Nos. 21-16506 & 21-16695

IN THE 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.

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

BRIEF OF AMICUS CURIAE PUBLIC CITIZEN IN SUPPORT OF APPELLANT, CROSS-APPELLEE

Wendy Liu Scott Nelson Allison M. Zieve Public Citizen Litigation Group 1600 20th Street NW Washington, DC 20009 (202) 588-1000

Attorneys for Amicus Curiae

January 27, 2022



Case: 21-16506, 01/27/2022, ID: 12353463, DktEntry: 50, Page 2 of 37

CORPORATE DISCLOSURE STATEMENT

Amicus curiae Public Citizen is a nonprofit, non-stock corporation. It has no parent corporation, and no publicly traded corporation has an ownership interest in it.



TABLE OF CONTENTS

	Pa	age
CORPOR	RATE DISCLOSURE STATEMENT	i
TABLE (OF AUTHORITIES	iv
INTERE	ST OF AMICUS CURIAE	1
INTROD	OUCTION	2
FACTUA	AL BACKGROUND	3
ARGUM	ENT	4
DP	E DISTRICT COURT ERRED IN HOLDING THAT THE LA FAILS TO SATISFY THE CONCERTED-ACTION QUIREMENT OF SECTION 1	4
A.	The DPLA satisfies the concerted-action requirement because it is a contract between separate decisionmakers	5
	1. All contracts between independent economic actors, including contracts of adhesion, come within the scope of section 1.	5
	2. The DPLA satisfies the <i>American Needle</i> test for concerted action	9
В.	The DPLA is direct evidence of concerted action because the contract itself operates to achieve anti-competitive results.	
С.	The district court erred in ruling that the DPLA was "unilateral" activity outside the scope of section 1	. 17
	1. The plaintiff's agreement to an anti-competitive contraction is not independent action resulting from a company's refusal to deal	



Case: 21-16506, 01/27/2022, ID: 12353463, DktEntry: 50, Page 4 of 37

2.	The cases cited by the district court do not support its view that a contract with anti-competitive provisions fails to satisfy the concerted-action requirement of	
	section 1	22
CONCLUSIO	ON	27
CERTIFICA	TE OF COMPLIANCE	29
CERTIFICA	TE OF SERVICE	30



TABLE OF AUTHORITIES

Cases	ages
Aerotec International, Inc. v. Honeywell International, Inc., 836 F.3d 1171 (9th Cir. 2016)	4
American Needle, Inc. v. National Football League, 560 U.S. 183 (2010)pa	ssim
Barry v. Blue Cross of California, 805 F.2d 866 (9th Cir. 1986)	5, 26
Black Gold, Ltd. v. Rockwool Industrial, Inc., 729 F.2d 676 (10th Cir. 1984)	20
Copperweld Corp. v. Independent Tube Corp., 467 U.S. 752 (1984)	7, 10
Datagate, Inc. v. Hewlett-Packard Co., 60 F.3d 1421 (9th Cir. 1995)	7, 20
Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. 451 (1992)13	3, 16
Eskofot A/S v. E.I. Du Pont De Nemours & Co., 872 F. Supp. 81 (S.D.N.Y. 1995)	5, 25
Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574 (1986)23, 24	4, 25
Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752 (1984)	ssim
Paladin Associates, Inc. v. Montana Power Co., 328 F.3d 1145 (9th Cir. 2003)pa	ssim



DOCKET

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.

