

1 THEODORE J. BOUTROUS JR., SBN 132099
tboutrous@gibsondunn.com
2 RICHARD J. DOREN, SBN 124666
rdoren@gibsondunn.com
3 DANIEL G. SWANSON, SBN 116556
dswanson@gibsondunn.com
4 JAY P. SRINIVASAN, SBN 181471
jsrinivasan@gibsondunn.com
5 GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
6 Los Angeles, CA 90071
Telephone: 213.229.7000
7 Facsimile: 213.229.7520

8 VERONICA S. MOYÉ (Texas Bar No.
24000092; *pro hac vice*)
9 vmoye@gibsondunn.com
GIBSON, DUNN & CRUTCHER LLP
10 2100 McKinney Avenue, Suite 1100
Dallas, TX 75201
11 Telephone: 214.698.3100
Facsimile: 214.571.2900

MARK A. PERRY, SBN 212532
mperry@gibsondunn.com
CYNTHIA E. RICHMAN (D.C. Bar No.
492089; *pro hac vice*)
crichman@gibsondunn.com
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, DC 20036
Telephone: 202.955.8500
Facsimile: 202.467.0539

ETHAN DETTMER, SBN 196046
edettmer@gibsondunn.com
RACHEL S. BRASS, SBN 219301
rbrass@gibsondunn.com
GIBSON, DUNN & CRUTCHER LLP
555 Mission Street
San Francisco, CA 94105
Telephone: 415.393.8200
Facsimile: 415.393.8306

Attorneys for Defendant APPLE INC.

12
13
14
15 UNITED STATES DISTRICT COURT
16 FOR THE NORTHERN DISTRICT OF CALIFORNIA
17 OAKLAND DIVISION
18

19 EPIC GAMES, INC.,

Plaintiff, Counter-
defendant

20 v.

21 APPLE INC.,

22 Defendant,
23 Counterclaimant.
24

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

**APPLE INC.'S REPLY IN SUPPORT OF
MOTION FOR STAY OF INJUNCTION
PENDING APPEAL**

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
DISCUSSION	2
A. Apple Would Be Irreparably Harmed In The Absence Of A Stay	2
B. Apple Has A Substantial Case For Relief On The Merits	6
1. There Is No Legal Or Factual Basis For UCL Liability.....	6
2. Epic Lacks Standing.....	8
3. The Equitable Relief Order Is Overbroad	11
C. A Stay Will Not Injure Epic.....	13
D. A Stay Is In The Public Interest.....	14
E. In The Alternative, The Court Should Temporarily Stay The Injunction.....	15
CONCLUSION	15

TABLE OF AUTHORITIES

Page(s)

CASES

1

2

3

4 *Bresgal v. Brock,*

5 843 F.2d 1163 (9th Cir. 1987).....13

6 *Cal. Dental v. FTC,*

7 224 F.3d 942 (9th Cir. 2000).....7

8 *Campbell v. National Passenger Rail Road Corp.,*

9 No. 05-CV-5434, 2009 WL 4546673 (N.D. Cal. Nov. 30, 2009).....15

10 *Conservation Cong. v. U.S. Forest Serv.,*

11 No. CIV. S-11-2605 LKK, 2012 WL 3150307 (E.D. Cal. Aug. 1, 2012)15

12 *Coto Settlement v. Eisenberg,*

13 593 F.3d 1031 (9th Cir. 2012).....9

14 *Deckers Outdoor Corp. v. Ozwear Connection Pty Ltd.,*

15 No. 14-CV-2307, 2014 WL 4679001 (C.D. Cal. Sept. 18, 2014)13

16 *Dickson, Carlson & Campillo v. Pole,*

17 83 Cal. App. 4th 436 (2000)12

18 *Dole Food Co. v. Patrickson,*

19 538 U.S. 468 (2003).....9

20 *Elliot v. Williams,*

21 No. 2:08-CV-00829-GMN, 2011 WL 5080169 (D. Nev. Oct. 25, 2011).....15

22 *Facebook, Inc. v. Brandtotal, Ltd.,*

23 No. 20-CV-7182, 2021 WL 2354751 (N.D. Cal. June 9, 2021)6

24 *Franchise Tax Bd. of Cal. v. Alcan Aluminum Ltd.,*

25 493 U.S. 331 (1990).....9

26 *Hangarter v. Provident Life & Accident Ins. Co.,*

27 373 F.3d 998 (9th Cir. 2004).....11

28 *Hawkins v. Risley,*

984 F.2d 321 (9th Cir. 1993).....10

Hunt v. Check Recovery Sys., Inc.,

No. 05-CV-4993, 2008 WL 2468473 (N.D. Cal. June 17, 2008)14

Lair v. Bullock,

697 F.3d 1200 (9th Cir. 2012).....6, 13

TABLE OF AUTHORITIES

(continued)

Page(s)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

<i>Lozano v. AT&T Wireless Servs., Inc.</i> , 504 F.3d 718 (9th Cir. 2007).....	8
<i>Lujan v. Defs. of Wildlife</i> , 504 U.S. 555 (1992).....	11
<i>Motorola Mobility LLC v. AU Optronics Corp.</i> , 775 F.3d 816 (7th Cir. 2015).....	9
<i>Nken v. Holder</i> , 556 U.S. 418 (2009).....	13
<i>O'Donnell v. Harris County</i> , 260 F. Supp. 3d 810 (S.D. Tex. 2017)	4, 10
<i>Ohio v. Am. Express Co.</i> , 138 S. Ct. 2274 (2018).....	2, 5, 6, 8
<i>ProMedica Health Sys., Inc. v. FTC</i> , 749 F.3d 559 (6th Cir. 2014).....	7
<i>Thurman Indus., Inc. v. Pay 'N Pak Stores, Inc.</i> , 875 F.2d 1369 (9th Cir. 1989).....	6
<i>Ticconi v. Blue Shield of Cal. Life & Health Ins. Co.</i> , 160 Cal. App. 4th 528 (2008)	12
<i>Warth v. Seldin</i> , 422 U.S. 490 (1975).....	9
<i>Wisc. Educ. Ass'n Council v. Walker</i> , No. 11-CV-428-WMC, 2012 WL 13069917 (W.D. Wis. Apr. 27, 2012).....	4

INTRODUCTION

1
2 Apple has already complied with one-half of the Court’s injunction by striking the Guidelines
3 restricting targeted out-of-app communications. Apple has moved to stay the other half of the
4 injunction, which precludes Apple from enforcing the Guidelines’ prohibition on in-app “buttons,
5 external links, or other calls to action,” because immediate implementation of that aspect of the
6 injunction would upset the integrity of the iOS ecosystem. Epic has endorsed a broad interpretation of
7 the injunction (so broad, indeed, that its own hotfix would be permitted under the injunction), yet it
8 objects to Apple’s request for a stay during the resolution of both parties’ appeals. Epic’s arguments
9 against staying the injunction, however, are unavailing.

10 *First*, Apple would be irreparably harmed by immediate implementation of the injunction with
11 respect to in-app messaging and, especially, mechanisms. Restrictions on linking out are inextricably
12 tied to Apple’s requirement that developers use IAP for purchases of digital content—a requirement
13 this Court considered in detail and *upheld* against Epic’s challenge. Eliminating these restrictions
14 entirely would undermine the IAP requirement, force Apple to make its intellectual property available
15 without compensation, and lessen the security and privacy afforded consumers. Epic’s half-hearted
16 attempt to dispute that Apple would suffer these harms is contradicted by the evidentiary record.

17 *Second*, the injunction is not likely to survive appellate review. Epic Games, Inc.—the sole
18 plaintiff in this litigation—lacks standing to secure or enforce an injunction because its developer
19 program account has been terminated and it has no apps on the App Store. Epic’s termination was a
20 direct result of its own misconduct in triggering the hotfix; Epic’s CEO and corporate representative
21 “acknowledge[d]” at trial “that Apple has the right to terminate Epic for any reason or no reason,” and
22 this Court confirmed that right in its declaratory judgment. Epic also failed to prove that the anti-
23 steering provisions harm competition in any relevant market or that they constitute either actual or
24 incipient violations of the antitrust laws. Moreover, Epic failed to prove any harm to itself—or, for
25 that matter, to any of its subsidiaries or their licensees—from the anti-steering provisions and thus
26 would not be harmed by a stay pending appeal.

27 Apple respectfully requests that the Court stay the injunction pending final resolution of the
28 appellate proceedings.

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.