Nos. 21-16506 and 21-16695

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EPIC GAMES, INC.,

Plaintiff-Appellant/Cross-Appellee,

v.

APPLE INC.,

Defendant-Appellee/Cross-Appellant.

On Appeal from the United States District Court
for the Northern District of California
No. 4:20-cv-05640-YGR (Hon. Yvonne Gonzalez Rogers)

BRIEF OF THE CIVIL JUSTICE ASSOCIATION OF CALIFORNIA IN SUPPORT OF APPLE INC.'S BRIEF ON CROSS-APPEAL

FRED J. HIESTAND (SBN 44241)
General Counsel
Civil Justice Association of California
3418 3rd Avenue, Suite 1
Sacramento, CA 95817
Telephone: (916) 448-5100
fred@fjh-law.com

WILLIAM L. STERN (SBN 96105)
Law Offices of William L. Stern
1525 Thousand Oaks Blvd.
Berkeley, CA, 94707
Telephone: (510) 527-9670
wsternesq@gmail.com

Counsel for Amicus Curiae

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Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), *amicus curiae*, the Civil Justice Association of California, states that: (1) no party's counsel authored this brief in whole or in part; (2) no party or party's counsel has contributed money intended to fund preparing or submitting this brief; and (3) no person other than *amicus* or its counsel has contributed money that was intended to fund the preparation or submission of this brief.

CONSENT

Pursuant to Ninth Circuit Rule 29-2(a), all parties have consented to the filing of amicus briefs.

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IMPORTANCE OF ISSUES AND INTEREST OF *AMICUS*

The Civil Justice Association of California ("CJAC") urges the Court to reverse one count of the district court judgment. That is the tenth and last count holding Apple Inc. liable to Epic Games, Inc. for violating the "unfairness" prong of California's Unfair Competition Law ("UCL"; Cal. Bus. & Prof. Code § 17200 et seq.). That portion of the judgment is internally inconsistent with the court's findings and legal conclusions as to the other nine counts that exonerate Apple from all liability under Epic's dominant federal and state antitrust claims. It also conflicts with opinions of this Circuit and California courts and defies common sense. If allowed to stand, it will create much mischief and confusion concerning the scope and application of the UCL's already elusive "unfairness' prong, magnifying the uncertainty that businesses face in trying to comply with the UCL, fomenting future litigation, and increasing the costs for goods and services—exactly what the California Supreme Court has cautioned against.

CJAC is a longstanding non-profit organization representing businesses, professional associations, and financial institutions. Our principal purpose is to educate the public about ways to assure that our civil liability laws are fair, efficient, certain, and uniform. Toward this end, CJAC officially sponsored and supported Proposition 64 in 2004, which voters passed to, in part, tighten the standing requirements for private enforcement of the UCL. Both before and since that enactment,

CJAC has participated as *amicus curiae* in numerous cases concerning the UCL. *See, e.g.*, *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal.4th 1134 (2003); *Duran v. U.S. Bank Nat'l. Assn.*, 59 Cal. 4th 1 (2014); *In re Tobacco II Cases*, 46 Cal. 4th 298 (2009).

INTRODUCTION AND SUMMARY OF ARGUMENT

There is much to admire about the 180-page order that bristles with 666 footnotes, but the last part of it about the scope and application of the UCL invites reproach. That portion of the judgment finding UCL liability against Apple for injunctive relief favoring Epic should be reversed for several reasons.

First, the district court found that Epic "has not proven a present antitrust violation." Its only injury, said the court, was "threatened" and "incipient"—a *twice*-removed contingency. It nevertheless found that Epic had standing to bring its "unfair" claim in federal court. It did so by conflating statutory standing under the UCL with Article III standing.

The UCL doesn't determine who may sue in federal court. Article III does. Without a present wrong, this is simply a "fear of injury" case. Epic's UCL injury is not "concrete," an "irreducible constitutional minimum" of Article III. The moment the district court found the UCL injury merely "incipient," dismissal was mandatory.

Second, Apple terminated Epic's developer account, which the district court found it had the right to do. Yet, it enjoined Apple anyway. Epic can never again

offer apps on the Apple platform, so the UCL injunction can never affect Epic. To have "injury in fact," the injury must be "particularized," that is, it must affect Epic "in a personal and individual way." With no prospect of future dealings with Apple, that can't happen.

Third, suppose there were Article III standing to sue and seek injunction. Until this case, no court has ever allowed a derivative UCL "unfair" claim to survive after judgment is entered on the underlying antitrust claims. Here, the district court found that Epic's UCL claim arose from "the same conduct" as the rejected antitrust claims, specifically rejecting the anti-steering underpinnings of Epic's tag-along UCL claim. It entered judgment on those antitrust claims. Epic cannot relitigate the identical anti-steering claims under the UCL.

Fourth, the UCL part of the judgment is logically inconsistent with the rest of the opinion finding no liability against Apple for the antitrust claims asserted directly or "bootstrapped" to the UCL's "unfair" prong. After giving Epic's "unfair" claim "separate consideration," the district court found "unfair" the very restraints it had just determined to be procompetitive and to withstand scrutiny under the "rule of reason." It believed this was compelled by a sentence in *Cel-Tech Comms., Inc. v. Los Angeles Cellular Tel. Co.*, 20 Cal. 4th 163, 187 (1999) ("*Cel-Tech*") that, under certain circumstances, a UCL "unfair" claim may proceed even after the underlying antitrust claims are extinguished. But that belief disregards *Cel-Tech's*

caution that "[a]though the unfair competition law's scope is sweeping, it is not unlimited. Courts may not simply impose their own notions of the day as to what is fair or unfair." 20 Cal. 4th at 182. The district court did exactly that. That is not consonant with *Cel-Tech,* but a perversion of it.

Fifth, the judgment runs afoul of *Sonner v. Premier Nutrition Corp*., 971 F.3d 834 (9th Cir. 2020) ("*Sonner*"), which holds that if a plaintiff has an adequate remedy at law, that is a complete defense to a UCL claim. As the court below noted, the objective of this lawsuit "[f]irst and foremost" was to obtain "tremendous monetary gain and wealth" for Epic. Epic pursued nine antitrust claims for "the same conduct" as its UCL claim. *Sonner* bars the UCL claim.

Sixth, and finally, the judgment for injunctive relief should be barred by the "unclean hands" defense. The court ruled that Epic breached its contract with Apple. Courts have long permitted an unclean hands defense in breach of contract cases like this where, as here, the breaching plaintiff seeks equitable relief.

ARGUMENT

I. EPIC LACKS ARTICLE III STANDING

A. The District Court's Finding of "Incipiency" Precludes Article III Standing

"Epic Games has not proven a present antitrust violation." (1-ER-164.) So found the district court. At most, certain of Apple's policies "*threaten* an *incipient* violation of the antitrust law…." (*Id*., emphasis added.)

"Incipiency" and Article III are mutually exclusive. "Article III demands that an 'actual controversy' persist throughout all stages of litigation." *Hollingsworth v. Perry*, 570 U.S. 693, 705 (2013); *see also Env't Prot. Info. Ctr., Inc. v. Pac. Lumber Co.*, 257 F.3d 1071, 1076-77 (9th Cir. 2001) ("[w]ithout jurisdiction the court cannot proceed at all in any cause.").

The district court nevertheless determined that Epic had standing to bring a UCL claim despite finding that Epic's injury was only "threatened" and "incipient"—a *twice*-removed contingency. (1-ER-160–61.) It did so by conflating statutory standing under the UCL with Article III standing.

The court's opinion is a carousel of circularity. It starts by observing, correctly, that "[t]he injury-in-fact requirement of the UCL incorporates standing under Article III of the United States Constitution." (1-ER-160.) But then it veers sharply off course. Because state law allows litigants to assert UCL claims over "threatened" injuries still in their "incipiency," so the opinion reasons, Epic may pursue those claims in federal court. (1-ER-161.) But the UCL doesn't determine who may sue in federal court. Article III does.

As it happened, that discussion of state law was merely predicate to a second state law question, which the district court erroneously believed to be controlling: Whether the UCL's "competitor" test or "consumer" test applies to Epic's UCL claim. (1-ER-160-61.) The district court thought that question "close," but

concluded that Epic had statutory "standing" to sue Apple under the UCL both as competitor and "quasi-consumer"—a new and undefined category. (1-ER-161.)

Therein lies the problem. The moment the district court made its "incipiency" finding, dismissal was warranted. "Injury in fact is a constitutional requirement, and it is settled that Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing." *Spokeo v. Robins*, 578 U.S. 330, 339 (2016), internal quotes omitted. If Congress can't "erase Article III's standing requirements," neither can the California legislature.

The "'irreducible constitutional minimum' of [Article III] standing consists of three elements." *Spokeo*, 578 U.S. at 338 (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992).) One element is "injury in fact." *Id*. To satisfy this element, Epic had to demonstrate "an injury that is both 'concrete and particularized.'" *Id*. at 1545 (quoting *Friends of the Earth, Inc. v. Laidlaw Env't Servs., Inc*., 528 U.S. 167, 180–81 (2000). To be "concrete," the "injury must be "*de facto*"; that is, it must be "real" and not "abstract." *Spokeo*, 578 U.S. at 340. In short, the injury must "actually exist." *Id*.

Epic's "incipient" injury doesn't exist. It is only "threatened." "[T]he mere risk of future harm, without more, cannot qualify as a concrete harm in a suit for damages." *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2208 (2021); *Spokeo*, 578

U.S. at 342 (a statutory violation that poses only the potential for harm to future employment prospects is not "concrete harm" for purposes of Article III).

In *Ramirez*, TransUnion had technically violated the Fair Credit Reporting Act by reporting inaccurate information on some consumers' credit reports. But class members failed to show that "the risk of future harm *materialized*—that is, that the inaccurate . . . alerts in their internal TransUnion credit files were ever provided to third parties or caused a denial of credit." 141 S. Ct. at 2211, emphasis added. "An injury in law is not an injury in fact." *Id.*, at 2205.

Like *Ramirez*, this is a "fear of injury" case. The district court believed Apple's policies pose a risk to "[t]he open flow of information," which is important in "technology markets." (1-ER-161.) But that risk was purely hypothetical: For consumers, "[i]nformation costs *may* create" a "lock-in" for Apple platforms; users "*may* also lack the ability to attribute costs to the [Apple] platform versus the developer;" and "such information costs *may* create the *potential* for anticompetitive exploitation of consumers." (*Id.*, emphasis added.)

"May create," "may lack," and "potential exploitation" express conditional risks. So too, the terms "incipient" and "threatened" describe, respectively,

something not yet in existence and merely "an indication of something impending."[1] As the district court put it, Epic "has *not* proven a present wrong." (1-ER-164, emphasis added.)

Nor does it matter that the court characterized the injury as "informational." "An asserted informational injury that causes no adverse effects cannot satisfy Article III." *Ramirez*, 141 S. Ct. at 2214.

The district court sought to satisfy this requirement by stating that "[b]ecause Epic Games would [but for the anti-steering provision in its contract with Apple] earn revenues from a competing store, it has suffered an economic injury." (1-ER-159.) To satisfy Article III, "would earn" is not enough. The risk needs to have materialized.

In fact, "would earn" is not enough even for statutory standing. In *Lee v. Luxottica Retail N. Am., Inc.*, 65 Cal. 5th 793, 803 (2021), the Court held that losing expected but unvested income from a future customer base does not satisfy statutory standing under the UCL. *See also Rincon Band of Luiseño Mission Indians v. Flynt*, 70 Cal. App. 5th 1059, 1099 (2021) (questioning "whether lost or diminished

[1] "Incipient" means "beginning to come into being or to become apparent. *See* https://www.merriam-webster.com/dictionary/incipient (last viewed March 26, 2022). "Threat" means "an expression of intention to inflict evil, injury, or damage" and "an indication of something impending." *See* https://www.merriam-webster.com/dictionary/threat (last viewed March 26, 2022).

government programs and services" could ever qualify for statutory standing under the UCL); *In re Yahoo! Inc. Customer Data Security Breach Litig.* 313 F.Supp.3d 1113, 1130 (N.D. Cal. 2018) ("fear of identity theft" following a data breach is not actionable under the UCL).

In the short time since *Ramirez* was decided, this Court has consistently rejected future and unrealized injuries as a proxy for Article III standing. In *Perry v. Newman,* for example, it held that proponents of California's Proposition 8, which banned same-sex marriage, lacked standing to block the district court's unsealing of court video recordings of the 2010 bench trial despite the proponents' already-realized fears of harassment and the chilling effect the act of unsealing would have on "future litigants." 18 F.4th 622, 632-33 (9th Cir. 2021); *see also Condry v. UnitedHealth Group, Inc*., 2021 WL 4225536, *3 (9th Cir., Sept. 16, 2021) (because plaintiffs were not entitled to insurance reimbursement, "any harm caused by a confusing denial letter was no more is no more than a 'bare procedural violation'"); *In re Coca-Cola Prod. Mktg. and Sales Prac. Lit*., 2021 WL 3878654 *2 (9th Cir., Aug. 13, 2021) (plaintiffs in mislabeling class action lack standing because none desired to purchase Coke again and the allegation that they might "consider" buying is not enough).

On this record, "injury in fact" and "incipiency" are oxymorons. This Court should reverse the UCL portion of the judgment for lack of Article III standing.

B. Apple's Lawful Termination of Epic's Developer Account Eliminated Epic's Standing to Seek UCL Injunctive Relief

Even if Epic had standing to sue, it lacked standing to seek injunctive relief once Apple terminated Epic's developer account. (1-ER-25-26.) As the district court found, Apple was justified in doing so. (1-ER-173.)

Epic can never offer apps on Apple's platform again. Hence, Epic cannot be personally affected by the allegedly offending anti-steering provisions. The district court lacked Article III jurisdiction to issue the UCL injunction.

"Particularization is necessary to establish injury in fact." *Spokeo*, 578 U.S. at 339. To be "particularized," the injury must affect Epic "in a personal and individual way." *Id*. That can't happen here. A party with no future dealings with the defendant lacks standing to seek a UCL injunction. *See Yazzie v. Hobbs*, 977 F.3d 964, 966 (9th Cir. 2020). In *Hangarter v. Provident Life & Accident Ins. Co.*, 373 F.3d 998 (9th Cir. 2004), plaintiff no longer had an insurance policy with the insurer once the jury awarded damages for breach of contract. Consequently, she lacked Article III standing to seek injunctive relief under the UCL. *Id*., 1021–22.

Nor does it matter that others—here developers or consumers—might benefit from an injunction. In *Perez v. Nidek Co., Ltd*, this Court held that Article III precludes suing physicians who did not perform LASIK eye surgery on the class

representatives even though they may have performed surgeries on other absent class members. 711 F.3d 1109, 1113 (9th Cir. 2013).[2]

Likewise, that the UCL affords courts with broad equitable powers is of no moment. (*Cf.* 1-ER-166.) The problem isn't the UCL. It's Article III.

In *Schneider v. Chertoff*, 450 F.3d 944, 959 (9th Cir. 2006), plaintiff sought injunctive relief after the underlying claim became moot. This Court could have been describing this case when it wrote: "[W]e have no authority to … declare principles or rules of law which cannot affect the matter in issue in the case before us."

Apple's lawful termination of Epic's developer account eliminated Epic's standing to seek a UCL injunction.

II. THE DISTRICT COURT'S FINDING OF NO ANTITRUST VIOLATION PRECLUDES EPIC'S UCL "UNFAIR" CLAIM

Even if Epic had standing to sue and to seek an injunction, the UCL judgment still would have to be reversed. There was no UCL violation.

A. Epic Cannot Relitigate its Failed Anti-Steering Claims Under the UCL

Until this case, no court had ever allowed a UCL "unfair" claim to survive judgment on the underlying antitrust claims. Because Epic's antitrust claims ended

[2] The district court recognized, at least implicitly, that citing to someone else's irreparable injury is insufficient. (*Cf.* 1-ER-166 ("[A] plaintiff seeking equitable relief under the UCL in federal court must demonstrate: (1) that *it* has suffered an irreparable injury…"), emphasis added.)

badly, in a judgment, this case presents an exceptionally poor candidate for innovation.

Following a 16-day trial, the district court entered detailed findings. The court rejected Epic's antitrust claims, including the very anti-steering provisions it would later remake into Epic's UCL "unfair" claim. These were no ordinary findings. The court entered judgment. Those findings are conclusive and cannot be "borrowed."

The district court disagreed. It relied on a single sentence in *Cel-Tech* for the proposition that a UCL "unfair" claim may continue even after the underlying anti-trust claims are extinguished:

> We thus adopt the following test: When a plaintiff who claims to have suffered injury from a direct competitor's "unfair" act or practice invokes section 17200, the word "unfair" in that section means conduct that 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.

20 Cal. 4th at 187. The district court apparently believed this afforded Epic a second bite at the apple, so it gave the anti-steering provisions "separate consideration." (1-

ER-161.) From there, the court found anti-steering violations that Epic never actually pled,[3] dispensing an injunction that Epic never sought.[4]

Cel-Tech is not to the contrary. In *Cel-Tech*, there was no judgment on the antitrust claims. Here there was.

Judgment matters. After setting forth the new test of "unfair" in competitor cases, *Cel-Tech* remanded. Because "the parties did not litigate the case with the particular test in mind, we cannot yet give a definitive answer [whether the below-cost sales were unfair]. But we agree with the Court of Appeal that plaintiffs *might be able to show* the sales were unfair under this test." 20 Cal. 4th at 188–89, emphasis added.

Cel-Tech was a pleadings case. "Might be able to show" is different from "went to trial, lost, and suffered an adverse judgment with incapacitating findings."

Epic's UCL claims arose from "the same conduct" as its antitrust claims. (1-ER-162.) Moreover, Epic challenged the anti-steering provisions as predicate to its argument that the IAP requirement is how Apple enforces its illegal restraint of the

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[3] Epic never alleged a stand-alone anti-steering violation. In fact, Epic challenged only two of Apple's limitations, App Store distribution and In-App Purchase (IAP). The complaint says nothing about Apple's anti-steering policies apart from a fleeting reference as to how those policies advance the IAP requirement. (4-SER902–03).

[4] The district court reasoned that although Epic's "strategy of seeking broad sweeping relief failed, narrow remedies are not precluded." (1-ER-162.)

iOS App distribution market in violation of Sherman Act section 1. But the district court found that Apple's IAP restrictions do not violate Section 1 (*see* 1-ER-150) and, in fact, the IAP requirement is procompetitive. (1-ER-153.) If Apple's underlying IAP restrictions are permissible, in what sense could Apple's mechanism for enforcing those lawful and procompetitive restrictions be "unfair"? That's like saying it is lawful to make a right turn on red but if you use your turn signal you'll get a ticket.

The district court's comprehensive findings leave no daylight for the "same conduct" to qualify for legal reincarnation as "unfair." Specifically:

- No Sherman Act § 2 restraint. (1-ER-150.).
- No Sherman Act § 2 monopoly in any relevant market because Epic failed to prove that Apple possesses monopoly power in any relevant market or that the challenged restrictions are anticompetitive under the rule of reason. (1-ER-152.)
- No Sherman Act § 1 tying because IAP is not a separate product from iOS app distribution. (1-ER-155.)
- No Cartwright Act because Apple's provisions have procompetitive effects that offset their anticompetitive effects. (1-ER-157.)
- No Sherman Act § 2 "essential facility" because Epic failed to show that Apple is an illegal monopolist in control of the iOS platform and failed to show that that the iOS platform is an essential facility. (1-ER-157.)

Aguilar v. Atlantic Richfield Co., 25 Cal. 4th 826 (2001), is controlling. There, the trial court entered summary judgment against plaintiffs on their antitrust claims because they could not raise a triable issue of material fact regarding conspiracy. On

appeal, the Supreme Court held that even though "in the abstract" the UCL does not require proof of conspiracy, plaintiffs "cannot deny that conspiracy is indeed a component of the unfair competition law cause of action *in this case as a matter of fact*." *Id.*, p. 867, emphasis in original. Thus, even though the UCL may not require proof of conspiracy, judgment on the underlying antitrust claim—which does require conspiracy—dooms the UCL claim.

The district court never mentions *Aguilar*. The closest it comes to addressing the conundrum of judgment is the observation that the UCL was drafted with "broad, sweeping language." (1-ER-162.) But that argument "in the abstract" didn't carry the day in *Aguilar* and it shouldn't here. As in *Aguilar*, Epic cannot deny that the anti-steering theory underlying its UCL claim was foundational to its antitrust claims. As such, the ensuing judgment extinguished the derivative UCL claim, same as in *Aguilar*.

Aguilar is not alone. Numerous cases after *Cel-Tech* have involved hybrid cases such as this, with dominant antitrust and derivative UCL "unfair" claims. As here, in all those cases the UCL and the underlying antitrust laws were not completely congruent. Nonetheless, in every hybrid case—until this one—the judgment that ended the antitrust claim doomed the UCL "unfair" claim. *See Nova Designs, Inc. v. Scuba Retailers Ass'n*, 202 F.3d 1088, 1092 (9th Cir. 2000) (affirming summary judgment on UCL claim following summary judgment on Sherman

and Cartwright Act claims); *RLH Indus., Inc. v. SBC Communications, Inc.*, 133 Cal. App. 4th 1277, 1286 (2005) ("[h]aving properly granted PacBell summary judgment on the Cartwright Act causes of action, the court also properly granted PacBell summary judgment on the unfair competition cause of action").

These same claim-destroying principles apply at the pleading stage.[5] The difference is that, at the motion-to-dismiss stage, courts sometimes allow leave to amend to give the plaintiff another chance at alleging a standalone UCL claim.

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[5] *See e.g., Hicks v. PGA Tour, Inc.*, 897 F.3d 1109, 1123-24 (9th Cir. 2018) (though the UCL does not require proof of conspiracy, the failure of plaintiff's Cartwright Act claims, which do require conspiracy, extinguishes the UCL claim); *LiveUniverse, Inc. v. MySpace, Inc.*, 304 F. App'x 554, 557 (9th Cir. 2008) (citing *Chavez* and holding that "[w]here … the same conduct is alleged to support both a plaintiff's federal antitrust claims and state-law unfair competition claim, a finding that the conduct is not an antitrust violation precludes a finding of unfair competition"); *name.space, Inc. v. Internet Corp. for Assigned Names & Numbers*, 795 F.3d 1124, 1131 & n.5 (9th Cir. 2015) ("Because name.space failed to state an antitrust violation, trademark claim, or other unlawful act, the district court properly dismissed [the UCL] claim); *City of San Jose v. Off. of the Comm'r of Baseball*, 776 F.3d 686, 691–92 (9th Cir. 2015) ("if the same conduct is alleged to be both an antitrust violation and an 'unfair' business act or practice for the same reason[,] ... the determination that the conduct is not an unreasonable restraint of trade necessarily implies that the conduct is not 'unfair' toward consumers."); *William O. Gilley Enterprises, Inc. v. Atlantic Richfield Co.*, 588 F.3d 659, 669 (2009) (dismissal of antitrust claims due to lack of proof of conspiracy requires dismissal of derivative UCL claim); *SC Manufactured Homes, Inc. v. Liebert*, 162 Cal. App. 4th 68, 93 (2008) ("[i]n that Plaintiff cannot allege a Cartwright Action violation ... the cause of action for a violation of the UCL also cannot stand"); *People's Choice Wireless, Inc. v. Verizon Wireless*, 131 Cal. App. 4th 656, 672 (2005) ("we are aware that section 17203 can apply even if a defendant has not violated the antitrust laws[.] [b]ut ... *Cel-Tech* is not satisfied" where the UCL claim seeks to restrict as "unfair"

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Here, amendment is not an option. The judgment on Epic's antitrust claims precludes Epic from relitigating the same anti-steering claim in the guise of the UCL arising from "the same conduct."

B. The District Court Erred in Applying the "Unfair" Test of *Cel-Tech*

The district court afforded Epic "separate consideration" in the mistaken belief it was adhering to *Cel-Tech.* Because *Cel-Tech* permits redress for "'incipient' violations of antitrust laws and violations of the 'policy or spirit' of those laws with "comparable" effects (1-ER-162), it thought "Apple's interpretation" would render "that standard … meaningless because any conduct that fails under the Sherman Act would also fail the UCL." (1-ER-162.)

That is a false dichotomy. A more apt observation is that under the district court's interpretation, any judgment in any case would be meaningless because it would only invite "separate consideration" under the UCL. That is not and should not be the case. *Cel-Tech* has withstood the test of time notwithstanding that in every case—except this one—entry of judgment on an underlying antitrust claim in a

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unilateral action that poses no risk of monopolization); *Chavez v. Whirlpool Corp*., 93 Cal. App. 4th 363, 375 (2001) ("[W]e hold that conduct alleged to be 'unfair' because it unreasonably restrains competition and harms consumers, such as the resale price maintenance agreement alleged here, is not 'unfair' if the conduct is deemed reasonable and condoned under the antitrust laws.").

hybrid case has always extinguished the follow-on UCL claim. In none of those cases was the *Cel-Tech* principle of "separate consideration" offended.

The district court's analysis and resulting injunction do violence to both antitrust and UCL law. Let's first consider antitrust.

Having concluded that Apple's required use of IAP was procompetitive, the district court decided that the anti-steering provisions Apple used to *enforce* that requirement were nevertheless "unfair." (1-ER-166–69.) That contradiction is unsustainable. As this Court held in *City of San Jose v. Office of the Com'r of Baseball*:

> Under California law, "[i]f the same conduct is alleged to be both an antitrust violation and an 'unfair' business act or practice for the same reason—because it unreasonably restrains competition and harms consumers—the determination that the conduct is not an unreasonable restraint of trade necessarily implies that the conduct is not 'unfair' toward consumers."

776 F.3d at 692–93. *City of San Jose* teaches that an independent UCL claim is barred so long as a defendant's activities are lawful under the antitrust laws. *Id*., citing *Chavez v. Whirlpool Corp*., 93 Cal. App. 4th 363, 375 (2001).

Thus, the district court got it exactly backward when it supposed that dismissal of the UCL claim is allowed only if the underlying antitrust laws *affirmatively* "deem reasonable" the conduct. (1-ER-162, n. 631.) *Drum v. San Fernando Valley Bar Ass'n*, 182 Cal. App. 4th 247 (2010), is illustrative. That was a post-*Cel Tech* case in which a private mediator sued a voluntary bar association alleging that its refusal

to sell him its mailing list was an "unfair" business practice under the UCL. The appellate court said no, citing numerous antitrust cases holding that "[a]bsent a legal provision to the contrary, a private party generally may choose to do or not to do business with whomever it pleases." Moreover, "unless there is an exception, the right to refuse to deal remains sacrosanct" and "the mere refusal to deal does not violate the spirit or policy of antitrust law." *Id.*, at 254; accord, *Graham v. VCA Animal Hosp., Inc*,, 729 Fed.Appx. 537, 540 (9th Cir. March 9, 2018) (citing *Drum* and concluding that summary judgment on "unfair" claim was proper where nothing prohibited veterinary company from charging a biohazard fee).

As in *Drum*, so here, the antitrust laws provide no exception to the type of anti-steering provisions Epic assails. Thus, under *Drum*, the use of admittedly procompetitive anti-steering provisions should have been found consistent with—not violative of—the spirit and policy of the antitrust laws. A motions panel of this Court cited *Chavez* and stayed the district court's injunction: "Apple has demonstrated, at minimum, that its appeal raises serious questions on the merits of the district court's determination that Epic Games, Inc. failed to show Apple's conduct violated any antitrust laws but did show that the same conduct violated California's Unfair Competition Law." (Order, Dkt. No. 27, *2, Dec. 8. 2021.)

Antitrust claims provide a standard to the otherwise amorphously vague *Cel-Tech* test for what is "unfair" under the UCL: "conduct that 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." *Cel-Tech*, 20 Cal.4th at 187. The vice of this "penumbral antitrust threat" test is that:

> It is difficult enough for courts and businesses alike to determine whether a business practice amounts to an *actual* violation of the antitrust laws prohibiting restraint of trade or exclusionary monopolistic conduct. A business seeking to guide its competitive conduct by the majority's standard will be put to the impossible task of deciding whether its conduct, even though not a violation of the antitrust laws, violates the "spirit" of the antitrust laws or is an "incipient" violation of those laws or is a threat to competition.

Id. at 199 (concurring and dissenting opinion by Kennard, J). That is why the court's conclusion, after trial, that defendant's conduct does not amount to an actual violation of the antitrust laws precludes the imposition of liability on defendant for the very same conduct under the unfairness prong of the UCL.

The district court opinion also tramples on *Ohio v. Am. Express Co*., 138 S. Ct. 2274 (2018). Addressing anti-steering provisions substantially indistinguishable from Apple's, *AmEx* found them procompetitive in the context of two-sided transaction platforms like the App Store. Until this case, no court had ever held such provisions to be unlawful. In what sense, this Court might ask, is the district court's holding consistent with "the policy or spirit" of antitrust law? *Cf. Cel-Tech*, 20 Cal. 4th at 187.

Compounding the problem, the district court's UCL holding was law by improvisation. For the antitrust claims, it "defined the relevant market … as the market for mobile gaming transactions." (1-ER-167.) But for the UCL claim it said: "UCL jurisprudence does not require that the Court import that market limitation." (*Id*.) Yet, "[w]ithout a definition of the market there is no way to measure the defendant's ability to lessen or destroy competition." *Cf. AmEx*, 138 S. Ct. at 2285.

Instead of adhering to the "policy or spirit" of the antitrust laws, the district court invented a novel prohibition the antitrust laws would find unrecognizable, then called it "unfair." *Cf. FTC v. Qualcomm Inc.*, 969 F.3d 974, 990–91 (9th Cir. 2020) ("novel business practices—especially in technology markets—should not be conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.")

The opinion also does violence to UCL law. Even under the district court's narrow view of *Chavez*, it still had to dismiss the UCL claim. The court's finding that Apple's anti-steering provisions are procompetitive and withstand scrutiny under the "rule of reason" (1-ER-152–53) means, necessarily, that they *are* "reasonable." Under the rule of reason "the factfinder weighs *all of the circumstances of a case* in deciding whether a restrictive practice should be prohibited as imposing an *unreasonable* restraint on competition." 1-ER-143, emphasis added (citing *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 885-86 (2007). Thus, "the

same" Apple anti-steering provisions found to be both procompetitive and reasonable under a long-recognized antitrust balancing test cannot be "unfair" under the UCL.

What the district court found was hardly being faithful to *Cel-Tech*: "Although the unfair competition law's scope is sweeping, it is not unlimited. Courts may not simply impose their own notions of the day as to what is fair or unfair." 20 Cal. 4th at 182. It did exactly what *Cel-Tech* said courts may not do.

As it happened, the district court did its own weighing. It correctly identified the myriad pro-competitive effects of Apple's policies and decided "*those* restrictions, under the *Cel-Tech* framework, [are] protected." (1-ER-163; emphasis in original.) The court then tallied the anti-competitive features and concluded that these "can be severed"—for injunctive treatment—"without any impact on the integrity of the ecosystem …." (*Id*., 163-64.)

This was no balance at all. Imagine a butcher weighing a pound of hamburger against a pound of nails, then removing the meat and selling you just the nails. Once the district court subtracted the pro-competitive effects, the contest was over. On one side were the anti-competitive effects. On the other, only an empty bucket whose mass, through severance, the district court reduced to zero.

III. THIS COURT SHOULD REVERSE THE UCL JUDGMENT BECAUSE EPIC HAD AN ADEQUATE REMEDY AT LAW

If a plaintiff has an adequate remedy at law, that is a complete defense to a UCL claim. *Sonner, supra*, 971 F.3d at 845. In *Sonner*, this Court held that plaintiff must "establish that [it] lacks an adequate remedy at law before securing equitable restitution for past harm under the UCL …." There, plaintiff's pursuit of legal remedies, the same as her UCL claim, precluded any finding that her legal remedy was inadequate. *Id*. at 845.[6]

As the district court noted, the objective of this lawsuit "[f]irst and foremost" was to obtain "tremendous monetary gain and wealth" for Epic. (1-ER-22.) Epic pled and pursued nine legally adequate federal and state antitrust claims for the same conduct as its UCL claim. That it lost doesn't undo that conclusion.

Sonner bars Epic's UCL claim. The Court should reverse the UCL judgment.

IV. EPIC IS BARRED FROM OBTAINING UCL INJUNCTIVE RELIEF BECAUSE ITS TACTICAL BREACH OF CONTRACT CONSTITUTES "UNCLEAN HANDS"

The UCL's exclusive remedies are equitable, not legal. "Under the UCL, [p]revailing plaintiffs are generally limited to injunctive relief and restitution."

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[6] Accord, *Clark v. American Honda Motor Co., Inc*., 528 F.Supp.3d 1108, 1121 (N.D. Cal. 2021) (citing *Sonner* and dismissing UCL claim where plaintiffs pled other claims at law); *Heighley v. J.C. Penney Life Ins. Co*., 257 F.Supp.2d 1241, 1259–60 (C.D. Cal. 2003) (the absence of an adequate remedy at law is an essential element of a UCL claim, entering summary judgment based, in part, on plaintiff's failure to allege this element).

Cacique, Inc. v. Robert Reiser & Co., Inc., 169 F.3d 619, 624 (9th Cir.1999). "UCL actions by private parties are equitable proceedings, with limited remedies." *Zhang v. Superior Court*, 57 Cal. 4th 364, 369 (2013). Accordingly, "[i]n deciding whether to grant the remedy or remedies sought by a UCL plaintiff [like Epic], . . . consideration of the equities between the parties is *necessary* to ensure an equitable result." *Cortez v. Purolator Air Filtration Products Co.*, 23 Cal. 4th 163, 181 (2000), italics added; *accord*, *Ticconi v. Blue Shield of Calif. Life & Health Ins. Co.*, 160 Cal. App. 4th 528, 544–45 (2008).

In the first place, Epic's breach was tactical. "Epic Games never showed why it had to breach its agreements to challenge the conduct litigated." (1-ER-178). Epic could, for instance, have pursued the less drastic equitable remedy of declaratory relief. "The express purpose of the Federal Declaratory Judgment Act was to provide a *milder* alternative to the injunction remedy." *Steffel v. Thompson*, 415 U.S. 452, 466 (1974), emphasis added. "Declaratory relief may be appropriate even when injunctive relief is not." *Olagues v. Russoniello*, 770 F.2d 791, 804 (9th Cir. 1985). "The prerequisites for injunctive and declaratory relief are different." *Perez v. Ledesma*, 401 U.S. 82, 123 (1971) (concurring opinion by Brennan, J.). The injunction consists of a declaration of rights and duties backed by the threat of sanction, including contempt. It gives the defendant one more chance. The declaratory judgment, on the other hand, gives the defendant two more chances: it consists of a

declaration of rights and duties, and if the defendant disobeys the plaintiff cannot get a contempt order, but must resort to an injunction to prevent an act of disobedience.

In the second place, Epic's antitrust claims are inconsistent with that portion of the judgment recognizing plaintiff's UCL claim. See *Nat'l Parks Conservation Ass'n v. EPA*, 788 F.3d 1134, 1141 (9th Cir. 2015) ("an internally inconsistent analysis is arbitrary and capricious" (citing *Gen Chem. Corp. v. United States*, 817 F.2d 844, 847 (D.C. Cir. 1987)). The primacy of the court protection policy of unclean hands was underscored by Justice Brandeis in his dissenting opinion in *Olmstead*, *supra*, 277 U.S. 438 (1928): "[A]id is denied despite the defendant's wrong. It is denied in order to maintain *respect for law*; in order to promote *confidence in the administration of justice*; in order to preserve the judicial process from contamination." *Id.* at 484; italics added.

The "unclean hands" doctrine relates to its equitable cousin "judicial estoppel," which provides that "a party should not be allowed to gain an advantage by litigation on one [judicially rejected] theory, and then seek an inconsistent advantage by pursuing an incompatible theory." *Ryan Operations G.P. v. Santiam-Midwest Lumber Co.*, 81 F.3d 355, 358 (3d Cir. 1996). What equity denies a party should also apply to a court's inconsistent judgment.

California has long permitted an unclean hands defense in breach of contract cases where, as here, the plaintiff seeks equitable relief. See, e.g., *Sketchley v. Lipkin*,

99 Cal. App. 2d 849, 934 (1950) ("Equity does not aid him who has breached his agreement.") If the required showing is made, unclean hands may be a complete defense to legal as well as equitable causes of action. *Mendoza v. Ruesga*, 169 Cal. App. 4th 270, 279 (2008).

Though the lower court found that Epic breached its contract with Apple, it did not consider the effect of that breach on the "unclean hands" doctrine. This Court should reverse or, in the event of remand on the UCL claim, instruct the district court to address this lacuna.

CONCLUSION

For all the foregoing reasons, CJAC respectfully requests that the Court reverse the UCL judgment in this case.

Dated: March 31, 2022

Respectfully submitted,

/s/ Fred J. Hiestand

FRED J. HIESTAND (SBN 44241)
General Counsel
Civil Justice Association of California
3418 3rd Avenue, Suite 1
Sacramento, CA 95817
Telephone: (916) 448-5100
fred@fjh-law.com

WILLIAM L. STERN (SBN 96105)
Law Offices of William L. Stern
1525 Thousand Oaks Blvd.
Berkeley, CA, 94707
Telephone: (510) 527-9670
wsternesq@gmail.com

CERTIFICATE OF COMPLIANCE

Under Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(C), as well as Circuit Rule 29-2(c)(2), I certify that the foregoing *amicus curiae* brief is proportionately spaced, contains 6,236 words, and is prepared in a format, type face, and type style that complies with Federal Rule of Appellate Procedure 32(a)(4)-(6).

Dated: March 31, 2022 /s/ *Fred J. Hiestand*

CERTIFICATE OF FILING AND SERVICE

I hereby certify that I caused the foregoing to be filed electronically with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on March 31, 2022.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: March 31, 2022 */s/ Fred J. Hiestand*