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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

EPIC GAMES, INC.,

Plaintiff, Counter-defendant,

v.

APPLE INC.

Defendant, Counterclaimant.

No. 4:20-cv-05640-YGR

BRIEF OF *AMICI CURIAE* DEVELOPER PLAINTIFFS REGARDING TRIAL ELEMENTS

Hon. Yvonne Gonzalez Rogers

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

Donald R. Cameron and Pure Sweat Basketball, Inc. ("PSB") are iOS developers and plaintiffs in *Cameron v. Apple Inc.*, N.D. Cal. No. 4:19-cv-03074-YGR. They respectfully submit this *amici curiae* brief as invited by the Court. (October 19, 2020 Tr. at 18-19; Order of October 21, 2020, *Epic Games v. Apple* ECF ("Epic ECF") No. 132). The Developer Class ("Developers") in *Cameron* assert that Apple has monopolized the multi-billion dollar market for distribution of iOS applications and in-app purchases ("IAP") in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2. They seek to recover the damages they suffered as a result of the supracompetitive prices that Apple charges in abuse of its monopoly power.

Developers have endeavored to avoid undue duplication of the parties' 167-page Joint Submission and, in accordance with the Court's guidance, to avoid merits-based arguments where not illustrative of a particular legal point. To this end, Developers address specific points raised by Apple and Epic in their Joint Submission, citing to the referenced section (*e.g.*, "7.1"). Given that discovery and expert analysis are ongoing in *Cameron*, Developers reserve all rights to vary, add to, or subtract from the following statements in the briefing that will ensue in their own matter.

Developers also have endeavored to comply with the Court's desire for transparency and the avoidance of surprise. (Oct. 20, 2020 Hearing Tr. at 16 ("I don't want to find out … there's something wholly different or some different perspective a year later… .") To that end, Developers address the preclusion issues raised by the *Epic Games v. Apple* trial, and the preservation of Developers' Seventh Amendment jury trial right.

First, though nonparties, Developers may benefit from the Court's ruling in the *Epic Games v. Apple* trial—*i.e.*, the Court's ruling may preclude Apple from relitigating any issue on which Epic prevails. *Parklane Hosiery Co., Inc. v. Shore,* 439 U.S. 322, 330-32 (1979). Developers would not be subject to preclusion on any issue on which Apple prevails. *Taylor v. Sturgell*, 553 U.S. 880, 892 (2008). Developers are not parties to the case, are not adequately represented by Epic, and do not "effectively control" the *Epic v. Apple* litigation. *Headwaters Inc. v. United States Forest Serv.*, 399 F.3d 1047, 1054 (9th Cir. 2005) ("[P]arallel legal interests alone, identical or otherwise, are not sufficient to establish privity, or to bind a plaintiff to a decision reached in another case involving another plaintiff."); *Munoz v. Cnty of. Imperial*, 667 F. 2d 811, 816 (9th Cir. 1982) ("[T]he filing of an amicus brief has never been enough to bind a non-party to the result of a proceeding").

Second, Developers (including the named plaintiffs) are entitled to a jury trial, and if there were any risk that they could be precluded from litigating an issue resolved in the *Epic Games v. Apple* bench trial, then their jury trial would need to proceed first. *Parklane*, 439 U.S. at 334 ("[W]hen legal and equitable claims are joined in the same action, the trial judge has only limited discretion in determining the sequence of trial and 'that discretion … must, wherever possible, be exercised to preserve jury trial") (quoting *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 510 (1959)); *Illinois Union Ins. Co. v. Intuitive Surgical, Inc.*, 179 F. Supp. 3d 958, 961 (N.D. Cal. 2016) ("As a result, where there are issues common to both the equitable and legal claims, the legal claims involved in the action must be determined prior to any final court determination of [the] equitable claims.") (internal citations omitted). To the extent desired by the Court, Developers stand ready to accelerate the date for a jury trial as much as reasonably practical.

Developers submit this brief solely in the role of *amici curiae*, pointing out areas of law that may help the Court's understanding and preparation for the bench trial in *Epic Games v. Apple*.

I. RELEVANT MARKET

A. Relevant Market Analysis (Joint Submission § 4.1)

Developers generally agree with the analytical framework that Epic provides for defining the relevant product market. (Joint Subm., Epic ECF No. 276, at 10-11.) Defining the relevant market is a question of fact rather than law. *Epic Games v. Apple Inc.*, No. 4:20-cv-05640-YGR, 2020 WL 5993222, at *7 (N.D. Cal. Oct. 9, 2020); *Eastman Kodak Co. v. Image Tech. Servs.*, 504 U.S. 451, 481-82 (1992); *Theme Promotions, Inc. v. News America Mktg. FSI*, 546 F.3d 991, 1001-02 (9th Cir. 2008). The purpose of the relevant market analysis is to draw boundaries around an area of competition within which the products or services are reasonably interchangeable in the eyes of the purchaser. *Eastman Kodak*, 504 U.S. at 481-82 (stating that relevant market for providing service to Kodak equipment "is determined by the choices available to Kodak equipment owners"). As this Court already observed, the relevant market is the "area of effective competition," *i.e.*, the "field in which meaningful competition is said to exist." *Epic Games*, 2020 WL 5993222, at *7 (quoting *Federal*

Trade Comm'n v. Qualcomm, 969 F.3d 974, 992 (9th Cir. 2020), and *Image Tech. Servs. v. Eastman Kodak Co.*, 125 F. 3d 1195, 1202 (9th Cir. 1997)).

The Supreme Court has explained that "[t]he outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it." *Brown Shoe Co. v. U.S.*, 370 U.S. 294, 325 (1962); *see also Epic Games*, 2020 WL 5993222, at *7 (quoting *Newcal Indus. v. IKON Office Sol.*, 513 F.3d 1038, 1045 (9th Cir. 2008) ("Including economic substitutes ensures that the relevant product market encompasses the group or groups of sellers or producers who have actual or potential ability to deprive each other of significant levels of business.") (internal quotation marks omitted)); *Hicks v. PGA Tour, Inc.*, 897 F.3d 1109, 1120 (9th Cir. 2018) (quoting *Newcal*). However, not all substitute products belong in the relevant market—rather, only those substitutes to which a significant number of purchasers will turn:

> For every product, substitutes exist. But a relevant market cannot meaningfully encompass that infinite range. The circle must be drawn narrowly to exclude any other products to which, within reasonable variations in price, only a limited number of buyers will turn … .

Times-Picayune Publ'g Co. v. United States, 345 U.S. 594, 612, n.31 (1953); FTC Horizontal Merger Guidelines § 4 (2010) ("[P]roperly defined antitrust markets often exclude some substitutes to which some customers might turn in the face of a price increase even if such substitutes provide alternatives for those customers.").[1]

Interchangeability is the lynchpin to relevant market analysis because a purchaser's ability to readily switch from one product to another is what constrains a seller from charging a supracompetitive price. *Rebel Oil. Co. v. Atl. Richfield Co.*, 51 F.3d 1421, 1434 (9th Cir. 1995) (substitute products belong in relevant market "[i]f the sales of other producers substantially constrain the price-increasing ability of [defendant]"); *Theme Promotions*, 546 F.3d at 1002 (increase in price of product (coupon inserts) did not result in decrease of insert usage); *United States v. Microsoft Corp.*, 253 F.3d 34, 53-54 (D.C. Cir. 2001) (explaining that "reasonable interchangeability" requires inclusion in relevant market "only [of] substitutes that constrain pricing" by seller). If the seller of product A raises the price

[1] Available at https://www.ftc.gov/sites/default/files/attachments/merger-review/100819hmg.pdf.

and purchasers can readily shift to product B, then product A will lose sales. But if the purchasers cannot readily switch from product A to product B, then the products are not close substitutes, do not meet the reasonable interchangeability test, and do not belong in the same relevant market. *Eastman Kodak*, 504 U.S. at 481-82.

Thus, as discussed in the FTC Horizontal Merger Guidelines, "[t]he hypothetical monopolist test may identify a group of products as a relevant market even if customers would substitute significantly to products outside that group in response to a price increase." FTC Guidelines § 4.1.1 (providing example in which "two-thirds of the sales lost … are diverted to products outside the relevant market" but nonetheless concluding that hypothetical monopolist test is satisfied). The Guidelines explain:

> Defining a market broadly to include relatively distant product or geographic substitutes can lead to misleading market shares. This is because the competitive significance of distant substitutes is unlikely to be commensurate with their shares in a broad market. Although excluding more distant substitutes from the market inevitably understates their competitive significance to some degree, doing so often provides a more accurate indicator of the competitive effects of the merger than would the alternative of including them and overstating their competitive significance as proportional to their shares in an expanded market.

Id. § 4.

The test for interchangeability is hypothetical and asks whether purchasers would substitute product B for product A if the price of B went down. The test does not require proof of an actual change in price. *St. Alphonsus Med. Ctr. – Nampa, Inc. v. St. Luke's Health Sys.*, 778 F.3d 775, 785 (9th Cir. 2015) (relevant market determination "involves prospective analysis—it predicts consumer response to a hypothetical price increase"); *Rebel Oil*, 51 F.3d at 1434 (noting that relevant market is determined by whether "hypothetical" set of sellers would be able to successfully raise price of their products without consumers switching to products of other sellers).

The relevant market is frequently defined by applying economic analysis known as "'small but significant nontransitory increase in price' ('SSNIP') analysis." *Epic Games*, 2020 WL 5993222 at *8. Consistent with the FTC's Horizontal Merger Guidelines, this test looks to determine the relevant market based on whether the rate of substitution across the entire market is enough to constrain a hypothetical monopolist from raising prices by 5%. Contrary to Apple's description (Epic ECF No.

276 at 12), the economic SSNIP test is not just another "academic theory" but, rather, a well-settled methodology that is routinely used by Courts to define the relevant market. *Theme Promotions*, 546 F.3d at 1002.

In applying a SSNIP analysis (as Epic correctly notes in its discussion of the *Cellophane* fallacy and *Eastman Kodak* (Epic ECF No. 276, at 11)), courts must carefully consider whether the monopolist already has raised prices above the competitive level. Apple disputes this point, but the Supreme Court addressed and rejected Apple's argument in *Eastman Kodak*—holding that "[e]ven if Kodak could not raise the price of service and parts one cent without losing equipment sales, that fact would not disprove market power in the aftermarkets." 504 U.S. at 470-71 (quoting Areeda & Kaplow, *Antitrust Analysis* ¶ 340(b) (4th ed. 1988) ("[T]he existence of significant substitution in the event of *further* price increases or even at the *current* price does not tell us whether the defendant already exercises significant market power.") (emphasis in original). The FTC Horizontal Merger Guidelines take the same approach, recognizing that even if the rate of substitution at current prices is high enough to make price increases unprofitable, that does not justify broadening the market definition in a monopolization case, because a firm with monopoly power will have already raised prices above competitive levels. *See* FTC Guidelines § 4.1.2 & n.5.

Apple also is wrong in asserting that Judge Posner somehow supports its view that there is no such thing as the *Cellophane* fallacy. In *Santa Cruz Medical Clinic v. Dominican Santa Cruz Hospital*, No. C93 20613 RMW, 1995 WL 853037 at *10 (N.D. Cal. Sept. 7, 1995), the court cited Judge Posner's book *Antitrust Law: An Economic Perspective* and stated that Judge Posner "has rejected this theory." But what the court meant was that Judge Posner rejected making the error of the fallacy, not that he rejected the fallacy's existence. Indeed, in the passage of *Antitrust Law* cited by the court, Judge Posner states the "elementary point" explicitly: "Reasonable interchangeability at the current price but not at a competitive price level, far from demonstrating the absence of monopoly power, might well be a symptom of that power; this elementary point was completely overlooked by the [*Cellophane*] Court." Richard A. Posner, *Antitrust Law: An Economic Perspective* 128-29 (1976); *see also* Richard A. Posner, *Antitrust Law* 150-51 (2d ed. 2001).

1. Single Brand Markets (Joint Submission § 4.1.2)

As Epic states, the Ninth Circuit recognizes properly defined single-brand aftermarkets. (Epic ECF No. 276, at 13-14.) In *Eastman Kodak*, the Supreme Court held that Kodak spare parts could be a single-brand market—because the spare parts manufactured by other copier companies would not work in a Kodak machine and the purchaser of the needed parts could turn only to Kodak. 504 U.S. at 457 ("Kodak parts are not compatible with other manufacturers' equipment, and vice versa").

Kodak contended (as Apple does here) that none of that mattered if "competition exists in the equipment market." *Id*. at 465 n.10. The Supreme Court rejected Kodak's argument.

First, the Supreme Court held that Kodak's argument did not accurately reflect market behavior because of the "existence of significant information and switching costs." *Id*. at 473. With regard to information problems, the Court pointed out that aftermarket prices would affect initial equipment sales only if the equipment purchaser knew, when the initial equipment was purchased, the extent of future purchases and prices of aftermarket products. *Id*.; *see also Newcal*, 513 F.3d at 1050 (explaining that "aftermarket" may constitute relevant market when switching costs "prevent consumers from realizing that their choice in the initial market will impact their freedom to shop in the aftermarket").

Second, the Supreme Court rejected Kodak's assertion that competition in the equipment market would prevent the exercise of market power in a Kodak-only aftermarket, because of "the cost to current owners of switching to a different product." *Eastman Kodak*, 504 U.S. at 476. To put the issue in terms of this case, if the cost of switching from an iOS device to an Android device is high, then Apple would be able to charge supracompetitive prices for app-distribution and IAP services without causing much or any loss of equipment sales. *Id*. According to the Supreme Court, this would be especially true "if the switching costs were high relative to the increase in [aftermarket] service prices." *Id*. For these and other reasons, the Supreme Court held in *Eastman Kodak* that a plaintiff can prove a single-brand relevant market.

Nonetheless, Apple relies on *Apple Inc. v. Psystar Corp.*, 586 F. Supp. 2d 119 (N.D. Cal. 2008), for the proposition that courts reject single-brand aftermarkets. But in *Psystar*, the plaintiff manufactured computer hardware that was compatible with "a wide range of operating systems," including Apple's Mac OS, and the computer purchaser could choose from that range of alternatives.

586 F. Supp. 2d at 1193. The plaintiff in that case alleged that Apple prevented its operating system from being installed on plaintiff's hardware and that Apple had restricted competition in two relevant markets: (1) a market for Mac OS; and (2) a market for computer hardware hosting Mac OS. *Id*. Rejecting those market allegations, the court found that: (1) Mac OS systems were reasonably interchangeable with other operating systems and just one of the many operating systems a consumer could choose; and (2) Apple computers with Mac OS operating systems competed with other computers and operating systems and had "reasonable substitute[s]" in the eyes of the purchasers. *Id*. at 1199-1200. And, the court distinguished Psystar's allegations from the ruling in *Eastman Kodak*—on the ground that Psystar alleged a single-brand market in the *initial equipment market* where Apple faced competitors that offered reasonably interchangeable equipment, as opposed to the aftermarket single-brand market found in *Eastman Kodak*, in which the purchasers were "locked in" to only a single brand. *Id*. at 1201.

Apple also contends that there cannot be a Kodak-like aftermarket for iOS app distribution unless Apple "changed its policy after locking-in some of its customers." (Epic ECF No. 276, at 15 (citing *PSI Repair Servs. v. Honeywell, Inc.*, 104 F.3d 811, 820 (6th Cir. 1997).) Yet, there is no such lock-in timing requirement in *Eastman Kodak* or in the Ninth Circuit's precedent.[2] *Newcal*, 513 F.3d

[2] *PSI Repair* is also distinguishable on its facts. As Apple points out, PSI received information that allowed it to take repair/life cycle information into account before buying the product. *Id.* at 820-21 ("Honeywell and its customers engage in lengthy negotiations before the sale … This fact is hardly surprising in light of the substantial price of the [$800,000] equipment."). Thus, the fully informed customers could comparison-shop and purchase a competing control system if the expected cost of repair made a deciding difference in the overall price. *Id.* The same is true in *Lee v. The Life Ins. Co. of N.A.*, where students were *not* locked in to complete their education at URI after their first year (*i.e.*, they had not paid four years of tuition in advance). 23 F.3d 14, 20 (1st Cir. 1994) (Students' effort "to extend *Kodak*, beyond the 'derivative aftermarket' context to the educational context, is problematic at best.")

Apple's other cited cases are inapt. In *Digital Equip. Corp. v. Uniq Digital Technologies*, 73 F.3d 756, 762 (7th Cir. 1996), Uniq saw "in *Kodak* the message that there is a market in a firm's own products, even if it sells in vigorous competition." The court rejected the argument, and it did so in a way that does not help Apple here (because users would have to change operating systems to switch from the App Store to the Google Play Store); *id.* at 763 ("DEC is selling a fungible commodity (CPU cycles) to customers who can substitute brands without changing operating systems…. A monopoly this is not."). And, in *DSM Desotech Inc. v. 3D Sys. Corp.*, 749 F.3d 1332, 1346 (Fed. Cir. 2014) the Federal Circuit erroneously flipped the meaning of language in *Kodak*'s footnote 24, in which the at 1048, 1050 ("Newcal offers factual allegations to rebut the economic presumption that IKON consumers make a knowing choice to restrict their aftermarket options when they decided in the initial (competitive) market to enter an IKON contract."); *Digidyne Corp. v. Data Gen. Corp.*, 734 F.2d 1336, 1342-43 (9th Cir. 1984) (rejecting defendant's "lock-in" argument because it did not accurately characterize the market).[3]

As the case law shows, all that matters is whether the consumer is "locked-in." While a post-acquisition lock-in would be helpful evidence to a plaintiff, it is not necessary—as is made clear by one of Apple's authorities. In *Avaya Inc., RP v. Telecom Labs, Inc.*, the Third Circuit "cautioned that, although one important consideration is whether a unilateral change in aftermarket policy exploits locked-in customers, an 'aftermarket policy change' is not the *sine qua non* of a *Kodak* claim." 838 F.3d 354, 402 (3d Cir. 2016) (internal citations and brackets omitted). The Third Circuit continued that "[o]ther factors to consider include evidence of (1) supracompetitive pricing, (2) the seller's dominant share of the relevant aftermarket, (3) significant information costs that prevent lifecycle pricing, and (4) high switching costs that serve to lock in the seller's aftermarket customers." *Id.*

Finally, "[i]t is important to make clear that single-brand market definitions are not formally limited to the aftermarket context":

> Single-brand market allegations are usually rejected because they are consistently pled in a manner that lacks plausibility or is otherwise untethered to economic reality. Accordingly, an antitrust plaintiff may succeed in defining a single-brand relevant market if it can establish that a product's characteristics make it unique or circumstances prevent consumers from substituting alternatives for the same purposes.

In re Am. Express Anti-Steering Rules Antitrust Litig., 361 F. Supp. 3d 324, 344 (E.D.N.Y. 2019) (internal citations, quotation marks, and emphasis omitted); *see also US Airways, Inc. v. Sabre Holdings Corp.*, 938 F.3d 43, 66 n.8 (2d Cir. 2019). The question is whether a plaintiff can show a

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majority pointed out that a fact "crucial" to the *dissent's hypothetical argument* supporting summary dismissal was in fact missing – and *not* that the fact was crucial to the *Kodak* Court's ruling.

[3] While stating that *Digidyne* had been "implicitly overruled" by *Illinois Tool Works* because *Digidyne* had relied on "the presumption of market power for copyrighted or patented products," *Psystar* distinguished the case on the grounds that the Ninth Circuit had "emphasized the presence of market imperfections such [as] switching costs and customer 'lock-in'" – which had not been alleged in *Psystar*. 586 F. Supp. 2d at 1197 n.3.

relevant market using appropriate economic analysis or practical indicia. In this regard, even if the iOS distribution and IAP services are not an *aftermarket* under *Eastman Kodak*, they could alternatively constitute a *submarket* under the "practical indicia" test of *Brown Shoe*. *See Newcal*, 513 F.3d at 1045 (Submarket is "economically distinct from general product market" and can be determined based on *Brown Shoe* indicia.). As addressed in the Joint Submission (Epic ECF No. 276, at 16), such a submarket can be established by, among other things, "public recognition" of the iOS app distribution market "as an economic entity." *Newcal*, 513 F.3d at 1045 (quoting *Brown Shoe*, 370 U.S. at 325).[4]

2. Two-Sided Markets (Joint Submission § 4.1.4)

Epic accurately describes the legal framework governing two-sided markets. But these considerations do not come into play unless the App Store is a two-sided *transaction* platform. As explained by the Supreme Court, a transaction platform must exhibit indirect network effects *and* simultaneity. *US Airways*, 938 F.3d at 57 ("[Transaction] platforms inherently 'exhibit more pronounced indirect network effects and interconnected pricing and demand' than other types of two-sided platforms, because transaction platforms require that 'both sides of the platform simultaneously agree to use their services.' As a result, '[e]valuating both sides of a two-sided transaction platform is … necessary to accurately assess competition.'") (quoting *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2286–87 (2018) (hereinafter, "*Amex*")).

Even when the relevant market is properly defined as a two-sided transaction market, the defendant will be found to have engaged in anticompetitive conduct that causes "actual detrimental effects on competition" if the plaintiff demonstrates that challenged conduct increased the net two-sided price of the transaction above the competitive level, reduced the number of two-sided transactions, or otherwise stifled competition in the two-sided market. *Amex*, 138 S. Ct. at 2284, 2287.

In defining two-sided markets, the SSNIP test can appropriately be applied. In *United States v. Sabre Corp.*, the court rejected the DOJ market definition for not taking both sides into account; the

[4] *See Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co.*, 334 U.S. 219, 243-44 (1948) (Court should not disregard the commercial realities of the market; rejecting argument that non-competitive beet industry should be viewed as part of the competitive agricultural market generally – "[t]o compare an industry so completely interlocked in all its stages … is to ignore the facts of industrial life").

court did not say SSNIP tests could not be used in two-sided markets. 452 F. Supp. 3d 97, 137-38 (D. Del. 2020). Likewise, contrary to Apple's argument, (Epic ECF No. 276, at 12), the academic work it cites does not reject application of a SSNIP test to a two-sided transaction market, rather its author argues that the SSNIP test should simply be modified to instead assess "the profitability of an increase in the price level (*i.e.* the same of the prices paid for the transaction by the two sides)." *See* Filistrucchi, *Market Definition in Multi-Sided Markets*, OECD Paper (2018) at ¶ 83. It also bears note that courts assessing two-sided markets have analyzed interchangeability on only one side of the market. *See, e.g.*, *US Airways*, 839 F.3d at 64-67.

B. Section 2 of the Sherman Act Monopolization – Monopoly Power (Joint Submission § 7.1)

Developers also generally agree with the analytical framework Epic provides for determining monopoly power within the relevant market, a necessary element of a § 2 claim. (Epic ECF No. 276, at 10-11.) Apple's discussion of monopoly power improperly elevates an observation to a legal requirement. Quoting *Kolon Indus. v. E.I. DuPont de Nemours & Co.*, 748 F.3d 160, 174 (4th Cir. 2014), Apple asserts that the "Supreme Court has never found a party with less than 75% market share to have monopoly power." (Epic ECF No. 276, at 53). But *Kolon* did not characterize 75% as a baseline. Rather, the Fourth Circuit stated that its own "bottom of the range" was a 70% share and that even that number was not an absolute requirement. 748 F.3d at 174 ("Kolon is correct that DuPont's market share of less than 60% during the relevant period does not necessarily foreclose a finding of monopoly power" although "it does weigh heavily against such a finding").

The *Cameron* plaintiffs allege supracompetitive prices for Apple's distribution services. While Apple argues that plaintiffs must show decreased output in addition to supracompetitive pricing in order to succeed with direct evidence of monopoly power (Epic ECF 276, at 52-54), supracompetitive pricing, *or* restricted output, is ample to demonstrate anticompetitive effects. And the word "or" is the appropriate conjunction. *See Epic Games*, 2020 WL 5993222, at *7 ("Monopoly power … can be defined as 'the power to control prices *or* exclude competition'") (quoting *United States v. Grinnell*, 384 U.S. 563, 571) (1966) (emphasis added). As a practical matter, however, a company with power to control price will generally also have the power to exclude competition and reduce output—

otherwise, competitors would enter and compete on price. *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, 307 (3d Cir. 2007) ("If a firm can profitably raise prices without causing competing firms to expand output and drive down prices, that firm has monopoly power."); *Kolon*, 748 F.3d at 174 (noting that, if DuPont had market power, it could have prevented competitor from taking market share).

The power to control price or exclude competition "may be demonstrated through either of two types of proof." *Rebel Oil*, 51 F.3d at 1434. It may be proven by either "direct evidence of the injurious exercise of market power" or by "circumstantial evidence pertaining to the structure of the market" (*i.e.*, high market share). *Id.*; *Microsoft*, 253 F.3d at 51 (explaining that monopoly power may be proven by (1) direct evidence that defendant raised price or excluded competition or (2) circumstantial evidence of defendant's dominant market share, from which monopoly power is inferred).

Under the direct method of proof, the plaintiff demonstrates that defendant has actually injured competition by, for example, restricting output, raising price, or reducing quality, which "is direct proof of [an] injury to competition which a competitor with market power may inflict, and thus, of the actual exercise of market power." *Rebel Oil*, 51 F.3d at 1434; *see also FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 460-61 (1968) ("proof of actual detrimental effects such as a reduction of output" obviates the need for further inquiry into market power "which is but a surrogate for detrimental effects"); *Microsoft*, 253 F.3d at 51 (defining power to control price as ability to "profitably raise prices substantially above the competitive level" and stating that "[w]here evidence indicates that a firm has in fact profitably done so, the existence of monopoly power is clear") (citing *Rebel Oil*, 51 F.3d at 1434, and *Indiana Fed'n of Dentists*, 476 U.S. at 460-61).

Under the indirect or circumstantial method of proving market power, "a plaintiff must: (1) define the relevant market, [and] (2) show that the defendant owns a dominant share of that market." *Rebel Oil*, 51 F.3d at 1434. Monopoly or market power is then inferred from the dominant share of the market. *Id.*[5]

[5] When the direct method of proving market power is used, however, there is no need to prove that defendant has a high share of the market to prove market power. In *Indiana Federation of Dentists*, the FTC did not define a relevant market at trial, much less prove the defendant's share of that market. 476 U.S. at 453. Nonetheless, the Supreme Court held that the FTC's direct proof of "actual, sustained

Finally, Apple contends that a rate-of-return analysis reveals very little about a defendant's market power, and that no circuit has used "such measures to ascertain market power." (Epic ECF No. 276, at 54.) Yet, Apple's contentions ignore the Second Circuit's decision in *US Airways*, 938 F.3d at 60-62, which is one of Apple's cited cases. In that case, the Second Circuit spoke favorably regarding the rate-of-return analyses conducted by the plaintiffs in terms of demonstrating supracompetitive pricing—which, as discussed above, is direct evidence of market power, obviating the need to both define the relevant markets and show that the defendant owns a dominant share.

C. Section 2 of the Sherman Act – Willful Acquisition or Maintenance of Monopoly Power Defined (Joint Submission § 7.2)

As Epic correctly asserts, monopolization under § 2 of the Sherman Act has two elements: "(1) the possession of monopoly power in the relevant market[;] and (2) the willful acquisition or maintenance of that power." *Grinnell Corp.*, 384 U.S. at 570-71; *Qualcomm,* 969 F.3d at 990 (adding third element of antitrust injury).[6] In order to constitute willful acquisition or maintenance of monopoly power, the defendant's conduct must be "fairly characterized as 'exclusionary' or 'anticompetitive' … or 'predatory'." *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 602, 605 (1985); *MetroNet Servs. Corp. v. West Corp.*, 383 F.3d 1124, 1130 (9th Cir. 2004) (plaintiff must show that defendant obtained or maintained monopoly power through "exclusionary conduct"); *Qualcomm*, 969 F.3d at 990 (possession of monopoly power is unlawful if "it is accompanied by an element of anticompetitive conduct").

Conduct that is exclusionary, predatory, or anticompetitive means "behavior that not only (1) tends to impair the opportunities of rivals, but also (2) either does not further competition on the merits or does so in an unnecessarily restrictive way." *Aspen Skiing Co.*, 472 U.S. at 605 n.32. And "[i]f a firm has been attempting to exclude rivals on some basis other than efficiency, it is fair to characterize

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adverse effects on competition" was sufficient to demonstrate that the defendant enjoyed market power and that the FTC's "failure to engage in detailed market analysis is not fatal to its finding of a violation of the Rule of Reason." *Id.* at 460-61.

[6] If plaintiffs show monopoly or monopsony power, and willful acquisition or maintenance of that power (the first and second parts of the three-part test), the last part (causation) "may be inferred 'when exclusionary conduct is aimed at producers of nascent competitive technologies as well as when it is aimed at producers of established substitutes.'" *Epic Games*, 2020 WL 5993222, at *9 (quoting *Microsoft*, 253 F.3d at 79); *Qualcomm*, 969 F.3d at 992.

its behavior as predatory." *Id.* at 605; *see also Cascade Health Sols. v. PeaceHealth*, 515 F.3d 883, 894 (9th Cir. 2008) (anticompetitive conduct is defined as "behavior that tends to impair the opportunities of rivals and either does not further competition on the merits or does so in an unnecessarily restrictive way"); *Pacific Express, Inc. v. United Airlines, Inc.*, 959 F.2d 814, 818 (9th Cir. 1992) ("[a] defendant's behavior may fairly be characterized as predatory when the defendant is attempting to exclude rivals on some basis other than efficiency") (citation and internal quotation marks omitted).

Thus, in this case, Apple's conduct may be found to be anticompetitive if it substantially foreclosed the market. *Qualcomm*, 969 F.3d at 1003 (substantial foreclosure means that "the opportunities for other traders to enter into or remain in that market [are] significantly limited") (quoting *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 328 (1961)).

Likewise, Apple's conduct may be found to be anticompetive if it prevents consumer choice. A primary goal of the Sherman Act is maximizing consumer choice, so exclusionary conduct that reduces consumer choice is destructive of competition and constitutes an anticompetitive effect within the meaning of the Act. *Associated Gen. Contractors, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 528 (1983) ("[A]ctivity that prevents its victims from making free choices between market alternatives is inherently destructive of competitive conditions and may be condemned even without proof of its actual market effect"). As the Supreme Court has stated, "[a]n agreement limiting consumer choice by impeding the ordinary give and take of the market place … cannot be sustained under the Rule of Reason." *FTC v. Indiana Fed'n of Dentists*, 476 U.S. at 459; *see also NCAA v. Bd. of Regents of the Univ. of Oklahoma*, 468 U.S. 85, 107 (1984) ("[A] restraint that has the effect of reducing the importance of consumer preference in setting price" is inconsistent "with this fundamental goal of antitrust law"); *Nat'l Soc. of Prof'l Engineers v. United States*, 435 U.S. 679, 692-93 (1978) (conduct that "substantially deprives the consumer of the ability to utilize and compare prices" adversely affects competition). An adverse effect on competition violative of the Sherman Act occurs if "the plaintiff … show[s] that diminished consumer choices and increased prices are … due to either artificial restraints or predatory and exclusionary conduct." *Qualcomm*, 969 F.3d at 990.

As a potentially relevant example here, a plaintiff may show that the defendant has obtained or maintained monopoly power through anticompetitive conduct by entering into exclusive dealing arrangements. *See, e.g.*, *Microsoft*, 253 F.3d at 70 ("[A] monopolist's use of exclusive contracts, in certain circumstances, may give rise to a § 2 violation"); *United States v. Dentsply Int'l, Inc.*, 399 F.3d 181, 197 (3d Cir. 2005) ("[E]vidence of … exclusive dealing [may] support the [Section] 2 claim"); *Masimo Corp. v. Tyco Health Care Grp., LP*, No. CV 02-4770 MRP, 2006 WL 1236666, at *11 (C.D. Cal. March 22, 2006) (exclusive dealing arrangement analyzed as § 2 violation). Exclusive dealing arrangements include agreements "between a vendor and a buyer that prevents the buyer from purchasing a given good [or service] from any other vendor." *Qualcomm*, 969 F.3d at 1003 (quoting *Allied Orthopedic Appliances, Inc. v. Tyco Health Care Group LP*, 592 F.3d 991, 996 (9th Cir. 2010)). Exclusive dealing arrangements also include agreements that foreclose a vendor from selling to a competitor of the buyer. *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 45 (1984) (O'Connor, J., concurring) (exclusive dealing arrangements restrains "buyers or sellers").

The critical factor in determining whether "the competition foreclosed … constitute[s] a substantial share of the relevant market." *Tampa Elec.*, 365 U.S. at 328 (noting that the anticompetitive effect of prohibited exclusive dealing arrangements is that they "significantly limit[]" the "opportunities for other traders to enter into or remain in [the relevant market]"); *see also Qualcomm*, 969 F.3d at 1003 (same); *Microsoft*, 253 F.3d at 68-69 (whether an exclusive dealing agreement is anticompetitive depends on whether "its probable effect is to foreclose competition in a substantial share of the [market]"). In determining the degree of market foreclosure, the courts look not only at the share of the market that is foreclosed to actual competitors by the exclusive dealing arrangement, but also the share foreclosed to potential entrants into the market. *Tampa Elec.*, 365 U.S. at 328 (issue is whether exclusive dealing agreements "significantly limited" opportunities for competitors to "enter into or remain in that market"); *Qualcomm*, 969 F.3d at 1003 (same).

Total exclusion from the market is not required. The "test is not total foreclosure, but whether the challenged practices bar a substantial number of rivals or severely restrict the market's ambit." *Dentsply*, 399 F.3d at 191. In determining whether the exclusive agreements are anticompetitive, the courts also look to (1) whether the exclusive dealing agreements "create or extend market power of a supplier or the purchaser party to the exclusive dealing arrangement." *Jefferson Parish*, 466 U.S. at 45 (O'Connor, J., concurring); (2) whether the exclusive dealing agreement has the effect of "preserving [defendant's] monopoly" and preventing "any other rival [from] pos[ing] a real threat to [defendant's] monopoly," *Microsoft*, 253 F.3d at 70-71; (3) the "relative strength of the parties" and "the probable immediate and future effects which pre-emption of that share of the market might have on effective competition therein," *Tampa Elec.*, 365 U.S. at 329; and (4) whether "the practical effect of [the] program was to make it economically infeasible for [the restricted party] to … switch to [a rival]," thus preventing rivals "from becoming an effective competitor," *McWane, Inc. v. FTC*, 783 F.3d 814, 834, 841 (11th Cir. 2015).

Alternatively, as Epic asserts, Apple's conduct can be found to be anticompetitive *per se* to the extent it engages in an unlawful tie. In this regard, tying claims are not limited to § 1 of the Sherman Act; they also may be prosecuted under § 2 as illegal *per se* or as unlawful under the Rule of Reason. *See California Glazed Prods., Inc. v. The Burns and Russell Co.*, 708 F.2d 1423, 1427 (9th Cir. 1983) ("Tying arrangements traditionally have been treated as per se illegal under Section 2 of the Sherman Act and Section 3 of the Clayton Act, 15 U.S.C. § 14 (1976)."); *CollegeNet, Inc. v. Common Application, Inc.*, 355 F. Supp. 3d 926, 953-56 (D. Or. 2018) (denying motion to dismiss tying claim brought under §§ 1 and 2).[7] "[T]he essential characteristic of an invalid tying arrangement lies in the seller's exploitation of 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 Parish*, 466 U.S. at 12. "When such 'forcing' is present, competition on the merits in the market for the tied item is restrained and the Sherman Act is violated." *Id.*[8]

1. Rule of Reason Analysis – No Less Restrictive Alternative and Balancing (Joint Submission §§ 7.2.1, 7.2.3, 7.2.4)

As this Court already held, "Anticompetitive conduct is evaluated under the 'rule of reason'." *Epic Games*, 2020 WL 5993222, at *9 (quoting *Qualcomm*, 969 F.3d at 991). Apple nonetheless

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[7] As to tying, see the *Cameron* operative complaint (¶¶ 29, 43, 93, 116, 127, 134, 146, 159).

[8] Again, Developers note that here, as elsewhere, they do not seek to articulate all theories of anticompetitve conduct alleged in their complaint but comment only on the legal framework as relevant to the trial in *Epic Games v. Apple*.

contends that, under the rule of reason in a § 2 case, the plaintiff cannot rebut defendant's procompetitive justification by showing that the procompetitive benefits achieved by defendant's conduct (1) could be achieved by a less restrictive alternative or (2) are outweighed by its anticompetitive effects. (Epic ECF No. 276, at 62, 65, 66).

But contrary to Apple's contention, the Ninth Circuit held in *Qualcomm* that the "three-part burden-shifting test under the rule of reason" applies "[r]egardless of whether the alleged antitrust violation" is brought under § 1 or § 2 of the Sherman Act. 969 F.3d at 991. If the plaintiff "establishes a *prima facie* case under § 2 by demonstrating anticompetitive effect," the defendant may "proffer a procompetitive justification" by showing that "the conduct is indeed a form of competition on the merits." *Id*. (internal citations and quotation marks omitted). Then the burden would "shift[] back to the plaintiff to rebut that [procompetitive] claim." *Id*. And even if plaintiff "cannot rebut the [defendant's] procompetitive justification," the plaintiff may still prevail by "demonstrat[ing] that the anticompetitive harm of the conduct outweighs the procompetitive benefit." *Id*.

While Apple's cited authorities address the question of whether, to avoid § 2 liability, companies must design and innovate with "less restrictive alternatives" in mind, *see Image Tech. Servs.*, 125 F.3d at 1212-13, this Court previously has made plain that anticompetitive behavior by an unlawful monopolist is always actionable under § 2. Thus, for example, Apple's conduct may violate § 2 if its behavior associated with the introduction of the App Store (and IAP), or enforcement of agreements, rules, and policies related to the use of the App Store (and IAP), "'constitutes an anticompetitive abuse or leverage of monopoly power, or a predatory or exclusionary means of attempting to monopolize the relevant market.'" *In re Apple iPod iTunes Antitrust Litig.*, 796 F. Supp. 2d 1137, 1143 (N.D. Cal. 2011) (Ware, J.) (citation and quotation marks omitted).

II. FOREIGN TRADE ANTITRUST IMPROVEMENTS ACT (JOINT SUBMISSION § 9)

As Epic indicates with respect to the Foreign Trade Antitrust Improvements Act ("FTAIA"), the jurisdictional requirement of the Sherman Act that interstate commerce be involved "can also be satisfied by foreign commerce that is cognizable under the FTAIA." Yet, the FTAIA does not purport to cover commerce that is not foreign. 15 U.S.C. § 6a; *United States v. Hui Hsiung*, 778 F.3d 738, 754-55 (9th Cir. 2015). Thus, for example, it does not apply simply because an end-user consumer in India might be the ultimate purchaser of a U.S. developer's application. When a U.S. entity is aggrieved by Sherman Act violations pertaining to its business with another U.S. entity, the FTAIA does not apply; The interstate commerce requirement of the Sherman Act is met in such instances by way of the business between those two American entities. 15 U.S.C. § 6a; *Hui Hsiung*, 778 F.3d at 754-55.

III. CALIFORNIA UNFAIR COMPETITION LAW (JOINT SUBMISSION § 18.4)

The plaintiff class has filed suit not only under the federal antitrust laws but, also, under the California Unfair Competition Law (Cal. Bus. & Prof. Code §§ 17200 *et seq.* ("UCL")). The UCL prohibits any "unlawful" business act or practice, and the violation of any federal or state statute governing business conduct may serve as the predicate unlawful act. *Farmers Ins. Exch. v. Super. Ct.*, 2 Cal. 4th 377, 383 (Cal. 1992); *Clerkin v. MyLife.Com, Inc.*, No. C 11-99527 CW, 2011 WL 3607496, at *6 (N.D. Cal. Aug. 16, 2011) (stating that "[v]iolation of almost any federal, state or local law may serve as a basis for a UCL claim").

IV. PREVIEW OF DEVELOPER-FOCUSED ISSUES

This submission addresses the legal framework that applies to claims asserted in the *Epic Games v. Apple* case. Unlike that case, *Cameron* will be tried to a jury and involves many different issues—including (among other things) direct-purchaser standing, claims for treble and overcharge damages, and a relaxed burden of proof regarding damages on antitrust claims. The legal framework that applies in *Cameron* will thus vary in significant respects from the framework addressed in this submission.

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