller).)

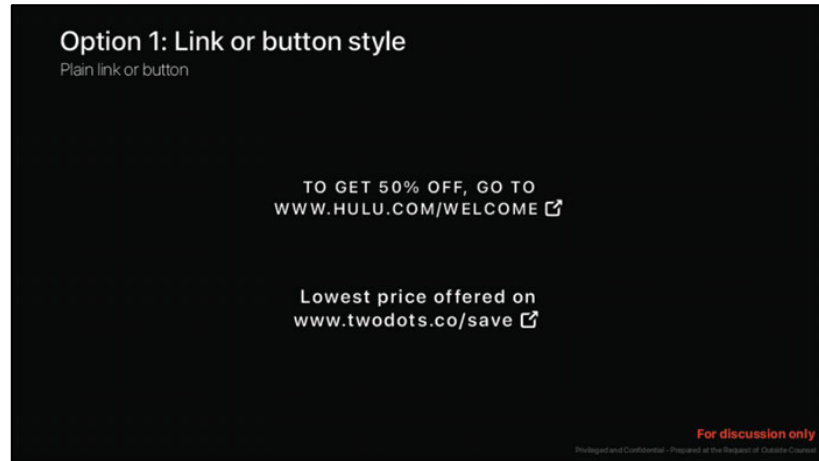
26 In its notice of compliance and at the May 2024 hearing, Apple claimed that restrictions on
27 link placement protect against “security risks.” (*See* Dkt. No. 871, Notice of Compliance at 6, 9–
28 11; May 2024 Tr. 734:22–743:21 (Schiller).) Again, Apple attempted to mislead. Mr. Schiller

1 asserted that having an external link appear on the same page as IAP can increase the risk of a
2 user’s exposure to fraudulent conduct. (May 2024 Tr. 735:20–24 (Schiller).) No real-time
3 business documents credit that view. Mr. Schiller acknowledged that Apple does not permit
4 developers to include an external link in an app under the Link Entitlement unless Apple first
5 reviews and signs off on the link. (*Id.* 736:7–10 (Schiller).) Apple can sign off on an external link
6 regardless of whether it was placed in the IAP purchase flow or elsewhere in the app. (*Id.* 736:11–
7 14 (Schiller).) The link itself would be the same, and the only difference would be a user’s
8 perception and potential confusion. (*Id.* 736:15–17 (Schiller).) The confusion, Mr. Schiller
9 explained, is that a user “may not understand which purchase method is not in-app purchase and
10 which isn’t.” (*Id.* 737:3–7 (Schiller).) Yet, as Apple has structured the program, a user would
11 nonetheless understand the external link directs them outside the app by virtue of Apple’s scare
12 screen informing them of such and the link’s appearance as a hyperlink to an outside web page.
13 (*See id.* 737:8–738:8 (Schiller).) Confusion is not a security risk. Given the lack of any document
14 identifying this alleged concern, the Court finds these justifications pretextual; said differently, the
15 proffered rationales are nothing more than after-the-fact litigation posturing or outright
16 misrepresentations to the Court.

17 ***Link Design Restrictions.*** As to external link design, Apple’s internal materials reflect
18 awareness that the Injunction requires that “[d]evelopers must be able to . . . format these prompts
19 as buttons or other calls to action, not just blue HTML links.” (CX-272.5 (May 2023
20 presentation); *see also id.* at .4 (“Working assumptions of compliance plan” include “[f]lexibility
21 of CTA [call-to-action] design, e.g. buttons.”).) Yet, the Link Entitlement prohibits what
22 consumers would expect to see as a button. (May 2024 Tr. 82:18–23 (Fischer).) The *only* button
23 Apple permits under its guidelines is what it refers to as the “Plain Button style,” which “may not
24 be enclosed in a shape that uses a contrasting background fill,” but rather the “background
25 surrounding text must match the background of [the] app’s page.” (CX-3.5.) A “link out icon
26 provided by Apple must be displayed directly to the right of [the] website URL” and “must
27 visually match the size of the text.” (*Id.*)

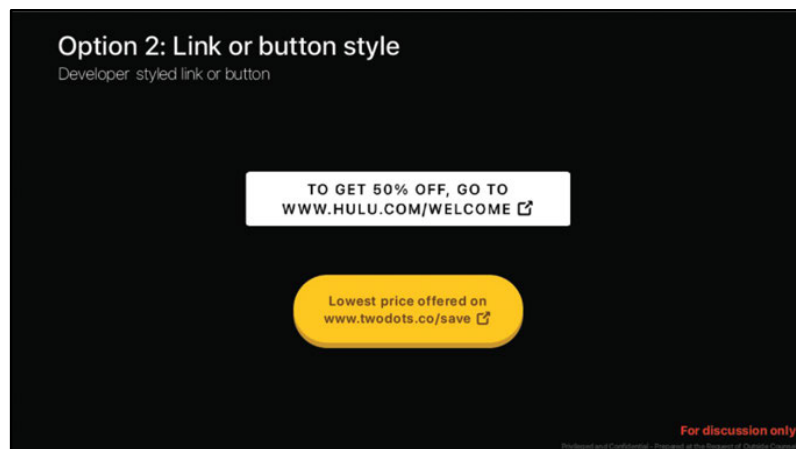
28 The June 20, 2023 presentation highlights Apple’s self-created distinction between a “link”

1 or “button.” Option 1, which did not include a commission or fee, presented the following options
 2 for a “plain link or button” style:



11 (CX-224.10.) Nothing about either example appears to be a “button,” by the ordinary usage and
 12 understanding of the word. There is, certainly, an external-link icon next to the call to action and
 13 hyperlink, but Apple strains to call either of these strings of text a “button.”

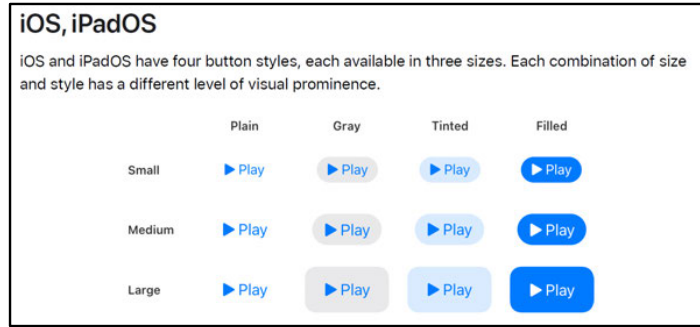
14 By contrast, Option 2, which would include a commission, presented the following
 15 “[d]eveloper styled link or button”:



25 (*Id.* at .19.) The lower example is readily identifiable as a button.

26 Apple’s witnesses acknowledged that the plain-link-style “button” is the least visually
 27 prominent of the button styles that Apple’s guidelines provide:

28



7 (CX-16.3; May 2024 Tr. 76:15–77:5 (Fischer), 897:18–898:1 (Schiller); Feb. 2025 Tr. 1308:15–
8 23 (Schiller).)

9 Understanding that developers use visually prominent buttons to attract users to click on a
10 link (as recommended by Apple in other contexts), Apple’s own witness Mr. Fischer testified that
11 he could think of no other reason to require developers to use a plain-link-style “button” other than
12 to stifle competition.³⁸

13 Mr. Schiller, who sat through both sets of evidentiary hearings, attempted to reverse course
14 on this admission, claiming that Apple required the plain-link-style button so that the external link
15 would look like hyperlinks or other internet links that consumers are used to seeing, along with a
16 link-out icon, which Apple also refers to as a “button”. (Feb. 2025 Tr. 1166:15-1167:14
17 (Schiller).)³⁹ Yet, Apple prohibits developers from using what their consumers would expect to
18 see as an actual “button.” (May 2024 Tr. 82:18–23 (Fischer); *see also* Feb. 2025 Tr. 1531:4–
19 1533:24 (Oliver).) At the end of the day, Apple’s internal documents reflect the underlying
20 motivation to stifle competition by cabining developers’ ability to attract users to alternate
21 payment methods: “How much can we limit what devs do with the text and links?” (CX-1104.2
22 (notes of June 1, 2023 meeting).)

23 ³⁸ May 2024 Tr. 83:15–22, 84:14–25 (Fischer) (“The Court: . . . When you were all talking
24 about this, . . . was any rationale provided for requiring this, not suggesting it, but requiring it
25 when you all know that what it will do is stifle competition? Any other reason given? Because if
26 you cannot identify one, that’s my assumption. [Mr. Fischer]: I don’t remember exactly The
27 Court: So the answer is no, you cannot think of any other reason for requiring that. [Mr. Fischer]:
28 No.”).

³⁹ The Court notes here that while, generally speaking, Mr. Schiller provided some credible
testimony, he was in the courtroom to hear everyone testify. Thus, when he testified and
attempted to rehabilitate the record, he is less credible and the Court discounts that testimony.

1 **C. Third Component: Purchase-Flow Friction**

2 As discussed above, the June 20, 2023 presentation informed Apple executives that “[w]e
3 know it’s very likely that when a link-out happens, there will be some breakage, meaning [the]
4 customer drop[s] off during the buy-flow process due to a less seamless experience compared to
5 Apple’s iAP [sic].” (CX-224.15; *see also* Feb. 2025 Tr. 1631:20–22 (Vij).) Apple understood,
6 and used to its advantage, that the more friction in a purchase flow, the more breakage a developer
7 faces. (May 2024 Tr. 70:23–71:16 (Fischer); Feb. 2025 Tr. 1644:17–20 (Vij).) Apple found that,
8 “[b]eyond ██████” breakage, developers reach a tipping point where they lose more on linking out
9 than they would sticking with Apple IAP and the higher commission.” (CX-224.16.) In other
10 words, to stifle competition, Apple was modeling the tipping point where external links would
11 cease to be advantageous for developers due to friction in the purchase flow. (Feb. 2025 Tr.
12 1211:14–19 (Schiller).)

13 Two aspects of Apple’s Link Entitlement in particular increase purchase-flow friction for
14 users attempting to conduct an external purchase outside of Apple’s IAP: deploying a scare screen
15 and requiring static URLs.

16 **1. The Scare Screen**

17 Apple deployed a warning message, referred to as a “scare screen,” to deter users from
18 using third-party payment options. Apple does not require developers selling *physical* goods to
19 display any warning at all before users proceed to make a payment with a third-party payment
20 solution. (May 2024 Tr. 70:9–13 (Fischer).) By contrast, Apple now requires developers selling
21 *digital* goods to display an “[i]n-app system disclosure sheet”⁴⁰ when a user links-out to a third-
22 party payment solution:

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25
26 ⁴⁰ The “[i]n-app system disclosure sheet” explained that “[e]ach time your app calls the
27 StoreKit External Purchase Link API, it will surface a disclosure sheet provided by the system
28 (iOS 15.4 and/or iPadOS 15.4 or later) that explains to the user that they’ll be leaving the app and
going to an external website to make a purchase through a source other than Apple. When a user
taps the Continue button, they will be directed to your website within a web browser.” (CX-3.5.)

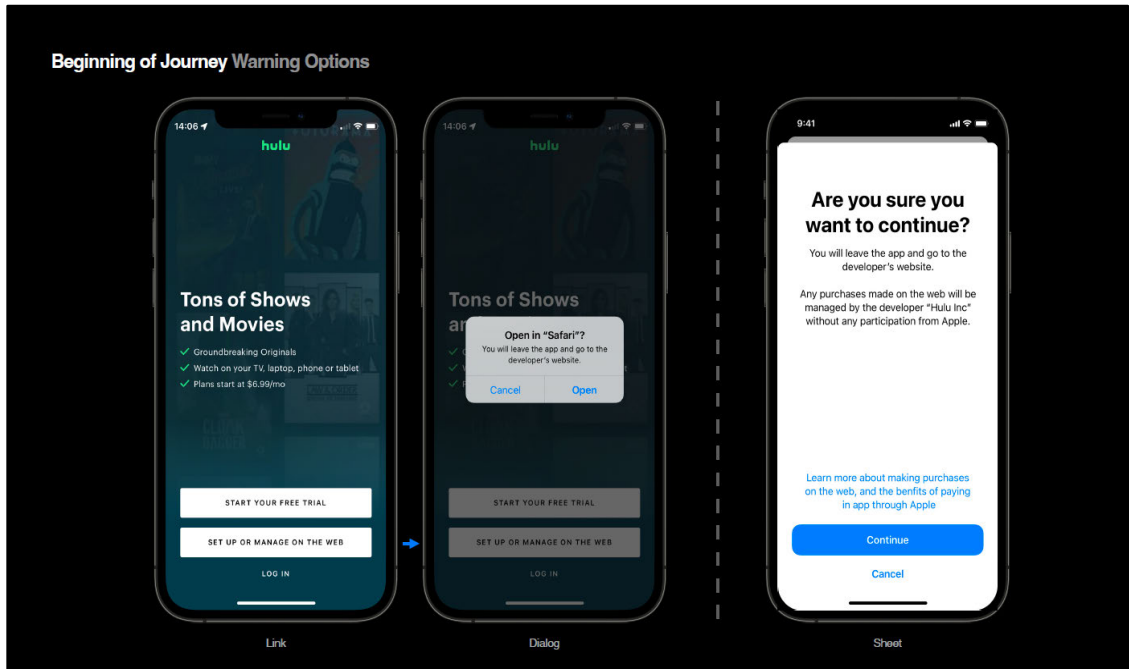
United States District Court
Northern District of California

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(CX-3.5; May 2024 Tr. 70:14–18 (Fischer).)

Two months after the Injunction issued, Apple began evaluating options for its warning screen. In an appendix to a draft November 15, 2021 Apple presentation, Apple details three different “[w]arning Options,” involving escalating levels of warning messages, presumably as exemplars to show customers as part of the link-out flow under consideration. (CX-520.39; Feb. 2025 Tr. 1333:18–23 (Onak).)

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United States District Court
Northern District of California

(CX-520.39.) The screen on the left is called a “link,” where the user would simply be taken directly to the external site. (Feb. 2025 Tr. 1333:25–1334:17 (Onak).) The middle screen is called a “dialogue,” which generates a small pop-up after a user clicks on an external link that communicates to the user they are leaving the app. (*Id.*; also *id.* 1335:10–16 (Onak).) The screen on the right is called a “sheet,” which is a full screen takeover after the user clicks on an external link. (*Id.* 1333:25–1334:17 (Onak).) Moving left to right, the warning level to the user increases. (*Id.* 1335:3–6 (Onak).)

Again, Apple chose the most anticompetitive option, namely the full screen takeover. (*Id.* 1335:7–9 (Onak).); (Primary and Overarching Finding No. 3)

In Slack communications dated November 16, 2021, the Apple employees crafting the warning screen for Project Michigan discussed how best to frame its language. (CX-206.) Mr. Onak suggested the warning screen should include the language: “By continuing on the web, you will leave the app and be taken to an external website” because “‘external website’ sounds scary, so execs will love it.” (*Id.* at .2.) From Mr. Onak’s perspective, of the “execs” on the project, Mr. Schiller was at the top. (Feb. 2025 Tr. 1340:4–6 (Onak).) One employee further wrote, “to make your version even worse you could add the developer name rather than the app

1 name.” (CX-206.4.) To that, another responded “ooh - keep going.” (*Id.*)

2 Again, Apple decided on the most anticompetitive option, that is, the “even worse” option
3 of including the developer’s name rather than the app name (Primary and Overarching Finding
4 No. 4). (Feb. 2025 Tr. 1343:23–1344:1 (Onak); CX-3.5.) All of this was hidden from the Court
5 and not revealed in the May 2024 evidentiary hearings.

6 From 2021 to 2023, while this Court’s Injunction was stayed, Apple employees also
7 worked on warning screens for similar compliance requirements imposed in other jurisdictions,
8 including the Netherlands and Japan.⁴¹ In a January 2022 email, Mr. Schiller was asked for
9 feedback on “In App Messaging - link out”, and he responded: “This is not good. This is a big
10 warning that the user is about to be sent out of the app to a website. I do not think the headline
11 should say ‘continue’, this is a warning that the user is about to go out to the web, and are they
12 sure they want to do that, we cannot verify that anything that occurs on the web is private and
13 secure. The default button should not be ‘continue’.” (CX-268.11.) In response, an employee
14 confirmed that “[w]e updated the title and the copy to be super clear on what is about to happen
15 and have more of that warning tone.” (*Id.* at .10.)

16 On March 15, 2022, Apple held a meeting to discuss the warning screen for the
17 Netherlands and Japan response, which included Messrs. Schiller and Onak. (CX-496.1.)
18 Immediately afterwards, employees developing the warning screen language had a debrief over
19 Slack to discuss how to implement Mr. Schiller’s comments. (Feb. 2025 Tr. 1355:13–22 (Onak);
20 CX-281.) They also discussed how to make the language “scarier.” One employee said some of
21 the draft language “feels safe . . . like, don’t worry, you’re still within the app and it’s just guiding
22 you somewhere else right now.” (CX-281.2.) Rather, the language should sound like users are
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24
25 ⁴¹ The Netherlands Authority for Consumers and Markets (“NACM”) had issued a ruling
26 requiring Apple to make changes to allow for alternative purchase mechanisms for dating apps.
27 Feb. 2025 Tr. 1325:6–19 (Onak). Apple’s work in response to the NACM’s ruling was referred to
28 as “██████████.” See CX-268.1; CX-281.5; Feb. 2025 Tr. 1357:24–1358:9 (Onak). Similarly, Apple
was developing language for screens presented to users linking out for reader apps, in response to
a Japanese Fair Trade Commission investigation. Feb. 2025 Tr. 1326:2–10 (Onak). Apple’s work
in response to the Japanese FTC’s investigation was referred to as “██████████.” See CX-281.5; Feb.
2025 Tr. 1357:24–1358:9 (Onak).

1 sent “into the great wide open.” (*Id.*) Mr. Onak commented that “if we want to ‘scare’ users a bit,
2 i like the addition of ‘out’ because it raises questions and hesitancy haha. out? out where? omg
3 what do i do?” (CX-281.3.)

4 Mr. Onak testified that “in term of UX writing, the word ‘scary’ doesn’t . . . mean the same
5 thing as instilling fear.” (Feb. 2025 Tr. 1340:10–12 (Onak).) Rather, “scary” is a term of art that
6 “means raising awareness and caution and grabbing the user’s attention.” (Feb. 2025 Tr. 1340:13–
7 15 (Onak).) Mr. Onak repeatedly asserted that the team’s goal was simply “to raise caution so the
8 user would have all the facts so that they can make an informed decision on their own.” (Feb.
9 2025 Tr. 1340:22–1341:2 (Onak).) Mr. Onak’s testimony was not credible and falls flat given
10 reason, common sense, and the totality of the admitted exhibits. The designers’ discussions
11 contextualize their use of the word “scary” to indicate its ordinary meaning and, most applicable
12 here, indicate the goal of deterring users as much as possible from completing a linked-out
13 transaction. Apple repeatedly acted to maintain its revenues and stifle competition. This was no
14 exception. His attempts to reframe the obvious meaning of these communications do not
15 persuade. All of this was hidden from the Court and not revealed in the May 2024 evidentiary
16 hearing.

17 After the June 20, 2023 meeting regarding this Court’s Injunction, Apple decided that it
18 would implement a full screen warning after users click on an external link, regardless of which
19 commission option was ultimately selected. (Tr. 1180:12–19 (Schiller); CX-223.7.) At the
20 meeting, Mr. Cook “asked the team to revise the customer warning screen . . . to reference the fact
21 that Apple’s privacy and security standards do not apply to purchases made on the web.”
22 (CX-225.1.) The team updated the warning screen, sent it to Mr. Schiller for approval, and
23 returned the revised copy to Mr. Cook on June 23, 2023. (*Id.*) The updated warning screen
24 changed a sentence from “You will no longer be transacting with Apple” to “Apple is not
25 responsible for the privacy or security of purchases made on the web.” (Feb. 2025 Tr. 1266:12–
26 18 (Schiller); CX-225.2.) As Ms. Goldberg’s notes reflect, the idea discussed was that this
27 “[i]nterstitial . . . tells ppl its dangerous and they are leaving the app store.” (CX-399.1; Feb. 2025
28 Tr. 1810:5–24 (Goldberg).)

1 The presentation for the June 28, 2023 meeting reflects Mr. Cook’s revision (*see* CX-291.5
 2 (“Tim, based on your feedback, here is the System disclosure sheet with the updated copy on the
 3 right.”)), and is included in the final version of the warning screen that Apple adopted (Feb. 2025
 4 Tr. 1267:19–23 (Schiller)).⁴² This “system disclosure sheet” pops up for every single user that
 5 clicks on an external link, and for every single instance that a user clicks on any external link, not
 6 just the first time. (CX-3.5; May 2024 Tr. 725:8–14 (Schiller).) Further, these chilled consumer
 7 conduct, especially given the use of other informative “warning screens,” like those asking to track
 8 a user’s activity across companies’ apps and websites. That information is not a “trivial” ask, but
 9 by Mr. Fischer’s admission, those “warnings” cover only a third or less than half of the screen,
 10 this one covers the entire screen. (CX-3.5; May 2024 Tr. 44:11–45:12 (Fischer).)

11 2. Static URLs

12 A static URL is a web address that “simply is a specific place that the user is going to be
 13 sent to.” (May 2024 Tr. 811:12–18 (Schiller).) By contrast, a dynamic URL “can change”—it
 14 “can send a user to different places.” (*Id.* 811:21–24 (Schiller).) “[E]ven if it doesn’t . . . a
 15 dynamic URL can attach parameters, data, to the URL,” which can include information “like user
 16 identity, geolocation,” or “[s]ession information about what the user’s been doing, to pass along to
 17 that website.” (*Id.* 811:24–812:17 (Schiller).) For the Link Entitlement program, Apple requires
 18 developers to use static URLs for external links. (*Id.* 813:3–5 (Schiller).)

19 As explained by Epic’s witness, Mr. Simon, static URLs can introduce friction in a
 20 purchase flow where dynamic URLs do not. Increased friction decreases competition. For
 21 instance, a dynamic link can identify the user and automatically log that user into their account
 22 after clicking the link. (May 2024 Tr. 953:8–23 (Simon).) For a static URL, however, a user
 23 would have to log in before making a purchase. (*Id.* at 954:20–25.)⁴³ As Mr. Simon attested,

24 _____
 25 ⁴² The final version adds an additional sentence absent from the June 28, 2023 version in
 small font: “Apple can’t verify any pricing or promotions offered by the developer.” (CX-3.5.)

26 ⁴³ That said, as Mr. Schiller explained, users can use Apple’s key chain or password
 27 management tool so that the user automatically fills in their credentials and “[e]very subsequent
 28 visit [the site] will remember that and you will be logged in,” as long as a user utilizes those tools.
 (May 2024 Tr. 813:17–814:9 (Schiller).)

1 some users on the fence about a purchase may decide to stop pursuing the transaction at that point.
2 (*Id.* at 954:25–955:2.)⁴⁴ He also indicated the static URL can create user confusion—some users
3 may feel frustrated “because they feel misled about having purchased . . . in the app without
4 knowing about the other [cheaper] options.” (*Id.* at 959:6–8.) Or a user may accidentally log in to
5 or create a different account, purchasing the product for the wrong account. (*Id.* at 955:3–8.)⁴⁵

6 As with the other restrictions discussed above, Apple claimed the static URL requirement
7 protects users’ security and privacy. Mr. Schiller explained that a static URL “keeps the URL
8 from being used to pass along information about the user without their knowledge from the app
9 out to the website. It has nothing to do with sending them to a page to find pricing. It’s about
10 passing along parameters like their demographics.” (May 2024 Tr. 813:6–14 (Schiller).) Yet,
11 despite these concerns, developers can program dynamic links for any other purpose—Apple in
12 general only prohibits the use of dynamic links for external links for link-out purchases. (*See* May
13 2024 Tr. 90:8–17 (Fischer), 881:3–6 (Schiller), 952:16–19 (Simon).) In fact, “any app that’s
14 connected to the internet doing anything nontrivial is going to have to use dynamic URLs.” (May
15 2024 Tr. 957:3–20 (Simon) (explaining developers’ various uses of dynamic URLs in-app).)
16 Thus, according to Mr. Simon, “[i]f dynamic URLs are a security risk,” then “all of iOS is a
17 security risk because the platform gives you every ability to make Internet requests with dynamic
18 URLs.” (*Id.* 957:21–958:2 (Simon).)⁴⁶

19 Apple understood well that breakage increases with additional friction in the purchase flow
20 (*see* Feb. 2025 Tr. 1643:4–8 (Vij); CX-224.16) and capitalized on that option. Documents reveal
21

22 _____
23 ⁴⁴ Chatter among Apple’s UX design team reveals agreement. As one employee said, “i
24 think personally that is why i wouldnt bother”—“more steps, have to find my card, type it all out.
25 and then giving another company my details.” (CX-206.4.)

26 ⁴⁵ As Mr. Simon explained, after clicking a static URL, users may “log in or create an
27 account with a different email address, which happens more often than you might think, in which
28 case they would purchase for the wrong account, return to their mobile app, not have access, and
usually that leads to them reaching out to our customer support.” May 2024 Tr. 955:3–8 (Simon).

⁴⁶ *See also* May 2024 Tr. 958:3–5 (Simon) (“Web browsing also, every web page has
dynamic URLs on it. So I think all of the Internet would sort of have to be a security risk for
dynamic URLs to be a security risk.”).

1 that Bumble informed Apple in a May 2023 presentation that one additional step in Google’s
 2 three-screen User Choice Billing system resulted in an approximately █% drop-off rate for
 3 customers in a link-out transaction. (CX-246.12.)

4 Again, here, the Court finds that Apple chose the most anticompetitive option to reduce the
 5 efficacy of external link-outs that compete with IAP (Primary and Overarching Finding No. 5).

6 **D. Fourth Component: Limitations on Calls to Action**

7 Under the final component of the Link Entitlement program, Apple prohibits developers
 8 from using calls to action other than the text of external links. (*See* CX-3.5.) Even when using an
 9 external link, a developer “must match the template language” that Apple provides—e.g., the
 10 “purchase template” requires a developer to say “Purchase from the website at www.example.com”.
 11 (*Id.*) That statement—one of five templates which constitutes the external link for a link-out—is
 12 the entirety of the call to action that developers may use. (May 2024 Tr. 85:21–25 (Fischer).)


13 **Templates**


14 Use the templates that best fits your use case. Aside from the price, percentage off, and your website
 15 URL, the language used in your app must match the template language. Don't modify or use the template
 16 in a manner that misleads customers.

17 **Purchase template:**

18 Purchase from the website at www.example.com 


19 **Special offer template:**

20 For special offers, go to www.example.com 

21 For a special offer, go to www.example.com 

22 **Lower price template:**

23 Lower prices offered on www.example.com 

24 Lower price offered on www.example.com 

25 **Percent off template:**

26 To get XX% off, go to www.example.com 

27 **Specific price template:**

28 Buy for \$X.XX at www.example.com 

29 (CX-3.5.)

30 A developer cannot use words beyond those provided in the templates to communicate
 31 with users about external purchase availability. (May 2024 Tr. 85:25–86:3 (Fischer).) A
 32 developer cannot say something like “buy cool new stuff over here,” or “unlock new and special
 33 subscription content only when you [subscribe] on our website.” (*Id.* 86:4–10 (Fischer); *see also*
 34 Tr. 958:8–12 (Simon).) If a developer wanted to compete on price not by offering lower prices
 35 but by offering other products or benefits on the web, there is no way to communicate that to a
 36 user in-app. (May 2024 Tr. 86:14–18 (Fischer).) Apple is aware that, absent these restrictions,

1 developers *would* like to include calls to action directing users to their websites, including through
 2 text without a link if the developer can do so without paying a commission to Apple. (*Id.* 107:21–
 3 108:1 (Fischer); Feb. 2025 Tr. 1883:3–7 (Schiller).)

4 Despite testimony to the contrary,⁴⁷ some working on Project Wisconsin did consider
 5 permitting unlinked and unrestricted calls to action with no commission as to calls of action. The
 6 appendix to the June 1, 2023 presentation given to Mr. Cook includes an Option 3, which would
 7 provide for a commission on linking out with “0% Commission on In-App Text
 8 Communications.” (CX-859.54.) Option 3 would “introduce[] . . . the additional information
 9 allowed to be presented but without a link to customers as mentioned where we would not charge
 10 a commission.” (*Id.*) In this scenario, Apple assessed “the incremental impact that may happen as
 11 more customers might migrate to the web with this additional information being presented to
 12 them.” (*Id.*) Apple estimated that, if in-app text communications caused 5% migration to the
 13 web, Apple would lose hundreds of millions (\$ [REDACTED]) in revenue. (*Id.*) On the high end, at
 14 25% migration, Apple would lose over a billion (\$ [REDACTED]) in revenue. (*Id.*) As Mr. Schiller
 15 acknowledged, Apple recognized—at least from Mr. Barton and the finance team, who were
 16 designated to present Option 3—that unlinked and unrestricted calls to action could foster
 17 competition against Apple’s IAP by causing customer migration to developer websites. (Feb.
 18 2025 Tr. 1891:18–1892:2 (Schiller); CX-859.54.)

19 Again, Apple chose the most anticompetitive option (Primary and Overarching Finding
 20 No. 6).

21 **E. Program Exclusions**

22 In creating the Link Entitlement program, Apple specifically excluded certain developers,
 23

24 ⁴⁷ Before this Court required that the June 1, 2023 presentation be produced, Mr. Schiller
 25 testified that “we didn’t consider . . . that developer would want to not include a link with their call
 26 to action It just hadn’t crossed our mind that somebody would want that.” (Tr. 1309:21–
 27 1310:2 (Schiller); *see also id.* at 1882:24–1883:2.) He qualified that “of course that’s something
 28 we’d be happy to consider.” (Tr. 1309:25–1310:1 (Schiller).) When shown the presentation,
 Mr. Schiller acknowledged that the presentation, albeit in an appendix, does discuss in-app text
 communication without a link and without commission, although he still did not recall the
 discussion. (Tr. 1890:13–20 (Schiller).)

1 namely those in Apple’s Video Partner Program (“VPP”) and its News Partner Program (“NPP”).
2 (May 2024 Tr. 261:23–262:1 (Roman).) Those programs have a standard commission rate of 15%,
3 rather than IAP’s 30% commission. (*Id.* at 262:2–4.) Under the new rule, if a subscription video
4 app like Disney+ or a newspaper publisher like the New York Times uses external purchase links
5 in their app, they will no longer be eligible for the VPP or NPP 15% commission rate and would
6 be subject to the standard 30% IAP commission for all in-app purchases. (*Id.*) Said differently,
7 and simply, including an external purchase link in their app doubles their commission rate. (*Id.* at
8 262:11–13.)

9 In December 2022, Apple considered how to treat programs including VPP and NPP in the
10 event Apple would need to change its business model to meet the requirements of the Digital
11 Markets Act, a European Union regulation. (Feb. 2025 Tr. 1724:8–18 (Vij); CX-231.) The
12 presentation notes that, among other benefits to Apple, VPP and NPP “can serve as a tool for
13 retaining developers exclusively on Apple IAP.” (CX-231.8.) This is because the effect of losing
14 program benefits—the lower commission rate—makes choosing alternative payments more costly
15 given the commission rate increases to Apple’s standard IAP commission. (*See* Feb. 2025
16 Tr. 1730:7–21 (Vij).)

17 Apple repurposed its EU analysis for the June 28, 2023 presentation regarding this Court’s
18 injunction. (*Compare* CX-231.8 with CX-291.13.) This time, no reference is made to how the
19 exclusion can serve as a tool for IAP retention, noting instead that excluding VPP and NPP
20 developers from the Link Entitlement “[r]equire[s] participants to maintain high bar of user
21 experience and ecosystem integration aligned with partner program goals” and there would be a
22 “[l]imited number of developers impacted.” (CX-291.13.) At the same time, Apple believed that
23 very large developers like those participating in VPP and NPP were the most likely to use linked
24 purchases if Apple charged a commission. (Feb. 2025 Tr. 1722:2–14 (Vij).) Apple acknowledged
25 that excluding these developers from the program would deter adoption of link-out purchases in
26 the United States, because link-outs would be much more costly due to the commission rate
27 doubling from 15% to 30%. (*Id.* 1733:2–15 (Vij).) To underscore this reasoning, the presentation
28 for the June 20, 2023 meeting with Mr. Cook provides data projecting that Apple would lose more

1 revenue if developers participating in VPP or NPP were still eligible for program discounts.

2 (*Id.* 1218:17–1221:7 (Schiller).)⁴⁸

3 Apple workshopped how to articulate the rationale for VPP and NPP program exclusion
 4 from the Link Entitlement. Notes from a June 26, 2023 Project Wisconsin meeting indicate that
 5 Mr. Vij was slated to present on “Program Eligibility” and that the team wanted a “more nuanced
 6 way to write our positioning here,” floating the idea that they “want to maintain a high bar of user
 7 experience for participants.” (CX-506.3.) Yet, on June 28, 2023, Mr. Vij messaged Mr. Oliver
 8 that he thought “our argument on vpp npp is weak” and acknowledged “[o]n VPP and NPP the
 9 argument on the high bar can be made with the discount as well.” (CX-511.2, .5.) Mr. Oliver
 10 responded that he did not “think it’s the same” and that “VPP and NPP are unique programs that
 11 have specific requirements to ensure a distinct user experience on Apple’s platforms.”
 12 (CX-511.6.) Thus, even though the program eligibility slide in the June 28, 2023 presentation was
 13 pulled from the EU presentation that indicated VPP and NPP exclusion could serve as an IAP
 14 retention tool, the slide used for Project Wisconsin presents Mr. Oliver’s rationale instead and
 15 scrubs any mention of the retention benefits for excluding VPP and NPP. (CX-505.16.)⁴⁹

16 Here too, Apple chose the most *anticompetitive* course.

17 * * *

18 Finally, under the Link Entitlement, Apple reserves the right in its sole discretion to revoke

19
 20 ⁴⁸ Compare CX-224.30 (revenue impact with “[l]ink-out billings not eligible for program
 21 discounts”) *with id.* at CX-224.33 (revenue impact where “[l]ink-out billings are eligible for
 22 program discounts). On their face, the revenue difference is minimal. However, Mr. Schiller
 23 agreed that because the revenue impact projections for link-out billings where program discounts
 are ineligible factors in a 30% collection risk, on an “apples-to-apples comparison” of the two
 slides, the projected revenue loss is actually much larger. Feb. 2025 Tr. 1220:16–1221:7
 (Schiller).

24 ⁴⁹ Epic also emphasizes Apple witness testimony acknowledging that even though the
 25 Injunction applies to all developers, they made the deliberate decision to exclude participation in
 26 VPP and NPP from participation in the Link Entitlement. *See, e.g.*, May 2024 Tr. 488:23–489:22
 27 (Oliver). While VPP and NPP developers lose program benefits if they choose to utilize external
 28 links, they are ultimately subject to the same restrictions as any other developer selling digital
 products. To be sure, this loss of program benefits highlights Apple’s clear design to forbid
 competitive alternatives to IAP, but this does not mean that Apple has carved out a class of
 developers from their compliance program. Viewed from any angle, Apple’s first priority was to
 protect its bottom line.

1 a link entitlement at any time. (May 2024 Tr. 31:14–16 (Fischer); CX-2.3 § 2.3.) This rule targets
 2 external links mandated by the Injunction—Apple permits developers to include links to external
 3 websites for non-transaction purposes without applying for an entitlement or obtaining permission
 4 from Apple. (May 2024 Tr. 31:23–32:2 (Fischer).) Apple does *not* require developers who sell
 5 physical goods or services to apply for any type of entitlement before their app links to a third-
 6 party payment solution. (*Id.* at 32:7–11.)

7 As of the May 2024 hearing, only 34 developers out of the approximately 136,000 total
 8 developers on the App Store applied for the program, and seventeen of those developers had not
 9 offered in-app purchases in the first place.⁵⁰ In May 2024, Apple argued that it would take more
 10 time for developers to take advantage of the Link Entitlement and that the adoption rates could not
 11 be known. (*E.g.*, May 2024 Tr. 278:3–5 (Roman), 761:12–762:8 (Schiller).) Apple attempted here
 12 to mislead.

13 Given the revelations of the February 2025 hearing, Apple modeled the lack of adoption.
 14 That Apple adduced no testimony or evidence indicating developer adoption of the program is no
 15 surprise. As shown above, Apple knew it was choosing a course which would fail to stimulate any
 16 meaningful competition to Apple’s IAP and thereby maintain its revenue stream.

17 **IV. DISCUSSION**

18 Before the Court are several motions, three of which form the primary discussion. *First*,
 19 Apple moves to set aside this Court’s judgment and injunction based on two intervening cases
 20 handed down after the judgment issued. *Second*, Epic moves to enforce the injunction and hold
 21 Apple in civil contempt for blatantly violating the injunction. *Third*, Apple moves for
 22 indemnification under the DPLA after the Ninth Circuit’s reversal of this Court’s prior findings.
 23 The Court considers each.

24 **A. Apple’s Motion to Set Aside Judgment**

25 As a preliminary matter, Apple moves under Rule 60(b) to set aside this Court’s judgment
 26

27 _____
 28 ⁵⁰ As of the May 2024 hearings, Mr. Oliver testified that he had no discussions with any
 large developers about using the Link Entitlement. (May 2024 Tr. 499:22–25 (Oliver).)

1 based on two decisions issued after the judgment and injunction: *Beverage v. Apple, Inc.*, 320 Cal.
 2 Rptr. 3d 427 (Cal. Ct. App. 2024), *review denied* (July 10, 2024), and *Murthy v. Missouri*, 603
 3 U.S. 43 (2024).

4 Reconsideration under Federal Rule of Civil Procedure 60(b) “is an ‘extraordinary remedy
 5 that works against the interest of finality and should be applied only in exceptional circum-
 6 stances.’” *FTC v. Apex Cap. Grp.*, 2021 WL 7707269, at *2 (C.D. Cal. Sept. 3, 2021) (citation
 7 omitted). “Motions for relief from judgment pursuant to Rule 60(b) are addressed to the sound
 8 discretion of the district court and will not be reversed absent an abuse of discretion.” *Casey v.*
 9 *Albertson’s Inc.*, 362 F.3d 1254, 1257 (9th Cir. 2004).

10 Rule 60(b)(5) permits a court, “[o]n motion and just terms,” to “relieve a party or its legal
 11 representative from a final judgment” when “applying it prospectively is no longer equitable.”⁵¹
 12 Relief is warranted “when the party seeking relief from an injunction or consent decree can show
 13 ‘a significant change either in factual conditions or in law.’” *Agostini v. Felton*, 521 U.S. 203, 215
 14 (1997) (quoting *Rufo v. Inmates of Suffolk Cnty. Jail*, 502 U.S. 367, 384 (1992)). “[W]hen a
 15 district court reviews an injunction based solely on law that has since been altered to permit what
 16 was previously forbidden, it is an abuse of discretion to refuse to modify the injunction in the light
 17 of the changed law.” *California by & through Becerra v. U.S. Env’t Prot. Agency*, 978 F.3d 708,
 18 718–19 (9th Cir. 2020).

19 According to Apple, *Beverage* and *Murthy* present significant changes in the law under-
 20 lying Apple’s judgment that warrant relief therefrom. In *Beverage*, Apple contends the California
 21 Court of Appeal now explicitly permits what this Court held was forbidden. As for *Murthy*, Apple
 22 argues the decision changed the law of standing as to require this Court, at a minimum, to limit the
 23 injunction’s reach to only Epic and its affiliates.

24
 25
 26 ⁵¹ Apple also references Rule 60(b)(6), which permits a court to relieve a party from a final
 27 judgment for “any other reason that justifies relief.” Rule 60(b)(6) is “used sparingly as an
 28 equitable remedy to prevent manifest injustice” and is used “only where extraordinary circum-
 stances prevented a party from taking timely action to prevent or correct an erroneous judgment.”
Latshaw v. Trainer Wortham & Co., 452 F.3d 1097, 1103 (9th Cir. 2006) (citations omitted).

1 **1. Beverage v. Apple, Inc.**

2 In *Beverage*, two plaintiffs who made purchases through the App Store in Fortnite for use
3 on iOS devices sued Apple on behalf of themselves and a putative class, alleging that “Apple’s
4 restrictions on app distribution increased the prices developers charge iOS device users, and that
5 Apple’s anti-steering restrictions ‘artificially increase’ Apple’s power within the market for
6 mobile gaming transactions.” *Beverage*, 320 Cal. Rptr. 3d at 433. Plaintiffs asserted three causes
7 of action for violations of (1) the Cartwright Act, (2) the “unlawful” prong of the UCL, and (3) the
8 “unfair” prong of the UCL. *Id.* at 433–34.

9 The trial court granted Apple’s demurrer, finding that plaintiffs failed to state a claim
10 under the Cartwright Act and the “unlawful” prong of the UCL as a matter of law because they
11 alleged only unilateral conduct by Apple, which was immunized from antitrust liability under
12 *Colgate*. *Id.* At 434. The claim for violations of the “unfair” prong of the UCL was then barred
13 by *Chavez*. *Id.*

14 The Court of Appeal affirmed and elaborated on the legal framework. Under the
15 Cartwright Act, “unlike its federal counterpart, the Sherman Act, ‘single firm monopolization is
16 not cognizable’” *Id.* at 436 (citation omitted) (quoting *Asahi Kasei Pharma Corp. v.*
17 *CoTherix, Inc.*, 138 Cal. Rptr. 3d 620, 626 (Cal. Ct. App. 2012)). Instead, a plaintiff must allege
18 the formation and operation of a conspiracy and illegal acts done in furtherance of the conspiracy.
19 *Id.* at 437. “Conversely, a claim describing only a unilateral refusal to deal without alleging a
20 corresponding illegal conspiracy or combination does not state an actionable antitrust claim.” *Id.*
21 The premise underlying this proposition—that “‘a private party generally may choose to do or not
22 do business with whomever it pleases’ without violating antitrust laws”—is known as the *Colgate*
23 doctrine. *Id.* (quoting *Drum v. San Fernando Valley Bar Assn.*, 106 Cal. Rptr. 3d 46, 51 (Cal. Ct.
24 App. 2010)); see also *United States v. Colgate & Co.*, 250 U.S. 300 (1919). Additionally, under
25 *Cel-Tech*, “[w]hen specific legislation provides a ‘safe harbor,’ plaintiffs may not use the general
26 unfair competition law to assault that harbor.” *Id.* at 435 (quoting *Cel-Tech Commc’ns, Inc. v. Los*
27 *Angeles Cellular Tel. Co.*, 973 P.2d 527, 541 (Cal. 1999)).

28 “In *Chavez*, a case decided after *Cel-Tech*, the court applied the *Colgate* doctrine to

1 preclude a UCL cause of action” because “the plaintiff failed to plead facts sufficient to establish a
2 coerced agreement in violation of the Cartwright Act or the ‘unlawful’ prong of the UCL.” *Id.* at
3 438 (discussing *Chavez v. Whirlpool Corp.*, 113 Cal.Rptr.2d 175 (Cal. Ct. App. 2001)).⁵² By the
4 same token, the *Chavez* plaintiffs failed to state a claim under the UCL’s “unfair” prong, because
5 “the determination that the conduct is not an unreasonable restraint of trade” under the Cartwright
6 Act or the “unlawful” prong of the UCL “necessarily implies that the conduct is not ‘unfair’
7 toward consumers.” *Id.* (quoting *Chavez*, 113 Cal.Rptr.2d at 184). “To permit a separate inquiry
8 into essentially the same question under the unfair competition law would only invite conflict and
9 uncertainty and could lead to the enjoining of procompetitive conduct.” *Chavez*, 113 Cal.Rptr.2d
10 at 184.

11 Before the Court of Appeal, the *Beverage* plaintiffs’ “challenge [was] limited only to the
12 dismissal of their cause of action under the ‘unfair’ prong of the UCL,” because plaintiffs had
13 “abandoned any claim of error in the other aspects of the trial court’s ruling on Apple’s demurrer.”
14 *Id.* at 439. Thus, the Court of Appeal presumed that plaintiffs’ causes of action under the
15 Cartwright Act and the “unlawful” prong of the UCL were legally insufficient under the *Colgate*
16 doctrine. *Id.* As a consequence, plaintiffs presented the Court of Appeal with a narrow question,
17 namely whether plaintiffs “adequately alleged an ‘unfair’ act or practice under the UCL
18 considering the trial court’s ruling that Apple’s practices constituted permissible unilateral
19 conduct.” *Id.*; *see also id.* at 434 (“The central premise of Plaintiffs’ argument is that *Chavez* was
20 wrongly decided to the extent it held that a failed antitrust claim cannot be replead as an unfair
21 business practice under the UCL.”).

22 The Court of Appeal concluded “that the *Colgate* doctrine provides Apple with a ‘safe
23 harbor’ against Plaintiffs’ UCL claim under the ‘unfair’ prong.” *Id.* at 441. Consistent with
24 *Chavez*, “a plaintiff cannot plead around the absolute bar imposed by the *Colgate* doctrine by
25

26 ⁵² *See also Beverage*, 320 Cal.Rptr.3d at 438 (“[A] manufacturer’s announcement of a
27 resale price policy and its refusal to deal with the dealers who do not comply coupled with the
28 dealers’ voluntary acquiescence in the policy does not constitute an implied agreement or an
unlawful combination as a matter of law.” (quoting *Chavez*, 113 Cal.Rptr.2d at 182.))

1 resurrecting a failed antitrust claim as an unfair business practice under the UCL, especially when,
 2 as here, the only other cause of action alleged in the SAC was a violation of the Cartwright Act.”
 3 *Id.* at 440.

4 Applied to this case, *Beverage* does not warrant setting aside this Court’s judgment and
 5 Injunction. *First*, *Beverage* did not change California law. The plaintiffs argued that “*Chavez* was
 6 wrongly decided and is ‘wholly inconsistent’ with *Cel-Tech*.” *Id.* at 439. The Court of Appeal
 7 disagreed: “*Chavez* is entirely consistent with *Cel-Tech*,” and “[i]ts holding has been adopted and
 8 applied by other California Courts of Appeal.” *Id.* at 440–41. In other words, the *Beverage*
 9 decision explicitly declined to change California law. Ironically, Apple agrees: despite Apple’s
 10 motion before this Court, in Apple’s answer to the *Beverage* plaintiffs’ petition for review in the
 11 Supreme Court of California, Apple wrote that the “decision below followed a decision of the
 12 Second Appellate District that reached the same result more than 20 years ago, *Chavez v.*
 13 *Whirlpool Corp.* . . . California courts have followed *Chavez* for more than two decades, and no
 14 California appellate court has questioned or departed from its holding.” Answer to Petition for
 15 Review (“Apple’s Answer to Petition”) at 7, *Beverage v. Apple Inc.*, No. S285154 (Cal. June 18,
 16 2024).⁵³

17 *Second*, this Court’s judgment does not conflict with *Beverage*. The *Beverage* court
 18 stressed that its “decision is a narrow one” which “is limited to situations typified by this case,
 19 where the same conduct found immune from antitrust liability by the *Colgate* doctrine is also
 20 alleged to violate the ‘unfair’ prong of the UCL.” *Beverage*, 320 Cal. Rptr. 3d at 442. That is not
 21 this case. Neither this Court nor the Ninth Circuit have held that Apple’s conduct at-issue in this
 22 case is immune from antitrust liability under the *Colgate* doctrine, nor did either court disagree
 23

24
 25 ⁵³ Apple continued, explaining that “[i]n the Court of Appeal, plaintiffs conceded that the
 26 *Chavez* decision would bar their ‘unfair’ claim under the UCL. Plaintiffs urged the Court of
 27 Appeal to disagree with *Chavez* and adopt a different rule. In declining to do so, that court relied
 28 on settled principles and emphasized the ‘narrow’ nature of its holding, stressing that its ‘decision
 is limited to’ situations ‘where the same conduct found immune from antitrust liability by the
Colgate doctrine is also alleged to violate the “unfair” prong of the UCL.’” Apple’s Answer to
 Petition at 7.

1 with the law articulated in *Colgate* or *Chavez*.⁵⁴

2 Once again, Apple’s answer to the *Beverage* plaintiffs’ petition for review in the Supreme
3 Court of California is instructive. In its briefing, Apple argued that the *Beverage* plaintiffs “are
4 wrong” to “argue that *Chavez* and the decision below are inconsistent with decisions in a federal
5 court lawsuit involving Epic Games,” i.e., this case. Apple’s Answer to Petition at 11–12. “The
6 Ninth Circuit did not disagree with *Chavez*, nor did it address the applicability of the *Colgate*
7 doctrine to the conduct challenged in that case, and therefore did not resolve the issue presented in
8 this case.” *Id.* at 12. The *Beverage* court itself acknowledged as much. *See Beverage*, 320 Cal.
9 Rptr. 3d at 446 n.6 (“The Ninth Circuit and the district court mentioned *Chavez* only in passing,
10 and neither court engaged a rigorous analysis of the *Colgate* doctrine and its effect on UCL
11 claims. We therefore do not find these decisions persuasive on the precise issue presented by this
12 appeal.”).

13 Apple had the opportunity to argue that *Colgate* immunized its antitrust liability before this
14 Court in the first instance, before the Ninth Circuit, and on petition for certiorari at the Supreme
15 Court. Direct appeal was the appropriate route for a challenge under *Colgate*, and Apple lost on
16 appeal. Apple cannot revisit its prior losses under Rule 60(b) absent a significant change in
17 factual conditions or the law, and *Beverage*’s affirmance of settled California law does not change
18 to the legal theories previously available to Apple at trial and on appeal.⁵⁵

19 *Third, Beverage* does not “permit what was previously forbidden.” *See California v. EPA*,

21 _____
22 ⁵⁴ The Ninth Circuit in fact acknowledged that in *Chavez*, “the *Colgate* doctrine—that it is
23 lawful for a company to unilaterally announce the terms on which it will deal—precluded a UCL
24 action.” *Epic Games, Inc.*, 67 F.4th at 1001. However, the Ninth Circuit explained that “[n]either
Apple nor any of its *amici* cite a single case in which a court has held that, when a federal antitrust
claim suffers from a *proof deficiency*, rather than a *categorical legal bar*, the conduct underlying
the antitrust claim cannot be deemed unfair pursuant to the UCL.” *Id.*

25 ⁵⁵ The parties also use Apple’s Rule 60(b) motion to dive into the merits of *Colgate*’s
26 applicability. For example, Epic appears to suggest that *Colgate* may not apply because the Ninth
27 Circuit’s decision—issued after the *Beverage* trial court’s decision—concluded that Apple’s
28 agreements with developers constituted bilateral contracts rather than unilateral conduct for the
purposes of Epic’s Sherman Act Section 1 claims. (*See* Dkt. No. 1049, Epic’s Opp. at 16 n.4.)
Regardless, for the reasons stated above, this Court declines the invitation to revisit those merits
where *Beverage* made no change to settled California law.

1 978 F.3d at 719. The *Beverage* trial court dismissed the plaintiffs’ claims at the motion to dismiss
 2 stage, and the Court of Appeal *assumed without deciding* that Apple’s conduct *as pled* was
 3 permissible under the Cartwright Act, because plaintiffs conceded that issue for purposes of
 4 appeal. *Beverage*, 320 Cal. Rptr. 3d at 439. The Court of Appeal did not decide whether Apple’s
 5 anti-steering provisions violated antitrust law and was faced instead with the narrow question of
 6 whether plaintiffs’ concession as to their Cartwright Act claims rendered their UCL unfairness
 7 claim non-cognizable as a matter of pleading.⁵⁶

8 *Beverage* does not warrant setting aside this Court’s judgment and injunction under
 9 Rule 60(b).

10 2. *Murthy v. Missouri*

11 In *Murthy*, the “plaintiffs, two States and five social-media users, sued dozens of Executive
 12 Branch officials and agencies, alleging that they pressured the platforms to suppress protected
 13 speech in violation of the First Amendment.” *Murthy*, 603 U.S. at 49. The Fifth Circuit agreed
 14 and “affirmed a sweeping preliminary injunction.” *Id.* The Supreme Court reversed, holding that
 15 the plaintiffs failed to establish standing by “demonstrat[ing] a substantial risk that, in the near
 16 future, they will suffer an injury that is traceable to a Government defendant and redressable by
 17 the injunction they seek.” *Id.* at 49–50, 76.

18 The Supreme Court reiterated the familiar rule that, to establish standing, at least one
 19 plaintiff “must show that she has suffered, or will suffer, an injury that is ‘concrete, particularized,
 20 and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable
 21 ruling.’” *Id.* at 57 (quoting *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 409 (2013)). The *Murthy*
 22 plaintiffs claimed “standing based on the ‘direct censorship’ of their own speech as well as the
 23 ‘right to listen’ to others who faced social media censorship.” *Id.* However, both theories
 24 depended on the conduct of *third-party* social media platforms, rather than the conduct of the
 25 *defendant* Government agencies and officials alone. *Id.* This “one-step-removed, anticipatory
 26

27 ⁵⁶ By contrast, both this Court and the Ninth Circuit developed and evaluated a trial record
 28 that involved both state and federal antitrust claims not implicated in *Beverage*.

1 nature of their alleged injuries” presented two particular challenges. *Id.*

2 First, “it is a bedrock principle that a federal court cannot redress ‘injury that results from
3 the independent action of some third party not before the court,’” *id.* (quoting *Simon v. E. Ky.*
4 *Welfare Rts. Org.*, 426 U.S. 26, 41–42 (1976)), and as a consequence courts are “reluctant to
5 endorse standing theories that require guesswork as to how independent decisionmakers will
6 exercise their judgment,” *id.* (quoting *Clapper*, 568 U.S. at 413). For those theories, plaintiffs
7 must show that the third party “will likely react in predictable ways” to the defendants’ conduct.
8 *Id.* at 57–58 (citation omitted). Second, the Supreme Court explained that “because the plaintiffs
9 request forward-looking relief, they must face ‘a real and immediate threat of repeated injury.’” *Id.*
10 at 58 (quoting *O’Shea v. Littleton*, 414 U.S. 488, 496 (1974)).

11 “Putting these requirements together, the plaintiffs must show a substantial risk that, in the
12 near future, at least one platform will restrict the speech of at least one plaintiff in response to the
13 actions of at least one Government defendant.” *Id.* “On this record, that is a tall order.” *Id.* “The
14 primary weakness in the record of past restrictions is the lack of specific causation findings with
15 respect to any discrete instance of content moderation.” *Id.* at 59. Neither the district court nor
16 the Fifth Circuit made any specific causation findings. *Id.* Operating at such a high level of
17 generality, the Supreme Court explained, was insufficient to establish standing in a “sprawling suit
18 like” *Murthy* where “plaintiffs faced speech restrictions on different platforms, about different
19 topics, at different times,” “[d]ifferent groups of defendants communicated with different
20 platforms, about different topics, at different times,” and each platform had “independent
21 incentives to moderate content.” *Id.* at 61. Nor did plaintiffs’ allegations support “obtain[ing]
22 forward-looking relief”: “without proof of an ongoing pressure campaign, it is entirely speculative
23 that the platforms’ future moderation decisions will be attributable, even in part, to the
24 defendants.” *Id.* at 69.

25 Applied to this case, *Murthy* does not warrant setting aside this Court’s judgment and
26 Injunction against Apple. First, *Murthy* did not change the law of standing, but rather applied
27 familiar rules of standing to a novel circumstance. Apple argues that the “Court in *Murthy*
28 explained that it is a ‘tall order’ to establish standing for an injunction when the plaintiff’s theory

1 of future injury depends on anticipated conduct of ‘independent decisionmakers.’” (Dkt. No. 1018
2 at 12.) That mischaracterizes *Murthy*: as to establishing plaintiffs’ standing, the Court wrote that
3 “[o]n this record, that is a tall order.” *Murthy*, 603 U.S. at 58 (emphasis supplied). Rather, the
4 Court stressed that it was *not* applying a new and elevated standard. *See id.* at 74 n.11.

5 *Second*, Apple muddles the law and advances an argument that has little to do with
6 *Murthy*. As Epic points out, Apple conflates two issues: whether Epic has standing to obtain an
7 injunction, and the appropriate scope of that injunction. As to Epic’s standing, while *Murthy*
8 articulates the applicable legal framework at a high level, *Murthy* neither changes that framework
9 nor addresses the foundation of Epic’s standing to challenge Apple’s anti-steering provisions, i.e.,
10 injury to Epic as a competing game distributor and injury to Epic’s subsidiaries’ earnings. *See*
11 *Epic Games, Inc.*, 67 F.4th at 1000.

12 As to the appropriate *scope* of an injunction once a party has established standing, *Murthy*
13 provides no instruction because *Murthy* did not reach that distinct question. The Ninth Circuit’s
14 opinion in this case is indicative: that opinion discussed Epic’s standing in one section under one
15 set of legal standards, and the availability and scope of the injunction in another section under a
16 different set of legal standards. *See Epic Games, Inc.*, 67 F.4th at 999–1000, 1002–03. The same
17 is true for Judge Smith’s concurrence in the order granting the motion to stay the mandate pending
18 filing a petition for certiorari. *See Epic Games, Inc. v. Apple, Inc.*, 73 F.4th 785 (9th Cir. 2023)
19 (Smith, J., concurring).

20 Apple’s citation to *Murthy* is the latest installment in its repeated attempts to cabin the
21 scope of the injunction. Fundamentally, Apple argues that “[u]nder *Murthy*, Epic lacks standing to
22 enjoin Apple’s application of its anti-steering rules toward third-party developers.” (Dkt. No.
23 1018 at 13.)⁵⁷ To be clear, neither this Court nor the Ninth Circuit have held, as Apple continues
24

25 _____
26 ⁵⁷ *See also* Dkt. No. 1018, Apple’s Mot. to Set Aside at 13 (“Epic had the burden of
27 proving that (1) third-party developers would imminently react to a change in Apple’s policies by
28 steering iOS users to the Epic Games Store as a place for purchasing in-app digital goods or
services; (2) such steering by third-party developers would imminently cause their customers to
make purchases on the Epic Games Store through external links; and (3) enjoining Apple’s
restrictions on such steering would imminently cause an indirect increase in Epic’s profits.”).

1 to try and mischaracterize, that Epic has obtained injunctive relief *on behalf of* third parties.⁵⁸

2 Rather, Epic has standing to seek injunctive relief with respect to *its own injuries*. That relief, as
 3 this Court, the Ninth Circuit, and Judge Smith’s concurrence on the order to stay made clear,
 4 “enjoin[ed] Apple’s anti-steering provision as to all iOS developers because doing so was
 5 necessary to fully remedy the harm *that Epic suffers* in its role as a competing games distributor.”
 6 *Epic Games, Inc.*, 73 F.4th at 787 (Smith, J., concurring) (emphasis supplied). Apple’s arguments
 7 to the contrary and mischaracterization of those findings have been repeatedly rejected.⁵⁹

8 In short, *Murthy* has little to do with this case, does not change the relevant law, and as
 9 such does not warrant setting aside this Court’s judgment and injunction.⁶⁰

10 * * *

11 Because neither *Beverage* nor *Murthy* have altered the law, the factual circumstances of
 12 this case, or now “permit what was previously forbidden,” *California v. EPA*, 978 F.3d at 719,
 13 Apple has failed to show that applying the judgment “prospectively is no longer equitable.”
 14 Fed. R. Civ. P. 60(b)(5). Thus, Apple’s motion for relief from the judgment is **DENIED**.

15 _____
 16 ⁵⁸ See, e.g., Dkt. No. 1018, Apple’s Mtn. to Set Aside at 14 (“To be sure, Judge Smith’s
 17 concurrence in the order staying the mandate stated that record is ‘filled with support’ for Epic’s
 standing to enjoin Apple’s conduct towards third-party developers.”).

18 ⁵⁹ Apple advanced the same argument in substance when seeking a stay of the injunction
 pending filing of a writ of certiorari. See *Epic Games, Inc.*, 73 F.4th at 788 (Smith, J., concurring)
 19 (“Apple contends that the district court’s injunction impermissibly allowed Epic’s suit to proceed
 as a ‘de facto’ class action in which Epic obtained nationwide injunctive ‘relief on behalf of
 20 others.’ . . . Like its standing argument, this argument overlooks aspects of the panel opinion’s
 analysis that are inconvenient to its position and is incorrect. As the opinion explained, it was
 21 Epic’s role as a competing games distributor—not its role as a parent company—that justified
 application of the injunction beyond just Epic’s subsidiaries.”).

22 ⁶⁰ Apple’s other contentions with respect to *Murthy* lack merit. For instance, Apple’s
 argument focuses on *Murthy*’s language that courts are “reluctant to endorse standing theories that
 23 require guesswork as to how independent decisionmakers will exercise their judgment.” *Murthy*,
 603 U.S. at 57 (quoting *Clapper*, 568 U.S. at 413). However, Epic’s injury does not depend on
 24 third-party decisionmakers, but Apple’s anti-steering provisions. Apple also argues that the
Murthy court engaged in a detailed, plaintiff-by-plaintiff analysis of injury, and the Ninth Circuit’s
 25 “two short sentences” of analysis are insufficiently specific under *Murthy*. Dkt. No. 1018 at 12–
 26 13. For one, *Murthy* did not alter the standard of review applicable in this case. Regardless, as
 Judge Smith wrote in his concurrence on the order to stay, the record is “filled with support for the
 27 common-sense proposition that Epic is harmed as a competing games distributor.” *Epic Games,*
Inc., 73 F.4th at 786. That the panel’s *analysis* is concise does not reduce the support in the
 28 record.

1 **B. Epic’s Motion to Enforce Injunction**

2 On March 13, 2024, Epic moved to enforce the Injunction after Apple released its
3 compliance program with the Link Entitlement. (Dkt. No. 897.) Epic requests that this Court
4 “enter an order (1) holding Apple in contempt for violating the Court’s Injunction; (2) requiring
5 Apple to promptly bring its policies into compliance with the Injunction; and (3) requiring Apple
6 to remove all anti-steering provisions” in its developer guidelines.” (*Id.*)

7 The Court may hold Apple in civil contempt if Apple violated “a specific and definite
8 court order by failure to take all reasonable steps within the part’s power to comply.” *In re Dual-*
9 *Deck Video Cassette Recorder Antitrust Litig.*, 10 F.3d 693, 695 (9th Cir. 1993). “[T]he party
10 alleging civil contempt must demonstrate by clear and convincing evidence that (1) the contemnor
11 violated a court order, (2) the non-compliance was more than technical or de minimis, and (3) the
12 contemnor’s conduct was not the product of a good faith or reasonable interpretation of the
13 violated order.” *Facebook, Inc. v. Power Ventures, Inc.*, 2017 WL 3394754, at *8 (N.D. Cal. Aug.
14 8, 2017). Sanctions for civil contempt are warranted where a court “weighs all the evidence
15 properly before it” and determines that there is a “present ability to obey” and past “failure to do
16 so [that] constitutes deliberate defiance or willful disobedience which a coercive sanction will
17 break.” *Falstaff Brewing Corp. v. Miller Brewing Co.*, 702 F.2d 770, 781 n.6 (9th Cir. 1983). In
18 awarding civil contempt sanctions, the Court must “consider the character and magnitude of the
19 harm threatened by continued contumacy, and the probably effectiveness of any suggested
20 sanction.” *Gen. Signal Corp. v. Donallco, Inc.*, 787 F.2d 1376, 1380 (9th Cir. 1983).⁶¹

21 “Since an injunctive order prohibits conduct under threat of judicial punishment, basic
22 fairness requires that those enjoined receive explicit notice of precisely what conduct is outlawed.”
23 *Schmidt v. Lessard*, 414 U.S. 473, 476 (1974).⁶² “In deciding whether an injunction has been

24 _____
25 ⁶¹ “Substantial compliance with the court order is a defense to civil contempt,” and “a
26 person should not be held in contempt if his action appears to be based on a good faith and
27 reasonable interpretation of the court’s order.” *Id.* (cleaned up); *but see In re Dual-Deck Video*
28 *Cassette Recorder Antitrust Litig.*, 10 F.3d 693, 695 (9th Cir. 1993) (“The contempt ‘need not be
willful,’ and there is no good faith exception to the requirement of obedience to a court order.”
(quoting *In re Crystal Palace Gambling Hall, Inc.*, 817 F.2d 1361, 1365 (9th Cir. 1987))).

⁶² *See also Clark v. Coye*, 60 F.3d 600, 604 (9th Cir. 1995) (The “injunction must be clear

1 violated it is proper to observe the objects for which the relief was granted and to find a breach of
 2 the decree in a violation of the spirit of the injunction, even though its strict letter may not have
 3 been disregarded.” *Inst. of Cetacean Rsch. v. Sea Shepherd Conservation Soc’y*, 774 F.3d 935,
 4 949 (9th Cir. 2014) (quoting *John B. Stetson Co. v. Stephen L. Stetson Co.*, 128 F.2d 981, 983 (2d
 5 Cir. 1942)). “[A]ll ambiguities are resolved in favor of the person subject to the injunction.”
 6 *Clark v. Coye*, 60 F.3d 600, 604 (9th Cir. 1995) (citation omitted).

7 The Court’s analysis is divided in two parts. *First*, the Court considers Apple’s defense
 8 that it need not look outside the text of the Injunction and considered this Court’s and the Ninth
 9 Circuit’s orders that explained the legal basis for the injunction. *Second*, for efficiency purposes,
 10 the Court has indicated in the factual section above each time it found that Apple had chosen to
 11 respond to the Injunction with the most anticompetitive options it considered. That, taken
 12 together, evidences clear and convincing evidence of Apple’s violation of the Injunction.
 13 Nonetheless, the Court expounds further on how Apple’s response violates this Court’s orders.

14 **1. The Letter and Spirit of the Injunction**

15 As a preliminary matter, Apple disputes whether this Court can look outside the four
 16 corners of the injunction to hold it in civil contempt. In *Sea Shepard*, the Ninth Circuit provided
 17 that “it is proper to observe the objects for which the relief was granted and to find a breach of the
 18 decree in a violation of the spirit of the injunction, even though its strict letter may not have been
 19 disregarded.” 774 F.3d at 949. Despite this unequivocal language, Apple argues that the Court
 20 cannot look to the spirit or other objects of the Injunction and judgment issued against it relying on
 21 one district court case that appears to have tried to limit *Sea Shepherd* to its facts. *See Epona, LLC*
 22 *v. Cnty. of Ventura*, 2019 WL 4187393, at *14 (C.D. Cal. Apr. 12, 2019) (“*Sea Shepherd* did not
 23 conclude that a party may be held in contempt for refusing to engage in affirmative conduct that is
 24 not required by the terms of a prohibitory injunction, or for engaging in conduct that is not
 25 specifically and definitely prohibited therein.”).

26 _____
 27 enough on its face to give . . . notice that the behavior is forbidden.”); *cf. Reno Air Racing Ass’n.,*
 28 *Inc. v. McCord*, 452 F.3d 1126, 1134 (9th Cir. 2006) (“The recipient of a TRO, which usually
 takes effect immediately, should not be left guessing as to what conduct is enjoined.”).

1 The Court disagrees. There are several issues with Apple’s argument. *First*, it is ludicrous
 2 to expect any court to repeat the contents of a 180-page order issued in conjunction with a
 3 simultaneously issued one-paragraph injunction. The latter flows from the former. To suggest
 4 otherwise strains credulity. *Second*, even limited to the four corners of the Injunction, Apple
 5 violated the literal text. *Third*, contrary to Apple’s position, other courts within this and other
 6 circuits will look to the spirit of the injunction when a litigant applies a dubiously literal
 7 interpretation of the injunction, particularly where that interpretation is designed to evade the
 8 injunction’s goals. *See, e.g., Simon v. City & Cnty. of San Francisco*, No. 22-CV-05541-JST,
 9 2024 WL 4314207, at *3 (N.D. Cal. Sept. 26, 2024) (“Arguably, this conduct does not violate the
 10 strict terms of the injunction [However,] there can be no question that the conduct violates
 11 the spirit of the injunction.”); *John B. Stetson Co. v. Stephen L. Stetson Co.*, 128 F.2d 981, 983 (2d
 12 Cir. 1942) (“In deciding whether an injunction has been violated it is proper to observe the objects
 13 for which the relief was granted and to find a breach of the decree in a violation of the spirit of the
 14 injunction, even though its strict letter may not have been disregarded.”); *United States v. Christie*
 15 *Indus., Inc.*, 465 F.2d 1002, 1007 (3d Cir. 1972) (While ambiguities are resolved in favor of the
 16 person charged with contempt, “this is not to say that where an injunction does give fair warning
 17 of the acts that it forbids, it can be avoided on merely technical grounds. The language of an
 18 injunction must be read in the light of the circumstances surrounding its entry: the relief sought by
 19 the moving party, the evidence produced at the hearing on the injunction, and the mischief that the
 20 injunction seeks to prevent.”); *see also Cnty. of Fulton v. Sec’y of Commonwealth*, 292 A.3d 974,
 21 1007 (Pa.), *cert. denied* 144 S. Ct. 283 (2023) (“To similar effect is a long list of cases, including a
 22 Second Circuit case in which the court rejected a defense based upon a dubiously literal
 23 interpretation of an order”).

24 *Fourth*, Apple’s approach would require courts to effectively engage in a “whack-a-mole”
 25 game to require compliance. Consider Justice Douglas’s reasoning in *McComb v. Jacksonville*
 26 *Paper Company*:

27 It does not lie in their mouths to say that they have an immunity from
 28 civil contempt because the plan or scheme which they adopted was
 not specifically enjoined. Such a rule would give tremendous impetus

1 to the program of experimentation with disobedience of the law which
 2 we condemned [previously]. The instant case is an excellent
 3 illustration of how it could operate to prevent accountability for
 4 persistent contumacy. Civil contempt is avoided today by showing
 5 that the specific plan adopted by respondents was not enjoined.
 Hence a new decree is entered enjoining that particular plan.
 Thereafter the defendants work out a plan that was not specifically
 enjoined. Immunity is once more obtained because the new plan was
 not specifically enjoined. And so a whole series of wrongs is
 perpetrated and a decree of enforcement goes for naught.

6 336 U.S. 187, 192–93 (1949). This case presents the same reality today and risk for tomorrow.

7 The Court prohibited certain of Apple’s policies that prevented meaningful competition with IAP.
 8 Apple rewrote those policies by choosing a different anticompetitive path (that was *more*
 9 expensive for developers) with full knowledge of what it was doing. Apple had its opportunity to
 10 conduct a bottoms-up analysis of the value of its services. It declined to do so. Instead, it opted to
 11 construct a program that nullified the revenue impact of the Injunction by prohibiting any viable
 12 alternative.

13 *Fifth*, Apple’s arguments that the Court did not enjoin Apple’s commission ignore explicit
 14 findings in the Injunction. Most importantly, this Court, and the Ninth Circuit, found Apple’s
 15 30% commission on IAP transactions was supracompetitive and unjustified. The Court and the
 16 Ninth Circuit further found that Apple’s then-existing program to stifle competition violated the
 17 UCL, especially as seen in the anti-steering provisions. Thus, all acts are based upon those
 18 identified above as the “Primary and Overarching Findings” resulting in this contempt order.

19 Crucially, no commissions had ever existed on external link-out purchases. That is
 20 undisputed. Apple’s *new* attempt to change this “zero commission” rubric are evaluated under the
 21 terms of the Injunction. While true that the Court did not select a rate, the Court is authorized to
 22 evaluate Apple’s response to the Injunction as based on its Primary and Overarching Findings.
 23 *See Epic Games, Inc.*, 559 F. Supp. 3d at 1069 (explaining that eliminating Apple’s anti-steering
 24 provisions “does not require the Court to micromanage business operations which courts are not
 25 well-suited to do as the Supreme Court has appropriately recognized”).

26 As set forth in detail above, the Court finds that the evidence clearly and convincingly
 27 demonstrates that Apple *willfully* chose to ignore the Injunction, *willfully* chose to create and
 28 impose another supracompetitive rate and new restrictions, and thus *willfully* violated the

1 injunction.⁶³ In fact, despite numerous opportunities, not once did Apple choose a path that would
2 have shown compliance.

3 In short, Apple’s conduct lacks any justification: it does not comport with the text of the
4 Injunction, requires a strained and questionable interpretation of that language, completely ignores
5 this Court’s 180-page Injunction and the Ninth Circuit’s 91-page opinion, and prompted lies on
6 the witness stand. The law requires that Apple be on notice of the scope of permissible conduct to
7 hold Apple in civil contempt. Apple was. In fact, at every step Apple considered whether its
8 actions would comply, and at every step Apple chose to maintain its anticompetitive revenue
9 stream over compliance. Given the repeated misrepresentations, the real-time business
10 documents, and the proffer of a made-for-litigation expert “report,” the Court reasonably
11 concludes that Apple knew it was violating the Injunction.

12 2. More Specific Findings of Civil Contempt

13 Several aspects of the Link Entitlement program, taken together and to a certain extent
14 independently, violate the Injunction. The Court considers them in two groups: (i) the
15 commission rate, and (ii) design restrictions and purchase-flow friction.

16 ***The Commission Rate.*** As described above, Apple assessed the external costs developers
17 face when utilizing linked-out transactions, which generally ranged based on the size of the
18 developer—the larger the developer, the better able to reduce the external costs of linked-out
19 transactions. With that information, Apple selected a 3% discount on its 30% IAP commission
20 that it knew was anticompetitive. In doing so, Apple willfully set a commission rate that in
21 practice made all alternatives to IAP economically non-viable.⁶⁴ The Court cannot conceive of
22

23 ⁶³ Apple also points to Rule 65(d), which provides that “[e]very order granting an
24 injunction and every restraining order must: (A) state the reasons why it issued; (B) state its terms
25 specifically; and (C) describe in reasonable detail—and not by referring to the complaint or other
26 document—the act or acts restrained or required.” Fed. R. Civ. P. 65(d). For the reasons stated
27 above and in the Court’s 180-page Injunction, Apple received a more than fulsome notice of what
28 specific conduct was prohibited at law.

⁶⁴ The *amici* agree. (*See, e.g.*, Dkt. No. 904-1 at 14 (“[D]evelopers incur additional costs
for transactions outside of their apps that would exceed the 3% ‘discount’ to Apple’s normal IAP
commission in almost every case. For example, payment processing fees alone often exceed 3%
of the amount of the transaction.”).)

1 how any reasonable mind interpreting this Court’s and the Ninth Circuit’s orders would find that
 2 structure permissible, because it *forecloses competitive alternatives*. That appears to have been
 3 the point. Business documents reveal that the internal justification was to maintain the existing
 4 anticompetitive revenue stream.

5 This Court previously recognized that “[e]ven in the absence of IAP, Apple could still
 6 charge a commission on developers.” *Epic Games, Inc.*, 559 F.Supp.3d at 1042.⁶⁵ Apple was
 7 tasked with valuing its intellectual property, not with reverse engineering a number right under
 8 30% that would allow it to maintain its anticompetitive revenue stream. *Id.* at 994 (“Apple cannot
 9 hide behind its lack of clarity on the value of its intellectual property.”). Apple and Mr. Schiller
 10 knew this. (*See* Feb. 2025 Tr. 1893:11–1894:22 (Schiller).) Apple ignored this opportunity
 11 choosing instead to retroactively justify the desired end result.

12 The AG report’s recommendation of a commission rate on link-out transactions as the
 13 basis for its commission determination is entirely manufactured, and Apple’s reliance thereon is a
 14 sham. (*See, e.g.*, Dkt. No. 1324, Apple’s Post-Hearing Br. at 12.) As the 2025 hearing revealed,
 15 the AG’s report did not materially factor into Apple’s decision-making process. It was created as a
 16 show piece for the Court. The plan backfired.

17 The real-time business documents which the Court ordered Apple to produce revealed the
 18

19 ⁶⁵ Apple emphasizes that California courts have declined to use the UCL as a ratemaking
 20 tool. (Dkt. No. 1324 at 30); *see, e.g., Lazzareschi Inv. Co. v. San Francisco Fed. Sav. & Loan*
 21 *Assn.*, 99 Cal.Rptr.417, 422 (Cal. Ct. App. 1971) (“[T]he control of charges, if it be desirable, is
 22 better accomplished by statute or by regulation authorized by statute than by ad hoc decisions of
 23 the courts.”). Apple also argues that the question of whether Apple’s commission appropriately
 24 reflects the value of its intellectual property is not an issue for injunction compliance, and that it is
 25 legitimate for a business to promote the value of its corporation for stockholders. (Dkt. No. 1324
 26 at 18, 32.) Apple misses the point. The issue is that Apple flouted the Court’s order by designing
 27 a top-down anticompetitive system, in which its commission played a fundamental role.

28 For the same reasons, the Court disagrees that requiring Apple to set a commission of zero
 constitutes and unconstitutional taking. *See* Dkt. No. 1324 at 30 (citing *Cedar Point Nursery v.*
Hassid, 594 U.S. 139 (2021)). For instance, as described *infra* Section IV, in the trademark
 context, “a party who has once infringed is allowed less leniency for purposes of injunction
 enforcement than an innocent party.” *Forever 21, Inc. v. Ultimate Offprice, Inc.*, 2013 WL
 4718366, at *3 (C.D. Cal. Sept. 3, 2013). Apple does not have an absolute right to the intellectual
 property that it wields as a shield to competition without adequate justification of its value. Apple
 was provided with an opportunity to value that intellectual property and chose not to do so.

1 true business decision. Apple’s focus was on the impacts to its revenue as well as some analysis of
2 the costs developers would face when implementing a link-out transaction. The AG report only
3 appears in a public-facing presentation for the July 5, 2023 meeting where Apple decided to
4 impose a 27% commission. Thus, the Court does not credit the AG report as support for a
5 bottoms-up analysis of the value of Apple’s intellectual property.

6 ***Design Restrictions and Purchase-Flow Friction.*** In addition to a commission rate,
7 Apple imposed a variety of restrictions on developers’ ability to craft a link-out program: requiring
8 any external purchase link be placed outside of the IAP purchase-flow to which a user is ordinarily
9 directed; prohibiting developers from designing “buttons” aside from Apple’s “plain ‘link’ button”
10 style; prohibiting developers from using any calls to action aside from a limited set defined by
11 Apple; instituting a full-window takeover (scare screen) after clicking on an external link *only* in
12 the context of purchases of digital goods; and prohibiting the use of dynamic URLs.

13 This Court previously explained that the “measured remedy” of eliminating Apple’s anti-
14 steering provisions “will increase competition, increase transparency, increase consumer choice
15 and information while preserving Apple’s iOS ecosystem which has procompetitive
16 justifications.” *See Epic Games, Inc.*, 559 F.Supp.3d at 1069. Despite that directive, Apple
17 decided to replace the explicit anti-steering provisions the Injunction prohibited with a mosaic of
18 the same: an ensemble of requirements that significantly reduces developers’ ability to steer
19 consumers to any competitive, favorable alternatives. Nor was this accidental: Apple’s sensitivity
20 analyses of breakage reveal that Apple was modeling precisely the amount of friction needed in a
21 transaction to ensure that link-out transactions were not viable for a developer. While Apple
22 initially considered imposing some of these restrictions *as an alternative* to a commission, it
23 decided to impose *all* restrictions *and* set a commission rate. In other words, Apple sought to
24 secure its illegal revenue stream from every angle.

25 Apple’s justifications for these requirements (set forth above) strain credulity. Most
26 notably, and to underscore Apple’s meritless justifications, Apple does not require developers
27 selling physical goods to apply for a link entitlement before deploying link-out transactions.
28 Apple imposes these restrictions *only* for link-outs that compete with IAP.

1 Further, two of Apple’s restrictions are explicitly at odds with the Injunction. The
2 Injunction prevented Apple from stopping developers from “including in their apps and their
3 metadata buttons, external links, or other calls to action that direct customers to purchasing
4 mechanisms, in addition to” IAP. Apple resorts to dictionaries (*see* Dkt. No. 1324 at 15–16) to
5 argue that it no longer categorically prohibits developers from using buttons or other calls to
6 action.⁶⁶ While perhaps literally true, the gamesmanship abounds as the business documents
7 reveal the true motive (and do not rely on dictionaries).

8 For button styles, Apple limits developers to what Apple calls the “plain” button style—
9 essentially just a hyperlink—because Apple does not want the developers to use the more effective
10 “button.” A more effective button would increase competition. (*See* Feb. 2025 Tr. 1212:9–
11 1213:22 (Schiller).) Similarly, Apple limits calls to action to five, narrowly cabined templates.
12 (*See* CX-3.5.) Nowhere does the Court authorize those limitations. At a minimum, the Court
13 need not decide whether these restrictions alone violate the Injunction, because Apple has violated
14 the central mandate of this Court’s orders: that Apple not foreclose competitive alternatives to
15 IAP.⁶⁷

16 To summarize, this Court’s orders required that Apple not impose restrictions in its iOS
17 marketplace which would prohibit consumer access to and awareness of competitive alternatives
18 to IAP. The Injunction specifically enjoined Apple’s anti-steering provisions which at the time
19 prohibited developers from raising that consumer awareness and access. In response, Apple

21 ⁶⁶ Apple also points to authority that interprets the distinction between “regulating” and
22 “prohibiting,” particularly in the context of statutory interpretation. Dkt. No. 1324 at 17; *see, e.g.,*
23 *Ysleta Del Sur Pueblo v. Texas*, 596 U.S. 685, 697 (2022) (explaining that “to *regulate* something
24 is usually understood to mean to fix the time, amount, degree, or rate of an activity according to
25 rules” whereas “to *prohibit* something means to forbid, prevent, or effectively stop it, or make it
impossible” (cleaned up)). In this way, Apple argues that its rules *regulate* and do not *prohibit* the
use of calls to action or buttons. Other options may have constituted regulation. Here, the
business documents prove the opposite: the overall effect is quite literally, intentional *de facto*
prohibition.

26 ⁶⁷ Additionally, Apple has excluded simultaneous participation in the VPP or NPP
27 programs and the Link Entitlement program. While this mutual exclusion does not itself
28 constitute a violation of the Injunction, it does highlight Apple’s all-or-nothing approach—every
developer would be subject to the same link-out program which, as discussed exhaustively, is not
economically viable.

1 intentionally devised a compliance scheme to prevent developers from deploying competitive
 2 alternatives to IAP. Apple’s discounted commission rate, on its own, forecloses a developer’s use
 3 of link-out purchases. Adding to that, Apple’s various design restrictions and purchase-flow
 4 friction arbitrarily decrease the attractiveness of competitive alternatives (if they were utilized) and
 5 increase breakage in a purchase flow.

6 Apple’s conduct violates the Injunction. The non-compliance was far from “technical or
 7 de minimis.” Apple’s lack of adequate justification, knowledge of the economic non-viability of
 8 its compliance program, motive to protect its illegal revenue stream and institute a new de facto
 9 anticompetitive structure, and then create a reverse-engineered justification to proffer to the Court
 10 cannot, in any universe, real or virtual, be viewed as product of good faith or a reasonable
 11 interpretation of the Court’s orders.

12 The Court **HOLDS** Apple in civil contempt. Sanctions and relief with respect to Apple’s
 13 noncompliance are set forth *infra* Section IV.

14 **C. Privilege Disputes⁶⁸**

15 **1. Apple’s Motion to Strike**

16 Apple moves to strike Philip Schiller’s February 2025 testimony concerning a document
 17 that Apple improperly under-redacted for privilege. (Dkt. No. 1328.) The Court rejects Apple’s
 18 invitation to reconsider its prior ruling from the bench. Apple waited to raise its privilege
 19 objection until *after* Mr. Schiller testified about the document at length. At the hearing the
 20 following day, Apple’s attorneys conceded their oversight in failing to object to the exhibit and
 21 Epic’s questioning. (Feb. 2025 Tr. at 1443:23–24) (“I do understand the cat-is-out-of-the-bag
 22 problem from yesterday. . . .”) The Court agreed and ruled that “[y]esterday’s testimony stands.”
 23 (Feb. 2025 Tr. at 1447:8.) That Apple is having second thoughts about its decision does not make
 24 for a proper motion for reconsideration. The testimony stands. Apple’s Motion for
 25

26 _____
 27 ⁶⁸ The Court will decide in a separate order Apple and Epic’s rolling motions for relief for
 28 relief from non-dispositive orders issued by Judge Hixson involving his and the special masters’
 determinations of privilege in Apple’s document productions. (Dkt. Nos. 1193, 1221, 1285, 1298,
 and 1305).

1 Reconsideration is **DENIED**.

2 **2. Apple’s Rule 502(d) Motion**

3 Prior to the February 2025 testimony, Apple moved for an order pursuant to Federal Rule
4 of Evidence 502(d) that would “confirm[] that Apple’s production of certain documents to [Epic]
5 over which Apple continues to maintain claims of attorney-client privilege or work product
6 protection,” and any use of those documents at the hearing or in connection with Epic’s motion to
7 enforce, “does not waive any applicable protections in this proceeding or any other.” (Dkt. No.
8 1198 at 2.) At the hearing, the Court rejected Apple’s motion for an order pursuant to Rule
9 502(d). (Feb. 2025 Tr. at 1125:23–1126:12.) In short, a Rule 502(d) order is inappropriate where
10 the Court has held that the at-issue documents are not privileged. The Court elaborates as to two
11 further considerations presented in the papers:

12 *First*, as to documents Apple has produced to Epic, Apple has been “compelled” by this
13 Court to produce those documents over its objection, so in general Apple has not waived privilege
14 with respect to documents by virtue of their production alone. *See Transamerica Computer Co. v.*
15 *Int’l Bus. Machines Corp.*, 573 F.2d 646, 651 (9th Cir. 1978). That said, the Court does not and
16 need not decide in general whether Apple’s production constitutes waiver absent a review of
17 specific documents and the particular context of their production.

18 *Second*, as to the use of any documents in the evidentiary hearing for which Apple
19 maintains a claim of privilege, the Court cannot issue a carte blanche ruling that any use of
20 privileged documents will not constitute waiver. Waiver will depend on what documents are used
21 by which party and how they are used. On the one hand, should Epic make an *offensive* use of a
22 privileged communication, Apple’s *defensive* use of the portions of that *same* communication for
23 which this Court has rejected Apple’s claim of privilege will likely not constitute waiver, just as in
24 Apple’s cited case, *Shenzhenshi*, 2017 WL 8948739, at *5 (N.D. Cal. Nov. 15, 2017). On the
25 other hand, Apple’s *offensive* introduction of a privileged communication will likely constitute
26 waiver, under the well-established doctrine that attorney-client privilege may not be used both as a
27 sword and shield.

28 All this is to say, the Court declined to permit Apple to pre-litigate whether it will waive

1 privilege over unspecified documents that it might use for different purposes at this evidentiary
2 hearing. Apple’s motion for an order pursuant to Rule 502(d) is **DENIED**.

3 **3. Abuse of Privilege**

4 The Court discussed Apple’s abuse of its privilege assertions *supra* Section I.D, which
5 caused months of delay in this proceeding. Notably, as discussed earlier, on re-review Apple
6 withdrew a significant body of its privilege claims, effectively withdrawing approximately 42.1%
7 of those claims. These dilatory tactics were unwarranted, wasted party and judicial resources, and
8 delayed the Court’s ability to effectuate relief.

9 The Court’s discussion in its December 31, 2024 order on Apple’s first motion for relief
10 provided the foundation for how Apple integrated the presence of legal personnel into
11 documentation of business decisionmaking that, by this Court’s and Judge Hixson’s
12 determinations, did not involve the provision of legal advice. (*See* Dkt. No. 1095.)

13 Adding a lawyer’s name to a document does not create a privilege. Instructions from
14 Apple’s internal counsel Jennifer Brown are illustrative. In a set of email exchanges discussing
15 drafts of a Project Wisconsin presentation, Ms. Brown wrote, “[a]lso, one procedural tweak - can
16 we change the ‘Prepared at the Request of Counsel’ label in the slides to ‘Prepared at the Request
17 of External Counsel’. This work is necessary for our outside counsel to advocate our
18 compliance.” (CX-538.4.) Every email on this email thread self-designates as privileged, as does
19 every slide in the presentation, even though the vast majority of information therein this Court and
20 Judge Hixson have held do not contain privileged information, but rather documents the business
21 assessment Apple was conducting that is central to enforcement of the Injunction. While
22 Ms. Brown explained that Apple was “working very closely with” external counsel “throughout
23 the entire process” (Feb. 2025 Tr. 1615:4–5), that does not automatically confer privilege
24 protections on all documents relevant to that process.

25 The record is rife with such examples of over-designation of privilege. As another
26 example, consider an email discussed above from Apple’s counsel Sean Cameron sent to Tim
27 Cook, among others, on Friday, June 23, 2023. The email reads, in full:

28

Privileged and Confidential

Tim,

At our meeting on Tuesday, you asked the team to revise the customer warning screen (which is surfaced when a customer taps on a link to the developer's web site) to reference the fact that Apple's privacy and security standards do not apply to purchases made on the web.

The team worked on updated copy — please see the original and updated versions below. We reviewed with Phil, Matt, and Jeff and believe that the revised language in bold clearly highlights the issue for customers.

Please let us know if you have any comments, or if we are clear to move ahead with this change.

Thank you.

(CX-225.1.)

Here, legal counsel provides “updated copy” after discussion with non-legal members of the team. The only substantive comment as to the changed copy refers to how the revised language “clearly highlights the issue for customers.” Nothing about this email indicates the presence or provision of legal advice, but rather implementing Mr. Cook's request. Like many of Apple's documents produced in connection with Epic's motion to enforce, this document does indicate, however, a desire to conceal Apple's real decisionmaking process, particularly where those decisions involved senior Apple executives. Given those abuses and others, the Court concluded that “sanctions are warranted” in its February 4, 2025 Order. (Dkt. No. 1171.)

Apple filed a “response,” but that response ultimately harms its position. (Dkt. No. 1329-3 (sealed); Dkt. No. 1330 (redacted).) In its defense, Apple blames everyone but itself, claiming that it acted in good faith and under a compressed timeframe in conducting its privilege review. The first to be faulted are Apple's third-party document review vendors, Deloitte and Consilio. Apple claims that it appropriately instructed those teams on designating for privilege and argues that those instructions reflected Ninth Circuit precedent. Although Apple's outside counsel purportedly gave “weekly and often daily feedback to the vendor and outside counsel quality control teams,” (Dkt. No. 1330 at 11), Apple did not catch, *and should have caught*, those errors. The notion that Apple mistakenly over-designated documents is not credible. Almost all “mistakes” and “inconsistencies” flow in one direction: toward withholding and redacting.

1 Further, Apple held steadfast with its privilege designations until ordered otherwise.

2 Next, Apple blames Epic. Apple argues that its over-designation was the “ultimate
3 consequence” of Epic’s overbroad custodian and search term requests. (Dkt. No. 1330 at 14.) To
4 boot, Apple argues that Epic failed to police *Apple’s* privilege calls until months after Apple
5 served its first privilege log, which “impaired Apple’s ability to make any meaningful changes to
6 its privilege review and logging process before the deadline.” (*Id.* at 16–17.) The Court rejects
7 Apple’s fingerpointing to justify its own misconduct.

8 Finally, Apple urges that it should not be sanctioned because it has already borne the
9 consequence of its discovery misconduct by re-reviewing the documents that it initially withheld
10 for privilege. (Dkt. No. 1330 at 18.) Apple argues that because it cured compliance, punitive
11 sanctions, as it characterizes them, are not warranted. Complying with a court order cannot be
12 deemed a sanction. Holding otherwise would incentivize any litigant to avoid complying with
13 unfavorable discovery rulings until ordered to do so after more litigation. The Court elaborates on
14 a remedy *infra* Section IV.

15 **D. Apple’s Motion for Indemnification**

16 As discussed *supra* Section I, the Ninth Circuit reversed this Court insofar as the DPLA’s
17 indemnification provision requires Epic to pay Apple’s attorneys’ fees related to this litigation,
18 specifically as to Apple’s counterclaim for breach of contract. *See Epic Games, Inc.*, 67 F.4th at
19 1004. However, the panel “express[ed] no opinion on what portion of Apple’s attorney fees
20 incurred in this litigation can be fairly attributed to Epic’s breach of the DPLA.” *Id.* at 1004 n.24.

21 On the day Apple’s petition for certiorari was denied, Apple moved for entry of judgment
22 on its indemnification counterclaim, seeking an adjusted, discounted total of \$73,404,326 in
23 attorneys’ fees and costs. (Dkt. Nos. 872-3 (sealed motion), 876 (redacted).) Epic opposed
24 (Dkt. No. 886), and below the Court considers the appropriate scope of attorneys’ fees Apple may
25 recover under the DPLA, given the nature of this litigation.

26 **1. Legal Standard**

27 The DPLA’s indemnification provision provides, in relevant part:

28 To the extent permitted by applicable law, You agree to indemnify

1 and hold harmless, and upon Apple’s request, defend, Apple, its
 2 directors, officers, employees, independent contractors and agents
 3 (each an “Apple Indemnified Party”) from any and all claims, losses,
 4 liabilities, damages, taxes, expenses and costs, including without
 5 limitation, attorneys’ fees and court costs (collectively, “Losses”),
 incurred by an Apple Indemnified Party and arising from or related to
 any of the following . . . : (i) Your breach of any certification,
 covenant, obligation, representation or warranty in this
 Agreement

6 (PX-2619.40; *see also Epic Games, Inc.*, 559 F.Supp.3d at 1065–66.)

7 “Based on the DPLA’s choice-of-law provision,” the Court “interpret[s] its
 8 indemnification provision pursuant to California contact-interpretation principles.” *Epic Games,*
 9 *Inc.*, 67 F.4th at 1003. “Under California law, ‘[a]n indemnity agreement is to be interpreted
 10 according to the language and contents of the contract as well as the intention of the parties as
 11 indicated by the contract.’” *Epic Games, Inc.*, 559 F.Supp.3d at 1065 (quoting *Myers Bldg.*
 12 *Indus., Ltd. v. Interface Tech., Inc.*, 17 Cal.Rptr.2d 242, 253 (Cal. Ct. App. 1993); *see also Cal.*
 13 *Civ. Proc. Code* § 1021 (“[T]he measure and mode of compensation of attorneys and counselors at
 14 law is left to the agreement, express or implied, of the parties”). As with any contract,
 15 California courts “apply the rule that words in a contract are to be understood in their usual sense.”
 16 *Xuereb v. Marcus & Millichap, Inc.*, 5 Cal. Rptr. 2d 154, 158 (Cal. Ct. App. 1992).

17 2. Analysis

18 The central question in Apple’s motion for entry of judgment on its indemnification
 19 counterclaim is “what portion of Apple’s attorney fees incurred in this litigation can be fairly
 20 attributed to Epic’s breach of the DPLA.” *Epic Games, Inc.*, 67 F.4th at 1004 n.24.⁶⁹ However, it
 21 is not possible to cleanly separate what costs and fees are attributable to Epic’s breach, because
 22 Epic stipulated that it breached the DPLA and “[t]he parties agree[d] that Epic’s illegality defense”
 23 to Apple’s claim for breach of contract “rises and falls with its Sherman Act claims.” *Id.* at 999.⁷⁰

24 ⁶⁹ The DPLA, as well as the Ninth Circuit’s opinion, make clear that Apple is entitled to all
 25 “losses . . . , expenses and costs, including without limitation, attorneys’ fees and court costs,”
 26 “arising from or related to” Epic’s “breach of any certification, covenant, [or] obligation” in the
 DPLA. PX-2619.40.

27 ⁷⁰ “Epic Games alleges that Apple’s counterclaims are barred because ‘the contracts on
 28 which Apple’s counterclaims are based’ are ‘illegal and unenforceable’ on the basis that they
 violate the Sherman Act, the Cartwright Act, and the UCL.” *Epic Games*, 559 F.Supp.3d at 1060.

1 In other words, Apple’s fees and costs expended defending against Epic’s federal claims—the
2 bulk of Epic’s affirmative case—are the same fees and costs Apple expended to ultimately win its
3 breach of contract claim, for which Apple is entitled to indemnification under the DPLA.⁷¹

4 Centrally, Epic argues that, under California law, prevailing defendants cannot recover
5 attorneys’ fees or litigation costs incurred while defending against antitrust claims, even where the
6 parties have entered into a fee-shifting agreement. (Dkt. No. 886 at 9–12.) Epic relies on *Carver*
7 *v. Chevron U.S.A., Inc.*, 14 Cal. Rptr. 3d 467, 469 (Cal. Ct. App. 2004). There, plaintiffs alleged
8 18 causes of action, including intentional and negligent misrepresentation, concealment, breach of
9 contract, beach of the implied covenant of good faith and fair dealing, and violations of the
10 Cartwright Act. The parties did “not dispute that Chevron, as prevailing party, has a contractual
11 right to attorney fees for defending non-Cartwright causes of action.” *Id.* However, “certain
12 claims were inextricably intertwined and could not be further separated because they had elements
13 of both Cartwright Act and non-Cartwright Act causes of action.” *Id.* at 472.

14 The Court of Appeal explained that “[t]he Cartwright Act contains a unilateral fee-shifting
15 provision that allows an award of attorney fees to a prevailing plaintiff but not to a prevailing
16 defendant.” *Id.* at 471. The public policy implicit in such a nonreciprocal fee provision is, in the
17 case of the Cartwright Act, “to encourage injured parties to broadly and effectively enforce the
18 Cartwright Act ‘in situations where they otherwise would not find it economical to sue.’” *Id.*
19 (quoting *Covenant Mut. Ins. Co. v. Young*, 225 Cal. Rptr. 861, 865 (Cal. Ct. App. 1986)). “The
20 Legislature clearly intended to give special treatment to antitrust claims under the Cartwright Act
21 by creating this one-way fee-shifting right for a successful plaintiff but not for a defendant who
22

23 ⁷¹ The Court disagrees with Epic that its antitrust claims cannot be said to arise out of or
24 relate to a breach of the DPLA “because they are completely independent of Epic’s violation of
25 the terms of the DPLA,” and that “[i]t is undisputed that Epic’s antitrust claims could have been
26 brought against Apple even if Epic had not violated the terms of the DPLA.” Dkt. No. 886 at 13.
27 While perhaps true in theory, neither contention reflects what has in fact occurred in this litigation.
28 Epic crafted a litigation strategy that involved a deliberate and conceded breach of the DPLA, and
in turn Epic made its own antitrust claims the cornerstone defense against Apple’s breach of
contract counterclaim. Nor was Epic’s breach without its benefits—some of the data revealed by
that breach has been incorporated into this order in support of Epic’s motion for enforcement.
Epic’s strategy involved certain risks and payoffs, and potential liability for Apple’s attorneys’
fees formed a possible trade-off.

1 successfully defends such a claim.” *Id.*

2 The court concluded that “[i]n light of these public policy considerations,” the Cartwright
3 Act’s fee-shifting provision “prohibits an award of attorney fees for successfully defending
4 Cartwright Act and non-Cartwright Act claims that overlap.” *Id.* Permitting a defendant to
5 recover fees for work on Cartwright Act issues “would superimpose a judicially declared principle
6 of reciprocity on the statute’s fee provision, a result unintended by the Legislature, and would
7 thereby frustrate the legislative” public policy. *Id.*

8 While *Carver* concerned Cartwright Act claims, which Epic abandoned on appeal, *see Epic*
9 *Games, Inc.*, 67 F.4th at 970 n.4, one federal court has extended *Carver*’s reasoning to the defense
10 of federal antitrust claims. In *Dominick v. Collectors Universe, Inc.*, plaintiffs asserted nine
11 claims, which included violations of the Sherman Act, the Clayton Act, the Latham Act, the
12 Cartwright Act, and the UCL, among other state-law tort and breach of contract claims. 2013 WL
13 990825, at *1 (C.D. Cal. Mar. 13, 2013). After prevailing on a motion to dismiss, defendants
14 argued that they could “recover their fees under the Clayton Act’s fee-shifting provision” and also
15 could “recover all fees under the fee-shifting provision of the” applicable agreement. *Id.* at *2.

16 The *Dominick* court disagreed, explaining that “under California law, prevailing
17 defendants may not recover attorneys’ fees for successfully defending against antitrust claims,
18 even if a contractual fee-shifting clause may have otherwise allowed for such fees. The California
19 Court of Appeal has held that where a statute contains a unilateral fee-shifting provision for
20 prevailing plaintiffs, courts should not allow contractual fee-shifting for prevailing defendants, as
21 this allowance would override congressional intent.” *Dominick*, 2013 WL 990825, at *5 (citations
22 omitted) (citing *Carver*, 14 Cal.Rptr.3d at 471). Even absent a statutory fee-shifting provision, the
23 court cited a Third Circuit case which “held that attorneys’ fees may not be awarded to prevailing
24 defendants in antitrust lawsuits absent express congressional authorization,” in a case that did not
25 involve an indemnification agreement among the parties. *See id.* at *5 (citing *Byram Concretanks,*
26 *Inc. v. Warren Concrete Prods. Co. of N. J.*, 374 F.2d 649, 651 (3d Cir. 1967)).⁷²

27
28 ⁷² *See also Byram*, 374 F.2d at 651 (“We hold that in the absence of specific legislative
authorization attorneys' fees may not be awarded to defendants in private anti-trust litigation. Our

1 However, the Ninth Circuit appears to have rejected this approach as to Sherman Act
 2 claims in *Reudy v. CBS Corp.* Before the district court, plaintiffs argued that “the Sherman Act
 3 authorizes recovery of attorneys’ fees only for successful plaintiffs,” citing 15 U.S.C. § 15. *Reudy*
 4 *v. Clear Channel Outdoors, Inc.*, 693 F.Supp.2d 1091, 1100 (N.D. Cal. 2010), *aff’d sub nom.*
 5 *Reudy v. CBS Corp.*, 430 F.App’x 568 (9th Cir. 2011). The court explained that while this may be
 6 true of “certain statutes, such as the Cartwright Act,” “it is not true under these facts and the
 7 statutes at issue.” *Id.* Specifically, “[a]s for Plaintiffs’ antitrust cause of action, Plaintiffs failed to
 8 cite any case, either in their briefing or at the hearing, in support of their argument that the
 9 Sherman Act trumps a private contract when it comes to a fee award. The only cases cited
 10 pertained to actions pursuant to the Cartwright Act.” *Id.* at 1101. Thus, the court rejected
 11 plaintiffs’ objections to an award of attorneys’ fees relating to Sherman Act claims.

12 On appeal, plaintiffs posed the question of “[w]hether the district court erred in awarding
 13 attorney fees on the Sherman Act cause of action.” Opening Brief of Appellants, *Reudy v. CBS*
 14 *Corp.*, No. 10-15533 (9th Cir. June 10, 2010), 2010 WL 6762022. In an unpublished opinion, the
 15 Ninth Circuit succinctly affirmed: “There is no support for appellants’ contention that the fee-
 16 shifting rule applicable to antitrust claims displaces the different rule set forth in the agreement.”
 17 *Reudy*, 430 F.App’x at 569.

18 As applied to this case, the Court finds that Apple’s requested fee award does not
 19 appropriately account for *Carver*. Apple calculated its total litigation expenses through October
 20 31, 2023, at \$82,971,401, and “to ensure every dollar is covered by the DPLA” adjusted that total
 21 down to \$81,560,362. (Dkt. No. 876 at 15.) Then, because Apple “won 9 out of 10 claims that
 22 Epic asserted challenging the DPLA” as well as Apple’s own breach of contract counterclaim,
 23 Apple discounted its adjusted total by 10%, to \$73,404,326. Absent *Carver*, this could be a
 24 sensible starting point. However, the California Court of Appeal was clear that the Cartwright
 25 Act’s fee-shifting provision “prohibits an award of attorney fees for successfully defending
 26 Cartwright Act and non-Cartwright Act claims that overlap.” *Carver*, 14 Cal. Rptr. 3d at 471.

27 _____
 28 conclusion is based on policy considerations reflected in the Clayton Act.”).

1 Here, that ultimately means that Apple is entitled to attorneys' fees and expenses covering its
2 defense against Epic's Sherman Act claims that do *not* overlap with Apple's defense against
3 Epic's Cartwright Act claims.⁷³ Said differently, the question is what *unique* attorneys' fees or
4 expenses did Apple incur in defense against Epic's Sherman Act claims that were not also
5 incurred in defense against Epic's Cartwright Act claims.

6 To summarize, this is because, first, the DPLA provides that Apple's indemnity extends to
7 its attorneys' fees and expenses arising from or relating to Epic's breach of the DPLA, i.e.,
8 Apple's breach of contract counterclaim. Second, the parties agreed that the success of Apple's
9 breach of contract claim was coextensive with Apple's defense against Epic's Sherman Act
10 claims, because Epic stipulated to breach of the DPLA and only argued an illegality defense under
11 the Sherman Act. Thus, given Apple's success as to the Sherman Act claims, the DPLA entitles
12 Apple to attorneys' fees and expenses incurred in its defense against those claims. However,
13 *Carver* limits that award to the extent it overlaps with Epic's Cartwright Act claims. *See Carver*,
14 14 Cal. Rptr. 3d at 473 ("When a defendant incurs attorney fees for successfully defending both
15 Cartwright Act and non-Cartwright Act claims, the portion of those fees related exclusively or by
16 'inextricable overlap' to Cartwright Act claims are not recoverable.").

17 The Court declines to attempt an estimate in the first instance. Apple bears the burden of
18 identifying those attorneys' fees and costs that it can attribute solely to the breach of the DPLA
19 and/or its defense against Epic's Sherman Act claims that did not overlap with its defense of
20 Epic's Cartwright Act claims.⁷⁴ The Court **DENIES WITHOUT PREJUDICE** Apple's motion for
21

22 ⁷³ That said, Epic overreaches by seeking to apply *Carver*'s rule to all federal antitrust
23 claims, in particular here Epic's Sherman Act claims. While *Dominick* provides support for Epic's
24 argument, this Court will defer to the Ninth Circuit's unpublished holding in *Reudy* and find that
25 the fee-shifting rules articulated in *Carver* or otherwise do not displace Apple's contractual
indemnity for attorneys' fees expended in defense of Epic's illegality defense under the Sherman
Act.

26 ⁷⁴ The Court notes that the parties' prior representations, as always, are relevant. For
27 instance, at trial Epic argued that "even if its claims under the Sherman Act fail, it is nevertheless
28 entitled to relief on its Cartwright Act claims because the Cartwright Act is broader in range and
deeper in reach than the Sherman Act." *Epic Games, Inc.*, 559 F.Supp.3d at 1048. Apple
disagreed, arguing that Epic had "not identified any specific and material differences between the
Cartwright Act and the Sherman Act," and so could not "prevail on a Cartwright Act where its

1 entry of judgment on its indemnification counterclaim.

2 *Next*, the parties dispute whether Apple is entitled to collect costs and expenses in addition
3 to attorneys' fees. Epic argues that Apple's recovery of any "losses" other than attorneys' fees
4 exceeds the Ninth Circuit's mandate, which provided that this Court is to determine "what portion
5 of Apple's *attorney fees* incurred in this litigation can be fairly attributed to Epic's breach of the
6 DPLA." (Dkt. No. 886 at 17 (quoting *Epic Games, Inc.*, 67 F.4th at 1004 n.24 (emphasis
7 supplied)).) On the other hand, Apple points to the expansive language of the DPLA—notably,
8 that the indemnification provision covers "any and all" "expenses and costs" and "losses,"
9 "including without limitation, attorneys' fees and court costs." (PX-2619.40; *see also*
10 Dkt. No. 876 at 12–14.) The Court agrees with Apple. Nowhere did the Ninth Circuit hold that
11 Apple is prohibited from recovering costs and expenses arising from or related to Epic's breach of
12 contract. Rather, the Ninth Circuit recited the DPLA's expansive language that includes costs
13 "without limitation," and the scope of the question presented on appeal was simply focused on
14 "attorneys' fees." *See Epic Games, Inc.*, 67 F.4th at 1004 & n.24.

15 *Finally*, Epic argues that Apple failed to meet and confer with Epic pursuant to Federal
16 Rule of Civil Procedure 54(d), which Apple claims does not apply to its motion for entry of
17 judgment. Apple's "restyling" of its request for attorneys' fees as a motion of entry of judgment
18 does not persuade. Judgment was entered on September 10, 2021 at Docket No. 814. Apple filed
19 an appeal thereon. Rule 54(d)(2)(A) requires claims to attorneys' fees to be asserted by way of
20 motion "unless the substantive law requires those fees to be proved at trial as an element of
21 damages." California Civil Code § 1717(a) allows the prevailing party to recover attorneys' fees
22 in a contract dispute "as an element of the cost of the suit" and requires that reasonable fees be
23 "fixed by the court." The Ninth Circuit has read those rules in tandem to mean that contract
24 provisions for attorney's fees "are not an element of damages to be proved at trial" and, therefore,
25 _____
26 claims fail under the Sherman Act." *Id.*

27 Given the lack of an appropriate accounting, the Court takes no position on whether Apple
28 can include attorneys' fees which may have overlapped with the related *Cameron* and *Pepper*
actions. (Dkt. No. 886 at 16.)

1 Rule 54(d) applies. *Port of Stockton v. W. Bulk Carrier KS*, 371 F.3d 1119, 1121 (9th Cir. 2004)
 2 (internal quotations omitted); *see also Zhu v. Li*, 2023 WL 4770431, at *1 (N.D. Cal. July 26,
 3 2023); *Instrumentation Lab’y Co. v. Binder*, No. 11-cv-965, 2013 WL 12049072 (S.D. Cal. Sept.
 4 18, 2013), *aff’d*, 603 F. App’x 618 (9th Cir. 2015) (applying Rule 54(d) to recover indemnity
 5 award). Apple’s suggestion to the contrary is merely an attempt to avoid the rules. The district’s
 6 local rule 54-5, as authorized by Rule 54(d)(2)(D), requires parties to meet and confer in advance
 7 of filing any motion. Compliance is required.

8 With respect to Apple’s argument that Epic has not challenged the reasonableness or
 9 accuracy of Apple’s calculations of its attorneys’ fees, costs or expenses, the Court finds the issue
 10 premature given the parties’ misapplication of the standard and because Apple failed to provide
 11 evidentiary support for its request. (Dkt. No. 886 at 3–4.) Anticipating further disputes on this
 12 topic, if the parties cannot agree on the reasonable amount of attorneys’ fees and costs, the Court
 13 orders the issue referred to a special master of the parties choosing under Rule 54(d)(2)(D). In the
 14 first instance, the parties shall split the costs of the special master. However, the special master
 15 may reallocate the costs if appropriate.

16 **V. RELIEF AND SANCTIONS**

17 “District courts have broad equitable power to order appropriate relief in civil contempt
 18 proceedings.” *SEC v. Hickey*, 322 F.3d 1123, 1128 (9th Cir. 2003). That broad power includes
 19 “the inherent authority to enforce compliance with its orders,” *Craters & Freighters v. Daisychain*
 20 *Enterprises*, 2014 WL 2153924, at *1 (N.D. Cal. May 22, 2014), as well as issuance of
 21 “[s]anctions . . . to coerce obedience to a court order, or to compensate the party pursuing the
 22 contempt action for injuries resulting from the contemptuous behavior, or both.” *Gen. Signal*
 23 *Corp. v. Donallco, Inc.*, 787 F.2d 1376, 1380 (9th Cir. 1986).

24 With respect to violations of a permanent injunction, a civil contempt order may clarify the
 25 terms of the injunction to coerce compliance. *See, e.g., H.I.S.C., Inc. v. Franmar Int’l Importers,*
 26 *Ltd.*, 2022 WL 104730, at *6 (S.D. Cal. Jan. 11, 2022). Analogous here, “a party who has once
 27 infringed is allowed less leniency for purposes of injunction enforcement than an innocent party.”
 28 *Forever 21, Inc. v. Ultimate Offprice, Inc.*, 2013 WL 4718366, at *3 (C.D. Cal. Sept. 3, 2013)

1 (trademark-infringement actions). An “infringer must keep a fair distance from the ‘margin line.’”
 2 *Wolfard Glassblowing Co. v. Vanbragt*, 118 F.3d 1320, 1323 (9th Cir. 1997) (same).

3 With respect to monetary sanctions, “[p]rior to issuing a coercive civil contempt order, a
 4 court should weigh all the evidence properly before it determines whether or not there is actually a
 5 present ability to obey and whether failure to do so constitutes deliberate defiance or willful
 6 disobedience which a coercive sanction will break.” *Falstaff Brewing Corp. v. Miller Brewing*
 7 *Co.*, 702 F.2d 770, 781 n.6 (9th Cir. 1983).

8 Apple was afforded ample opportunity to respond to the Injunction. It chose to defy this
 9 Court’s order and manufacture *post hoc* justifications for maintaining an anticompetitive revenue
 10 stream. Apple’s actions to misconstrue the Injunction continue to impede competition. This
 11 Court will not play “whack-a-mole,” nor will it tolerate further delay.

12 Accordingly, for the reasons set forth herein, and good cause appearing, the Court
 13 **PERMANENTLY RESTRAINS AND ENJOINS** Apple Inc. and its officers, agents, servants, employees,
 14 and any person in active concert or participation with them, from:

- 15 1. Imposing any commission or any fee on purchases that consumers make outside an
 16 app, and as a consequence thereof, no reason exists to audit, monitor, track or
 17 require developers to report purchases or any other activity that consumers make
 18 outside an app;
- 19 2. Restricting or conditioning developers’ style, language, formatting, quantity, flow
 20 or placement of links for purchases outside an app;
- 21 3. Prohibiting or limiting the use of buttons or other calls to action, or otherwise
 22 conditioning the content, style, language, formatting, flow or placement of these
 23 devices for purchases outside an app;
- 24 4. Excluding certain categories of apps and developers from obtaining link access;
- 25 5. Interfering with consumers’ choice to proceed in or out of an app by using anything
 26 other than a neutral message apprising users that they are going to a third-party site;
 27 and⁷⁵

28 ⁷⁵ The Court pre-authorizes the “dialogue” version of Apple’s screen in advance so as not

United States District Court
Northern District of California

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6. Restricting a developer’s use of dynamic links that bring consumers to a specific product page in a logged-in state rather than to a statically defined page, including restricting apps from passing on product details, user details or other information that refers to the user intending to make a purchase.

As these are *restrictions* on the specific actions Apple took to violate this Court’s Injunction and as they require no affirmative action on Apple’s part, the **INJUNCTION IS EFFECTIVE IMMEDIATELY**. The Court will not entertain a request for a stay given the repeated delays and severity of the conduct.

Time is of the essence. Every day since January 16, 2024, the date of the Supreme Court’s refusal to hear its appeal, Apple has sought to interfere with competition and maintain an anticompetitive revenue stream. This Injunction terminates the conduct.

* * *

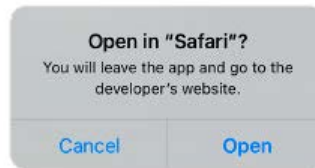
THE COURT FURTHER FINDS that Apple’s abuse of attorney-client privilege designations to delay proceedings and obscure its decision-making process warrants sanction to deter future misconduct. Apple is **SANCTIONED** in the amount of the full cost of the special masters’ review and Epic’s attorneys’ fees on this issue alone through approximately May 15, 2025, the anticipated date of completion. (Dkt. No. 1459.) The parties shall meet and confer on the actual amount due. Any dispute shall be submitted to the special masters by motion for review in the first instance.

* * *

MOREOVER, a more significant response may be warranted.

Despite Apple’s misconduct, civil contempt sanctions are limited to instances where a sanction would “coerce obedience to a court order” or “compensate the party pursuing the

_____ to hinder developer progress:



CX-520.39 (middle example); *see* Feb. 2025 Tr. 1333:25–1334:17, 1335:10–16 (Onak).

1 contempt action for injuries resulting from the contemptuous behavior.” *Gen. Signal Corp. v.*
2 *Donallco, Inc.*, 787 F.2d 1376, 1380 (9th Cir. 1986); *see also United States v. Mine Workers*, 330
3 U.S. 258, 303–304 (1947). Compensatory sanctions are limited to a party’s “actual loss.” *Id.* Epic
4 Games does not, at this juncture, seek sanctions. Should Apple again attempt to interfere with
5 competition and violate the Court’s injunctive relief, civil monetary sanctions to compel
6 compliance may be appropriate.

7 By contrast, criminal contempt sanctions are “punitive,” and are meant to punish past
8 misconduct and deter future noncompliance. *Int’l Union, United Mine Workers of Am. v. Bagwell*,
9 512 U.S. 821, 827 (1994); *Oracle USA, Inc. v. Rimini St., Inc.*, 81 F.4th 843, 858 (9th Cir. 2023)
10 (“Criminal contempt sanctions are ‘punitive’—meant to punish prior offenses”); *Nat’l Abortion*
11 *Fed’n v. Ctr. for Med. Progress*, 926 F.3d 534, 538 (9th Cir. 2019) (“[D]eterrence is one of the
12 purposes served by compensatory and punitive awards alike.”) Sanctions paid to the public or to
13 parties outside of the proceeding are categorized as criminal. *Hicks on Behalf of Feiock v. Feiock*,
14 485 U.S. 624, 632 (1988). With criminal sanctions comes additional proceedings where “punitive
15 sanctions may not be imposed without the constitutional protections afforded ordinary criminal
16 proceedings.” *Oracle*, 81 F.4th at 858.

17 Due process and a potential punitive sanction require government, not private,
18 involvement. *Gompers v. Buck’s Stove & Range Co.*, 221 U.S. 418, 444–45 (1911) (“Proceedings
19 for civil contempt are between the original parties, and are instituted and tried as a part of the main
20 cause. But, on the other hand, proceedings at law for criminal contempt are between the public and
21 the defendant, and are not a part of the original cause.”)⁷⁶; *Int’l Union, United Mine Workers*, 512
22 U.S. at 834 (“Under these circumstances, criminal procedural protections such as the rights to
23 counsel and proof beyond a reasonable doubt are both necessary and appropriate to protect the due
24 process rights of parties and prevent the arbitrary exercise of judicial power.”)

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27 ⁷⁶ Corporations have due process rights with respect to criminal sanctions. *Falstaff*
Brewing Corp. v. Miller Brewing Co., 702 F.2d 770 (9th Cir. 1983)

United States District Court
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ATTACHMENT A

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FOR PUBLICATION**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

EPIC GAMES, INC.,
*Plaintiff-counter-
defendant-Appellant,*

v.

APPLE, INC.,
*Defendant-counter-
claimant- Appellee.*

No. 21-16506

D.C. No.
4:20-cv-05640-
YGR

OPINION

EPIC GAMES, INC.,
*Plaintiff-counter-
defendant-Appellee,*

v.

APPLE, INC.,
*Defendant-counter-
claimant-Appellant.*

No. 21-16695

D.C. No.
4:20-cv-05640-
YGR

Appeal from the United States District Court
for the Northern District of California
Yvonne Gonzalez Rogers, District Judge, Presiding

Argued and Submitted November 14, 2022
San Francisco, California

Filed April 24, 2023

Before: SIDNEY R. THOMAS and MILAN D. SMITH,
JR., Circuit Judges, and MICHAEL J. MCSHANE,*
District Judge.

Opinion by Judge Milan D. Smith, Jr.;
Partial Concurrence and Partial Dissent by Judge S.R.
Thomas

SUMMARY**

Antitrust

The panel affirmed in part and reversed in part the district court's judgment, after a bench trial, against Epic Games, Inc., on its Sherman Act claims for restraint of trade, tying, and monopoly maintenance against Apple, Inc.; in favor of Epic on its claim under California's Unfair Competition Law; against Epic on Apple's claim for breach of contract; and against Apple on its claim for attorney fees. The panel affirmed except for the district court's ruling respecting attorney fees, where it reversed and remanded for further proceedings.

* The Honorable Michael J. McShane, United States District Judge for the District of Oregon, sitting by designation.

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

The panel explained that, when Apple opened the iPhone to third-party app developers, it created a “walled garden,” rather than an open ecosystem in which developers and users could transact freely without mediation from Apple. Epic alleged that Apple acted unlawfully by restricting app distribution on iOS devices to Apple’s App Store, requiring in-app purchases on iOS devices to use Apple’s in-app payment processor, and limiting the ability of app developers to communicate the availability of alternative payment options to iOS device users. These restrictions were imposed under the Developer Program Licensing Agreement (“DPLA”), which developers were required to sign in order to distribute apps to iOS users. The district court rejected Epic’s Sherman Act §§ 1 and 2 claims challenging the first and second restrictions, principally on the factual grounds that Epic failed to propose viable less restrictive alternatives to Apple’s restrictions. The district court concluded that the third restriction was unfair pursuant to the California UCL and enjoined Apple from enforcing it against any developer. The district court held that Epic breached its contract with Apple but was not obligated to pay Apple’s attorney fees.

On Epic’s appeal, the panel affirmed the district court’s denial of antitrust liability and its corresponding rejection of Epic’s illegality defense to Apple’s breach of contract counter-claim. The panel held that the district court erred as a matter of law in defining the relevant antitrust market and in holding that a non-negotiated contract of adhesion, such as the DPLA, falls outside the scope of Sherman Act § 1, but those errors were harmless. The panel held that, independent of the district court’s errors, Epic failed to establish, as a factual matter, its proposed market definition and the existence of any substantially less restrictive

alternative means for Apple to accomplish the procompetitive justifications supporting iOS's walled-garden ecosystem.

On Apple's cross-appeal, the panel affirmed as to the district court's UCL ruling in favor of Epic, holding that the district court did not clearly err in finding that Epic was injured, err as a matter of law when applying California's flexible liability standards, or abuse its discretion when fashioning equitable relief. Reversing in part, the panel held that the district court erred when it ruled that Apple was not entitled to attorney fees pursuant to the DPLA's indemnification provision.

Concurring in part and dissenting in part, Judge S.R. Thomas wrote that he fully agreed with the majority that the district court properly granted Epic injunctive relief on its California UCL claims. Judge S.R. Thomas also fully agreed that the district court properly rejected Epic's illegality defenses to the DPLA but that, contrary to the district court's decision, the DPLA did require Epic to pay attorney fees for its breach. On the federal claims, Judge S.R. Thomas also agreed that the district court erred in defining the relevant market and erred when it held that a non-negotiated contract of adhesion falls outside the scope of Sherman Act § 1. Unlike the majority, however, Judge S.R. Thomas would not conclude that these errors were harmless because they related to threshold analytical steps and affected Epic's substantial rights. He would remand for the district court to re-analyze the case using the proper threshold determination of the relevant market.

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OPINION

M. SMITH, Circuit Judge:

Epic Games, Inc. sued Apple, Inc. pursuant to the Sherman Act, 15 U.S.C. §§ 1–2, and California’s Unfair Competition Law (UCL), Cal. Bus. & Prof. Code § 17200 *et seq.* Epic contends that Apple acted unlawfully by restricting app distribution on iOS devices to Apple’s App Store, requiring in-app purchases on iOS devices to use Apple’s in-app payment processor, and limiting the ability of app developers to communicate the availability of alternative payment options to iOS device users. Apple counter-sued for breach of contract and indemnification for its attorney fees arising from this litigation.

After a sixteen-day bench trial involving dozens of witnesses and nine hundred exhibits, the district court rejected Epic’s Sherman Act claims challenging the first and second of the above restrictions—principally on the factual grounds that Epic failed to propose viable less restrictive alternatives to Apple’s restrictions. The court then concluded that the third restriction is unfair pursuant to the UCL and enjoined Apple from enforcing it against any developer. Finally, it held that Epic breached a contract with Apple but was not obligated to pay Apple’s attorney fees. Epic appeals the district court’s Sherman Act and breach of contract rulings; Apple cross-appeals the district court’s UCL and attorney fees rulings. We affirm the district court, except for its ruling respecting attorney fees, where we reverse and remand for further proceedings.

FACTUAL AND PROCEDURAL HISTORY

I. The Parties

Apple is a multi-trillion-dollar technology company that, of particular relevance here, sells desktop and laptop computers (Macs), smartphones (iPhones), and tablets (iPads). In 2007, Apple entered, and revolutionized, the smartphone market with the iPhone—offering consumers, through a then-novel multi-touch interface, access to email, the internet, and several preinstalled “native” apps that Apple had developed itself. Shortly after the iPhone’s debut, Apple decided to move on from its native-apps-only approach and open the iPhone’s (and later, the iPad’s) operating system (iOS) to third-party apps.¹

This approach created a “symbiotic” relationship: Apple provides app developers with a substantial consumer base, and Apple benefits from increased consumer appeal given the ever-expanding pool of iOS apps. Apple now has about a 15% market share in the global smartphone market with over 1 billion iPhone users, and there are over 30 million iOS app developers. Considering only video game apps, the number of iOS games has grown from 131 in the early days of the iPhone to over 300,000 by the time this case was brought to trial. These gaming apps generate an estimated \$100 billion in annual revenue.

Despite this general symbiosis, there is periodic friction between Apple and app developers. That is because Apple, when it opened the iPhone to third-party developers, did not

¹ The iPad has its own operating system (iPadOS) that is derived from iOS. For convenience, we use “iOS” to refer to both the iPhone and iPad’s operating systems and collectively refer to iPhones and iPads as “iOS devices.”

create an entirely open ecosystem in which developers and users could transact freely without any mediation. Instead, Apple created a “walled garden” in which Apple plays a significant curating role.² Developers can distribute their apps to iOS devices only through Apple’s App Store and after Apple has reviewed an app to ensure that it meets certain security, privacy, content, and reliability requirements. Developers are also required to use Apple’s in-app payment processor (IAP) for any purchases that occur within their apps. Subject to some exceptions, Apple collects a 30% commission on initial app purchases (downloading an app from the App Store) and subsequent in-app purchases (purchasing add-on content within an app).

Epic is a multi-billion-dollar video game company with three primary lines of business, each of which figures into various aspects of the parties’ appeals. First, Epic is a video game developer—best known for the immensely popular *Fortnite*, which has over 400 million users worldwide across gaming consoles, computers, smartphones, and tablets. Epic monetizes *Fortnite* using a “freemium” model: The game is free to download, but a user can purchase certain content within the game, ranging from game modes to cosmetic upgrades for the user’s character. *Fortnite* is also notable as one of the first major video games to feature “cross-play,” “cross-progression,” and “cross-wallet.” Cross-play permits users on different platforms to play with one another. Smartphone users, for example, can play against friends on gaming consoles. Cross-progression allows users to retain their in-game progress across every device they own. Users

² Many game consoles—including the Microsoft Xbox, Nintendo Switch, and Sony PlayStation—provide ecosystems that can similarly be labeled “walled gardens.”

can, for example, play *Fortnite* in the morning on their smartphones and then pick up with their progress saved on their gaming consoles in the evening. Cross-wallet allows users to spend *Fortnite*'s in-game currency on one device even if they purchased it on another. This cross-functionality gives the estimated 32 to 52% of *Fortnite* users who own multiple gaming devices flexibility regarding where and how they play as well as on which devices they make in-game purchases.

Second, Epic is the parent company of a gaming-software developer. Epic International (a Swiss subsidiary) licenses *Unreal Engine* to game developers. *Unreal Engine* offers developers a suite of tools to create three-dimensional content; in return, Epic International receives 5% of a licensee's gross revenue from a product developed using *Unreal Engine* after that product generates \$1,000,000 in revenue. Although *Unreal Engine* is not on Apple's App Store, Epic International does offer several complementary apps there. *Unreal Remote* and *Live Link Face*, for example, allow users to capture live-action footage and then view it on *Unreal Engine*. Thus, Epic—through its subsidiary—continues to be affected by the policies that govern the App Store.

Third, Epic is a video game publisher and distributor. It offers the Epic Games Store as a game-transaction platform on PC computers and Macs and seeks to do the same for iOS devices. As a distributor, Epic makes a game available for download on the Epic Games Store and covers the direct costs of distribution; in exchange, Epic receives a 12% commission—a below-cost commission that sacrifices short-term profitability to build market share. The Epic Games Store has over 180 million registered accounts and over 50 million monthly active users. Through the Epic

Games Store, Epic is a would-be competitor of Apple for iOS game distribution and a direct competitor when it comes to games that feature cross-platform functionality like *Fortnite*.

II. The Developer Program Licensing Agreement

Apple creates its walled-garden ecosystem through both technical and contractual means. To distribute apps to iOS users, a developer must pay a flat \$99 fee and execute the Developer Program Licensing Agreement (DPLA). The DPLA is a contract of adhesion; out of the millions of registered iOS developers, only a handful have convinced Apple to modify its terms.

By agreeing to the DPLA, developers unlock access to Apple's vast consumer base—the over 1 billion users that make up about 15% of global smartphone users. They also receive tools that facilitate the development of iOS apps, including advanced application-programming interfaces, beta software, and an app-testing software. In essence, Apple uses the DPLA to license its IP to developers in exchange for a \$99 fee and an ongoing 30% commission on developers' iOS revenue.

The DPLA contains the three provisions that give rise to this lawsuit and were mentioned in the introduction. First, developers can distribute iOS apps only through the App Store (the distribution restriction). Epic Games, for example, cannot make the Epic Games Store available as an iOS app and then offer *Fortnite* for download through that app. Second, developers must use Apple's IAP to process in-app payments (the IAP requirement). Both initial downloads (where an app is not free) and in-app payments are subject to a 30% commission. Third, developers cannot communicate out-of-app payment methods through certain

mechanisms such as in-app links (the anti-steering provision). “Apps and their metadata may not include buttons, external links, or other calls to action that direct customers to purchasing mechanisms other than [IAP].” Nor can developers use “points of contact obtained from account registration within the app (like email or text) [to] encourage users to use a purchasing method other than [IAP].”

III. Apple and Epic’s Business Relationship

In 2010, Epic agreed to the DPLA. Over the next few years, Epic released three games for iOS, each of which Apple promoted at major events. In 2015, however, Epic began objecting to Apple’s walled-garden approach. Epic’s CEO Tim Sweeney argued, in an email seeking a meeting with Apple senior leadership, that it “doesn’t seem tenable for Apple to be the sole arbiter of expression and commerce” for iOS users, and explained that Epic runs a competing game-transaction platform that it “would love to eventually” offer on iOS. Nothing came of this email, and Epic continued to offer games on iOS while complying with the DPLA’s terms. In 2018, Epic released *Fortnite* on iOS—amassing about 115 million iOS users.

In 2020, Epic renewed the DPLA with Apple but sought a “side letter” modifying its terms. In particular, Epic desired to offer iOS users alternatives for distribution (the Epic Games Store) and in-app payment processing (Epic Direct Pay). Apple flatly rejected this offer, stating: “We understand this might be in Epic’s financial interests, but Apple strongly believes these rules are vital to the health of the Apple platform and carry enormous benefits for both consumers and developers. The guiding principle of the App Store is to prove a safe, secure, and reliable experience for users”

Once Apple rejected its offer, Epic kicked into full gear an initiative called “Project Liberty”: a two-part plan it had been developing since 2019 to undermine Apple’s control over software distribution and payment processing on iOS devices, as well as Google’s influence over Android devices. Project Liberty coupled a media campaign against Apple and Google with a software update expressly designed to circumvent Apple’s IAP restriction. On the media-campaign side, Epic lowered the price of *Fortnite*’s in-app purchases on all platforms but Apple’s App Store and Google’s Google Play Store; it formed an advocacy group (the Coalition for App Fairness), tasking it with “generating continuous media . . . pressure” on Apple and Google; and it ran advertisements portraying Apple and Google as the “bad guys” standing in the way of Epic’s attempt to pass cost-savings onto consumers.

On the IAP-circumvention side, Epic submitted a *Fortnite* software update (which Epic calls a “hotfix”) to Apple for review containing undisclosed code that, once activated, would enable *Fortnite* users to make in-game purchases without using Apple’s IAP. Unaware of this undisclosed code, Apple approved the update and it was made available to iOS users. Shortly thereafter Epic activated the undisclosed code and opened its IAP alternative to users. That same day, Apple became aware of the hotfix and removed *Fortnite* from the App Store. Apple informed Epic that it had two weeks to cure its breaches of the DPLA, or otherwise Apple would terminate Epic Games’ developer account.

IV. Procedural History

A. Pre-Trial Proceedings

Only three days after Apple removed *Fortnite* from the App Store, Epic filed a 62-page complaint against Apple in the Northern District of California seeking a temporary restraining order (TRO) reinstating *Fortnite* and enjoining Apple from terminating Epic's iOS developer account.³ The district court granted Epic's prayer in part and denied in part—leaving *Fortnite* off the App Store but temporarily preventing Apple from taking any adverse action regarding Epic's developer account. After the TRO expired, Apple terminated Epic's developer account. The court then issued a preliminary injunction preventing Apple from terminating the developer accounts of Epic's subsidiaries (including Epic International) and scheduled a bench trial on an expedited basis, with trial beginning just about eight months after Epic filed its complaint.

Epic brought claims for permanent injunctive relief pursuant to the Sherman Act and the UCL. Epic's requested relief, though somewhat vague, would essentially convert iOS into an entirely open platform: Developers would be free to distribute apps through any means they wish and use any in-app payment processor they choose. Taken together, this relief would create a pathway for developers to bypass Apple's 30% commission altogether, though Epic made open-ended assurances at trial that its relief would allow

³ The same day, Epic filed a 60-page complaint against Google, challenging its policies regarding the Google Play Store on Android devices—*i.e.*, smartphones and tablets that use the main operating-system alternative to iOS. *See* Complaint for Injunctive Relief, *Epic Games, Inc. v. Google LLC*, No. 3:20-cv-05671 (filed Aug. 13, 2020 N.D. Cal.).

Apple to collect a commission—just not in the manner that the DPLA establishes. Apple brought counter-claims for breach of contract and indemnification for its attorney fees related to this litigation.⁴

B. The District Court’s Rule 52 Order

After a sixteen-day bench trial, the district court issued a 180-page order pursuant to Federal Rule 52 detailing its findings of facts and conclusions of law.

1. Market Definition

The district court began its analysis by defining the relevant market for Epic’s Sherman Act claims. Epic proposed two *single-brand* markets: the *aftermarkets* for iOS app distribution and iOS in-app payment solutions, derived from a *foremarket* for smartphone operating systems. Apple, by contrast, proposed the market for *all* video game transactions, whether those transactions occur on a smartphone, a gaming console, or elsewhere. The district court ultimately found a market between those the parties proposed: mobile-game transactions—*i.e.*, game transactions on iOS and Android smartphones and tablets. Compared to Epic’s proposed aftermarkets, the district court’s relevant market was both broader and narrower—broader in that it declined to focus exclusively on iOS, but narrower in that it considered only video game transactions instead of all app transactions. Compared to Apple’s proposed market, the district court’s relevant market was

⁴ We omit any discussion of the following claims that the parties asserted below but do not address before our court: (1) Epic’s Cartwright Act claims; (2) Apple’s counter-claim for breach of the implied covenant of good faith and fair dealing; and (3) Apple’s counter-claim for unjust enrichment.

narrower—excluding game-console and streaming-service transactions.

The district court rejected Epic’s proposed single-brand markets on several grounds. It held that there was no foremarket for smartphone and tablet operating systems because Apple does not license or sell iOS. More critically, it analyzed Epic’s aftermarket in the alternative and found a failure of proof. Epic presented no evidence regarding whether consumers unknowingly lock themselves into Apple’s app-distribution and IAP restrictions when they buy iOS devices. A natural experiment facilitated by Apple’s removal of *Fortnite* from the App Store showed that iOS *Fortnite* users switched about 87% of their pre-removal iOS spending to other platforms—suggesting substitutability between the App Store and other game-transaction platforms. The district court also rejected Apple’s relevant market-definition expert as “weakly probative” and “more interested in a result [that] would assist his client than in providing any objective ground to assist the court in its decision-making” (cleaned up). Among other flaws, the expert’s analysis contradicted his own academic articles on how to analyze two-sided markets; used consumer-survey wording that departed from well-established market-definition principles; failed to account for holiday-season idiosyncrasies; and excluded minors (who are an important segment of mobile-game purchasers). The district court then turned to Apple’s proposed relevant market definition and refined it from *all* game transactions to *mobile* game transactions by relying extensively on the “practical indicia” of markets enumerated in the Supreme Court’s decision in *Brown Shoe v. United States*, 370 U.S. 294, 325 (1962).

2. Sherman Act Section 1: Restraint of Trade

The district court then rejected Epic’s Sherman Act Section 1 restraint-of-trade-claim. As a threshold matter, the court held that the DPLA was not a “contract[.]” that fell within the scope of Section 1 because it was a “contract of adhesion,” not a truly bargained-for agreement. It then, in the alternative, applied the Rule of Reason—the antitrust liability standard applicable to most cases.

At step one of the Rule of Reason, the district court found that Epic proved substantial anticompetitive harms through both direct and indirect evidence. Apple has for years charged a supracompetitive commission on App Store transactions that it set “without regard” for competition. That commission, in turn, creates an “extraordinary high” operating margin of 75% for App Store transactions. Moreover, Apple has market power in the mobile-games-transactions market, evidenced by its 52 to 57% market share and barriers to entry in the form of network effects. Apple uses that market power to prevent would-be competitors like Epic from offering app-distribution and payment-processing alternatives, reducing innovation and Apple’s own investment in the App Store in the process.

At step two of the Rule of Reason, the district court found that Apple established non-pretextual, legally cognizable procompetitive rationales for its app-distribution and IAP restrictions. The district court credited Apple’s rationale that its restrictions seek to enhance consumer appeal and differentiate Apple products by improving iOS security and privacy. It also *partially* accepted Apple’s rationale that the restrictions are a means of being compensated for third-party developers’ use of its intellectual property—crediting it generally but rejecting it

“with respect to the [App Store’s] 30% commission rate specifically.”

At step three of the Rule of Reason, the district court rejected Epic’s proposed less restrictive alternatives (LRAs) as severely underdeveloped. As a purported LRA to Apple’s app-distribution restriction, Epic primarily advanced a “notarization model” based on Apple’s approach to security on the Mac operating system (macOS). On macOS, Apple does not mandate an exclusive distribution channel, as it does on iOS; nor does Apple condition distribution of an app on first submitting that app to Apple for review. But when a developer chooses to forego submitting an app to Apple, that app—regardless of how it is distributed to Mac users—will carry a warning that Apple has not scanned it for malware. Critically, the macOS notarization model does not contain a layer of human review as iOS app review does. Given this discrepancy, the district court found that such a model would not be as effective as Apple’s current model in achieving Apple’s security and privacy goals. It briefly considered whether Apple could close the gap by imposing a security and privacy floor on third-party app stores, but then noted that it is unclear whether doing so would comport with Epic’s requested injunctive relief. In any event, the court found that Epic failed to prove the notarization model would accomplish Apple’s IP-compensation rationale because Epic’s requested relief “leave[s] unclear whether Apple can collect licensing fee royalties and, if so, how it would do so.”

As a purported LRA for the IAP requirement, Epic proposed opening in-app payment processing to competing vendors. The district court again rejected the proposed LRA as not being as effective as Apple’s current model in accomplishing its security and privacy goals. More

fundamentally, there was little in the record showing how Epic envisioned Apple accomplishing its IP-compensation goal through the proposed LRA. Because the court upheld the app-distribution restriction, Apple would still be entitled to its 30% commission on in-app purchases within apps downloaded from the App Store. On its own initiative, the district court floated the idea of Apple permitting multiple in-app payment processors while reserving a right to audit developers to ensure compliance with the 30% commission. But it quickly rejected that as an alternative because it “would seemingly impose both increased monetary and time costs.”

3. Sherman Act Section 1: Tying

The district court rejected Epic’s Sherman Act claim that Apple ties in-app payment processing (IAP) to app distribution (the App Store). It did so on the grounds that neither of the purported separate products were actually separate. As a result, it did not decide which liability standard—*per se* condemnation or the Rule of Reason—would govern the arrangement’s lawfulness.

4. Sherman Act Section 2: Monopoly Maintenance

The district court also rejected Epic’s claim that Apple monopolized the market for mobile-games transactions. Though Apple has significant market power, the court found it to be insufficiently durable given the rapidly changing nature of the market. In any event, the court reiterated its Rule of Reason analysis to hold that Apple did not maintain its power through anticompetitive conduct.

5. Unfair Competition Law

The court then applied the UCL to Apple's anti-steering provision. The court found that Epic is sufficiently injured to seek injunctive relief because Epic is a competing games distributor and would earn additional revenue but for Apple's restrictions. On the merits, the court applied the competitor-suit "tethering test" and consumer-suit "balancing test" and found the anti-steering provision to be "unfair" pursuant to both. The court concluded that Epic satisfied all the requirements for injunctive relief and the nature of Epic's injury warranted an injunction preventing Apple from enforcing the provision against any developer.

6. Breach of Contract

Turning to Apple's counter-claims, the district found Epic liable for breach of the DPLA. Epic had stipulated that the Project Liberty hotfix breached the DPLA's IAP requirement, so the only dispute was whether Epic could prove that the contract was illegal, void as against public policy, or unconscionable. The district court rejected each of these affirmative defenses.

7. Attorney Fees

Finally, the district court rejected Apple's indemnification claim, which asserted Epic was obligated to pay its attorney fees incurred in this litigation. The DPLA provides that Epic "agree[s] to indemnify and hold harmless [Apple] . . . from any and all claims, losses, liabilities, damages, taxes, expenses and costs, including without limitation, attorneys' fees and court costs . . . , incurred by [Apple] and arising from or related to" Epic's "breach of any certification, covenant, obligation, representation or warranty in [the DPLA]." Applying a principle of California

contract law requiring a clear statement before finding an indemnification clause to apply to disputes between the parties themselves, the district court construed the provision as applicable only to third-party claims.

C. Post-Trial Proceedings

Following the handing down of the district court's order, the parties timely appealed and cross-appealed. Apple also moved to stay the UCL injunction pending appeal—arguing that Epic lacked standing in light of its developer account termination and that injunctive relief was inappropriate. The district court denied the motion and a panel of our court granted it in part.

JURISDICTION AND STANDARD OF REVIEW

We have jurisdiction pursuant to 28 U.S.C. § 1291. In an appeal following a bench trial, we review the district court's factual findings for clear error and its conclusion of law *de novo*. *Oakland Bulk & Oversized Terminal, LLC v. City of Oakland*, 960 F.3d 603, 612 (9th Cir. 2020). We specify the applicable standards of review throughout our opinion.

ANALYSIS

On appeal, Epic challenges the district court's Sherman Act and breach of contract rulings. We affirm the district court's denial of antitrust liability and its corresponding rejection of Epic's illegality defense to Apple's breach of contract counter-claim. Though the district court erred as a matter of law on several issues, those errors were harmless. Independent of the district court's errors, Epic failed to establish—as a factual matter—its proposed market definition and the existence of any substantially less restrictive alternative means for Apple to accomplish the

procompetitive justifications supporting iOS's walled-garden ecosystem.

On cross-appeal, Apple challenges the district court's UCL and attorney fees rulings. We affirm in part and reverse and remand in part. The district court did not clearly err in finding that Epic was injured, err as a matter of law when applying California's flexible liability standards, or abuse its discretion when fashioning equitable relief. The district court did, however, err when it held that Apple was not entitled to attorney fees pursuant to the DPLA's indemnification provision.

I. Market Definition

We begin with Epic's appeal. Epic argues that the district court incorrectly defined the relevant market for its antitrust claims to be mobile-game transactions instead of Epic's proposed aftermarkets of iOS app distribution and iOS in-app payment solutions. Epic contends both that the district court erred as a matter of law by requiring several threshold showings before finding a single-brand market and that, once those errors are corrected, the record compels the conclusion that Epic established its single-brand markets. We agree that the district court erred in certain aspects of its market-definition analysis but conclude that those errors were harmless. Despite some threshold errors, the district court proceeded to analyze Epic's evidence pursuant to the proper legal framework and did not clearly err in rejecting Epic's proposed relevant markets. In particular, Epic failed to produce any evidence showing—as our precedent requires—that consumers are generally unaware of Apple's app-distribution and IAP restrictions when they purchase iOS devices.

A. General Market-Definition Principles

The Sherman Act contains two principal prohibitions. Section 1 targets *concerted* action, rendering unlawful “every contract, combination . . . , or conspiracy, in restraint of trade.” 15 U.S.C. § 1. Section 2 targets *independent* action, making it unlawful to “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.” *Id.* § 2; *see Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 767 (1984) (“The Sherman Act contains a ‘basic distinction between concerted and independent action.’” (quoting *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 761 (1984))).⁵

There are two general categories of liability standards for Sherman Act claims. *Flaa v. Hollywood Foreign Press Ass’n*, 55 F.4th 680, 685 (9th Cir. 2022). “A small group of restraints are unreasonable *per se* because they ‘always or almost always tend to restrict competition and decrease output.’” *Id.* (quoting *Ohio v. Am. Express Co.* (“*Amex*”), 138 S. Ct. 2274, 2283 (2018)). When a *per se* prohibition applies, we deem a restraint unlawful without any “elaborate study of the industry” in which it occurs. *Id.* (quoting *Texaco Inc. v. Dagher*, 547 U.S. 1, 5 (2006)). Most

⁵ This concerted/independent distinction is somewhat imprecise because Section 2 also encompasses certain concerted action—*i.e.*, “conspiring with any other person or persons” to monopolize a market. *See Dreamstime.com, LLC v. Google LLC*, 54 F.4th 1130, 1137 (9th Cir. 2022) (“Section 2 of the Sherman Act prohibits concerted and independent action that ‘monopolize[s] or attempt[s] to monopolize.’”). However, because the distinction is a useful shorthand that is accurate in the mine-run of cases and used throughout the Supreme Court’s and our court’s decisions, we adopt it here as well.

restraints, however, are subject to the Rule of Reason: a multi-step, burden-shifting framework that “requires courts to conduct a fact-specific assessment” to determine a restraint’s “actual effect” on competition. *Amex*, 138 S. Ct. at 2284 (quoting *Copperweld*, 467 U.S. at 768).

The Rule of Reason applies “essentially the same” regardless of “whether the alleged antitrust violation involves concerted anticompetitive conduct under § 1 or independent anticompetitive conduct under § 2.” *FTC v. Qualcomm Inc.*, 969 F.3d 974, 991 (9th Cir. 2020); *see also Flaa*, 55 F.4th at 685 (“Because the legal tests for sections 1 and 2 of the Sherman Act similar, we can ‘review claims under each section simultaneously.’” (quoting *Qualcomm*, 969 F.3d at 991)).

In most, though not all, Rule of Reason cases, a “threshold step” is defining the relevant market in which the alleged restraint occurs. *Qualcomm*, 969 F.3d at 992; *see also Amex*, 138 S. Ct. at 2285 (“[C]ourts usually cannot properly apply the rule of reason without an accurate definition of the relevant market.”).⁶ Because Epic asserts

⁶ Despite dicta in *Qualcomm* suggesting the contrary, we have never held that a precise market definition is an absolute requirement “in any antitrust case.” *Qualcomm*, 969 F.3d at 992. We apply *per se* rules (e.g., the prohibition against price-fixing) without inquiring into market power. *See, e.g., Dagher*, 547 U.S. at 5 (*per se* rules require “no elaborate study of the industry”). Moreover, as the Supreme Court noted in *Amex*, it has previously applied the Rule of Reason—in its so-called “quick look” cases—without first defining the exact contours of the relevant market. 138 S. Ct. at 2285 n.7 (citing *FTC v. Ind. Fed’n of Dentists*, 476 U.S. 447 (1986), and *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643 (1980)); *see also* 1 Julian Von Kalinowski, Peter Sullivan & Maureen, *Antitrust Laws and Trade Regulation* § 12.01[3] (2022)

Rule of Reason claims and presented both direct and indirect evidence of Apple’s market power, we begin our analysis with market definition.

The relevant market for antitrust purposes is “the area of effective competition”—*i.e.*, “the arena within which significant substitution in consumption or production occurs.” *Amex*, 138 S. Ct. at 2285 (quoting Phillip E. Areeda & Herbert Hovenkamp, *Fundamentals of Antitrust Law* § 5.02 (4th ed. 2017)); *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.”). A relevant market contains both a geographic component and a product or service component. *Hicks v. PGA Tour, Inc.*, 897 F.3d 1109, 1120 (9th Cir. 2018).

A market comprises “any grouping of sales whose sellers, if unified by a monopolist or a hypothetical cartel” could profitably raise prices above a competitive level. *Rebel Oil Co., Inc. v. Atl. Richfield Co.*, 51 F.3d 1421, 1434 (9th Cir. 1995). If the “sales of other producers [could] substantially constrain the price-increasing ability of the monopolist or hypothetical cartel, these other producers must be included in the market.” *Id.* To conduct this inquiry, courts must determine which products have a “‘reasonable interchangeability of use’ or sufficient ‘cross-elasticity of demand’” with each other. *Hicks*, 897 F.3d at 1120 (quoting *Brown Shoe*, 370 U.S. at 325); *see also United States v. E. I.*

(“Usually, the ‘quick look’ does not require a detailed analysis of the relevant market and market power.”); Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 1911a (4th ed. 2022) (“[D]ifferent applications of the rule of reason require different types and levels of inquiry.”).

du Pont de Nemours & Co., 351 U.S. 377, 400 (1956) (emphasizing “the responsiveness of the sales of one product to price changes of [another]”).

Often, this inquiry involves empirical evidence in the form of a “SSNIP” analysis. That analysis echoes *Rebel Oil* and uses past consumer-demand data and/or consumer-survey responses to determine whether a hypothetical monopolist could profitably impose a Small, Significant, Non-transitory Increase in Price above a competitive level. As we have previously summarized this analysis:

[A]n economist proposes a narrow geographic and product market definition and then iteratively expands that definition until a hypothetical monopolist in the proposed market would be able to profitably make a small but significant non-transitory increase in price (“SSNIP”). At each step, if consumers would respond to a SSNIP by making purchases outside the proposed market definition, thereby rendering the SSNIP unprofitable, then the proposed market definition is too narrow. At the next step, the economist expands the proposed geographic or product market definition to include the substituted products or area. This process is repeated until a SSNIP in the proposed market is predicted to be profitable for the hypothetical monopolist.

Optronic Techs., Inc. v. Ningbo Sunny Elec. Co., 20 F.4th 466, 482 n.1 (9th Cir. 2021). SSNIP analyses are relevant to

both Clayton Act merger challenges and Sherman Act restraint-of-trade or monopolization cases. *See id.* (Sherman Act section 2 monopolization claim); *Saint Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke's Health Sys., Ltd.*, 778 F.3d 775, 783 (9th Cir. 2015) (Clayton Act section 7 merger challenge).⁷

Courts also consider several “practical indicia” that the Supreme Court highlighted in *Brown Shoe*: “[1] industry or public recognition of the [market] as a separate economic entity, [2] the product’s peculiar characteristics and uses, [3] unique production facilities, [4] distinct customers, [5] distinct prices, [6] sensitivity to price changes, and [7] specialized vendors.” *Brown Shoe*, 370 U.S. at 325; *Olin Corp. v. FTC*, 986 F.2d 1295, 1299 (9th Cir. 1993) (invoking *Brown Shoe* indicia); *see also* Areeda & Hovenkamp, *Antitrust Law, supra*, ¶ 533 (describing these indicia as having “evidentiary usefulness” in determining cross-elasticity of demand).

B. Single-Brand Aftermarkets

“[I]n some instances one brand of a product can constitute a separate market.” *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 482 (1992); *see also Newcal Indus., Inc. v. Ikon Office Sol.*, 513 F.3d 1038, 1048 (9th Cir.

⁷ Thus, to the extent the district court held that a SSNIP analysis applies only to merger challenges, it erred. However, because Sherman Act cases may involve markets in which a defendant has substantial market power or monopoly power (and has *already* exercised that power to charge a supracompetitive price), a SSNIP analysis in such cases “must not be used uncritically, and alternative indicia of market power should be explored.” Areeda & Hovenkamp, *Antitrust Law, supra*, ¶ 539. Otherwise, a court may risk a false negative: *over*-defining a market and finding no market power where, in fact, it does exist.

2008) (“[T]he law permits an antitrust claimant to restrict the relevant market to a single brand of the product at issue[.]”). More specifically, the relevant market for antitrust purposes can be an *aftermarket*—where demand for a good is entirely dependent on the prior purchase of a durable good in a *foremarket*.

In *Kodak*, the Supreme Court considered the question of whether a lack of market power in the foremarket (photocopier machines, generally) categorically precludes a finding of market power in the aftermarket (replacement parts for and servicing of Kodak-brand photocopiers), which Kodak had allegedly achieved by contractually limiting customers to Kodak-provided parts and services. 504 U.S. at 455, 466. The Supreme Court rejected Kodak’s invitation to impose an across-the-board rule because it was not convinced that the rule—which “rest[ed] on a factual assumption about the cross-elasticity of demand” in aftermarkets—would always hold true. *Id.* at 470. The Supreme Court thus folded aftermarkets into the framework for assessing markets generally, evaluating cross-elasticity of demand to determine whether a hypothetical monopolist could profitably charge a supracompetitive price. *See id.* at 469 (“The extent to which one market prevents exploitation of another market depends on the extent to which consumers will change their consumption of one product to a price change in another, *i.e.*, the ‘cross-elasticity of demand.’” (quoting *Du Pont*, 351 U.S. at 400)).

Explaining its skepticism of the factual assumption underlying *Kodak*’s proposed categorical rule, the Court reasoned that “significant” (1) information costs and (2) switching costs “could create a less responsive connection between aftermarket prices and [foremarket] sales,” particularly where the percentage of “sophisticated

purchasers” able to accurately life-cycle price is low. *Id.* at 473, 475; *see also id.* 477 n.24 (a “crucial” element is that the aftermarket restrictions were not “generally known” by foremarket consumers). That is, these conditions might “lock-in” unknowing customers such that competition in the foremarket cannot “discipline [competition in] the aftermarkets,” meaning a hypothetical monopolist could price its aftermarket products at a supracompetitive level without a substantial number of customers substituting to other products. *Id.* at 486; *see also* Von Kalinowski *et al.*, *supra*, § 24.02[5] (*Kodak* single-brand aftermarket requires “high switching costs,” “high information costs,” and “substantial” ability to “exploit ‘ignorant’ consumers”). Whether a plaintiff has proven such a lock-in must be resolved “on a case-by-case basis, focusing on the ‘particular facts disclosed by the record.’” *Kodak*, 504 U.S. at 467 (quoting *Maple Flooring Mfrs. Ass’n v. United States*, 268 U.S. 563, 579 (1925)).

In *Newcal*, we considered how to square *Kodak* with our prior holding in *Forsyth* that contractual obligations are generally “not a cognizable source of market power.” *Newcal*, 513 F.3d at 1047 (citing *Forsyth v. Humana, Inc.*, 114 F.3d 1467 (9th Cir. 2017)). We reasoned that the “critical distinction” between *Kodak*, on the one hand, and *Forsyth*, on the other, is that “the *Kodak* customers did not knowingly enter a contract that gave *Kodak* the exclusive right to provide parts and services for the life of the equipment.” *Id.* at 1048. Put otherwise, the “simple purchase of a *Kodak*-brand equipment” was not “functionally equivalent to the signing of a contractual agreement” limiting aftermarket choices. *Id.*; *see also id.* at 1049 (“[T]he law permits an inquiry into whether a consumer’s selection of a particular brand in the competitive

market is the functional equivalent of a contractual commitment, giving that brand an agreed-upon right to monopolize its consumers in an aftermarket.”). Kodak thus differed markedly from *Forsyth*, which involved medical-insurance policyholders who entered into insurance contracts with Humana knowing that certain hospitals would carry higher deductibles and co-payments than others. *See id.* at 1048–49.

Our knowledge-based distinction in *Newcal* flowed directly from the Supreme Court’s emphasis in *Kodak* on a defendant’s ability to use not “generally known” aftermarket restrictions to exploit unsophisticated consumers. *Kodak*, 504 U.S. at 477 n.24. And, as in *Kodak*, we made sure to emphasize that the aftermarket inquiry does not end as soon as a plaintiff checks the *Kodak*-based boxes related to consumer knowledge, information costs, and switching costs. “Even when a submarket is an *Eastman Kodak* market, though, it must bear the ‘practical indicia’ of an independent economic entity in order to qualify as a cognizable submarket under *Brown Shoe*.” *Newcal*, 513 F.3d at 1051.

In sum, to establish a single-brand aftermarket, a plaintiff must show: (1) the challenged aftermarket restrictions are “not generally known” when consumers make their foremarket purchase; (2) “significant” information costs prevent accurate life-cycle pricing; (3) “significant” monetary or non-monetary switching costs exist; and (4) general market-definition principles regarding cross-

elasticity of demand do not undermine the proposed single-brand market.⁸

C. Standard of Review

“We review relevant market definitions as fact findings reversible only if the evidence compels a conclusion contrary to the [factfinder’s] verdict.” *Optronic*, 20 F.4th at 482; *see also Saint Alphonsus*, 778 F.3d at 784 (finding “no clear error” in the district court’s market definition). Where a plaintiff asserts a *Kodak*-style single-brand aftermarket, it bears the burden of “rebut[ting] the economic presumption that . . . consumers make a knowing choice to restrict their aftermarket options when they decide in the initial (competitive) market to enter a[] . . . contract.” *Newcal*, 513 F.3d at 1050.

D. Epic’s Legal Challenges

With these principles in mind, we now turn to Epic’s arguments that the district court committed legal error when it (1) held a market can never be defined around a product that the defendant does not license or sell, (2) required lack of consumer awareness to establish a *Kodak*-style market, (3) purportedly required a change in policy to establish a *Kodak*-style market, and (4) required Epic to establish the “magnitude” of switching costs. We agree with Epic on its first argument and, to the extent the district court did impose

⁸ Epic and the district court interpret *Newcal* to impose a different four-part test. In doing so, they mistakenly rely on a portion of *Newcal* where we determined that the *specific* complaint before us plausibly alleged lack of consumer awareness such that it fell on the *Kodak* side of the *Kodak/Forsyth* divide. *See Newcal*, 513 F.3d at 1049 (“In determining whether this case is more like . . . *Forsyth* or more like *Eastman Kodak*, there are four relevant aspects of the complaint.”).

a change-in-policy requirement, Epic’s third argument. But we reject Epic’s second and fourth arguments as squarely foreclosed by *Kodak* and *Newcal*.⁹

1. Unlicensed or Unsold Product Markets

First, the district court erred by imposing a categorical rule that an antitrust market can *never* relate to a product that is not licensed or sold—here smartphone operating systems. To begin, this categorical rule flouts the Supreme Court’s instruction that courts should conduct market-definition inquiries based not on “formalistic distinctions” but on “actual market realities.” *Amex*, 138 S. Ct. at 2285 (quoting *Kodak*, 504 U.S. at 466–67).

Moreover, the district court’s rule is difficult to square with decisions defining a product market to include vertically integrated firms that self-provision the relevant product but make no outside sales. For example, the D.C. Circuit in *Microsoft* noted that “Apple had a not insignificant share of worldwide sales of operating systems,” even though Apple did not sell or license macOS but instead only included it in its own Mac computers. *United States v.*

⁹ We also reject Apple’s suggestion that Epic’s antitrust claims should have automatically failed as soon as the district court adopted a market of mobile-game transactions, instead of Epic’s proposed aftermarket. None of the authorities Apple cites comes anywhere close to supporting its radical argument that, where parties offer dueling market definitions, the case immediately ends if the district court finds the record supports the defendant’s proposed market (or a third in-between market, as was the case here) rather than the plaintiff’s market. Instead, our precedent squarely forecloses such an argument. *See Rebel Oil*, 51 F.3d at 1421 (rejecting the plaintiff’s proposed market but stating that such a rejection was “not fatal” to its claim, and remanding to determine whether the defendant possessed market power in the defendant-proposed market that the court adopted).

Microsoft Corp., 253 F.3d 34, 73 (D.C. Cir. 2001). While the *Microsoft* court ultimately excluded macOS from its market, it did so on fact-bound substitutability grounds, not the categorical grounds that the district court used here. *Id.* at 52.

Finally, the district court’s rule overlooks that there may be markets where companies offer a product to one side of the market for free but profit in other ways, such as by collecting consumer data or generating ad revenue. *See, e.g., FTC v. Facebook, Inc.*, 581 F. Supp. 3d 34, 44–45, 55 (D.D.C. 2022) (finding FTC plausibly alleged a market of personal social networks even though “all [are] provided free of charge” to users). It puts form over substance to say that such products cannot form a market because they are not directly licensed or sold.

2. Lack of Consumer Knowledge

Second, the district court did not err when it required Epic to produce evidence regarding a lack of consumer knowledge of Apple’s app-distribution and IAP restrictions. Such a requirement comes directly from *Kodak* and *Newcal*. The former stated that it is “crucial” that aftermarket restrictions are not “generally known.” *Kodak*, 504 U.S. at 477 n.24. The latter placed the burden on a plaintiff to “rebut the economic presumption that . . . consumers make a knowing choice to restrict their aftermarket options” when they make a foremarket purchase. *Newcal*, 513 F.3d at 1050.¹⁰

¹⁰ As Epic correctly notes in its opening brief, *Kodak* does not impose a requirement that a plaintiff show “complete ignorance” of a defendant’s aftermarket restrictions; it need only show that the restrictions are not

3. Change in Policy

Third, Epic argues that the district court erred by holding that a plaintiff can establish a *Kodak*-style aftermarket only if it shows that the defendant adopted its aftermarket restrictions *after* some portion of consumers purchased their foremarket durable goods. Had the district court actually imposed such an absolute change-in-policy requirement, it would have erred. As explained above, *Kodak* and *Newcal* require a showing of a lack of consumer awareness regarding aftermarket restrictions. *Newcal*, 513 F.3d at 1050. A change in policy is of course *one* way of doing so; a consumer cannot knowingly agree to a restriction that did not exist at the time of the foremarket transaction. But it is not the *exclusive* means of doing so. Indeed, *Kodak* itself contemplated that some sophisticated, high-volume consumers would be able to accurately life-cycle price goods in the foremarket. *Kodak*, 504 U.S. at 476. Such life-cycle pricing would be impossible if those consumers were unaware that they would be restricted to certain vendors in the aftermarket.

But contrary to Epic’s assertion, we do not read the district court’s order as running counter to these principles. The district court explained that “other circuits have aligned with the contours of *Newcal* . . . regarding knowledge and/or post-purchase policy changes” and that the “breadth of antitrust law” requires that a restriction “must not have been sufficiently disclosed to consumers.” It then quoted the operative language from *Newcal* that focuses on lack of

“generally known.” *Kodak*, 504 U.S. at 477 n.24. We need not decide what amounts to “general[]” unawareness because Epic presented *no* evidence of consumer unawareness. *See infra* section I.E.

knowledge, not the necessity of a policy change. Finally, it examined the record to find neither a change in policy nor proof that iOS device purchasers are unaware of the distribution and IAP restrictions. *See infra* section I.E. The district court appropriately treated a change in policy as one, but not the exclusive, way of establishing *Kodak* and *Newcal*'s general-lack-of-knowledge requirement.

4. Significant Switching Costs

Fourth, the district court did not err when it required Epic to produce evidence about the *magnitude* of switching costs. *Kodak* explicitly requires that switching costs—whether monetary or non-monetary—be “significant.” *Kodak*, 504 U.S. at 473. This showing need not be extensive; among other things, a plaintiff can point to the “heavy initial outlay” of the foremarket good and brand-specific purchases. *Id.* at 477. By requiring such a showing, the district court was simply fulfilling its *Kodak* obligation of ensuring that switching costs are “significant.”¹¹

E. Epic's Clear-Error Challenge

We now turn to the main thrust of Epic's market-definition argument: that it is entitled, as a factual matter, to a finding in favor of its proposed aftermarkets. Though Epic attempts to avoid the clear-error label, its argument requires it to carry the heavy burden on appeal of showing that the district court clearly erred in finding that (1) Epic failed to show a lack of general consumer awareness regarding Apple's restrictions on iOS distribution and payment processing, (2) Epic failed to show significant switching

¹¹ As explained in the following section, we express no view on whether the district court erred when applying this significance requirement to Epic's proffered evidence regarding switching costs.

costs, and (3) the empirical evidence in the record and the *Brown Shoe* practical indicia support a market of mobile-game transactions, not Epic’s iOS-specific aftermarkets.¹²

Beginning with the first prong, Epic had the burden of showing a lack of consumer awareness—whether through a change in policy or otherwise. Epic identified a purported change in policy, contrasting the App Store’s now-immense profitability with a pre-launch statement from Steve Jobs that Apple did not “intend to make money off the App Store[’s]” 30% commission. The district court reasonably found this statement to simply reflect Jobs’s “initial expectation” about the App Store’s performance, not an announcement of Apple policy. Especially in light of the district court’s finding that Apple has “maintained the same general rules” for distribution and payment processing since the App Store’s early days, it did not clearly err in concluding that Epic failed to prove a lack of consumer awareness through a change of policy.

Nor did the district court clearly err in finding that Epic otherwise failed to establish a lack of awareness. Indeed, the district court squarely found: “[T]here is *no evidence* in the record demonstrating that consumers are unaware that the App Store is the sole means of digital distribution on the iOS platform” (emphasis added). And on appeal, Epic fails to cite any evidence that would undermine the district court’s characterization of the record.

Because of this failure of proof on the first prong of Epic’s *Kodak/Newcal* showing, we need not reach—and do

¹² The district court did not rule against Epic on the remaining prong of the *Kodak/Newcal* test: the presence of significant information costs that make accurate life-cycle pricing difficult.

not express any view regarding—the other factual grounds on which the district court rejected Epic’s single-brand markets: (1) that Epic did not show significant switching costs, and (2) that empirical evidence and the *Brown Shoe* factors rebut Epic’s proposed aftermarkets.

Moreover, the district court’s finding on *Kodak/Newcal*’s consumer-unawareness requirement renders harmless its rejection of Epic’s proposed aftermarkets on the legally erroneous basis that Apple does not license or sell iOS as a standalone product. *See supra* section I.D.1. To establish its single-brand aftermarkets, Epic bore the burden of “rebut[ing] the economic presumption that . . . consumers make a knowing choice to restrict their aftermarket options when they decide in the initial (competitive) market to enter a[] . . . contract.” *Newcal*, 513 F.3d at 1050. Yet the district court found that there was “no evidence in the record” that could support such a showing. As a result, Epic cannot establish its proposed aftermarkets on the record before our court—even after the district court’s erroneous reasoning is corrected.

In his partial dissent, our colleague, Judge Thomas, disagrees with our conclusion that the error discussed in section I.D.1 is harmless. First, Judge Thomas contends that we lack any “direct authority for [this] proposition.” While we do not have a *Kodak*-specific case to cite, treating an error as harmless in light of an independent and sufficient alternative finding is standard fare in appellate courts. *See, e.g., United States v. Wright*, 46 F.4th 938, 944 (9th Cir. 2022) (“[The district court’s . . . error was harmless in light of its alternative holding” (capitalization standardized)); *Tommasetti v. Astrue*, 533 F.3d 1035, 1042 (9th Cir. 2008) (“Although the ALJ’s step four determination constitutes error, it is harmless error in light

of the ALJ’s alternative finding at step five.”); *United States v. Koenig*, 912 F.2d 1190, 1190 (9th Cir. 1990) (“We agree [with the appellant’s assertion of error], but conclude that the district court made alternative rulings that render any error harmless.”). Second, and relatedly, Judge Thomas argues that our harmless-error conclusion runs counter to precedent instructing that, outside of certain exceptions, “courts usually cannot apply the rule of reason without an accurate definition of the relevant market.” *Amex*, 138 S. Ct. at 2285. But that argument misconstrues the effect of the district court’s finding on the consumer-unawareness prong. If, as Judge Thomas requests, we were to just correct the district court’s erroneous reasoning and then remand, the district court’s market definition on remand would be foreordained. Given the total lack of evidence on consumer-unawareness, Epic cannot establish its proposed aftermarket. So, contrary to the partial dissent’s assertion, we do not proceed to apply the Sherman Act’s liability standards without first defining a relevant market. Epic’s proposed aftermarket fails, and Apple did not cross-appeal the district court’s rejection of its proposed market. The district court’s middle-ground market of mobile-games transaction thus stands on appeal, and it is that market in which we assess whether Apple’s conduct is unlawful pursuant to the Sherman Act.

II. Sherman Act Section 1: Unreasonable Restraint

With the relevant market for Epic’s antitrust claims established (mobile-game transactions), we turn to the district court’s rejection of Epic’s Sherman Act Section 1 restraint-of-trade claim. Section 1 prohibits “[e]very contract, combination . . . , or conspiracy, in restraint of trade.” 15 U.S.C. § 1. Courts have long read Section 1 to “outlaw only *unreasonable* restraints.” *Amex*, 138 S. Ct. at

2283 (quoting *State Oil v. Khan*, 522 U.S. 3, 10 (1997)). Thus, a Section 1 inquiry has both a threshold component (whether there is a contract, combination, or conspiracy) and a merits component (whether it is unreasonable). *Qualcomm*, 969 F.3d at 988–89. While a restraint can be unreasonable *per se* or pursuant to the Rule of Reason, the parties agree that the latter standard applies here.

Epic contends that the district court (1) incorrectly found that the DPLA was not a “contract[]” within the scope of Section 1, (2) misapplied steps two and three of the Rule of Reason, and (3) omitted a fourth balancing step after it found that Epic failed to satisfy its step-three burden. Apple asserts—as an alternative basis for affirming the district court’s denial of Sherman Act liability—that the court erred at step one of the Rule of Reason. We agree with Epic on its first and third arguments but find the errors to be harmless; we reject Epic’s and Apple’s remaining arguments.

A. Existence of a Contract

The district court erred when it held that a non-negotiated contract of adhesion like the DPLA falls outside of the scope of Section 1. That holding plainly contradicts Section 1’s text, which reaches “[e]very contract, combination . . . , or conspiracy” that unreasonably restrains trade. 15 U.S.C. § 1 (emphasis added). To hold that a contract is exempt from antitrust scrutiny simply because one party “reluctant[ly]” accepted its terms “would be to read the word[] ‘contract’” out of the statute. *Systemcare, Inc. v. Wang Lab’ys Corp.*, 117 F.3d 1137, 1143 (10th Cir. 1997).

Moreover, the district court’s contract-of-adhesion exemption is difficult to square with numerous antitrust cases involving agreements in which one party set terms and

the other party reluctantly acquiesced. *See, e.g., Amex*, 138 S. ct. at 2282 (“Amex’s business model sometimes causes friction with merchants”); *Perma Life Mufflers, Inc. v. Int’l Parts Corp.*, 392 U.S. 134, 142 (1968) (the plaintiff “unwillingly complied with the restrictive . . . agreements”), *overruled on other grounds by Copperweld*, 467 U.S. 752; *Barry v. Blue Cross of Cal.*, 805 F.2d 866, 869 (9th Cir. 1986) (contract “terms and structure were made by” the defendant). Given the number of cases in which the district court’s exemption would have been decisive, it is telling that the dog never barked.

Additionally, as the district court itself recognized, its holding is “not particularly consistent” with ties being cognizable pursuant to Section 1. In a classic tie, the defendant “exploit[s] . . . its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms.” *Jefferson Par. Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 12 (1984), *overruled on other grounds by Ill. Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28 (2006). “If such conduct were to be labelled ‘independent,’ virtually all tying arrangements would be beyond the reach of Section 1.” *Image Tech. Serv., Inc. v. Eastman Kodak Co.*, 903 F.2d 612, 619 (9th Cir. 1990).

Moreover, Section 1 is primarily concerned with firms that exercise market power—*i.e.*, the “special ability . . . to force a [a contracting partner] to do something that he would not do in a competitive market.” *Jefferson Parish*, 466 U.S. at 13–14. The district court’s rule would preclude Section 1 suits and illegality defenses to breach of contract claims where they are most needed: when dealing with restraints

imposed by firms that have market power but lack the monopoly power that triggers Section 2 scrutiny.¹³

Thus, the district court erred on this threshold issue. But because the court, in the alternative, properly applied the Rule of Reason, its error was harmless.

B. Rule of Reason Step One: Anticompetitive Effects

The district court did not err when it found that Epic made the Rule of Reason's required step-one showing. At step one, "the plaintiff has the initial burden to prove that the challenged restraint has a substantial anticompetitive effect that harms consumers in the relevant market." *Amex*, 138 S. Ct. at 2284. Antitrust plaintiffs can make their step-one showing either "directly or indirectly." *Id.*; accord *PLS.Com, LLC v. Nat'l Ass'n of Realtors*, 32 F.4th 824, 834 (9th Cir. 2022); *Aya Healthcare Servs., Inc. v. AMN Healthcare, Inc.*, 9 F.4th 1102, 1112 (9th Cir. 2021); *Rebel Oil.*, 51 F.3d at 1434.

¹³ The decisions that the district court relied on are readily distinguishable. An express agreement is "direct evidence of 'concerted activity.'" *Paladin Assocs., Inc. v. Mont. Power Co.*, 328 F.3d 1145, 1153 (9th Cir. 2003). But the district court relied exclusively on cases in which there was *no* direct evidence of concerted activity and a plaintiff instead produced circumstantial evidence to show that the defendants were acting in concert. *See, e.g., Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984). Where a plaintiff puts forward only circumstantial evidence, courts must conduct a searching inquiry, lest they mistake parallel conduct (which is legal) for concerted activity (which is subject to Section 1 scrutiny). *Id.* at 768; *see In re Musical Instruments & Equip. Antitrust Litig.*, 798 F.3d 1186, 1193–94 (9th Cir. 2015). Where there is an express contract, that concern is simply not present.

“To prove a substantial anticompetitive effect *directly*, the plaintiff must provide ‘proof of actual detrimental effects [on competition],’ such as reduced output, increased prices, or decreased quality in the relevant market.” *PLS.Com*, 32 F.4th at 834 (emphasis added) (quoting *Amex*, 138 S. Ct. at 2284). Importantly, showing a reduction in output is one form of direct evidence, but it “is not the only measure.” *O’Bannon v. NCAA*, 802 F.3d 1049, 1070 (2015) (emphasis removed) (quoting Areeda & Hovenkamp, *Antitrust Law*, *supra*, ¶ 1503b(1)).

To prove substantial anticompetitive effects *indirectly*, the plaintiff must prove that the defendant has market power and present “some evidence that the challenged restraint harms competition.” *Amex*, 138 S. Ct. at 2284. Market power is the ability for a defendant to profitably raise prices by restricting output. *Id.* at 2288; *see also Jefferson Parish*, 466 U.S. at 13–14 (market power is the ability “to force a purchaser to do something that he would not do in a competitive market”). In other words, a firm with market power is a price-maker, not the price-takers that economic theory expects in a competitive market. Pursuant to this indirect-evidence route, “[t]he existence of market power is a significant finding that casts an anticompetitive shadow over a party’s practices in a rule-of-reason case.” *Hahn v. Or. Physicians’ Serv.*, 868 F.2d 1022, 1026 (9th Cir. 1988).

Market power is generally inferred from the defendant’s possession of a high market share and the existence of “significant barriers to entry.” *Rebel Oil*, 51 F.3d at 1434. Whether a defendant possesses market power is a factual question that we review for clear error. *Cf. L.A. Land Co. v. Brunswick Corp.*, 6 F.3d 1422, 1425 (9th Cir. 1993) (possession of monopoly power is a fact question).

A plaintiff must also present “some evidence” that the defendant uses that market power to harm competition. *Amex*, 138 S. Ct. at 2284; *see also Aya Healthcare*, 9 F.4th at 1113 (citing *Tops Mkts., Inc. v. Quality Mkts., Inc.*, 142 F.3d 90, 97 (2d Cir. 1998), for the proposition that “market power alone does not suffice as indirect evidence for a rule-of-reason analysis”). This inquiry need not always be extensive or highly technical. It is sufficient that the plaintiff prove the defendant’s conduct, as matter of economic theory, harms competition—for example that it increases barriers to entry or reduces consumer choice by excluding would-be competitors that would offer differentiated products. *See N. Am. Soccer League, LLC v. U.S. Soccer Fed’n Inc.*, 883 F.3d 32, 42 (2d Cir. 2018).

Here, the district concluded that Epic produced both sufficient direct and indirect evidence to show that Apple’s distribution and IAP restrictions impose substantial anticompetitive effects. In terms of direct evidence, the court found that Apple has for years extracted a supracompetitive commission that was set “almost by accident” and “without regard” to its own costs and has produced “extraordinarily high” operating margins that “have exceeded 75% for years.” The court found that “the economic factors driving” other platforms’ rates “do not apply equally to Apple,” with “nothing other than legal action seem[ing] to motivate Apple to reconsider pricing and reduce rates.” With respect to indirect evidence, the district court found that Apple has market power: Apple had a mobile-games market share of 52 to 57% for the three years in evidence, and network effects and information restrictions create barriers to entry. The court found that Apple wielded that market power to foreclose would-be competitors like Epic from offering app-distribution and payment-processing

alternatives—reducing innovation and Apple’s own investment in the App Store in the process.

1. Direct Evidence

Apple challenges both the district court’s direct- and indirect-evidence conclusions on several grounds—some legal, some factual. We are not persuaded that the district court erred at step one of the Rule of Reason.¹⁴

First, Apple argues that the district court’s direct-evidence conclusion cannot stand because Epic did not show that Apple’s restrictions reduced output. We squarely rejected this argument in *O’Bannon*. There, the NCAA similarly argued that liability was foreclosed because output in the relevant market “increased steadily over time.” 802 F.3d at 1070. “Although output reductions are one common kind of anticompetitive effect in antitrust cases, a ‘reduction in output is not the *only* measure of anticompetitive effect.’” *Id.* (citation omitted). Nor does *Amex* displace our holding in *O’Bannon*. A showing of decreased output was essential in that case because the plaintiff “failed to offer any reliable measure of Amex’s transaction price or profit margins” and “the evidence about whether Amex charges more than its competitors was ultimately inconclusive.” *Amex*, 138 S. Ct. at 2288.

¹⁴ We also reject Apple’s threshold argument that the district court erred by not isolating the effects of Apple’s unilateral product-design decisions from the effects of the contractual restrictions that are properly within the scope of Section 1. This argument runs counter to the record. When conducting its Rule of Reason analysis, the district court noted that Epic “appear[ed] to disclaim any challenge to Apple’s code signing restrictions,” so the court “consider[ed] only the DPLA restrictions.”

Second, Apple argues that Epic’s evidence of supracompetitive pricing fails as a matter of law because Apple never raised its commission. A supracompetitive price is simply a “price[] above competitive levels.” *Rebel Oil*, 51 F.3d at 1434. Apple cites no binding precedent in support of its proposition that the charging of a supracompetitive price must always entail a price increase, though we recognize that it ordinarily does.

Third, Apple attacks the supracompetitive-pricing finding on factual grounds by asserting that Apple charges a substantially similar commission as its competitors. That assertion is true as far as *headline* rates go, but the district court reasonably based its supracompetitive-price finding on *effective* commission rates instead of headline rates. The district court found Apple’s reliance on headline rates to be “suspect” because, unlike the App Store, other platforms “frequently negotiate[] down” the rates they charge developers. The court noted that Amazon has a headline rate of 30% but an effective commission rate of 18%. And it credited testimony that game-console transaction platforms often “negotiate special deals for large developers.” While the district court’s finding that the Google Play Store (the App Store’s “main competitor”) charges a 30% rate seemingly undermines the characterization of Apple’s commission as supracompetitive, we cannot say that the district court clearly erred absent evidence about the Google Play Store’s effective commission—the metric that the district court at trial found to be the key to determining the competitiveness of a price in this market.

Fourth, Apple argues that the district court’s direct-evidence finding fails as a matter of law because *Amex* requires Epic to establish anticompetitive effects on both sides of the two-sided market for mobile-game transactions

(developers and users). Apple’s argument falls short both legally and factually. We have previously held: “*Amex* does not require a plaintiff to [show] harm to participants on both sides of the market. All *Amex* held is that to establish that a practice is anticompetitive in certain two-sided markets, the plaintiff must establish an anticompetitive impact on the ‘market as a whole.’” *PLS.com*, 32 F.4th at 839 (quoting *Amex*, 138 S. Ct. at 2287). In any event, the district court found that, while Apple’s restrictions “certainly impact developers,” there was “some evidence” that the restrictions also “impact[] consumers when those costs are passed on.”

2. Indirect Evidence

We are not persuaded by Apple’s argument that the district court erred in concluding that Epic failed to establish indirect evidence of anticompetitive effects. Apple does not take issue with the district court’s finding of a 52 to 55% market share (other than noting it was the court’s “own . . . calculation”); nor does Apple challenge the court’s barriers-to-entry finding. It instead argues that the finding that Apple wields its market power in an anticompetitive manner is speculative. But, supported by basic economic presumptions, the district court reasonably found that, without Apple’s restrictions, would-be competitors could offer iOS users alternatives that would differentiate themselves from the App Store on price as well as consumer-appeal features like searchability, security, privacy, and payment processing. Indeed, it found competition in the PC-gaming market to be a “vivid illustration”: Steam had long charged a 30% commission, but upon Epic’s entry into the market, it lowered its commission to 20%. Epic’s indirect-evidence showing was sufficient. *See N. Am. Soccer League*, 883 F.3d at 42 (market power combined with a

restriction that “reduce[s] consumer choice” satisfies step one).

C. Step Two: Procompetitive Rationales

The district court correctly held that Apple offered non-pretextual, legally cognizable procompetitive rationales for its app-distribution and IAP restrictions. If a plaintiff establishes at step one that the defendant’s restraints impose substantial anticompetitive effects, then the burden shifts back to the defendant to “show a procompetitive rationale for the restraint[s].” *NCAA v. Alston*, 141 S. Ct. 2141, 2160 (2021) (quoting *Amex*, 138 S. Ct. at 2284). A procompetitive rationale is “a [1] nonpretextual claim that [the defendant’s] conduct is [2] indeed a form of competition on the merits because it involves, for example, greater efficiency or enhanced consumer appeal.” *Qualcomm*, 969 F.3d at 991.

Here, the district court accepted two sets of rationales as non-pretextual and legally cognizable. First, it found that Apple implemented the restrictions to improve device security and user privacy—thereby enhancing consumer appeal and differentiating iOS devices and the App Store from those products’ respective competitors. Second, the court *partially* accepted Apple’s argument that it implemented the restrictions to be compensated for its IP investment. While the court credited the IP-compensation rationale generally, it rejected the rationale “with respect to the 30% commission rate specifically.” On appeal, Epic raises three arguments challenging Apple’s rationales as legally non-cognizable.

1. Partial Acceptance of Apple's IP-Compensation Rationale

Epic argues that the district court may not credit Apple's IP-compensation rationale while finding that the rationale was pretextual "with respect to the 30% commission rate *specifically*" (emphasis added). We have held that IP-compensation is a cognizable procompetitive rationale, *Kodak*, 125 F.3d at 1219 ("desire to profit from . . . intellectual property" is presumptively procompetitive), and we find no error in the district court's *partial* crediting of that rationale here.

The district court's acceptance of the rationale generally, while rejecting a specific application of it, resembles the district court's analysis in the NCAA litigation that culminated in *Alston*, 141 S. Ct. 2141. There, the district court credited the NCAA's amateurism-as-consumer-appeal rationale but found that the NCAA's "rules and restrictions on [amateurism] ha[d] shifted markedly over time," that the NCAA adopted some restrictions "without any reference to considerations of consumer demand," and that some were "not necessary to consumer demand." *Id.* at 2163. The court did not, as Epic requests here, resolve the case at step two and hold that the NCAA's shaky proof meant it lacked *any* procompetitive rationale. Instead, the "deficiencies in the NCAA's proof of procompetitive benefits at the second step influenced the analysis at the third [step]." *Id.* at 2162. Because the NCAA's amateurism-as-consumer-appeal rationale was nebulously defined and weakly substantiated, the plaintiffs had more flexibility at step three to fashion less restrictive alternatives.

The same is true here. Because the district court accepted only a general version of Apple's IP-compensation

rationale (that Apple was entitled to “*some* compensation”), Epic at step three needed only to fashion a less-restrictive alternative calibrated to achieving that general goal, instead of one achieving the level of compensation that Apple currently achieves through its 30% commission. There is no legal requirement—as Epic suggests—that district courts make pretext findings on an all-or-nothing basis. When district courts at step two partially credit a rationale, step three will necessarily take that partial finding into account.

2. Cognizability of Apple’s Privacy/Security Rationales

Epic and its *amici* next argue that Apple’s security and privacy rationales are *social*, not procompetitive, rationales and therefore fall outside the purview of antitrust law. We reject this argument.

To begin, Epic waived this argument by failing to raise it below. *See Friedman v. AARP, Inc.*, 855 F.3d 1047, 1057 (9th Cir. 2017) (“Our general rule is that we do not consider an issue not passed upon below.”). In the parties’ pre-trial joint submission on elements and remedies, Epic agreed that “enhancing consumer appeal”—the goal of Apple’s security and privacy efforts—is a cognizable procompetitive justification. At trial, one of Epic’s experts conceded that “[p]rotecting iPhone users from security threats is a procompetitive benefit.” And Epic made no reference to cognizability in its proposed findings of fact and conclusions of law.

Even setting aside Epic’s failure to raise this argument below, we are not persuaded by it. *See Carrillo v. County of Los Angeles*, 798 F.3d 1210, 1223 (9th Cir. 2015) (courts of appeal have discretion to address pure questions of law if doing so will not prejudice the opposing party). Epic’s

argument characterizes Apple as asserting security and privacy as independent justifications in and of themselves. But, throughout the record, Apple makes clear that by improving security and privacy features, it is tapping into consumer demand and differentiating its products from those of its competitors—goals that are plainly procompetitive rationales. *See, e.g., Qualcomm*, 969 F.3d at 991 (listing enhanced “consumer appeal” as a legitimate procompetitive rationale); *O’Bannon*, 802 F.3d at 1072–73 (considering the NCAA’s amateurism rationale that “plays a role in increasing consumer demand”). Consumer surveys in the record show that security and privacy is an important aspect of a device purchase for 50% to 62% of iPhone users and 76% to 89% of iPad users worldwide. Even Epic’s CEO testified that he purchased an iPhone over an Android smartphone in part because it offers “better security and privacy.” And the district court found that, because Apple creates a “trusted app environment, users make greater use of their devices.”

With Apple’s restrictions in place, users are free to decide which kind of app-transaction platform to use. Users who value security and privacy can select (by purchasing an iPhone) Apple’s closed platform and pay a marginally higher price for apps. Users who place a premium on low prices can (by purchasing an Android device) select one of the several open app-transaction platforms, which provide marginally less security and privacy. Apple’s restrictions create a heterogenous market for app-transaction platforms which, as a result, increases interbrand competition—the primary goal of antitrust law. *See, e.g., Leegin Creative Leather Prod., Inc. v. PSKS, Inc.*, 551 U.S. 877, 895 (2007);

State Oil, 522 U.S. at 15.¹⁵ Antitrust law assumes that competition best allocates resources by allowing firms to compete on “all elements of a bargain—quality, service, safety, and durability—and not just the immediate cost.” *Nat’l Soc’y of Pro. Eng’rs v. United States*, 435 U.S. 679, 695 (1978). If we were to accept Epic and its *amici*’s argument, then no defendant could cite competing on non-price features as a procompetitive rationale.

To avoid this conclusion, Epic and its *amici* rely on a line of cases stemming from *National Society of Professional Engineers*. But neither that case nor its progeny support their argument that improved quality is a social, rather than procompetitive, rationale. Instead, the *Professional Engineers* line of cases holds that a defendant cannot severely limit interbrand competition on the theory that *competition itself* is ill-suited to a certain market or industry. *See id.* at 694–96. Epic’s selection of quotes from *Professional Engineers* and other cases—without acknowledging the distinct context in which they occurred—is unconvincing.

In *Professional Engineers*, a professional association with about 12,000 engineers adopted a rule prohibiting its members from engaging in competitive bidding on

¹⁵ Epic argues that interbrand competition in the smartphone market is irrelevant because in the app-transactions market Epic is Apple’s would-be competitor—*i.e.*, the DPLA prevents interbrand competition between the App Store and the Epic Games Store in the game-transactions market. But this was also true in *Kodak*: The independent service operators were would-be competitors of Kodak in the service market. Still, the Court entertained (while ultimately rejecting on factual grounds) Kodak’s procompetitive rationale that its service restrictions ensured high-quality products and thus promoted interbrand competition in the foremarket for photocopiers. *Kodak*, 504 U.S. at 482–84.

construction projects. *Id.* at 681. This “absolute ban” on competitive bidding imposed substantial anticompetitive effects, and the Society’s sole justification was that competition in the construction-engineering market would lead engineers to perform “inferior work with consequent risk to safety and health.” *Id.* at 692–94. In other words, competition in the construction engineering industry was not in the “public benefit.” *Id.* The Supreme Court rejected this request for a judge-made exemption from the Rule of Reason, which “does not support a defense based on the assumption that competition itself is unreasonable,” and stated that the Society’s argument should be “addressed to Congress.” *Id.* at 696.

Indiana Federation of Dentists likewise involved a request for an exemption from the Rule of Reason. There, an association of dentists, which had a nearly 100% market share in one area and a nearly 70% market share in another, adopted a rule prohibiting its members from submitting x-rays to dental insurers. *Ind. Fed. of Dentists*, 476 U.S. at 448–49. The rule made it prohibitively expensive for insurers to impose cost-containment measures and thus eliminated interbrand competition regarding cooperation with patients’ insurers. *Id.* at 449. The Federation argued that competition would undermine “quality of care”—that, without the rule, consumers would make “unwise and even dangerous choices” regarding dental procedures. *Id.* at 463. The Supreme Court rejected this argument—that competition was ill-suited for the dental industry—as squarely foreclosed by *Professional Engineers*. *Id.*

Trial Lawyers Association followed a similar track, but with respect to a requested exemption from a *per se* rule. A professional association comprising about 90% of “regulars” appointed for indigent criminal defense in the Superior Court

of the District of Columbia entered into a group boycott against the District until it “substantially increase[d]” hourly rates. *FTC v. Sup. Ct. Trial Lawyers’ Ass’n*, 493 U.S. 411, 416 (1990). The Association argued that its actions were not unlawful because the District had a “constitutional duty” to provide adequate representation to indigent defendants, which required it to provide meaningful compensation to their attorneys. *Id.* at 423. The Court refused to exempt the Association’s conduct from the normal application of antitrust’s *per se* prohibition on group boycotts, concluding that “[t]he social justifications proffered for respondents’ restraint of trade . . . do not make it any less unlawful.” *Id.* at 424.

The Supreme Court followed suit last term in *Alston* when it rejected the NCAA’s sweeping plea for leniency. The NCAA argued that something more deferential than the Rule of Reason should apply to its restrictions on student-athlete compensation because the NCAA’s amateurism restrictions advance the “societally important non-commercial objective of higher education.” *Alston*, 141 S. Ct. at 2158. The Supreme Court held that this argument—that the NCAA “should be exempt from the usual operation of the antitrust laws”—should be directed to Congress, not a court. *Id.* at 2160.

Apple’s rationales categorically differ from those asserted in the above cases. Apple did not agree with other app-transaction platforms (*e.g.*, the Google Play Store) to eliminate *interbrand* competition and then invoke security and privacy to avoid the “normal operation” of the Rule of Reason. *Id.* at 2147. Rather, Apple imposed *intra-brand* limitations (that iOS devices use Apple distribution and payment-processing channels) and contends that these restrictions tap into consumer demand for a private and

secure user experience and distinguish the App Store from its open-platform competitors.

3. Cognizability of Cross-Market Rationales

Epic finally argues that, even if Apple’s security and privacy restrictions are procompetitive, they increase competition in a *different market* than the district court defined and in which Epic showed step-one anticompetitive effects, and thus are not legally cognizable at step two. In Epic’s view, Apple’s rationales relate to the market for smartphone operating systems (or the market for smartphones), while the anticompetitive effects of Apple’s restrictions impact the market for mobile-game transactions.

The Supreme Court’s precedent on this issue is not clear. While *amici* argued in *Alston* that cross-market justifications fail as a matter of law, the Supreme Court “express[ed] no view[]” on the argument. 141 S. Ct. at 2155. Dicta from one a *per se* decision provides some support for Epic’s position. See *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 609–10 (1972) (courts are unable “to weigh, in any meaningful sense, destruction of competition in one sector of the economy against promotion of competition in another sector”). But the Supreme Court has considered cross-market rationales in Rule of Reason and monopolization cases. See *Kodak*, 504 U.S. at 482–84 (relevant market of Kodak-brand service and parts; procompetitive rationale in market for photocopiers); *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 104–08, 115–17 (1984) (relevant market of college football television; procompetitive rationale of protecting the market for college football tickets). Our court’s precedent is similar. While we have never expressly confronted this issue, we have previously considered cross-market rationales when applying the Rule

of Reason. See *O’Bannon*, 802 F.3d at 1069–73; *In re NCAA Athletic Grant-in-Aid Cap Antitrust Litig.*, 958 F.3d 1239, 1266–71 (9th Cir. 2020) (M. Smith, J., concurring).

We decline to decide this issue here. Like Epic’s general cognizability argument, Epic did not raise this argument below. Nor did it raise this argument in its opening brief before our court, denying Apple an opportunity to respond. See *Miller v. Fairchild Indus., Inc.*, 797 F.2d 727, 738 (9th Cir. 1986).

More importantly, we need not decide this issue because Epic’s argument rests on an incorrect reading of the record. Contrary to Epic’s contention, Apple’s procompetitive justifications *do* relate to the app-transactions market. Because use of the App Store requires an iOS device, there are two ways of increasing App Store output: (1) increasing the *total* number of iOS device users, and (2) increasing the *average* number of downloads and in-app purchases made by iOS device users. Below, the district court found that a large portion of consumers factored security and privacy into their decision to purchase an iOS device—increasing total iOS device users. It also found that Apple’s security- and privacy-related restrictions “provide[] a safe and trusted user experience on iOS, which encourages both users and developers to transact freely”—increasing the per-user average number of app transactions.

D. Step Three: Substantially Less Restrictive Means

The district court did not clearly err when it held that Epic failed to prove the existence of substantially less restrictive alternatives (LRAs) to achieve Apple’s procompetitive rationales. At step three of the Rule of Reason, “the burden shifts back to the plaintiff to demonstrate that the procompetitive efficiencies could be

reasonably achieved through less anticompetitive means.” *Alston*, 141 S.Ct. at 2160 (quoting *Amex*, 138 S.Ct. at 2284). When evaluating proposed alternative means, courts “must give wide berth to [defendants’] business judgments” and “must resist the temptation to require that enterprises employ the least restrictive means of achieving their legitimate business objectives.” *Id.* at 2163, 2166; *see also id.* at 2161 (“[A]ntitrust law does not require businesses to use anything like the least restrictive means of achieving legitimate business purposes.”). As such, this circuit’s test—which the Supreme Court approved in *Alston*—requires a “substantially less restrictive” alternative. *O’Bannon*, 802 F.3d at 1070 (emphasis added) (quoting *Tanaka v. Univ. of S. Cal.*, 252 F.3d 1059, 1063 (9th Cir. 2001)). To qualify as “substantially less restrictive,” an alternative means “must be ‘virtually as effective’ in serving the [defendant’s] procompetitive purposes . . . without significantly increased cost.” *Id.* at 1074 (quoting *County of Tuolumne v. Sonora Cmty. Hosp.*, 236 F.3d 1148, 1159 (9th Cir. 2001)).

Because LRAs inform the injunctive relief that a district court may enter if a plaintiff prevails, courts must also keep in mind “a healthy respect for the practical limits of judicial administration” when evaluating proposed LRAs. *Alston*, 141 S.Ct. at 2163. Courts should not “impose a duty . . . that it cannot explain or adequately and reasonably supervise.” *Id.* (quoting *Verizon Commc’ns Inc. v. L. Offs. Of Curtis V. Trinko, LLP*, 540 U.S. 398, 415 (2004)).

We review a district court’s findings on the existence of substantially less restrictive means for clear error. *See, e.g., NCAA Antitrust Litig.*, 958 F.3d at 1260; *O’Bannon*, 802 F.3d at 1074. This includes both the “virtually as effective” and “significantly increased cost” components encompassed in that finding. *See NCAA Antitrust Litig.*, 958 F.3d. at 1260.

1. Proposed LRA to the Distribution Restriction

Epic argues that Apple already has an LRA at its disposal for the distribution restriction: the “notarization model” that Apple uses for app distribution on its desktop and laptop operating system (macOS).¹⁶ The notarization model sits somewhere between iOS’s “walled garden” and the open-platform model that characterizes some app-transaction platforms. Unlike on iOS, the Mac Store (the Apple-run equivalent of the iOS App Store for Mac computers) is *not* the exclusive means for macOS users to download apps; instead, users can download apps from the Mac Store or anywhere else on the internet. Also unlike on iOS, a developer can distribute a macOS app to users without first submitting it to Apple. But, regardless of how the developer distributes that app, it will carry a warning that Apple has not scanned it for malware. The developer, however, can choose to submit the app to Apple. If the app passes Apple’s malware scan, then the developer can distribute the app to users—again, through the Mac Store or otherwise—without the warning that accompanies unscanned apps.

The malware scanning that Apple performs in the notarization model is not the same as the full app review that it conducts on iOS apps. Importantly, the notarization model does not include *human* review—a contextual review that, as found by the district court, cannot currently be automated. As part of iOS human review, a reviewer confirms that an app corresponds to its marketing description to weed out “Trojan Horse” apps or “social engineering” attacks that

¹⁶ In the district court, Epic also proposed the “enterprise model” (which Apple already implements for some iOS apps), but Epic does not advance that model on appeal as a proposed LRA.

trick users into downloading by posing as something they are not. The reviewer also checks that the app’s entitlements are reasonable for its purpose—rejecting, for example, a Tic-Tac-Toe game that asks for camera access and health data, while approving camera access for a social media app. On occasion, human review also detects novel, well-disguised malware attacks. Despite Epic carrying the burden at step three of the Rule of Reason, it was not clear before the district court—and still is not entirely clear—how Epic proposes that the notarization model translates from macOS to iOS. In particular, it is unclear whether the proposed model would incorporate human review and what type (if any) of licensing scheme Apple could implement to complement the notarization model.¹⁷ Whatever the precise form of Epic’s proposed notarization model, the district court did not err in rejecting it.

First, to the extent Epic argues that Apple could jot-for-jot adopt macOS’s notarization model without adding human review, Epic failed to establish that this model would be “virtually as effective” in accomplishing Apple’s procompetitive rationales of enhancing consumer appeal and distinguishing the App Store from competitor app-transaction platforms by improving user security and privacy. *See O’Bannon*, 802 F.3d at 1073. The district court

¹⁷ There is even some discrepancy between the injunctive relief Epic requests and the basic mechanics of the notarization system. As explained, the notarization model labels unscanned apps with a warning. Yet Epic requested an injunction that would prohibit Apple from in any way “impeding or deterring the distribution of iOS apps” through non-App Store “distribution channel[s].” A malware warning would seemingly steer some consumers back to the App Store—raising some question of whether it would violate the “impeding or deterring” prohibition.

ultimately found that the record contained “some evidence” that macOS computers experience higher malware rates than iOS devices. It also noted a third-party report that Android devices have higher malware rates than iOS ones due to Trojan Horse apps being distributed through open app-transaction platforms. And it credited Apple’s anecdotal evidence that human review sometimes detects novel malware attacks that slip through malware scans. Moreover, the district court found “compelling” Apple’s explanation of why human review is necessary “against certain types of attacks.” And it found that “Epic Games did not explain how, if at all” a purely automated process could screen for such threats. It also noted that Epic’s security expert testified that he did not consider fraud-prevention in his security analysis, that his opinion on the value-added of human app review “may change” if he did, and that automated protections “do not protect users against” social-engineering threats. Based on this record, the district court did not clearly err in finding that a process without human app review would not be “virtually as effective” as Apple’s current model.

Second, to the extent Epic proposes a notarization model that incorporates human app review, Epic failed to develop how Apple could be compensated in such a model for third-party developers’ use of its IP. Epic argues that “app review can be relatively independent on app distribution” and envisions a model in which a developer would submit an app, Apple would review it, and then “send it back to the developer to be distributed directly or in another store.” For example, Epic could submit a gaming app to Apple; Apple would scan it for malware and subject it to human review; and then Epic could choose to distribute it through the App Store, the Epic Games Store, or both.

While such a model would clearly be “virtually as effective” in achieving Apple’s security and privacy rationales (it contains all elements of Apple’s current model), Epic simply failed to develop how such a model would allow Apple to be compensated for developers’ use of its IP. At closing argument, the district court asked Epic whether its requested injunctive relief would allow Apple to impose some sort of licensing fee. Epic responded that “Apple can charge,” but it offered no concrete guidance on how to do so. Instead, Epic stated only that Apple “could charge certain developers more than others based on the advantage that they take of the platform” and that it “expect[s], given the innovation in Cupertino, that [Apple] would find ways to profit from their intellectual property and other contributions.” The district court accordingly found that Epic’s proposed distribution LRAs “leave unclear whether Apple can collect licensing royalties and, if so, how it would do so” and thus declined to consider them as “not sufficiently developed.”

On appeal, Epic attempts to transfigure into an LRA the district court’s off-hand statement noting the absence of “evidence that Apple could *not* create a tiered licensing scheme[,] which would better correlate the value of its intellectual property to the various levels of use by developers.” It is, however, Epic’s burden at step three to prove that a tiered licensing scheme (or some other payment mechanism) *could* achieve Apple’s IP-compensation rationale. Without any evidence in the record of what this tiered licensing scheme would look like, we cannot say that it would be “virtually as effective” without “significantly increased cost.” *O’Bannon*, 802 F.3d at 1074. Nor can we even “explain” it, let alone direct the district court to craft an

injunction that it could “adequately and reasonably supervise.” *Alston*, 141 S. Ct. at 2163.

2. Proposed LRA to the IAP Requirement

Epic proposes access to competing payment processors as an LRA to Apple’s IAP requirement. Like the distribution requirement LRA, this LRA suffers from a failure of proof on how it would achieve Apple’s IP-compensation rationale.¹⁸ As the district court noted, in a world where Apple maintains its distribution restriction but payment processing is opened up, Apple would still be contractually entitled to its 30% commission on in-app purchasers. Apart from any argument by Epic, the district court “presume[d]” that Apple could “utilize[e] a contractual right to audit developers . . . to ensure compliance with its commissions.” But the court then rejected such audits as an LRA because they “would seemingly impose both increased monetary and time costs.”

E. Step Four: Balancing

Epic—along with several *amici*, including the United States and thirty-four state attorneys general—argue that the district court erred by not proceeding to a fourth, totality-of-the-circumstances step in the Rule of Reason and balancing

¹⁸ As Epic argues, the district court’s ultimate conclusion on the security rationale (that opening up payment processing would undermine Apple’s “competitive advantage on security issues”) seems difficult to square with several of the court’s antecedent factual findings (*e.g.*, that “Apple has not show how its [IAP] process is any different” and that “any potential for fraud prevention [through IAP] is not put into practice”). Because Epic’s LRA fails on the IP-compensation aspect, we need not decide whether the district court clearly erred when it also rejected the LRA for not being virtually as effective in accomplishing Apple’s security and privacy rationales.

the anticompetitive effects of Apple's conduct against its procompetitive benefits. We hold that our precedent requires a court to proceed to this fourth step where, like here, the plaintiff fails to carry its step-three burden of establishing viable less restrictive alternatives. However, the district court's failure to expressly do so was harmless in this case.

We have been inconsistent in how we describe the Rule of Reason. Some decisions, when describing the Rule of Reason, contemplate a fourth step. *See, e.g., Qualcomm*, 969 F.3d at 991; *County of Tuolumne*, 236 F.3d at 1160. Others do not. *See, e.g., NCAA Antitrust Litig.*, 958 F.3d at 1263; *Tanaka*, 252 F.3d at 1063. Because of the paucity of cases that survive step one (let alone require a court to exhaust the three agreed-upon steps), most of our decisions have not required us to actually proceed to the portion of the analysis where Epic and its *amici* argue balancing would occur.¹⁹

The exception is *County of Tuolumne*, which provides the most on-point guidance regarding the existence of a fourth step. There, we held: "Because plaintiffs have failed to meet their burden of advancing viable less restrictive alternatives, we reach the balancing stage. We must balance the harms and benefits of the [challenged restrictions] to determine whether they are reasonable." 236 F.3d at 1160 (citation omitted). We then concluded, with just one sentence of analysis, that "any anticompetitive harm is offset

¹⁹ In *Alston*, the Supreme Court cited an amicus brief reporting that courts have decided 90% of Rule of Reason cases since 1977 at step one. 141 S. Ct. at 2160–61. A similar *amicus* brief filed in this case echoes this statistic and reports that the figure rises to 97% when considering only post-1999 cases.

by the procompetitive effects of [defendant's] effort to maintain the quality of patient care that it provides." *Id.*

Supreme Court precedent neither requires a fourth step nor disavows it. In the Court's two most recent Rule of Reason decisions, it discussed only the three agreed-upon steps. *See Alston*, 141 S. Ct. at 2160; *Amex*, 138 S. Ct. at 2284. But the Court did not characterize that test as the *exclusive* expression of the Rule of Reason. *Alston* stated that the Court "has *sometimes* spoken of 'a three-step, burden-shifting framework,'" emphasized that those "steps do not represent a rote checklist" or "an inflexible substitute for careful analysis," and approvingly cited one of the Areeda and Hovenkamp treatises as using a "slightly different 'decisional model.'" 141 S. Ct. at 2160 (emphasis added).

We are skeptical of the wisdom of superimposing a totality-of-the-circumstances balancing step onto a three-part test that is already intended to assess a restraint's overall effect. Neither Epic nor any *amicus* has articulated what this balancing really entails in a given case. Epic argues only that the district court must "weigh[]" anticompetitive harms against procompetitive benefits, and the United States describes step four as a "qualitative assessment of whether the harms or benefits predominate." Nor is it evident what value a balancing step adds. Several *amici* suggest that balancing is needed to pick out restrictions that have significant anticompetitive effects but only minimal procompetitive benefits. But the three-step framework is already designed to identify such an imbalance: A court is likely to find the purported benefits pretextual at step two, or step-three review will likely reveal the existence of viable LRAs. We are thus "wary about [this] invitation[]" to "set sail on a sea of doubt." *Alston*, 141 S. Ct. at 2166 (quoting

United States v. Addyston Pipe & Steel Co., 85 F. 271, 284 (6th Cir. 1898) (Taft, J.).

Nonetheless, we are bound by *County of Tuolumne* and mindful of *Alston*'s warning that the first three steps of the Rule of Reason are not a "rote checklist." Therefore, where a plaintiff's case comes up short at step three, the district court must proceed to step four and balance the restriction's anticompetitive harms against its procompetitive benefits. In most instances, this will require nothing more than—as in *County of Tuolumne*—briefly confirming the result suggested by a step-three failure: that a business practice without a less restrictive alternative is not, on balance, anticompetitive. But the Sherman Act is a flexible statute that has and will continue to evolve to meet our country's changing economy, so we will not "embarrass the future" by suggesting that will always be the case. *Nw. Airlines, Inc. v. Minnesota*, 322 U.S. 292, 300 (1944).

Turning to the record here, the district court's failure to explicitly reach the fourth step was harmless. Even though it did not expressly reference step four, it stated that it "carefully considered the evidence in the record and . . . determined, based on the rule of reason," that the distribution and IAP restrictions "have procompetitive effects that *offset* their anticompetitive effects" (emphasis added). This analysis satisfied the court's obligation pursuant to *County of Tuolumne*, and the court's failure to expressly give this analysis a step-four label was harmless.

III. Sherman Act Section 1: Tying

In addition to its general restraint-of-trade claim, Epic brought a Section 1 claim asserting that Apple unlawfully tied together app distribution (the App Store) and in-app payment processing (IAP). On appeal, Epic argues that (1)

the district court clearly erred when it found that Epic did not identify separate products, and (2) we can enter judgment in its favor because the tie is unlawful, either *per se* or pursuant to the Rule of Reason. We agree with Epic that the district court clearly erred in its separate-products finding, but we find that error to be harmless. The Rule of Reason applies to the tie involved here, and, for the reasons already explained, Epic failed to establish that Apple’s design of the iOS ecosystem—which ties the App Store and IAP together—is anticompetitive.

A. Existence of a Tie

“A tying arrangement is ‘an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier.’” *Kodak*, 504 U.S. at 461 (quoting *N. Pac. R. Co. v. United States*, 356 U.S. 1, 5–6 (1958)). To prove the existence of a tie, a party must make two showings.

First, the arrangement must, of course, involve two (or more) separate products. Pursuant to *Jefferson Parish* and *Kodak*, we apply a consumer-demand test when conducting this inquiry: To constitute two separate products, “[t]here must be sufficient consumer demand so that it is efficient for a firm to provide” the products separately. *Kodak*, 504 U.S. at 462 (citing *Jefferson Parish*, 466 U.S. at 21–22). Importantly, the separate-products inquiry “turns not on the functional relation between them, but rather on the character of the demand for the two items.” *Jefferson Parish*, 466 U.S. at 19 & n.30. This consumer-demand test, in turn, has two parts: (1) that it is possible to separate the products, and (2) that it is efficient to do so, as inferred from circumstantial

evidence. See Areeda & Hovenkamp, *Antitrust Law, supra*, ¶¶ 1743–45.

The efficiency showing does not require a full-blown economic analysis. Because the showing is just a threshold step to reaching the merits of a tie (including, sometimes, the application of a *per se* rule), it would be incongruous to require a resource-intensive showing. See *N. Pac. R. Co.*, 356 U.S. at 5 (*per se* rules are meant to “avoid[] the necessity for an incredibly complicated and prolonged economic investigation”). Accordingly, the existence of separate products is inferred from “more readily observed facts.” Areeda & Hovenkamp, *Antitrust Law, supra*, ¶ 1745c. These include consumer requests to offer the products separately, disentangling of the products by competitors, analogous practices in related markets, and the defendant’s historical practice. See *Jefferson Parish*, 466 U.S. at 22 (noting that patients and surgeons “often request specific anesthesiologists [the tied service] to come to a hospital [the tying service]” and “other hospitals often permit anesthesiologic services to be purchased separately”); *Kodak*, 504 U.S. at 463 (finding sufficient at the 12(b)(6) stage allegations that “consumers would purchase service without parts” and that the defendant had sold them “separately in the past”).

Second, even where a transaction involves separate products, it is not necessarily a tie; the seller must also “force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms.” *Jefferson Parish*, 466 U.S. at 12. Were a buyer merely to agree “to buy [a] second product on its own merits” absent any coercion, there would be no tie. Areeda & Hovenkamp, *Antitrust Law, supra*, ¶ 1752.

We review a finding that no tie occurred for clear error. *Krehl v. Baskin-Robbins Ice Cream Co.*, 664 F.2d 1348, 1354 (9th Cir. 1982) (reviewing separate-products finding for clear error); *Mozart Co. v. Mercedes-Benz of N. Am., Inc.*, 833 F.2d 1342, 1346 (9th Cir. 1987) (treating coercion as a fact question).

Here, the district court found that there was no tie because app distribution and IAP are not separate products. It based this finding on four rationales—each of which is either clearly erroneous or incorrect as a matter of law.

To begin, the district court erred as a matter of law when it concluded that IAP was not separate from app distribution because IAP is “integrated into . . . iOS devices.” *Jefferson Parish* expressly rejects an approach to the separate-products inquiry based on the “functional relation” between two purported products. 466 U.S. at 19.

Next, the district court clearly erred when it found that “Epic Games presented no evidence showing that demand exists for IAP as a standalone product.” Here, the App Store and IAP clearly can be separated because Apple *already does* so in certain contexts, namely that IAP is not required for in-app purchases of physical goods. The efficiency showing is also met. Epic produced evidence that it, Facebook, Microsoft, Spotify, Match, and Netflix, have all tried to convince Apple to let them develop their own in-app payment solutions. The Epic Games Store—a direct competitor of Apple in the mobile-games submarket—delinks distribution from payment processing. And prior to IAP’s development in 2009, Apple distributed apps through the App Store but permitted developers to use their own in-app payment systems.

Relatedly, the district court clearly erred when it reasoned that, even if Apple did not require IAP, Apple would still be entitled to collect a commission on payments made and, therefore, “no economically rational developer would choose to use the alternative [payment] processor.” The district court itself found that “Epic Games raises legitimate concerns” about the non-price features of IAP, including that: “Apple does a poor job of mediating disputes between a developer and its customers”; that Apple’s one-size-fits-all refund approach “leads to poor [customer] experiences”; and that IAP’s exclusion of developers from transactions “can also increase fraud.”

Finally, the district court erred as a matter of law when it concluded that a product in a two-sided market can *never* be broken into multiple products. Despite Apple’s strained effort to portray this as a factual finding, the district court imposed a bright-line legal rule. But *Amex* simply does not stand for the proposition that any two-sided platform will necessarily relate only to one market. Instead, it emphasized that market definition must “reflect[] commercial realities.” 138 S. Ct. at 2285. Indeed, if *Amex* truly required a one-platform, one-market rule, then the district court’s market definition—mobile gaming transactions, instead of *all* app transactions—would be erroneous, despite the court’s extensive findings that game and non-game apps are characterized by significantly different demand.²⁰

²⁰ We also reject Apple’s argument that that there is no tie because “thousands of developers . . . offer no in-app purchase[s].” True, a classic tie is: “I will sell you X widgets only if you buy Y bolts from me.” Here, the DPLA essentially provides: “Apple will sell you app-distribution transactions only if you buy your in-app-purchase-

B. Lawfulness of the Tie

A tie can be unlawful pursuant to either a modified *per se* rule or the Rule of Reason. A tie is *per se* unlawful if (1) the defendant has market power in the tying product market, and (2) the “tying arrangement affects a ‘not insubstantial volume of commerce’ in the tied product market.” *Blough v. Holland Realty, Inc.*, 574 F.3d 1084, 1089 (9th Cir. 2009) (quoting *Cascade Health Solutions v. PeaceHealth*, 515 F.3d 883, 912–13 (9th Cir. 2008)). The first prong requires the market-power inquiry standard throughout antitrust law. The second prong requires only that the tie affect an amount of commerce in the tied product market that is not “*de minimis*.” *Datagate, Inc. v. Hewlett-Packard Co.*, 60 F.3d 1421, 1426 (9th Cir. 1995). These requirements are met here: Apple has market power in the app-distribution market. And the tie affects a non “*de minimis*” amount of commerce in the in-app-payment-processing market: Apple requires IAP to be used for more than half of the transactions that comprise a \$100 billion market.

Nonetheless, we join the D.C. Circuit in holding that *per se* condemnation is inappropriate for ties “involv[ing] software that serves as a platform for third-party applications.” *Microsoft*, 253 F.3d at 89. “It is only after considerable experience with certain business relationships that courts classify them as *per se* violations.” *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 9 (1979) (quoting *Topco Assocs.*, 405 U.S. at 606). That is

processing *requirements* from Apple.” Substituting a requirements term for a quantity term does not change the nature of the agreement. See *Kodak*, 504 U.S. at 461 (ties include agreement[s] “to sell one product but only on the condition that the buyer . . . not purchase that product from any other supplier” (citation omitted)).

because *per se* condemnation embodies a judicial assessment that a category of restraints is “plainly anticompetitive” and “lack[ing] . . . [in] any redeeming virtue” such that it can be “conclusively presumed illegal.” *Id.* at 7–8 (citations omitted). Given the costs of improperly condemning a practice across the board, extending a *per se* rule requires caution and judicial humility. See *White Motor Co. v. United States*, 372 U.S. 253, 263 (1963) (“We need to know more than we do about the actual impact of these arrangements on competition to decide whether they . . . should be classified as *per se* violations of the Sherman Act.”); *Microsoft*, 253 F.3d at 94 (“We do not have enough empirical evidence regarding the effect of [the] practice . . . to exercise sensible judgment regarding that entire class of behavior.”). Based on the record, we do not have the level of confidence needed to universally condemn ties related to app-transaction platforms that combine multiple functionalities. See *Microsoft*, 253 F.3d at 93 (“[B]ecause of the pervasively innovative character of platform software markets, tying in such markets may produce efficiencies that courts have not previously encountered and thus the Supreme Court had not factored into the *per se* rule as originally conceived.”).

The tie in this case differs markedly from those the Supreme Court considered in *Jefferson Parish* and prior tying cases. Particularly, “[i]n none of these cases was the tied good . . . technologically integrated with the tying good.” *Microsoft*, 253 F.3d at 90. Moreover, none of the ties presented any purported procompetitive benefits that could not be achieved by adopting quality standards for third-party suppliers of the tied good, as Apple does here. *Id.*; see also *Int’l Salt Co. v. United States*, 332 U.S. 392, 398 (1947) (noting purported benefit can be achieved by

implementing quality control for machine consumables), *abrogated on other grounds by Ill. Tool*, 547 U.S. 28; *Int’l Bus. Machs. Corp. v. United States*, 298 U.S. 131, 139 (1936) (same).

Moreover, while *Jefferson Parish*’s separate-products test filters out procompetitive bundles from *per se* scrutiny in traditional markets, we are skeptical that it does so in the market involved here. Software markets are highly innovative and feature short product lifetimes—with a constant process of bundling, unbundling, and rebundling of various functions. In such a market, any first-mover product risks being labeled a tie pursuant to the separate-products test. *See Microsoft*, 253 F.3d at 92. If *per se* condemnation were to follow, we could remove would-be popular products from the market—dampening innovation and undermining the very competitive process that antitrust law is meant to protect. The Rule of Reason guards against that risk by “afford[ing] the first mover an opportunity to demonstrate that an efficiency gain from its ‘tie’ adequately offsets any distortion of consumer choice.” *Id.*

Applying the Rule of Reason to the tie involved here, it is clearly lawful. Epic’s tying claim (that app distribution and payment processing are tied together) is simply a repackaging of its generic Section 1 claim (that the conditions under which Apple offers its app-transactions product are unreasonable). For the reasons we explained above, Epic failed to carry its burden of proving that Apple’s structure of the iOS ecosystem is unreasonable. *See supra* section II.

IV. Sherman Act Section 2: Monopoly Maintenance

We now consider Epic’s Sherman Act Section 2 claim that Apple unlawfully maintained a monopoly. Section 2

makes it unlawful to “monopolize, or attempt to monopolize, or combine or conspire . . . to monopolize” a market. 15 U.S.C. § 2. A Section 2 monopolization claim “has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.” *United States v. Grinnell Corp.*, 384 U.S. 563, 570–71 (1966); *accord Qualcomm*, 969 F.3d at 990; *Microsoft*, 253 F.3d at 50.

At step one, the plaintiff must establish that the defendant possesses monopoly power, which is the substantial ability “to control prices or exclude competition.” *Grinnell*, 384 U.S. at 571; *accord United States v. Syufy Enters.*, 903 F.2d 659, 664 (9th Cir. 1990). Monopoly power differs in degree from market power, requiring “something greater.” *Kodak*, 504 U.S. at 481; *see also Areeda & Hovenkamp*, *Antitrust Law*, *supra*, ¶ 600b (market power and monopoly power exist along a spectrum). Like market power, monopoly power can be established either directly or indirectly. *Rebel Oil*, 51 F.3d at 1434; *see Microsoft*, 253 F.3d at 51.

At step two, the plaintiff must show that the defendant acquired or maintained its monopoly through “anticompetitive conduct.” *Trinko*, 540 U.S. at 407. This anticompetitive-conduct requirement is “essentially the same” as the Rule of Reason inquiry applicable to Section 1 claims. *Qualcomm*, 969 F.3d at 991; *see also Microsoft*, 253 F.3d at 59 (“[I]t is clear . . . that the analysis under section 2 is similar to that under section 1 regardless whether the rule of reason label is applied.” (citation omitted)). Where, like here, the plaintiff challenges the same conduct pursuant to Sections 1 and 2, we can “review claims under each section

simultaneously.” *Qualcomm*, 969 F.3d at 991. And if “a court finds that the conduct in question is not anticompetitive under § 1, the court need not separately analyze the conduct under § 2.” *Id.*

At step one in this case, the district court found that although Apple possesses “considerable” market power in the market for mobile-game transactions, that power is not durable enough to constitute monopoly power given the influx nature of the market. It then, at step two, echoed its Rule of Reason conclusion that Epic failed to establish Apple’s restrictions were anticompetitive.

We affirm the district court’s rejection of Section 2 liability. Epic does not argue on appeal that the district court clearly erred in finding that Apple lacks monopoly power in the mobile-games market. It argues only that the district court erred in rejecting its single-brand markets in which Apple would have a 100% market share—an argument we reject above. *See supra* section I. Moreover, even assuming Apple has monopoly power, Epic failed to prove Apple’s conduct was anticompetitive. *See supra* sections II–III.

V. Breach of Contract

Apple counter-sued Epic for breach of contract. Epic stipulated that it breached the DPLA when it implemented the *Fortnite* hotfix, which allowed it to process in-game transactions in violation of Apple’s IAP restriction. Epic raised several affirmative defenses, however, and argued that the DPLA is illegal, void as against public policy, and

unconscionable. The district court rejected each defense, and Epic now challenges the illegality holding on appeal.²¹

The parties agree that Epic’s illegality defense rises and falls with its Sherman Act claims. Because we affirm the district court’s holding that Epic failed to prove Apple’s liability pursuant to the Sherman Act, we also affirm its rejection of Epic’s illegality defenses.

VI. California’s Unfair Competition Law

We now turn to Apple’s cross-appeal, beginning with its arguments concerning the UCL. The district court found that Epic suffered an injury sufficient to confer Article III standing, concluded that Apple’s anti-steering provision violates the UCL’s unfair prong, and entered an injunction prohibiting Apple from enforcing the anti-steering provision against any developer. Apple challenges each aspect on appeal. We affirm.

A. Standing

Article III limits federal courts’ jurisdiction to “[c]ases” and “[c]ontroversies.” U.S. Const. art. III, § 2. “One

²¹ In its briefs, Epic also asserts that the district court erred in ruling that the DPLA was neither void-against-public-policy nor unconscionable, but the only substantive argument it makes is that the DPLA violates the Sherman Act. These doctrines, however, do not sound in express illegality. *See* Cal. Civ. Code § 1667(2) (a contract is void if it is “contrary to the policy of express law, though not expressly prohibited”); *Lhotka v. Geographic Expeditions, Inc.*, 181 Cal. App. 4th 816, 821, 824 (2010) (a contract is unconscionable if there is a disparity in bargaining power and the contract “reallocates risks in an objectively unreasonable or unexpected manner”). As such, Epic’s invocation of these doctrines without any relevant argument is insufficient to raise them on appeal. *See Singh v. Am. Honda Fin. Corp.*, 925 F.3d 1053, 1075 n.22 (9th Cir. 2019).

essential aspect of this [limitation] is that any person invoking the power of a federal court must demonstrate standing to do so.” *Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1950 (2019) (quoting *Hollingsworth v. Perry*, 570 U.S. 693, 704 (2013)). Constitutional standing requires a showing of: “(1) a concrete and particularized injury, that (2) is fairly traceable to the challenged conduct, and (3) is likely to be redressed by a favorable decision.” *Id.* Article III requires “that an ‘actual controversy’ persist throughout all stages of litigation.” *Id.* at 1951 (quoting *Hollingsworth*, 570 U.S. at 705).

Apple terminated Epic’s iOS developer account in August 2020. Then in September 2021 after the district court issued its order holding that Epic breached the DPLA, Apple informed Epic that it had no intention of reinstating Epic’s developer account. As a result, Epic has no apps remaining on the App Store. Apple therefore argues that Epic is no longer injured by the anti-steering provision. Apple’s argument, however, overlooks two critical aspects of the record. First, while Epic itself has no apps on the App Store, its subsidiaries do—causing Epic to be injured through the anti-steering provision’s effects on its subsidiaries’ earnings. Second, Epic is a competing game distributor through the Epic Games Store and offers a 12% commission compared to Apple’s 30% commission. If consumers can learn about lower app prices, which are made possible by developers’ lower costs, and have the ability to substitute to the platform with those lower prices, they will do so—increasing the revenue that the Epic Games Store generates. As such, the district court did not clearly err in finding that Apple’s anti-steering provision injures Epic.

B. Merits

As relevant here, the UCL prohibits “any [1] unlawful, [2] unfair or [3] fraudulent business act or practice.” Cal. Bus. & Prof. Code § 17200. As the UCL’s three-prong structure makes clear, a business practice may be “unfair,” and therefore illegal under the UCL, “even if not specifically proscribed by some other law.” *Cel-Tech Commc’ns, Inc. v. L.A. Cellular Tel. Co.*, 20 Cal. 4th 163, 180 (1999). The unfair prong is “intentionally framed in its broad, sweeping language, precisely to enable judicial tribunals to deal with the innumerable ‘new schemes which the fertility of man’s invention would contrive.’” *Id.* (quoting *Am. Philatelic Soc. v. Claibourne*, 3 Cal. 2d 689, 698 (1935)); *see also People ex rel. Mosk v. Nat’l Research Co. of Cal.*, 201 Cal. App. 2d 765, 772 (1962) (the UCL covers unfair practices that “may run the gamut of human ingenuity and chicanery”).

The California Supreme Court has refined this “wide standard,” *Cel-Tech*, 20 Cal. 4th at 181, into two tests relevant to this litigation. First, to support “any finding of unfairness to *competitors*,” a court uses the “tethering” test, which asks whether the defendant’s conduct “threatens an incipient violation of an antitrust law, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition.” *Id.* at 186–87 (emphasis added). Second, to support a finding of unfairness to *consumers*, a court uses the balancing test, which “weigh[s] the utility of the defendant’s conduct against the gravity of the harm to the alleged victim.” *Progressive W. Ins. Co. v. Super. Ct.*, 135 Cal. App. 4th 263, 285 (2005) (citation omitted). These tests “are not mutually exclusive.” *Lozano v. AT&T Wireless Servs., Inc.*, 504 F.3d

718, 736 (9th Cir. 2007) (citing *Schnall v. Hertz Corp.*, 78 Cal. App. 4th 1144 (2000)).

Here, the district court applied both tests. Through the Epic Games Store, Epic is a games-distribution competitor of Apple—triggering the competitor test. Through its subsidiaries that have apps on the App Store, Epic consumes the app transactions that Apple offers in a two-sided market—triggering the consumer test. *Cf. Amex*, 138 S. Ct. at 2286 (each side of two-sided market “jointly consume[s] a single product” (citation omitted)). Applying the tethering test, the court found that the anti-steering provisions “decrease [consumer] information,” enabling supracompetitive profits and resulting in decreased innovation. It relied on Apple’s own internal communications for the proposition that the anti-steering provision prevents developers from using two of the three “most effective marketing activities,” push notifications and email outreach. It then reiterated these factual findings to conclude that the provision also violates the balancing test.

Apple does not directly challenge the district court’s application of the UCL’s tethering and balancing tests to the facts of this case. Instead, Apple makes two arguments attacking UCL liability as a matter of law. Neither is supported by California law.

1. Safe-Harbor Doctrine

Apple argues that Epic’s failure to establish Sherman Act liability forecloses UCL liability pursuant to the UCL’s “safe harbor” doctrine, which bars a UCL action where California or federal statutory law “absolutely preclude[s] private causes of action or clearly permit[s] the defendant’s conduct.” *Zhang v. Sup. Ct.*, 57 Cal. 4th 364, 379–80 (2013). The safe-harbor doctrine emphasizes that there is a

“difference between (1) not making an activity unlawful, and (2) making that activity lawful.” *Cel-Tech*, 20 Cal. 4th at 183; *accord Zhang*, 57 Cal. 4th at 379. Accordingly, in every instance where a court found the Sherman Act to preclude a UCL action, a *categorical* antitrust rule formed the basis of the decision. We held that the judge-made baseball exemption—that “the business of providing public baseball games for profit . . . [is] not within the scope of the federal antitrust laws”—precluded a UCL action. *City of San Jose v. Off. of the Com’r of Baseball*, 776 F.3d 686, 689 (9th Cir. 2015) (quoting *Toolson v. N.Y Yankees, Inc.*, 346 U.S. 356, 357 (1953)). A California Court of Appeal similarly held that the *Colgate* doctrine—that it is lawful for a company to unilaterally announce the terms on which it will deal—precluded a UCL action. *Chavez v. Whirlpool Corp.*, 93 Cal. App. 4th 363, 367, 373, 375 (2001).

Neither Apple nor any of its *amici* cite a single case in which a court has held that, when a federal antitrust claim suffers from a *proof deficiency*, rather than a *categorical legal bar*, the conduct underlying the antitrust claim cannot be deemed unfair pursuant to the UCL. Indeed, in a leading case on the safe-harbor exception, the California Supreme Court permitted a UCL claim against a predatory-price scheme to proceed even though the plaintiff failed to prove—as state antitrust law requires—that the defendant intended to harm competition through the scheme. *Cel-Tech*, 20 Cal. 4th at 183. Apple’s rule would convert any Rule of Reason shortcoming into a UCL defense and undermine the UCL’s three-prong structure by collapsing the “unfair” and “unlawful” prongs into each other. We

reject Apple’s proposed rule as foreclosed by California law.²²

2. Importation of Sherman Act Principles

Apple next argues that two principles from Sherman Act case law preclude UCL liability here. We find neither argument persuasive. First, Apple contends that the Supreme Court’s decision in *Amex*—finding in favor of American Express in a suit challenging its anti-steering provision—bars UCL liability stemming from Apple’s anti-steering provision. Apple does not explain how *Amex*’s fact- and market-specific application of the first prong of the Rule of Reason establishes a categorical rule approving anti-steering provisions, much less one that sweeps beyond the Sherman Act to reach the UCL. *Amex* was based on the plaintiff’s failure to establish direct evidence of anticompetitive effects through a reduction in output, supracompetitive pricing, or excessively high profit margins; it was not a blanket approval of anti-steering provisions. *See Amex*, 138 S. Ct. at 2288.

Second, Apple argues that the UCL mandates trial courts to define a relevant market and then conduct the balancing test within that market (similar to the Rule of Reason). Again, Apple does not cite any California authority for this proposition. Moreover, such a rule runs contrary to California courts’ repeated instruction that “[n]o inflexible rule can be laid down as to what conduct will constitute unfair competition.” *E.g., Pohl v. Anderson*, 13 Cal. App.

²² Several *amici* contend that, under current California case law, the UCL provides insufficient guidance to businesses. That argument, however, fundamentally misunderstands our role when we interpret and apply state law while exercising diversity or supplemental jurisdiction.

2d 241, 242 (1936) (citation omitted). It also contradicts a California Supreme Court decision that conducted something akin to quick-look review (in which a precise market-definition is not needed) when confronted with significant restrictions on the free flow of price information. *See Oakland-Alameda Cnty. Builders' Exch. v. F. P. Lathrop Constr. Co.*, 4 Cal. 3d 354, 363–64 (1971) (invalidating a prohibition on unsealing competitor bids after bidding had culminated on the grounds that it “restrain[ed] open price competition and unlawfully tamper[ed] with the pricing structure”).

C. Injunctive Relief

Apple also argues that (1) the district clearly erred when it found that Epic’s injuries were irreparable, and (2) it abused its discretion when applying the injunction against all developers, not just Epic’s subsidiaries that have apps on the App Store. We disagree.

Even where the UCL authorizes injunctive relief pursuant to state law, a federal court must also ensure that the relief comports with “the traditional principles governing equitable remedies in federal courts.” *Sonner v. Premier Nutrition Corp.*, 971 F.3d 834, 844 (9th Cir. 2020). To issue an injunction, the court must find: “(1) that [the plaintiff] has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.” *Galvez v. Jaddou*, 52 F.4th 821, 831 (9th Cir. 2022) (quoting *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006)). Moreover, injunctive relief must be no “more burdensome to

the defendant than necessary to provide complete relief to the plaintiff[.]” *L.A. Haven Hospice, Inc. v. Sebelius*, 638 F.3d 644, 664 (9th Cir. 2011) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979)). We review a district court’s decision to grant a permanent injunction, and the scope of that injunction, for an abuse of discretion and review the factual findings underlying the injunction for clear error. *NCAA Antitrust Litig.*, 958 F.3d at 1253.

1. Issuance of the Injunction

First, the district court did not clearly err in finding that Epic suffered an injury for which monetary damages would be inadequate. While economic injury is generally not considered irreparable, it is where the underlying injury does not readily lend itself to calculable money damages. *See Rent-A-Ctr., Inc. v. Canyon Television & Appliance Rental, Inc.*, 944 F.2d 597, 603 (9th Cir. 1991). Here, the district court found that the anti-steering provision “is not easily remedied with money damages,” a finding that has ample support in the record. In 2019, there were over 300,000 games on the App Store. Calculating the damages caused by the anti-steering provision would require a protracted and speculative inquiry into: the availability of each of those 300,000 games on the Epic Games Store, the percentage of revenue on each game that comes from users who multi-home and can therefore substitute, and how high the substitution rate would be among those multi-home users.²³

²³ Apple also asserts—in one sentence and without any authority—that the district court abused its discretion in failing to hold that Apple’s unclean-hands argument precluded injunctive relief. This passing statement was insufficient to raise this issue on appeal. *See Singh*, 925 F.3d at 1075 n.22.

2. Scope of the Injunction

Second, the district court did not abuse its discretion when setting the scope of the injunctive relief because the scope is tied to Epic's injuries. The district court found that the anti-steering provision harmed Epic by (1) increasing the costs of Epics' subsidiaries' apps that are still on the App Store, and (2) preventing other apps' users from becoming would-be Epic Games Store consumers. Because Epic benefits in this second way from consumers of other developers' apps making purchases through the Epic Games Store, an injunction limited to Epic's subsidiaries would fail to address the full harm caused by the anti-steering provision.

VII. Attorney Fees

We reverse the district court's holding that the DPLA's indemnification provision does not require Epic to pay Apple's attorney fees related to this litigation. Based on the DPLA's choice-of-law provision, we interpret its indemnification provision pursuant to California contract-interpretation principles. We review the district court's interpretation of a contract *de novo*. *Shivkov v. Artex Risk Sols., Inc.*, 974 F.3d 1051, 1058 (9th Cir. 2020).

California courts presume that “[a] clause that contains the words ‘indemnify’ and ‘hold harmless’ generally obligates the indemnitor to reimburse the indemnitee for any damages the indemnitee becomes obligated to pay third persons—that is, it relates to *third party* claims, *not* attorney fees incurred in a breach of contract action *between the parties* to the indemnity agreement itself.” *Alki Partners, LP v. DB Fund Servs., LLC*, 4 Cal. App. 5th 574, 600 (2016) (emphasis added). However, courts also look to “the context in which the language appears.” *Id.* A contract, therefore,

can rebut this presumption with language that “specifically provide[s] for attorney’s fees in an action on the contract.” *Id.* at 600–01 (emphasis omitted) (citation omitted). For example, the California Court of Appeal read an indemnification clause to cover intra-party disputes when the clause covered all losses “whether or not arising out of third party [c]laims.” *Dream Theater, Inc. v. Dream Theater*, 124 Cal. App. 4th 547, 556–57 (2004). And it did the same where an indemnification clause was accompanied by a clause clarifying that, in addition to the remedies listed in the indemnification clause, each party could also seek specific performance for certain breaches of the contract—a provision that “would be unnecessary if indemnification only referred to third party claims.” *Zalkind v. Ceradyne, Inc.*, 194 Cal. App. 4th 1010, 1028 (2011).

Turning to the facts here, section 10 of the DPLA provides that Epic “agree[s] to indemnify and hold harmless, and upon Apple’s request, defend, Apple[] . . . from any and all claims, losses, liabilities, damages, taxes, expenses and costs, including without limitation, attorneys’ fees and court costs . . . , incurred by [Apple] and arising from or related to” several enumerated grounds. One grounds, clause (i), applies to Epic’s “breach of any certification, covenant, obligation, representation or warranty in [the DPLA].”

Clause (i) rebuts the *Alki Partners* presumption by “specifically provid[ing] for attorney’s fees in an action on the contract.” 4 Cal. App. 5th at 600–01. It expressly refers to Epic’s “breach” of its obligations pursuant to the DPLA—contemplating an intra-party action for breach of contract, not claims by third parties. The surrounding context of section 10 buttresses this conclusion. Section 14.3 of the DPLA disclaims that the agreement “is not for the benefit of any third parties.” Indeed, Epic has not identified a single

situation in which a third-party could possibly sue Apple pursuant to clause (i). Therefore, we hold that clause (i) contemplates intra-party disputes and Apple is entitled to attorney fees pursuant to it.²⁴

CONCLUSION

To echo our observation from the NCAA student-athlete litigation: There is a lively and important debate about the role played in our economy and democracy by online transaction platforms with market power. Our job as a federal Court of Appeals, however, is not to resolve that debate—nor could we even attempt to do so. Instead, in this decision, we faithfully applied existing precedent to the facts as the parties developed them below. For the foregoing reasons, we **AFFIRM IN PART AND REVERSE AND REMAND IN PART.**

S.R. THOMAS, Circuit Judge, concurring in part and dissenting in part:

I agree with much of the majority opinion. I fully agree that the district court properly granted Epic injunctive relief on its California Unfair Competition Law claims. I also fully agree that the district court properly rejected Epic’s illegality defenses to the Developer Program Licensing Agreement (“DPLA”) but that, contrary to the district court’s decision, the DPLA does require Epic to pay attorney fees for its breach. On the federal claims, I also agree that the district

²⁴ We express no opinion on what portion of Apple’s attorney fees incurred in this litigation can be fairly attributed to Epic’s breach of the DPLA, such that they fall within the scope of clause (i).

court erred in defining the relevant market and erred when it held that a non-negotiated contract of adhesion falls outside of the scope of Section 1 of the Sherman Act. However, unlike the majority, I would not conclude that these errors were harmless. An error is harmless if it “do[es] not affect the substantial rights of the parties.” 28 U.S.C. § 2111. The district court’s errors relate to threshold analytical steps, and the errors affected Epic’s substantial rights. Thus, I would reverse the district court and remand to evaluate the claims under the correct legal standard.

“A threshold step in any antitrust case is to accurately define the relevant market” *Fed. Trade Comm’n v. Qualcomm Inc.*, 969 F.3d 974, 992 (9th Cir. 2020). “Without a definition of [the] market there is no way to measure [the defendant’s] ability to lessen or destroy competition.” *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2285 (2018) (alterations in original) (quoting *Walker Process Equip., Inc. v. Food Mach. & Chem. Corp.*, 382 U.S. 172, 177 (1965)).

I agree with the majority that the district court erred in rejecting Epic’s proffered foremarket. The district court rejected the foremarket of mobile operating systems because Apple does not sell or license its operating system separately from its smartphones. But we have previously recognized that such a market can exist. *See Digidyne Corp. v. Data Gen. Corp.*, 734 F.2d 1336, 1338–39 (9th Cir. 1984), *implicitly overruled on other grounds by Ill. Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28, 31 (2006) (holding that separate markets existed for software and hardware even when they were always bundled together).

The district court then rejected Epic’s proposed aftermarket of solutions for iOS app payment processing

(“IAP”) because IAP is integrated into the operations system. This conclusion was not only legally erroneous, but in contradiction to the district court’s factual finding of separate demand. *See Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 19 (1984) (“[W]hether one or two products are involved turns . . . on the character of the demand for the two items . . . not on the functional relation between them . . .”).

I also agree with the majority that the district court erred in holding that a non-negotiated contract of adhesion falls outside of the scope of § 1 of the Sherman Act and, therefore, the Developer Program License Agreement was not a contract covered under § 1. “[E]very commercial agreement’ . . . among two or more entities” qualifies as a § 1 agreement. *Paladin Assocs., Inc. v. Mont. Power Co.*, 328 F.3d 1145, 1154 n.7 (9th Cir. 2003) (emphasis in original) (quoting *Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co.*, 472 U.S. 284, 289 (1985)). This includes a contract of adhesion. *See Perma Life Mufflers, Inc. v. Int’l Parts Corp.*, 392 U.S. 134, 141–142 (1968), *overruled on other grounds by Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 777 (1984).

The majority holds that the errors were harmless given the district court’s analysis of the remaining steps in the Rule of Reason analysis. However, there is no direct authority for that proposition, and it amounts to appellate court fact-finding. Indeed, the Supreme Court has instructed that “courts usually cannot properly apply the rule of reason without an accurate definition of the relevant market.” *Am. Express*, 138 S. Ct. at 2285.

Correction of these errors would have changed the substance of the district court’s Rule of Reason analysis. *See*

Qualcomm, 969 F.3d at 992. Unless the correct relevant market is identified, one cannot properly assess anticompetitive effects, procompetitive justifications, and the satisfaction of procompetitive justifications through less anticompetitive means. The analysis is different; therefore, the errors affected substantial rights and cannot be considered harmless.

Relying on the district court's market does not solve this problem. The parties formulated arguments around their own markets—not the district court's market. Remand would have given the parties an opportunity to argue whether the DPLA worked unfair competition in the district court's market.

The effect on substantial rights in this case is magnified by the majority's holding that, under *County of Tuolumne v. Sonora Community Hospital*, when the plaintiff shows anticompetitive effects but fails to show a less restrictive alternative to the defendant's procompetitive justification, the court must balance the anticompetitive harms against the procompetitive benefits. 236 F.3d 1148, 1160 (9th Cir. 2001). The district court did not undertake a formal *Tuolumne* balancing analysis as such, although the majority concludes that the district court's analysis was sufficient. Remand for a formal balancing should be required. Regardless, the effect of the legal errors on any balancing is obvious. The district court analyzed anticompetitive effects in terms of increases in the cost of mobile gaming transactions—the court's relevant market. But the court could have found greater increases in costs if its analysis concerned Epic's markets, and this would change a properly conducted balancing analysis. In essence, any balancing done out of the context of a relevant market necessarily involves putting a thumb on the balancing scale.

Accordingly, the district court’s legal errors “affect[ed] Epic’s] substantial rights” and therefore were not harmless. *See* 28 U.S.C. § 2111. I would remand for the district court to re-analyze the case using the proper threshold determination of the relevant market.

Therefore, I respectfully concur in part and dissent in part.

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United States District Court
Northern District of California

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

EPIC GAMES, INC.,
Plaintiff,

vs.

APPLE INC.,
Defendant.

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

PERMANENT INJUNCTION

AND RELATED COUNTERCLAIM

The Court, having considered the evidence presented at the bench trial in this matter and consistent with its findings of fact and conclusions of law, **HEREBY ORDERS** as follows:

1. Apple Inc. and its officers, agents, servants, employees, and any person in active concert or participation with them (“Apple”), are hereby permanently restrained and enjoined from prohibiting developers from (i) including in their apps and their metadata buttons, external links, or other calls to action that direct customers to purchasing mechanisms, in addition to In-App Purchasing and (ii) communicating with customers through points of contact obtained voluntarily from customers through account registration within the app.

2. Any party may seek modification of this Order, at any time, by written motion and for good cause based on changed circumstances or otherwise.

3. The Court will retain jurisdiction over the enforcement and amendment of the injunction. If any part of this Order is violated by any party named herein or any other person, plaintiff may, by motion with notice to the attorneys for defendant, apply for sanctions or other relief that may be appropriate.

4. This injunction will take effect in ninety (90) days.

IT IS SO ORDERED.

Dated: September 10, 2021


YVONNE GONZALEZ ROGERS
UNITED STATES DISTRICT JUDGE