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/counter-claimant,
Appellee/cross-appellant.

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

APPLE INC.'S PETITION FOR PANEL REHEARING OR REHEARING EN BANC

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The panel decision conflicts with Circuit precedent on (1) whether conduct determined to be reasonable under the antitrust laws may be enjoined as "unfair" under California's Unfair Competition Law ("UCL"), and (2) whether a UCL plaintiff who fails to establish injury may obtain nationwide injunctive relief on behalf of millions of non-parties. Rehearing is necessary to secure and maintain uniformity of decision on these issues of exceptional importance. *See* Fed. R. App. P. 35(b)(1)(A) & (B).

INTRODUCTION

The UCL cannot be used to enjoin procompetitive conduct. *Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co.*, 20 Cal. 4th 163, 185 (1999). Yet, the panel affirmed a UCL injunction against conduct that Apple *proved* at trial is procompetitive and does not violate the antitrust laws. In so doing, the panel departed from decades of unbroken precedent.

"If the same conduct is alleged to be both an antitrust violation and an 'unfair' business act or practice for the same reason . . . [,] *the determination that the conduct is not an unreasonable restraint of trade necessarily implies that the conduct is not 'unfair' toward consumers*" under the UCL. *Chavez v. Whirlpool Corp.*, 93 Cal. App. 4th 363, 375 (2001) (emphasis added); *see also, e.g.*, *City of San Jose v. Off. of the Comm'r of Baseball*, 776 F.3d 686, 691–92 (9th Cir. 2015) (same); *LiveUniverse, Inc. v. MySpace,*

Inc., 304 F. App'x 554, 557–58 (9th Cir. 2008) ("Where . . . the same conduct is alleged to support both a plaintiff's federal antitrust claims and state-law unfair competition claim, *a finding that the conduct is not an antitrust violation precludes a finding of unfair competition*" (emphasis added)).

Epic challenged Apple's "anti-steering" rules under both the antitrust laws and the UCL. The district court ruled that Epic "has not proven" that these rules constitute "a present antitrust violation." 1-ER-167. Under the principle announced in *Chavez* and repeatedly applied by this Court, the anti-steering rules cannot be enjoined under the UCL. "To permit a separate inquiry into essentially the same question under the unfair competition law would only invite conflict and uncertainty and could lead to the enjoining of procompetitive conduct." *Chavez*, 93 Cal. App. 4th at 375.

Without even quoting or acknowledging the pertinent language of *Chavez* and its progeny, the panel stated for the first time that a UCL claim is not barred where the parallel antitrust claim fails on evidentiary (as distinguished from legal) grounds. *See* Ex. A, at 80–82. That is just wrong: This Court has applied the *Chavez* doctrine to preclude a UCL claim where the plaintiff failed to make out the *factual* elements of a parallel antitrust claim. *Hicks v. PGA Tour, Inc.*, 897 F.3d 1109, 1124 (9th Cir. 2018). Under the *Chavez* doctrine, a separate UCL claim is precluded

whenever and however the challenged conduct is determined to be reasonable under the antitrust laws. The panel's departure from settled precedent will allow judges to apply idiosyncratic notions of "fairness" without offering any clear standards.

The panel recognized that unsupported condemnation of business conduct, particularly in the technology sector, "could remove would-be popular products from the market—dampening innovation and undermining the very competitive process that antitrust law is meant to protect." Ex. A, at 74. These concerns are paramount here: Digital platforms uniformly adopt anti-steering rules to ensure that transactions are completed securely and efficiently, and the Supreme Court has recognized that such rules are procompetitive. *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2289 (2018). Among other things, Apple's rules help protect consumer privacy and security. But even though Epic failed to prove that those rules violate the antitrust laws, Apple is now prohibited from enforcing them.

Compounding this error, the panel sustained a nationwide injunction that purports to benefit some 30 million non-parties, even though the sole plaintiff (Epic) never proved that it was harmed by the anti-steering provisions. That injunction transgresses Article III and violates both Federal Rule of Civil Procedure 23(b)(2) and due process.

The UCL aspect of the panel decision requires rehearing.

BACKGROUND

The iOS App Store is a two-sided transaction platform that connects app developers with iPhone and iPad users through simultaneous transactions (1-ER-97–98; 1-ER-124), including both initial downloads and subsequent in-app purchases (1-ER-37; 1-ER-68–70). Apple requires that all native iOS apps be distributed through the App Store (1-ER-21 n.124; 1-ER-95–96), and that all in-app transactions for digital content be executed using Apple's proprietary IAP functionality (1-ER-34; 2-SER-526).

Epic filed this lawsuit alleging that the App Store distribution and IAP requirements are anticompetitive. 4-SER-895. Epic pointed to Apple's anti-steering provisions—which prohibit developers from "steering" users away from the App Store through links or communications *within the app* (1-ER-34)—as one way that Apple allegedly enforces the challenged IAP requirement, but did not bring a standalone challenge to the anti-steering provisions (4-SER-902–03). In addition to raising nine antitrust counts, Epic summarily alleged that "Apple's conduct, as described above, [also] violates California's Unfair Competition Law." D.C. Dkt. 1 ¶ 286.

After a bench trial, the district court found that Epic had failed to carry its burden of proof on all of its antitrust claims. 1-ER-4. Analyzing the challenged conduct under the rule of reason, the court found that "Ap-

ple has shown procompetitive justifications" for each of the challenged restrictions (1-ER-150), holding that the IAP requirement—which the anti-steering rules enforce—promotes user welfare and enables efficient collection of Apple's commission on transactions (1-ER-152–53). The court also found that Apple's procompetitive justifications for the anti-steering rules were "coextensive" with those for commission collection. 1-ER-120. Finally, because Epic failed to prove any less restrictive alternatives, the court found Apple's requirements to be reasonable. 1-ER-160.

The district court specifically found that Epic "has not proven a present antitrust violation" with respect to "the anti-steering provisions" (1-ER-167), but nevertheless concluded that those provisions are "unfair" under the UCL (1-ER-168–69). The district court acknowledged that this Court had held in *LiveUniverse* that a UCL claim cannot proceed against conduct that has been deemed reasonable under the antitrust laws, but "respectfully disagree[d]" with that decision. 1-ER-166 n.632. The court permanently enjoined Apple from enforcing its anti-steering prohibitions against *any* iOS app developers in the United States. 2-ER-195.

This Court stayed the UCL injunction until the mandate issues, ruling that Apple had demonstrated "that its appeal raises serious questions on the merits of the district court's determination that [Epic] failed to show Apple's conduct violated any antitrust laws but did show that the same

conduct violated [the UCL]." 2-ER-189–90 (citing *City of San Jose*, 776 F.3d at 691–92).

On April 24, 2023, the panel affirmed the judgment against Epic on every antitrust claim (including with respect to the anti-steering rules), but also affirmed the UCL judgment and injunction prohibiting Apple from enforcing its anti-steering rules. Ex. A. The merits panel did not acknowledge the controlling rule of law on which Apple had premised its UCL appeal (and the motions panel had recognized in its stay order)—*viz.*, "the determination that . . . conduct is not an unreasonable restraint of trade [under the antitrust laws] necessarily implies that the conduct is not 'unfair' toward consumers." *Chavez*, 93 Cal. App. 4th at 375; *see also City of San Jose*, 776 F.3d at 691–92 (same). Instead, the panel asserted that a UCL claim is precluded only where "a *categorical* antitrust rule form[s] the basis of the" dismissal of the parallel antitrust claim, and concluded that because Epic's antitrust claims had failed for insufficiency of proof, as distinguished from a "*categorical legal bar*," the UCL claim was not barred. Ex. A, at 81.

The panel also said that Epic had satisfied Article III standing requirements and could obtain nationwide injunctive relief on behalf of millions of non-parties. Ex. A, at 78, 85.

REASONS FOR GRANTING THE PETITION

The panel's decision defies binding precedent of this Court and rewrites California law by holding that a court's determination that conduct is reasonable under the antitrust laws does not stop the court from enjoining that same conduct as "unfair" under the UCL. Moreover, the panel dispensed with essential limitations on standing and the scope of equitable relief. En banc review is required.

I. The Panel's UCL Liability Ruling Contravenes Binding Precedent

Epic alleged that the same conduct it challenged as anticompetitive under the antitrust laws was also "unfair" under the UCL for the same reasons. D.C. Dkt. 1 ¶ 286. The district court found, and the panel agreed, that the restrictions challenged by Epic are reasonable because Apple proved that they are procompetitive and Epic did not prove any less restrictive alternatives. The court specifically found that Epic had failed to prove that the anti-steering provisions violate the antitrust laws. 1-ER-167. That should have put an end to the UCL claim. *Chavez*, 93 Cal. App. 4th at 375; *City of San Jose*, 776 F.3d at 691.

The California Supreme Court has held that a court applying the UCL "may not apply purely subjective notions of fairness"; rather, where a plaintiff challenges conduct as anticompetitive and "unfair" under the UCL, that claim must be "tethered" to the antitrust laws. *Cel-Tech*, 20

Cal. 4th at 186. This case marks the *first* and *only* time since *Cel-Tech* that a UCL claim alleging anticompetitive conduct has been allowed to proceed after a parallel antitrust claim against the same conduct failed. *See* CJAC Br. 11. The panel erred in departing from the long line of precedent, from both California appellate courts and this Court, holding that courts may not enjoin procompetitive conduct under the UCL.

California appellate courts have derived from *Cel-Tech* the principle that should have controlled in this case: "If the same conduct is alleged to be both an antitrust violation and an 'unfair' business act or practice for the same reason—because it unreasonably restraints competition and harms consumers—the determination that the conduct is not an unreasonable restraint of trade necessarily implies that the conduct is not 'unfair' toward consumers." *Chavez*, 93 Cal. App. 4th at 375; *see also Drum v. San Fernando Valley Bar Ass'n*, 182 Cal. App. 4th 247, 254 (2010) (similar). That is because "[t]o permit a separate inquiry into essentially the same question under the unfair competition law would only invite conflict and uncertainty and could lead to the enjoining of procompetitive conduct." *Chavez*, 93 Cal. App. 4th at 375.

This Court has consistently applied the *Chavez* doctrine to hold UCL claims foreclosed as a matter of law where the challenged conduct was determined—for *any* reason—not to violate the antitrust laws. *See Hicks*,

897 F.3d at 1124; *City of San Jose*, 776 F.3d at 691–92; *Novation Ventures, LLC v. J.G. Wentworth Co., LLC*, 711 F. App'x 402, 405 (9th Cir. 2017). In other cases, this Court has summarily upheld dismissal of UCL claims where the parallel antitrust claims failed. *See name.space, Inc. v. ICANN*, 795 F.3d 1124, 1134 (9th Cir. 2015); *William O. Gilley Enters., Inc. v. Atl. Richfield Co.*, 588 F.3d 659, 669 (9th Cir. 2009). As this Court has summarized, "[w]here . . . the same conduct is alleged to support both a plaintiff's federal antitrust claims and state-law unfair competition claim, a finding that the conduct is not an antitrust violation precludes a finding of unfair competition." *LiveUniverse*, 304 F. App'x at 557–58.

Here, the district court found that none of the conduct challenged by Epic is unreasonable under the antitrust laws because Apple proved that its restrictions are *procompetitive* and Epic failed to rebut that showing. 1-ER-152–53; 1-ER-155; 1-ER-158; *see also* 1-ER-120 (anti-steering provisions have procompetitive justifications "coextensive" with those for commission collection); 1-ER-167 (Epic "has not proven" that the anti-steering rules violate the antitrust laws). The panel affirmed those findings. Ex. A, at 67. A straightforward application of the *Chavez* doctrine and every applicable precedent of this Court requires reversal of the UCL judgment and injunction—Apple's conduct was "determin[ed]" not to unreasonably

restrain trade, and thus it is not "unfair." *See* Apple Br. 105; Apple Reply Br. 9–13; AFPF Br. 9–11; CJAC Br. 11–22.

But the district court nonetheless enjoined Apple from enforcing its anti-steering provisions under the UCL, and the panel affirmed. That ruling is irreconcilable with the previously unbroken line of decisions from this Court applying the *Chavez* doctrine in analogous circumstances.

The panel erroneously asserted that Apple had raised "the UCL's 'safe harbor' doctrine" (Ex. A, at 80), which applies only when an express provision of "California or federal statutory law" affirmatively permits the challenged conduct. *Cel-Tech*, 20 Cal. 4th at 182. Apple made clear, however, that it was not relying on any safe harbor but rather sought reversal under the *Chavez* doctrine—a separate standard that applies only where there is *not* an affirmative statutory authorization for the challenged conduct. Apple Reply Br. 9–11; *see also Distance Learning Co. v. Maynard*, 2020 WL 2995529, at *10 n.3 (N.D. Cal. June 4, 2020) (rejecting argument "that *Chavez* was limited to cases involving safe harbors").

The panel did not even quote or acknowledge the controlling rule of law from *Chavez*—which, as repeatedly applied by this Court, unequivocally precludes the UCL claim here because the challenged conduct was determined not to be unreasonable under the antitrust laws. Instead, the panel stated that "[n]either Apple nor any of its *amici* cite a single case in

which a court has held that, when a federal antitrust claim suffers from a *proof deficiency*, rather than a *categorical legal bar*, the conduct underlying the antitrust claim cannot be deemed unfair pursuant to the UCL." Ex. A, at 81. This novel limitation on the *Chavez* doctrine is neither required by nor consistent with this Court's precedents.

This Court has regularly applied the *Chavez* doctrine where an evidentiary deficiency rather than a "categorical legal rule" precluded antitrust liability. In *Hicks*, the Court agreed that the plaintiffs had failed to adequately allege a relevant product market and consequently affirmed dismissal of the parallel UCL claims pursuant to *Chavez*. 897 F.3d at 1123–24. Apple cited *Hicks* to the panel and made this precise point at oral argument. Two other cases invoked *Chavez* where the plaintiff failed to adequately allege antitrust injury. *Novation Ventures*, 711 F. App'x at 405; *LiveUniverse*, 304 F. App'x at 557–58. And a California court recently dismissed a UCL claim against Apple challenging the *same anti-steering provisions*, relying solely on the *Chavez* doctrine and the plaintiff's failure to adequately plead an antitrust claim. *See Beverage v. Apple Inc.*, No. 20CV370535 (Cal. Super. Ct. Aug. 29, 2022), *appeal pending*. If a plaintiff's failure to *plead* the elements of an antitrust claim is sufficient to preclude a UCL claim under the *Chavez* doctrine, then the plaintiff's failure

to *prove* those elements at trial (as here) is *a fortiori* sufficient. The panel decision directly conflicts with *Hicks* and other decisions of this Court.

The cases cited by the panel for its new limitation on *Chavez* involved default rules of antitrust liability, but not "categorical" bars. In *City of San Jose*, the antitrust claims fell within the judicially created "baseball exemption" for antitrust liability, but the Court recognized that this exemption "doesn't necessarily mean all antitrust suits that touch on the baseball industry are barred." 776 F.3d at 690. And in *Chavez*, the antitrust claims were dismissed pursuant to the principle announced in *United States v. Colgate & Co.*, 250 U.S. 300 (1919), that manufacturers generally may announce prices and refuse to deal with dealers who do not agree to those prices—a judicially created limitation that admits of several exceptions. 93 Cal. App. 4th at 372–73.

As those cases reflect, certain default rules of antitrust liability reflect courts' views as to the likelihood that specified conduct is procompetitive. *See Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 886 (2007); *Novell, Inc. v. Microsoft Corp.*, 731 F.3d 1064, 1072 (10th Cir. 2013). Such rules, however, are only a proxy for competitive effect; here, in contrast, Apple *proved* the procompetitive nature of the challenged restraints under the rule of reason, and Epic failed to carry its corresponding burden. If conduct presumed to be procompetitive pursuant to a judicially

created rule cannot be unfair, then conduct proven to be procompetitive surely cannot be unfair. Contrary to the panel's assertion (Ex. A, at 80–81), *Cel-Tech* did not allow a UCL claim in such circumstances. Rather, the plaintiff there had failed to establish anticompetitive *intent* (20 Cal. 4th at 171), and the California Supreme Court made no determination whether (or not) the *conduct* was procompetitive.

The panel expressed concern that proper application of the *Chavez* rule would impermissibly "collaps[e] the 'unfair' and 'unlawful' prongs" of the UCL "into each other." Ex. A, at 81. *Chavez* itself rejected that concern, making clear that its rule comes into play only when the conduct is challenged as "unfair" under the UCL "for the same reason" as it is challenged under the antitrust laws and a court has "determined" that the conduct is not unreasonable. 93 Cal. App. 4th at 375. Epic challenged the anti-steering provisions as part of its broader challenge to Apple's IAP requirement, and failed to prove that these requirements violate the antitrust laws. There is no more "categorical" bar to antitrust liability than a company's successful defense of its conduct at a full trial on the merits.

In *Cel-Tech*, the California Supreme Court warned that "[a]n undefined standard of what is 'unfair" could "lead to the enjoining of *pro*competitive conduct and thereby undermine consumer protection." 20 Cal. 4th at 185. The injunction here does just that: Both the district court and the

panel correctly concluded that Apple's IAP requirement benefits competition, but have stopped Apple from implementing its anti-steering rules to *enforce* that requirement.

Apple introduced undisputed evidence that the UCL injunction will harm consumers, developers, and Apple. 1-SER-208–16. It will "introduce security and privacy risks" while preventing Apple from responding to them, "lower[ing] user confidence in the safety, security, and reliability of digital content purchases and mechanisms." 1-SER-214. "Developers will suffer from this lowered confidence as well, as users will be less inclined to make purchases." *Id.* More generally, the UCL injunction "will affect the promise of a curated app store." 1-SER-214–15.

The iOS App Store provides greater security and privacy than alternatives in the Android ecosystem, enhancing consumer choice while affording Apple a competitive advantage. The panel recognized this point in its antitrust analysis, observing that "Apple's restrictions create a heterogeneous market for app-transaction platforms which, as a result, increases interbrand competition—the primary goal of antitrust law." Ex. A, at 53. Yet the injunction prevents Apple from deploying one of the tools it uses to protect security and privacy, and thereby compete with other platforms. It thus subverts the goals of antitrust law—precisely what *Cel-Tech* said the UCL should not do.

Moreover, the uncontradicted evidence at trial showed that virtually every online platform has adopted anti-steering (or anti-circumvention) rules similar to Apple's. 4-SER-997-1012. And the Supreme Court has upheld materially identical anti-steering provisions as procompetitive. *See Am. Express*, 138 S. Ct. at 2289. By allowing Apple's rules to be enjoined under the UCL, the panel has sown confusion in an evolving technological environment, to the detriment of all participants.

The panel correctly acknowledged that "[s]oftware markets are highly innovative and feature short product lifetimes," and thus premature condemnation of novel or untested business conduct could "dampen[] innovation and undermin[e] the very competitive process that antitrust law is meant to protect." Ex. A, at 74. This Court and others have consistently recognized that courts should hesitate to condemn as anticompetitive conduct in evolving technology markets. *See New York v. Meta Platforms, Inc.*, 66 F.4th 288, 305 (D.C. Cir. 2023); *FTC v. Qualcomm Inc.*, 969 F.3d 974, 990–91 (9th Cir. 2020).

The panel decision contravenes these foundational principles by supplanting predictable rules for identifying anticompetitive conduct with a vague test for "unfairness," thus empowering judges to stymie legitimate innovation based on their own subjective views of what conduct should be allowed or prohibited. That danger is at its apex here, where Epic tried

but failed to prove that the anti-steering provisions violate the antitrust laws. 1-ER-167.

Although the panel stated that concerns about subjectivity and unpredictability are irrelevant to the UCL analysis (Ex. A, at 82 n.22), these are the precise reasons the California Supreme Court abandoned the untethered measure of "fairness" courts had previously used in competition cases. *Cel-Tech*, 20 Cal. 4th at 185–86. "[T]he law usually takes care to draw lines of legal liability in a way that maximizes areas of competition free of legal penalties." *Id.* at 185 (quotation marks omitted). These considerations also provide the doctrinal bases for the *Chavez* rule. William L. Stern, *Business & Professions Code Section 17200 Practice* Ch. 5-D (2023).

Where the same conduct is challenged under both the antitrust laws and the UCL, a determination that the conduct does not violate the antitrust laws (including in the crucible of a trial on the merits) means that the same conduct cannot be enjoined as "unfair" on the same basis—period. *City of San Jose*, 776 F.3d at 691–92; *Hicks*, 897 F.3d at 1124. The panel's contrary conclusion departs from decades of settled precedent and requires correction by the full Court.

II. The Panel's Affirmance of the UCL Injunction Also Warrants Review

The panel compounded its error by affirming a nationwide UCL injunction in a case brought by an individual, non-representative plaintiff that did not even establish injury to *itself*, let alone the kind of injury justifying classwide relief. That ruling independently warrants en banc review.

To establish standing, a plaintiff must prove that it suffered injury that both is traceable to the challenged conduct and can be redressed through appropriate relief. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992). "In the context of injunctive relief, the plaintiff must demonstrate a *real or immediate threat* of an irreparable injury." *Hangarter v. Provident Life & Accident Ins. Co.*, 373 F.3d 998, 1021 (9th Cir. 2004). And even then, injunctive relief must be narrowly tailored to "apply only to" the named plaintiff. *Easyriders Freedom F.I.G.H.T. v. Hannigan*, 92 F.3d 1486, 1501 (9th Cir. 1996).

Epic introduced no evidence that it had been injured by the anti-steering provisions. Based on Epic's deceptive breach of contract, Apple revoked Epic's developer program account and removed all of its apps from the App Store. The district court specifically upheld these actions. 1-ER-181–82. Because Epic has no apps on the App Store, it cannot be