Nos. 21-16506 & 21-16695

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EPIC GAMES, INC.,

Plaintiff/Counter-Defendant, Appellant/Cross-Appellee,

v.

APPLE INC.,

Defendant/Counterclaimant-Appellee/Cross-Appellant.

Appeal from the United States District Court
for the Northern District of California,
The Honorable Yvonne Gonzalez Rogers, District Judge
Case No. 4:20-cv-05640-YGR

BRIEF OF *AMICI CURIAE* UCL PRACTITIONERS AND SCHOLARS IN SUPPORT OF EPIC GAMES, INC.'S RESPONSE BRIEF TO APPLE INC.'S CROSS-APPEAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amici curiae* state that the UCL practitioners and scholars identified in Addendum A are individuals, and therefore do not issue stock or have a parent corporation.

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IDENTITY AND INTEREST OF *AMICI CURIAE*

Amici Curiae are leading antitrust and unfair competition law practitioners and scholars in California. The signatories to this brief have spent years in various capacities developing and documenting California's competition laws, including the Cartwright Act (Cal. Bus. & Prof. Code §§ 16720, et seq.), the Unfair Competition Law (Cal. Bus. & Prof. Code §§ 17200, et seq.) ("UCL"), and key differences between California and federal antitrust law. The signatories' many years of litigation and leadership on antitrust and UCL issues—including teaching law school classes, participating in antitrust organizations and committees, authoring articles and state law treatises, and serving as speakers on panel programs—reflects their deep investment in the proper development of California antitrust and unfair competition law, and their abiding interest in making certain that the UCL issues in this case are decided in accordance with longstanding and well-settled principles of California law. A list of the signatories, each of whom is joining in an individual capacity and do not purport to represent the views of their respective firms or institutions, is attached as Addendum A.

STATEMENT OF AUTHORSHIP AND REQUEST FOR CONSENT

Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), *Amici Curiae* certify that no party or party's counsel authored this brief in whole or in part, no party or party's counsel contributed money that was intended to fund preparing or

submitting this brief, and no person or entity—other than *Amici Curiae* or their counsel—authored the brief or made a monetary contribution to the preparation or submission of this brief.

Amici curiae sought consent of the Parties to file this brief. Epic Games, Inc. has consented to the filing. However, Apple Inc. did not consent. Accordingly, *amici curiae* are concurrently filing a motion for leave to file this brief pursuant to Rule 29(a)(3) of the Federal Rules of Appellate Procedure.

INTRODUCTION

After a 16-day bench trial and extensive submissions of evidence, the district court ruled that Apple violated the UCL by imposing anti-steering provisions that deprive consumers of critical information about "cheaper prices, increased customer service, and [alternative] options" when making in-app purchases on iPhones. 1-ER-121. The district court's ruling on Epic's UCL claim comports with California Supreme Court authority, is fully supported by the record, and should be affirmed.

First, the scope of the UCL is broad, and the district court properly found that a violation of the unfair prong of the UCL does not require proof of an antitrust violation. Arguments to the contrary made by Apple and its *amicus curiae* contradict the California Supreme Court's controlling decision in *Cel-Tech Comm'cns, Inc. v. L.A. Cellular Tel. Co.*, 20 Cal. 4th 163 (1999). In *Cel-Tech*, the

Court made clear that conduct that "threatens an incipient violation of antitrust law," "violates the policy or spirit of one of those laws," or "otherwise significantly threatens or harms competition," will give rise to liability under the UCL. 20 Cal. 4th at 187. The district court correctly rejected application of any "safe harbor" to Apple's violation of the UCL because no legislative or judicial exemption affirmatively renders Apple's conduct lawful. Rather than acknowledge the breadth of California state law, Apple and its *amicus curiae* seek to disregard controlling California state law and instead impose inapposite and inconsistent federal antitrust limitations.[1]

Second, the record shows that Epic proffered sufficient evidence to support the district court's finding of a UCL violation. Based upon trial testimony and evidentiary submissions, the district court found that Apple's anti-steering provisions stymied "informed choice among users of the [Apple] iOS platform" resulting in higher prices and supracompetitive profits. 1-ER-167. After hearing testimony from app developers and Epic's economic experts, the district court, relying on the California Supreme Court's decision in *Cel-Tech*, made express

[1] Moreover, several of the arguments made by Apple and its *amicus curiae* are not supported by federal antitrust law. Those issues are separately addressed in amicus filings by the United States Department of Justice and leading scholars, among others. Brief of the United States of America as Amicus Curiae (Dkt. No. 43), Brief of 38 Law, Economics, and Business Professors as Amici Curiae (Dkt. No. 35).

findings that Apple's anti-steering provisions violate the UCL's unfair prong. Accordingly, the record fully supports the district court's finding of a UCL violation.

Third, even were antitrust law considered (it need not be), the UCL ruling can be affirmed on the independent ground that California state antitrust law is broader than federal antitrust law in significant ways that fully supports the ruling. Unlike federal antitrust law (as argued extensively by Apple and its *amicus curiae*), applicable Cartwright Act rule of reason jurisprudence makes clear that a *defendant* (not the plaintiff) has the burden of proffering both a procompetitive justification *and* that the restriction is narrowly tailored such that the defendant could not achieve the procompetitive effect through less restrictive means.[2] Here, the district court found that that the anti-steering provisions had anticompetitive effects, and that Apple failed to proffer a legitimate justification to support the anti-steering provisions, much less justifications narrowly tailored to achieve a procompetitive effect. Accordingly, even if Cartwright Act rule of reason analysis

[2] Like the Sherman Act, the Cartwright Act also requires the court to weigh the anticompetitive effects against any established and narrowly tailored procompetitive effects.

was imposed on the UCL claim (an analysis that should be unnecessary), the district court's decision should be affirmed.[3]

Finally, the district court's nationwide injunction is entirely proper. It fully comports with the UCL's statutory mandate that courts are empowered to fashion equitable remedies required to address unfair competition. Here, the district court was well within its authority to craft a nationwide injunction to prevent Apple, a California-based company, from engaging in further violations of the UCL.

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[3] Apple makes various arguments as to why the district court's ruling on Epic's Sherman Act claim should be affirmed – points contested by Epic and other *amicus curiae*. However, it should be noted that a number of these arguments would not have vitality under the Cartwright Act. For example, California antitrust law expressly recognizes that an anticompetitive contract imposed by an entity with market power *is* an agreement under the Cartwright Act. *See* Cal. Bus. & Prof. Code 16270(e)(3) (Cartwright Act expressly covers "any contracts, obligations or agreements of any kind and description"); *see also Mailand v. Burckle*, 20 Cal. 3d 367, 378 n.10 (1978) (expressly rejecting defendant's argument that no combination exists under Cartwright Act where terms imposed by franchisor on franchisee). Moreover, the California Supreme Court has explained that defining a market is not the only way of demonstrating anticompetitive effects under the Cartwright Act. *See In re Cipro Cases I & II*, 61 Cal. 4th 116, 146 (2015). It has further noted that anticompetitive effects can be shown by proffering evidence of supracompetitive prices and reductions in consumer choice (*Marin County Bd. of Realtors v. Palsson*, 16 Cal. 3d 920, 937 (1976)), and that evidence of limits on information can constitute direct evidence of harm to competition. *See Oakland-Alameda County Builders' Exch. v. F. P. Lathrop Constr. Co*., 4 Cal. 3d 354, 363-64 (1971). Finally, an unclean hands defense will not vitiate a right to relief under California's statutory competition laws. *See Ticconi v. Blue Shield of California Life & Health Ins. Co*., 160 Cal. App. 4th 528, 543 (2008) ("Courts have long held that the equitable defense of unclean hands is not a defense to an unfair trade or business practices claim based on violation of a statute"); *Jomicra, Inc. v. California Mobile Home Dealers Assn*., 12 Cal. App. 3d 396, 401-02 (1970).

ARGUMENT

I. THE DISTRICT COURT PROPERLY FOUND THAT APPLE VIOLATED THE UCL

In its ruling, the district court found that Apple's anti-steering provisions violate the unfair prong of the UCL. *See* 1-ER-164-68. The district court's ruling should be affirmed. The scope of the UCL's unfair prong is broad; no antitrust violation is required to prove an unfair prong claim; and the record evidence supports the conclusion that Apple's conduct violated the UCL's unfair prong. Moreover, even if antitrust law is considered (which it need not be), the Cartwright Act is broader than federal antitrust law and provides independent grounds to affirm the district court's UCL ruling.

A. The Scope of the UCL Is Broad

The UCL protects consumers and businesses from "any unlawful, unfair, or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising." Cal. Bus. & Prof. Code § 17200. The California Supreme Court has further explained that because the UCL is written in the disjunctive, with specific prohibitions on "unlawful," "unfair" or "fraudulent" practices, each "prong" gives rise to a separate and distinct theory of liability. *Cel-Tech*, 20 Cal. 4th at 180; *see also* Antitrust & UCL Section, Cal. Lawyer's Assoc., California Antitrust & Unfair Competition Law § 16.04 (Westlaw 2022), (addressing scope of UCL).

As set forth more fully in the *amicus* brief filed by the State of California,[4] the California Supreme Court has repeatedly held that the UCL is intended to broadly root out all forms of unfair competition, and thus covers a wider range of conduct than covered under existing antitrust and consumer protection laws. *Cel-Tech*, 20 Cal. 4th at 180 (Legislature "intentionally framed [UCL] in its broad, sweeping language"); *Korea Supply Co. v. Lockheed Martin Corp*., 29 Cal. 4th 1134, 1143 (2003). Indeed, the UCL's "sweeping language" is intended to address the innumerable "new schemes which the fertility of man's invention would contrive." *Barquis v. Merchs. Collection Ass'n of Oakland, Inc*., 7 Cal. 3d 94, 112 (1972).

The UCL protects *both* competitors and consumers. *Cel-Tech*, 20 Cal. 4th at 180. Law enforcement officials and private parties are empowered to bring suit under the UCL. California Antitrust & Unfair Competition Law, *supra*, at § 16.01. Further, because the UCL is a strict liability statute, "it is not necessary to show that a defendant intended to injure or harm the plaintiff." *Id*.§ 16.04, at 16-18 (addressing scope of UCL). Thus, in crafting the UCL, the California Supreme Court has explained that the Legislature "deliberately traded the attributes of tort

[4] The State of California has separately submitted an amicus brief addressing the history and scope of the UCL, and the abundant California Supreme Court rulings interpreting the UCL. (*See* Docket No. 118.) *Amici curiae* concur with the State's views on the history and broad scope of the UCL. Accordingly, we only address the scope of the UCL in summary fashion.

law for speed and administrative simplicity." *Bank of the West v. Superior Court*, 2 Cal. 4th 1254, 1266-67 (1992). In creating this "streamlined procedure" to enjoin "ongoing and threatened acts" of unfair competition, the Legislature limited the scope of remedies under the UCL to only equitable remedies, not damages. *Korea Supply*, 29 Cal. 4th at 1150.

Because the district court's decision was predicated on a violation of the unfair prong, that will be the primary focus of the discussion below.

B. The Unfair Prong of the UCL Does Not Require Proof of an Antitrust Violation

The district court correctly held that a violation of the unfair prong of the UCL may be found even without a violation of antitrust law. *See* 1-ER-163, 165. Apple's argument that a violation of antitrust law is required completely disregards controlling California Supreme Court precedent.

1. California Supreme Court Precedent Is Clear: the UCL Unfair Prong Does Not Require a Violation of Antitrust Law

In *Cel-Tech*, the California Supreme Court made clear that the UCL "does more than just borrow" from violations of other laws. 20 Cal. 4th at 180. Rather, in the Court's words, the UCL "makes clear that a practice may be deemed unfair even if not specifically proscribed by some other law." *Id*. "In other words, a practice is prohibited as 'unfair' or 'deceptive' even if not 'unlawful' and vice versa." *Id*. (citations omitted). The California Supreme Court explained that even

where conduct is not prohibited by state antitrust law, the conduct can give rise to an independent cause of action under the UCL's unfair prong. *See id*. at 180-81 (citing *Motors, Inc. v. Times Mirror Co*., 102 Cal. App. 3d 735, 741 (1980)).

The California Supreme Court in *Cel-Tech* provided additional requirements and guidance for a UCL unfair prong case brought by a "competitor," as opposed to a consumer. In a competitor case, the Court held that a violation must be "tethered to some legislatively declared policy or proof of some actual or threatened impact on competition." 20 Cal. 4th at 186-87. Specifically, the Court announced 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 California Supreme Court's express language in articulating the test for the unfair prong in competitor actions repudiates the position advocated by Apple in its cross-appeal. It is axiomatic that conduct which: (a) threatens an incipient antitrust violation; (b) violates "the policy or sprit of the antitrust laws"; or (c) otherwise significantly threatens or harms competition, does not require proving an actual antitrust violation. Hence, the district court correctly found that Apple's

position would render the *Cel-Tech* test for the unfair prong "meaningless." *See* 1-ER-165 (Order at 162). In short, for the California Supreme Court's extensive discussion in *Cel-Tech* to have any meaning, it is evident that an antitrust violation is not required to prove a UCL unfair prong violation.

2. The Unfair Prong Does Not Require Proving Each Element of a Federal Antitrust Claim

Notwithstanding *Cel-Tech*'s express mandate that an antitrust violation need not be established to support an unfair prong violation under the UCL, Apple asks this Court to reverse the district court's UCL ruling for failing to comport with relevant market and anti-competitive effects analysis required by some federal antitrust case law. *See* Apple Cross-Appeal at 108-109. If, as the California Supreme Court has held, conduct which "violates the policy or spirit" of the antitrust laws is actionable, then it is axiomatic that complying with each element of a rule of reason antitrust case cannot be required.[5] 20 Cal. 4th at 187. Otherwise, the unfair prong would simply be co-extensive with the unlawful prong – a proposition the Legislature clearly did not and could not have intended based upon

[5] In its brief, Apple seemingly focuses only on whether the district court's ruling is consistent with an "incipient violation" and makes no effort to address *Cel-Tech*'s additional and broader language that a UCL unfair prong violation need only violate the "policy or spirit" of the antitrust laws. *See* Apple Cross-Appeal at 109 (addressing only "'incipient' antitrust violation"); *Cel-Tech*, 20 Cal. 4th at 187.

the plain meaning of the UCL. *See*, *e.g.*, *Korea Supply*, 29 Cal. 4th at 1146 ("If the language of the statute is unambiguous, the plain meaning governs").

Apple's argument, and that proffered by its *amicus curiae*, The Civil Justice Association of California, is essentially a facial challenge to the viability of the unfair prong of the UCL. *See* Apple Cross-Appeal at 104-109; *Amicus Curiae* Brief of The Civil Justice Association at 17-22 ("Antitrust claims provide a standard to the otherwise amorphously vague *Cel-Tech* test for what is 'unfair' under the UCL…."). But the wisdom of the Legislature in enacting the unfair prong cannot be challenged in this litigation. Nor can the unfair prong be read out of the UCL. *See Vasquez v. California*, 45 Cal. 4th 243, 253 (2008); *Bronson v. Samsung Elecs. Am, Inc.*, No. C 18-02300, 2019 WL 2299754, at *3 (N.D. Cal. May 30, 2019) ("A court may not change the scope of a statute by reading into it language it does not contain or by reading out of it language it does") (citing *Vasquez*). This Court is required to follow California Supreme Court precedent as to the UCL. *See Perez v. Mortg. Elec. Registration Sys., Inc*., 959 F.3d 334, 338 (9th Cir. 2020) ("When interpreting California law, we are bound by the decisions of the California Supreme Court, the state's highest court.").

Indeed, the California Supreme Court has expressly held that the UCL, while addressing unfair competition, is not designed to be simply duplicative of antitrust

law. *See Aryeh v. Canon Bus. Sols., Inc*., 55 Cal. 4th 1185, 1195 (2013) (UCL differs markedly in origin and scope from traditional antitrust law).

As the California Supreme Court has explained, the UCL was carefully constructed to allow for broad equitable remedies; yet, it does not allow for a jury trial right, and it does not allow for the recovery of damages. *Nationwide Biweekly Admin., Inc. v. Superior Court*, 9 Cal. 5th 279, 292 (2020) (UCL is equitable in nature and so no jury trial right); *Korea Supply*, 29 Cal. 4th at 1144 (UCL is equitable and damages are not an available remedy). The primary point of the UCL statutory scheme is to allow a court, utilizing its equitable powers, to enjoin all forms of unfair competition. *Cel-Tech*, 20 Cal. 4th at 181 (explaining that the UCL "has lesser sanctions" but broader scope than antitrust law because the Legislature intended to empower courts to deal with "the innumerable new schemes which the fertility of man's invention would contrive") (quotation omitted). Thus, empowering a court to consider a "variety of factors" *(Nationwide*, 9 Cal. 5th at 304), and ultimately enjoin conduct that it deems violative of the "policy or spirit" of the antitrust laws (*Cel-Tech*, 20 Cal. 4th at 187), is precisely what the unfair prong of the UCL was intended to address. *See*, *e.g*., *Metricolor LLC v. L'Oreal S.A*., No. 2:18-cv-00364, 2020 WL 3802942, at *17 (C.D. Cal. July 7, 2020) (denying motion to dismiss because UCL unfair prong claim was satisfied by allegations that consumer choice was impacted by the conduct); *Diva Limousine,*

Ltd. v. Uber Techs., *Inc*., 392 F. Supp.3d 1074, 1090-91 (N.D. Cal. 2019) (holding complaint failed to satisfy Sherman Act section 2 elements but allegations sufficient to meet UCL unfair prong under *Cel-Tech*); *hiQ Labs, Inc. v. LinkedIn Corp*., 273 F. Supp. 3d 1099, 1118 (N.D. Cal. 2017) (UCL unfair prong claim sufficient to satisfy preliminary injunction standard by competitor); *Sundance Image Tech., Inc. v. Inkjetmall.com, Ltd*., No. 02CV2258-B, 2005 WL 8173280, at *9 (S.D. Cal. Oct. 13, 2005) (denying summary judgment because plaintiff competitor proffered evidence sufficient to satisfy UCL unfair prong).

In short, the Legislature designed the UCL to address conduct that would violate the unfair prong without necessarily meeting the elements of an antitrust violation, as would be required to prove an unlawful prong claim. *See Cel-Tech*, 20 Cal. 4th at 180, 187.

3. There Is No "Safe Harbor" That Applies to the Conduct in this Case

In *Cel-Tech*, the California Supreme Court explained that while the UCL is broad, the UCL will not apply where "the Legislature has permitted certain conduct or considered a situation and concluded no action should lie, [and] courts may not override that determination." *Cel-Tech*, 20 Cal. 4th at 182. Thus, the UCL does not condemn actions the Legislature affirmatively and expressly permits, but any "safe harbor" is to be construed narrowly. To "bar a UCL action, another statute must absolutely preclude private causes of action or clearly permit the

defendant's conduct." *Zhang v. Superior Court*, 57 Cal. 4th 364, 379-80 (2013); California Antitrust & Unfair Competition Law, *supra*, at § 16.06 & n.241 ("Courts will not apply a safe harbor from an overall statutory scheme; rather, a safe harbor statute must explicitly prohibit liability for the defendant's acts or omissions or clearly permit the conduct").

Here, there is no legislatively recognized "safe harbor" protecting Apple's conduct with respect to the anti-steering provisions that the district court enjoined. 1-ER-165. Accordingly, the California Supreme Court's teaching is clear: without a "safe harbor" preempting judicial review, the district court was well within its rights to review Apple's conduct under the unfair prong. *See De La Torre v. CashCall, Inc*., 5 Cal. 5th 966, 987 (2018).

Apple cites three cases for the proposition that conduct not supporting a Sherman Act claim is entitled to a "safe harbor" in this case. *See* Apple Cross-Appeal at 105. None of the three cases are availing.[6]

[6] Although not cited by Apple, The Civil Justice Association of California, in its amicus curiae brief, suggests that *Aguilar v. Atlantic Richfield Co.*, 25 Cal. 4th 826 (2001), undermines the district court's ruling on the UCL. Not so. In *Aguilar*, the plaintiff alleged a price fixing conspiracy among several oil companies; the entire liability case turned on the existence or non-existence of the conspiracy. *See id*. at 864-65. The California Supreme Court held that the plaintiff failed to proffer sufficient evidence of a conspiracy to overcome summary judgment as to a Cartwright Act cause of action (*see id*.), and, on those facts, the attendant UCL cause of action could not proceed. *See id*. at 866-67. The California Supreme Court acknowledged that the elements of an unfair prong UCL claim is not predicated

In Apple's first cited case, *City of San Jose v. Office of the Comm'r of Baseball*, 776 F.3d 686 (9th Cir. 2015), the Ninth Circuit rejected federal and state antitrust claims based upon baseball's well-recognized (if often criticized) exemption from the antitrust laws. *See id*. at 691-92. The claims were rejected not for a failure of proof but because an express and affirmative exemption applied that made the conduct lawful. *See Cel-Tech*, 20 Cal. 4th at 183 ("There is a difference between (1) not making an activity unlawful, and (2) making that activity lawful.").

In *Chavez v. Whirlpool Corp*., 93 Cal. App. 4th 363 (2001), an antitrust challenge to alleged minimum resale price maintenance was dismissed due to the long-recognized protections of the *Colgate* doctrine that exempt antitrust liability where a defendant abides by certain requirements in announcing its suggested pricing. 93 Cal. App. 4th at 367, 370 (citing *United States v. Colgate & Co*., 250 U.S. 300 (1919)). Thus, the UCL cause of action was rejected because an exemption applied that made the conduct lawful.

The Ninth Circuit's unpublished decision in *LiveUniverse, Inc. v. MySpace, Inc*., 304 F. App'x 554 (9th Cir. 2008) similarly does not establish a safe harbor. In *LiveUniverse*, the plaintiff argued that its UCL claim was based on a federal antitrust violation; and therefore, because the district court erred in dismissing the

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upon proving an antitrust violation, ruling that "*in this case as a matter of fact*" the UCL claim failed because conspiracy was the linchpin to liability on the facts presented. *See id*. (emphasis in original).

federal Sherman Act claim, its UCL claim also should have been revived. *See id*. at 557-58. Thus, the *LiveUniverse* Court's statement that the failure to state a federal antitrust claim also supported dismissal of the UCL claim must be read in the context of the limited argument and concession made by the *LiveUniverse* plaintiff that its UCL claim relied on its allegations of monopolization and attempted monopolization under the Sherman Act. *See id*. To the extent Apple argues the statement should be read for a broader proposition, *i.e.*, that a UCL claim can only survive if predicated on an antitrust claim, the district court here correctly held that such a proposition would flout the California Supreme Court's repeated holdings that an antitrust violation is not necessary to state an unfair-prong UCL violation. *See Cel-Tech*, 20 Cal. 4th at 187.

C. Epic Proffered Sufficient Evidence to Support a Violation of the UCL

After a 16-day bench trial (and extensive evidentiary submissions), the district court held that Apple's "anti-steering provisions 'threaten [] an incipient violation of an antitrust law' by preventing informed choice among users of the iOS platform." 1-ER-167 (brackets in original).[7] The district court further found

[7] *See also* 1-ER-121-22 ("Thus, looking at the combination of the challenged restrictions and Apple's justifications, and lack thereof, the Court finds that common threads run through Apple's practices which unreasonably restrains competition and harm [*sic*] consumers, namely the lack of information and transparency about policies which effect consumers' ability to find cheaper prices,

that "the anti-steering provisions violate the 'policy [and] spirit' of these laws because anti-steering has the effect of preventing substitution among platforms for transactions." 1-ER-167 (brackets in original). The district court found that Apple used its anti-steering provisions to prohibit:

> "apps from including 'buttons, external links, or other calls to action that direct consumers to purchasing mechanisms other than in-app purchase"; and
> [prohibit app developers] "from 'encouraging users to use a purchasing method other than in-app purchase' either 'within the app or through communications sent to points of contact obtained from account registrations within the app (like email or text).'"

1-ER-166 (brackets in original).[8] As a result, the district court noted that "developers cannot communicate lower prices on other platforms either within iOS or to users obtained from the iOS platform." 1-ER-166-67. The district court further found that "Apple's general policy also prevents developers from informing

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increased customer service, and options regarding their purchases. Apple employs these policies so that it can extract supracompetitive commissions from this highly lucrative gaming industry… While some consumers may want the benefits Apple offers (*e.g.*, one-stop shopping, centralization of and easy access to all purchases, increased security due to centralized billing), Apple actively denies them the choice. These restrictions are also distinctly different from the brick-and-mortar situations. Apple created an innovative platform but it did not disclose its rules to the average consumer. Apple has used this lack of knowledge to exploit its position. Thus, loosening the restrictions will increase competition as it will force Apple to compete on the benefits of its centralized model or it will have to change its monetization model in a way that is actually tied to the value of its intellectual property.")

[8] *See also* 1-ER-34 (PX 2790).

users of its 30% commission" (1-ER-167), and that "Apple employs these policies so that it can extract supracompetitive commissions…." 1-ER-121-22.

Citing case law and a leading antitrust treatise, the district court explained that consumers can be harmed by a lack of information "relative [to] price and quality," and "[i]n the context of technology markets, the open flow of information becomes even more critical." 1-ER-167.

As a result, the district court concluded that Apple's "anti-steering provisions violate the UCL's unfair prong under [*Cel-Tech's*] tethering test." 1-ER-167. The district court held that, even without proving an antitrust violation, Epic demonstrated that "the anti-steering provisions 'threaten [] an incipient violation of an antitrust law' by preventing informed choice among users of the iOS platform." 1-ER-167 (quoting *Cel-Tech*, 20 Cal. 4th at 187, and citing *FTC v. Neovi, Inc*., 604 F.3d 1150, 1158 (9th Cir. 2010)). The district court further found that Apple's policies violate the "'policy [and] spirit'" of the antitrust laws "because anti-steering has the effect of preventing substitution among platforms for transactions." 1-ER-167 (brackets in original). Finally, the district court applied the balancing test applicable to consumers and quasi-consumers and similarly

found that "the harm from the anti-steering provisions outweighs its benefits, and the provision violates the UCL under the balancing test." 1-ER-168-69.[9]

Moreover, the district court's findings of fact are more than sufficient to uphold the district court's finding of a UCL unfair prong violation.[10] The findings of fact establish, among other things, that Apple's policies have resulted in a lack of information on price and quality that has resulted in "considerable" harm to users and developers. 1-ER-168. As the district court explained:

> 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.

1-ER-168. The district court also found that Apple failed to proffer "any justification… other than to argue entitlement," and that Apple's conduct "harm[s]

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[9] The district court found that Epic sued Apple as both a competitor and quasi-consumer, and therefore analyzed Apple's conduct under both the tethering test and the balancing test. 1-ER-164-65. Apple challenges the district court's application of the balancing test in this circumstance. *See* Apple Cross-Appeal at 104. Courts have applied both tests in similar circumstances. *See*, *e.g.*, *Gerawan Farming, Inc. v. Rehrig Pac. Co*., No. 1:11-cv-1273, 2013 WL 1934173, at *3-4 (E.D. Cal. May 9, 2013). Regardless, because the district court found a violation under either test, the distinction is seemingly immaterial for purposes of this appeal.

[10] Apple suggests there is a "meager" record on the UCL claim. *See* Apple Cross-Appeal at 102. Yet, the district court heard testimony from: (1) app developers about the effects of the anti-steering provisions (1-ER-96, 166-67); and (2) expert economists addressing the harm caused by Apple's anti-steering provisions (1-ER-168 n.639). This evidence should be more than sufficient to support the district court's findings.

competition and result[s] in supracompetitive pricing and profits." ER168-69.

The elements of the unfair prong, as pronounced by the California Supreme Court in *Cel-Tech*, are squarely and repeatedly satisfied by the district court's factual findings and conclusions of law.

D. Even if Antitrust Law Is Considered, the UCL Ruling Should Be Affirmed Because California Antitrust Law is Broader and Provides Independent Grounds to Affirm the Court's Ruling

Although not relied upon by the district court, there are significant differences between the Sherman Act and the Cartwright Act which provide an independent basis for affirming the UCL judgment. *See Charley's Taxi Radio Dispatch Corp. v. SIDA of Hawaii, Inc.*, 810 F.2d 869, 874 (9th Cir. 1987) ("We may affirm the district court on any ground supported by the record, even if the ground is not relied on by the district court."). In *Charley's Taxi*, this Court affirmed the district court's ruling after a bench trial but "on a ground in fact rejected by the district court." *Id*. Here, the record supports a violation of the Cartwright Act under standards that differ markedly from the Sherman Act. A violation of the Cartwright Act would, in turn, provide independent grounds for affirming a violation of the UCL.[11] Accordingly, even if California antitrust law is

[11] A violation of the Cartwright Act would support a violation of the unlawful prong as well as the unfair prong of the UCL. However, as noted herein, a violation of the Cartwright Act is not necessary to support an unfair prong violation.

considered, the Court's UCL decision should be affirmed because Apple's conduct violated the Cartwright Act, and therefore also violated the UCL's "unlawful" prong.

1. California Antitrust Law Cannot Be Conflated with Federal Antitrust Law: There Are Critical Differences

The California Supreme Court has repeatedly held that California's principal antitrust law, the Cartwright Act, was *not* patterned after the federal Sherman Act.[12] *See Aryeh v. Canon Bus. Sols., Inc*., 55 Cal. 4th 1185, 1195 (2013) ("the Cartwright Act was modeled not on federal antitrust statutes but instead on statutes enacted by California's sister states around the turn of the 20th century"); *State ex rel. Van de Kamp v. Texaco*, 46 Cal. 3d 1147, 1164-65 (1988) (tracing history and explaining that Cartwright Act was not patterned after Sherman Act). Consequently, California antitrust law can and does differ significantly from its federal counterpart. *See* California Antitrust Law & Unfair Competition, *supra*, at § 1.05 (explaining relationship between Cartwright Act and federal Sherman Act and noting significant differences). As the California Supreme Court has

[12] It should be noted that certain older authorities incorrectly suggested that the Cartwright Act was "patterned after" the federal Sherman Act. With its extensive analysis of the legislative history in *State ex rel. Van de Kamp v. Texaco, Inc*., 46 Cal. 3d 1147 (1988), the California Supreme Court explained that these earlier decisions were simply wrong. While a few modern authorities have incorrectly cited the old "patterned after" language, there can be no doubt that this language is decidedly wrong. California Antitrust & Unfair Competition Law, *supra*, at § 1.05.

explained, the Cartwright Act is "broader in range and deeper in reach" than the Sherman Act. *In re Cipro Cases I & II*, 61 Cal. 4th at 160-61. Thus, numerous courts have found that differences between federal and state antitrust law will, in some cases, lead to different results. *See*, *e.g.*, *Bay Guardian Co. v. New Times Media LLC*, 187 Cal. App. 4th 438, 455-58 (2010) (rejecting application of federal standard to California antitrust law addressing below cost pricing); *Fisherman's Wharf Bay Cruise Corp. v. Superior Court*, 114 Cal. App. 4th 309, 325 (2003) (reversing summary judgment and rejecting federal below cost pricing authorities because California utilizes different standard)[13]; *Cellular Plus, Inc. v. Superior Court*, 14 Cal. App. 4th 1224, 1234 (1993) (explaining that federal standards are inapplicable to "broader" antitrust injury under Cartwright Act); *see also Alan Darush MD APC v. Revision LP*, No. CV 12-10296, 2013 WL 17493539, at *6 (C.D. Cal. Apr. 10, 2013) (explaining that California law on vertical price fixing differs from federal law).

Here, even if the district court's Sherman Act analysis were upheld, the differences between the Cartwright Act and the Sherman Act lead to a very

[13] The *Fisherman's Wharf* court also found that 20% foreclosure was sufficient to satisfy an exclusive dealing claim under the Cartwright Act – a standard lower than typically allowed under the Sherman Act. *See* 114 Cal. App. 4th at 339.

different outcome, thereby providing an additional basis to affirm the UCL ruling – even if antitrust law is considered.[14]

2. The Cartwright Act Rule of Reason Analysis Differs Substantially from the Sherman Act

As articulated by the district court, the rule of reason analysis under Section 1 of the Sherman Act requires proof of anticompetitive effects from the challenged restraint, and that the defendant demonstrate procompetitive justifications for the challenged restraint, after which the burden shifts back to the plaintiff "to show that its proposed alternatives [to the restraint] are 'virtually as effective' as the current distribution model and can be implemented 'without significantly increased cost.'" 1-ER-146-52 (citations omitted). Thus, the district court in applying the Sherman Act squarely placed the burden on plaintiff Epic to show the "less restrictive alternatives" to the restriction at issue, and then applied the same analytical framework to the Cartwright Act.

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[14] Although not a point of distinction between the Cartwright Act and the Sherman Act, it should be noted that the district court's ruling that a contract of adhesion cannot support an "agreement" for purposes of an antitrust claim is not supported by California law. 1-ER-145. The district court found that the DPLA was effectively a contract of adhesion that Apple forced developers to sign, and therefore was not subject to antitrust scrutiny. *See id*.

The plain language of the Cartwright Act expressly covers "any contracts, obligations or agreements of any kind and description." Cal. Bus. & Prof. Code section 16720(e)(3). This clear and unambiguous statutory language controls the interpretation of the Cartwright Act. *Texaco*, 46 Cal. 3d at 1159-65.

Yet, Cartwright Act jurisprudence holds that in a rule of reason antitrust case, the *defendant* has to present evidence of *both* a purported procompetitive justification causally related to the restriction at issue, *and* that the restriction is narrowly tailored such that the defendant could not achieve the beneficial effects through less restrictive means. *See In re Cipro*, 61 Cal. 4th at 157-58 ("burden on defendants to offer legitimate justifications and come forward with evidence that the challenged [conduct] is in fact procompetitive"); *Marin County Bd. of Realtor, Inc. v. Palsson*, 16 Cal. 3d 920, 939 (1976) ("the rule of reason requires not only a demonstration that the anticompetitive practice relates to a legitimate purpose, but also that it is reasonably necessary to accomplish that purpose and narrowly tailored to do so"); *Corwin v. Los Angeles Newspaper Service Bureau, Inc*., 4 Cal. 3d 842, 855 (1971) ("If a less restrictive means can be used… [then defendant] cannot justify the restraints imposed by the present agreements").

In other words, under the Cartwright Act rule of reason framework, Apple has the burden to prove that its anti-steering restriction was narrowly tailored and necessary to achieve the procompetitive benefits.[15] On this record, the district court

[15] While the antitrust plaintiff has the ultimate burden of proof, placing the burden on Apple to proffer procompetitive justifications and to show the restriction is narrowly tailored, makes sense because it is uniquely positioned to explain its own internal contracting strategies and decision-making processes that led to the anti-steering provisions. *See In re Cipro Cases I & II*, 61 Cal. 4th at 157-58; *see also Morris v. Williams*, 67 Cal. 2d 733, 760 (1967) ("Where the evidence necessary to

held that the anti-steering provisions were anticompetitive and that Apple's justifications for the anti-steering provisions were not persuasive.[16] "Apple has not proffered any justification for its actions other than to argue entitlement. Where its actions harm competition and result in supracompetitive pricing and profits, Apple is wrong." 1-ER 168-69. Because this "wrong" also satisfies the elements of a Cartwright Act violation, it provides an independent ground to support the district court's ruling on the UCL claim.

Thus, as the district court found in carefully crafting the injunction, a narrowly tailored remedy was available that would "invalidate the offending

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establish a fact essential to a claim lies peculiarly within the knowledge and competence of one of the parties, that party has the burden of going forward with the evidence on the issue although it is not the party asserting the claim").

[16] Apple and certain *amicus curiae* argue that the controversial 5-4 decision in *Ohio v. American Express Co*., 138 S. Ct. 2274 (2018), establishes that all anti-steering provisions are lawful and should preclude the district court's finding of liability under the UCL. As the brief filed by the State of California properly points out, "[n]o California state law precedent applies the novel holdings of the closely divided *American Express* Court to any analysis under the Cartwright Act or the UCL." Brief of the State of California as *Amicus Curiae* at 22. The authors here concur with the position taken by the California Attorney General. Moreover, the competitive effects of anti-steering provisions are factual in nature, and their ability to harm competition has been recognized by the Department of Justice and the Federal Trade Commission. *See* Statement of Antitrust Enforcement Policy Regarding Accountable Care Organizations Participating in the Medicare Shared Savings Program; Notice, 76 Fed. Reg. 67030 (Oct. 28, 2011); *see also United States v. Charlotte-Mecklenburg Hosp. Authority*, No. 3:16-cv-00311, 2019 WL 2767005, at *3 (W.D.N.C. Apr. 24, 2018) (final judgment and settlement entered between Department of Justice and hospital authority prohibiting anti-steering provisions).

provisions" in Apple's policies, thereby "uncloaking the veil hiding pricing information on mobile devices and bringing transparency to the marketplace." 1-ER-169. In short, even if Cartwright Act rule of reason standards are imposed on the UCL claim (a proposition that should not be necessary for an unfair prong claim for the reasons set forth above), the record independently supports affirming the district court's ruling.

II. NATIONWIDE INJUNCTIVE RELIEF IS APPROPRIATE UNDER THE UCL

The California Supreme Court has explained that "the primary form of relief available under the UCL to protect consumers from unfair business practices is an injunction." *In re Tobacco II Cases*, 46 Cal. 4th 298, 319 (2009). Thus, the UCL expressly provides that courts shall have broad discretion to "make such orders…as may be necessary to prevent the use or employment *by any person of any practice which constitutes unfair competition*." Cal. Bus. & Prof. Code § 17203 (emphasis added); *see also* California Antitrust & Unfair Competition Law, *supra*, at § 16.05 ("Under section 17203, courts have broad discretion to exercise all powers inherent in a court of equity") (citation omitted). The expansive breadth of this language has given courts the power to issue injunctions that are both general and specific. *See, e.g., Consumers Union of the U.S., Inc. v. Alta-Dena Certified Dairy*, 4 Cal. App. 4th 963, 972 (1992); *see also* California Antitrust & Unfair Competition Law, *supra*, at § 16.05, n.203, n.204 (citing cases). Further, the California

Supreme Court has made clear that public injunctive relief is fully appropriate in UCL actions brought by private parties. *McGill v. Citibank, N.A.*, 2 Cal. 5th 945, 954-55 (2017).

Here, the nationwide injunction fashioned by the district court is fully consistent with the UCL's statutory scheme. Indeed, the Legislature amended section 17203 to broaden the reach of the UCL's injunctive relief specifically to encompass out-of-state activity. *Stop Youth Addiction, Inc. v. Lucky Stores, Inc.*, 17 Cal. 4th 553, 570 (1998), *superseded by statute on other grounds* ("More recently, in 1992, the Legislature…amended section 17203 to expand the scope of injunctive relief to encompass past activity and out-of-state activity.") Where, as here, the wrongful conduct emanated from California – Apple is headquartered in California – a court is fully empowered to issue an injunction to prevent the unlawful conduct from continuing. *See Allergan, Inc. v. Athena Cosmetics, Inc.*, SACV 07-1316, 2013 WL 1214255, at *3-*7 (C.D. Cal. Mar. 6, 2013) (power to enjoin unfair competition under UCL "extraordinarily broad" and holding nationwide injunction proper); *Colgan v. Leatherman Tool Grp., Inc*., 135 Cal. App. 4th 663, 701 (2006) (explaining that injunctive relief is the primary remedy under UCL); *see generally Wershba v. Apple Comput, Inc.*, 91 Cal. App. 4th 224, 243 (2001), *overruled on other grounds by Hernandez v. Restoration Hardware, Inc*., 4 Cal. 5th 260, 269-70 (2018) ("[A] California court may properly apply the same California statues at

issue here to non-California members of a nationwide class where the defendant is a California corporation and some or all of the challenged conduct emanates from California.").

CONCLUSION

For the foregoing reasons, the Court should affirm the district court's judgment and injunction as to Epic's UCL claim.

Dated: June 1, 2022

Respectfully submitted,

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FOR THE NINTH CIRCUIT

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ADDENDUM A

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CERTIFICATE OF SERVICE

I hereby certify that on June 1, 2022, I electronically filed the foregoing **BRIEF OF *AMICI CURIAE* UCL PRACTITIONERS AND SCHOLARS IN SUPPORT OF EPIC GAMES, INC.'S RESPONSE BRIEF TO APPLE INC.'S CROSS-APPEAL** with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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Dated: June 1, 2022

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