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5 UNITED STATES DISTRICT COURT
6 WESTERN DISTRICT OF WASHINGTON
7 AT SEATTLE

8 *In re* VALVE ANTITRUST LITIGATION

CASE NO. 2:21-cv-00563-JNW

9 ORDER
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12 **1. INTRODUCTION**

13 This matter comes before the Court on Plaintiff Wolfire Games, LLC, Dark
14 Catt Studios Holdings, Inc., and Dark Catt Studio Interactive LLC's (together,
15 "Plaintiffs") motion for class certification and the appointment of class counsel, Dkt.
16 No. 256¹, and Defendant Valve Corporation's motion to exclude expert testimony,
17 Dkt. No. 321². The Court has considered the papers submitted in support of and
18 opposition to the motions, and being otherwise fully informed, finds oral argument
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20 _____
21 ¹ This document contains Court-approved redactions. *See* Dkt. Nos. 198, 236, 237
(motion to seal and resulting order). A sealed, unredacted version is located at
Docket Number 181.

22 ² This document also contains Court-approved redactions. *See* Dkt. Nos. 294, 330,
23 331 (motion to seal and resulting order). A sealed, unredacted version is located at
Docket Number 232.

1 unnecessary. For the reasons stated below, the Court GRANTS Plaintiffs’ motion
2 for class certification and DENIES Valve’s motion to exclude.

3 2. BACKGROUND

4 2.1 Valve is the uncontroverted market leader in digital PC game 5 distribution.³

6 Video games are big business. Early in their history, PC games were
7 distributed on physical media and purchased at brick-and-mortar retail locations,
8 but now they’re distributed digitally. Valve, through its Steam Store and Steam
9 platform (collectively, “Steam”), is the largest distributor in the world, offering over
10 50,000 titles for sale and play. *See, e.g.*, Dkt. No. 127 ¶ 52. Valve started out
11 developing its own games, *id.* ¶¶ 46–54, but it is no longer primarily a developer. *Id.*
12 It leaves this task to others, ranging from small independent developers to large-
13 scale developers (“AAA” studios) like Electronic Arts and Epic Games. *Id.* ¶¶ 24,
14 136, 298, 355, 358. Valve then sells and distributes those games to end users
15 through its Steam platform and provides other game-related services. *Id.* ¶¶ 2, 3.

16 From the end-users’ perspective, the process works like this: A gamer creates
17 a Steam account and buys a video game through the Steam Store.⁴ *Id.* ¶¶ 11, 16, 40,
18 49. The gamer then downloads the game, uses Steam to launch it on their computer,

19 ³ These facts are from Plaintiffs’ Consolidated Second Amended Class Action
20 Complaint (“SAC”) and are largely uncontested. *Compare* Dkt. Nos. 127 at 4–42
21 (SAC), *with* Dkt. Nos. 37 at 9–11 (Valve’s motion to dismiss prior complaint
containing similar allegations), 74 at 8–9 (second motion to dismiss), 319 at 1–5
(Valve’s brief opposing class certification).

22 ⁴ In limited instances, the gamer may instead acquire a game’s Steam Key—a
23 unique alphanumeric code which Valve generates at no charge and provides to
gaming companies—either for a fee or for free through a promotion. The Court
discusses Steam Keys in more detail below.

1 and begins play. *Id.* As they play, Steam provides various features, including multi-
2 player functionality, in-game downloadable content (“DLC”), access to a gaming
3 community, and the streamlined delivery of technical updates. *See, e.g., id.* ¶¶ 48,
4 55, 236. Based on the availability and performance of these features, Steam has a
5 large and loyal following. *See id.* ¶¶ 103, 136, 138. Given Steam’s popularity, many
6 gamers have developed their game libraries, over years, on Steam’s platform. *See id.*

7 With few exceptions, Valve does not charge gamers for Steam—instead,
8 developers and publishers foot the bill through a commission for each game sold via
9 the Steam Store.⁵ *See id.* ¶ 9. Valve initially set its commission rate at 30 percent
10 and held it steady for years. *Id.* It now offers discounts for the best-selling games,
11 reducing the commission to as little as 20 percent. *Id.* ¶ 89 n.29. Game companies,
12 in turn, set the price for their games—whether that be \$5.99 or \$59.99—Valve
13 remits this amount, less its commission and fees. *See id.* ¶ 4. Regardless of the price
14 and resulting commission paid to Valve, it is the game company that decides how
15 much of the commission to pass on to the gamer. *See, e.g.,* ¶ 328.

16 **2.2 Plaintiffs allege Valve imposes a Platform Most Favored Nations** 17 **policy, which gives rise to this antitrust lawsuit.**

18 Plaintiffs allege that Valve requires content and price parity for any game it
19 distributes; this means Valve will not sell or support a game if a game company
20 sells it for less or offers a better version of it elsewhere. *See, e.g., id.* ¶¶ 159, 164,
21 179, 195. Plaintiffs call this a Platform Most Favored Nations (“PMFN”) Policy. *Id.*

22 ⁵ “Developer” and “publisher” carry different meanings within the PC gaming
23 industry but Plaintiffs use the terms interchangeably in the SAC. *See* Dkt. No. 127
at 4 n.1.

1 ¶¶ 154–84. Plaintiffs argue Valve implements the PMFN Policy to maintain its
2 market control. *Id.* ¶¶ 156–94. And Plaintiffs contend its effect is clear and largely
3 consistent: the industry knows that if you undercut Steam you pay for it. *See, e.g.,*
4 *id.* ¶¶ 83–90, 165–84, 198–205.

5 If a game company violates the PMFN Policy, Valve may start with a simple
6 conversation. *See, e.g., id.* ¶¶ 208–09. From there it turns to more punitive
7 measures. Valve is known to remove violating games from its in-platform marketing
8 efforts and, sometimes, delist them from the Steam Store altogether. *See, e.g., id.*
9 ¶¶ 146, 194, 195, 210, 202, 219, 233–36. Even AAA studios are not immune. *See id.*
10 ¶ 136. Given the breadth of Steam’s gamer base, ostensibly all game companies rely
11 on Steam and cannot afford to lose access to its customers. *Id.*

12 Plaintiffs assert that Valve’s PMFN Policy has the following anti-competitive
13 impacts, among others: (1) Steam earns a supracompetitive commission, (2) game
14 companies cannot compete between distribution platforms, and (3) rival platforms
15 cannot succeed. *Id.* ¶¶ 258–374. This harms consumers and game companies alike
16 by increasing consumers’ prices and reducing publishers’ profits (among other
17 anticompetitive ills). *Id.* Plaintiffs assert this violates Sections 1 and 2 of the
18 Sherman Act, 15 U.S.C. § 1 *et seq.*, and Washington’s Consumer Protection Act
19 (“CPA”), RCW 19.86 *et seq.* *Id.* ¶¶ 389–436. Plaintiffs seek class-wide remedies and
20 propose a class encompassing the following:

21 All persons or entities who, directly or through an agent, paid a
22 commission to Valve in connection with the sale or use of a game on the
23 Steam platform on or after January 28, 2017, and continuing through
the present until the effects of its scheme are eliminated (the “Class
Period”), and where either (1) the person or entity was based in the

1 United States and its territories or (2) the game was purchased or
2 acquired by a United States-based consumer during the Class Period.
3 Excluded from the Class are (a) Defendant, its parents, subsidiaries,
4 affiliate entities, and employees, and (b) the Court and its personnel.

5 *Id.* ¶ 375.

6 Valve strongly denies all but a few of Plaintiffs’ allegations. *See, e.g.*, Dkt. No.
7 128 ¶¶ 154–84.

8 3. DISCUSSION

9 3.1 Valve’s motion to exclude Plaintiffs’ expert’s testimony.

10 Because Plaintiffs’ motion for class certification relies heavily upon the work
11 of their expert Steven Schwartz, Ph.D., the Court addresses Valve’s *Daubert* motion
12 to exclude before turning to class certification.

13 According to Dr. Schwartz, Valve is the largest PC video game distributor in
14 the world. Its market share exceeds that of all other platforms *combined*. *See* Dkt.
15 Nos. 182-1, 343 ¶ 130.⁶ While Valve largely reached this position through
16 competitive practices, Dr. Schwartz concludes that it maintains its dominance
17 through its PMFN Policy. Dkt. No. 343 ¶¶ 130–72. And without the PMFN—that is,
18 in a “but-for world”—competitive pressures would drive Valve’s market share down,
19 forcing it to reduce its commission structure to maintain *any* market share. *Id.*
20 ¶¶ 274, 279, 375, 377. Valve contends Dr. Schwartz’s opinion is based on faulty
21 methods and improper assumptions and thus does not satisfy Rule 702’s admission
22 standards. *See generally* Dkt. No. 321. On this basis, it moves to exclude. *Id.*

23 ⁶ Docket Number 182-1 is a sealed unredacted version of Docket Number 343. *See*
Dkt. Nos. 294, 330, 330-1 (motion to seal and resulting order).

1 “Rule 702 of the Federal Rules of Evidence tasks a district judge with
2 ‘ensuring that an expert’s testimony both rests on a reliable foundation and is
3 relevant to the task at hand.’” *Hyer v. City & Cnty. of Honolulu*, 118 F.4th 1044,
4 1055 (9th Cir. 2024) (quoting *Elosu v. Middlefork Ranch Inc.*, 26 F.4th 1017, 1024
5 (9th Cir. 2022)). The district court has “broad discretion” in rendering such
6 evidentiary rulings. *Id.* (quoting *City of Pomona v. SQM N. Am. Corp.*, 866 F.3d
7 1060, 1065 (9th Cir. 2017)).

8 Rule 702 guides the Court’s discretion. Opinion testimony from an expert is
9 allowed if: (1) their scientific, technical, or other specialized knowledge will help the
10 trier of fact to understand the evidence or determine a fact in issue; (2) the
11 testimony is based on sufficient facts or data; (3) the testimony is the product of
12 reliable principles and methods; and (4) they have reliably applied the principles
13 and methods to the facts of the case. FED. R. EVID. 702. The rule is to be construed
14 liberally. *United States v. Hankey*, 203 F.3d 1160, 1168 (9th Cir. 2000). And the
15 resulting “inquiry is a flexible one,” with a focus on principles and methods, rather
16 than conclusions reached. *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 595
17 (1993).

18 Valve challenges Dr. Schwartz’s methodology, not his qualifications, arguing:
19 (a) Dr. Schwartz applied an incorrect method as matter of law by analyzing Valve
20 as a one-sided rather than two-sided platform; (b) Dr. Schwartz assumed a PMFN
21 price parity requirement without sufficient evidence, *i.e.*, the analytical gap
22 between his opinion and the evidence is too great; (c) he impermissibly speculated
23 when determining Valve’s but-for market share; (d) his analysis is incomplete in

1 that it ignores the import of Steam Keys; and (e) his passthrough determination is
2 methodologically unsound. Dkt. No. 321 at 2–3.

3 The Court takes each argument in turn.

4 **3.1.1 Dr. Schwartz accounts for Steam as a two-sided platform.**

5 According to Dr. Schwartz, a platform “facilitates interaction between two or
6 more groups of users, like consumers and producers.” Dkt. No. 343 ¶ 30. It can be
7 one-sided or two-sided. *Id.* A platform is one-sided if it “connects groups of users
8 directly to people like them,” and it is two-sided if it “connects two or more different
9 groups in a . . . virtual space.” *Id.* Two-sided platforms often “exhibit network
10 effects,” where “the product or platform’s value changes as the number of users of
11 that product or platform changes.” *Id.*

12 According to Valve, *Ohio v. Am. Exp. Co.*, 585 U.S. 529 (2018) (“*AMEX*”), the
13 network effects of antitrust conduct involving a two-sided platform must be
14 analyzed on a two-sided basis. Dkt. No. 321 at 3–4. Valve argues that Dr. Schwartz,
15 by utilizing his Platform Competition Model (“PCM”) to deduce solely the reduced
16 commission game developers and publishers would pay in a but-for world (without a
17 similar analysis of consumer effects), *see* Dkt. No. 343 ¶¶ 272–77, applied an
18 incorrect methodology as a matter of law. Dkt. No. 321 at 3–6. This critique is not
19 persuasive.

20 In *AMEX*, the district court permanently enjoined American Express
21 (“Amex”) from engaging in anticompetitive conduct that allegedly drove inflated
22 merchant fees (*i.e.*, the service fee charged to a merchant for a credit card sale). *See*
23 *United States v. Am. Exp. Co.*, 88 F. Supp. 3d 143, 199, 238–39 (E.D.N.Y. 2015). The

1 Second Circuit reversed and the Supreme Court affirmed. *See Ohio v. Amex*, 585
2 U.S. at 552, *aff'g*, 838 F.3d 179 (2d Cir. 2016). In so doing, the Supreme Court held
3 that a credit card is, ostensibly, a two-sided platform with merchants on one side
4 and consumers on the other. *Id.* at 535. And that both sides of a card’s network
5 effects—increased value to cardholders when more merchants accept it and
6 increased value to merchants when more cardholders use it—must be accounted for.
7 *Id.*

8 As Dr. Schwartz explains, his PCM utilized sales commissions as a proxy for
9 antitrust injury in quantifying class-wide damages because this reflects Valve’s
10 historic pricing practice⁷— an agency model imposing a one-sided charge. *See* Dkt.
11 Nos. 343 ¶¶ 338–40, 348-1 ¶¶ 146–52. The PCM is not intended to model a complete
12 but-for world. *See* Dkt. No. 348-1 ¶¶ 146, 208–10. Indeed, it is one of three models
13 Dr. Schwartz utilized to assess antitrust impact(s). *See* Dkt. No. 343 ¶¶ 284–95,
14 302–13. He also employed a yardstick approach, comparing the PC game delivery
15 platform to those for online retail and vacation home rentals, and an empirical
16 analysis of existing market data. *Id.* Both approaches address consumer impacts.
17 *Id.* Also worth noting—Dr. Schwartz’s method is based on the same Landes and
18 Posner research that the Supreme Court relied on in *Amex*. *Compare id.* ¶¶ 334–37,
19 *with Amex*, 585 U.S. at 535–36.

21
22 ⁷ On reply, Valve offers Steam’s “community market” as an example of a transaction
23 where consumers pay fees. Dkt. No. 363 at 6. But that market occurs solely between
consumers, *i.e.*, on one side of the platform. *See* Dkt. No. 383-1 ¶ 27. Dr. Schwartz
did not err in ignoring it.

1 **3.1.2 The analytical gap between antitrust injury and common**
2 **proof is *not* large.**

3 Dr. Schwartz’s opinion is, necessarily, predicated on the existence of Valve’s
4 PMFN Policy. *See* Dkt. No. 343 ¶¶ 154, 197. Valve suggests that his report cites
5 insufficient common facts or data to support its existence, at least with respect to
6 the alleged price parity component. Dkt. No. 321 at 6–10. Thus, there is too great an
7 “analytical gap” between Dr. Schwartz’s ultimate opinion and common proof. *Id.* at
8 7 (citing *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997)). Or put differently, Dr.
9 Schwartz relies on unreasonable inferences and assumptions not supported by
10 common proof. *Id.* at 7–9. The critique is inapt.

11 Valve allegedly cloaks its PMFN Policy to guard against antitrust actions.
12 *See* Dkt. No. 182-22 at 2. Therefore, Dr. Schwartz set about deducing its existence
13 and Valve’s enforcement efforts. *See* Dkt. No. 343 ¶¶ 154–96. He provides evidence
14 supporting his reasoning, citing to (1) contractual terms that video game companies
15 agree to before receiving Steam Keys, which suggest a price parity requirement;⁸ (2)
16 examples of one-on-one communications between Valve and video game companies
17 explicitly describing the requirement;⁹ and (3) a variety of other messaging,

18 ⁸ Those terms require, among other things, that game companies sell their games
19 “[i]n other stores in a similar way to how I am selling my game on Steam,” and that
20 discounts they offer outside the Steam Store be offered to “Steam customers within
21 a reasonable amount of time.” Dkt. No. 343 ¶ 157 (quoting Steam Key Guidelines).

22 ⁹ This includes communications from Valve that “the price on Steam [must be]
23 competitive with where it’s being sold elsewhere” and that Valve “wouldn’t be OK
24 with selling games on Steam if they are available at better prices on other stores,
25 even if they didn’t use Steam keys.” Dkt. No. 343 ¶ 158, 160 (quoting emails
26 produced at VALVE_ANT_0598921, 0605087).

1 including internal communications at Valve and other game companies, suggesting
2 the same. *Id.* ¶¶ 157–67. This is common evidence of the varied ways that Valve
3 allegedly communicates its PMFN Policy. Valve may disagree with the conclusions
4 Dr. Schwartz’s derived from this information and it may even offer countervailing
5 evidence, but Valve cannot render Dr. Schwartz’s opinion unsound under Rule 702
6 simply by advancing a contrary position.

7 Expert testimony need only be “based on *sufficient* facts or data.” FED. R.
8 EVID. 702(b) (emphasis added); see *Bosley v. DePuy Synthes Sales Inc.*, No. C21-
9 1683-MLP, 2023 WL 6038010, at *4 (W.D. Wash. Sept. 15, 2023) (finding that
10 challenged expert did more than “baldly state” a conclusion) (citing *United States. v.*
11 *W.R. Grace*, 455 F. Supp. 2d 1148, 1152 (D. Mont. 2006)). “[A]n expert [may] rely on
12 hypothetical facts that are supported by the evidence.” FED. R. EVID. 702 advisory
13 committee’s notes to 2000 amendments. Rule 702(b) “is not intended to authorize a
14 trial court to exclude an expert’s testimony on the ground that [it] believes one
15 version of the facts and not the other.” *Bosley*, 2023 WL 6038010, at *4 (internal
16 quotation omitted).

17 Valve, in making its analytical gap argument, takes an overly exacting view
18 of Rule 702’s requirements. Dr. Schwartz provides common evidence of the varied
19 ways in which Valve establishes its PMFN expectation. Whether that evidence and
20 Dr. Schwartz’s conclusions deserve credence is an inquiry for a different day.

21 **3.1.3 Dr. Schwartz’s but-for market share approach satisfies**
22 **Rule 702.**

23 In support of his opinion about class-wide injury, Dr. Schwartz concludes

1 that, in a but-for world, Valve would hold a █████¹⁰ percent share of the PC video
2 game distribution market, rather than the roughly █████ percent share it holds now.
3 Dkt. Nos. 182-1, 343 ¶¶ 130, 375. In reaching these figures, Dr. Schwartz relies on
4 Valve’s share of Steam Store game sales between 2008–2012. *Id.* Valve contends
5 this is untethered to an analytical base and thus produces a mere speculative
6 conclusion. Dkt. No. 321 at 10–12. Valve questions why Dr. Schwartz would assume
7 that the market as it existed in the Steam Store between 2008–2012, when Valve
8 sold a significant amount of its own games, is relevant today when Valve mostly
9 sells others’ games. *Id.*

10 The purpose of Dr. Schwartz’s analysis is not to estimate market share at a
11 temporal point but at a circumstantial one: A mature competitive PC game
12 distribution market “where the alleged [antitrust] conduct never took place” and
13 presumably where Valve lacks the market power it holds today, ostensibly forcing
14 third-party game companies to sell through the Steam Store. Dkt. No. 348-1 ¶ 227.
15 In this competitive market, Valve would be relegated to generating revenue mostly
16 from the sale of its own games.

17 According to Dr. Schwartz, because this market does not currently exist, he is
18 left with no choice but to use the closest historic analogue. *See* Dkt. Nos. 343 ¶ 302,
19 348-1 ¶ 227. Before 2008, not all large developers and publishers distributed their
20 games on Steam. Dkt. No. 343 ¶¶ 302, 375. And after 2012, some distributed their

21 ¹⁰ Valve is not a publicly traded company and therefore has no external reporting
22 obligation for proprietary information. So this redaction, like others, is necessary to
23 maintain the confidentiality of Valve’s business information. *See, e.g.*, Dkt. Nos. 95,
159, 169, 236, 237, 330, 331 (protective orders and orders granting motions to seal).

1 titles through their own platform(s). *Id.* Therefore, Dr. Schwartz focuses on Steam
2 Store sales between these two points because this is when the largest game
3 developers and publishers—Valve included—sold their games primarily through the
4 Steam Store. *See id.* ¶¶ 332–410.

5 Ultimately, Dr. Schwartz’s resulting opinion may be incorrect. But that is not
6 the standard for admissibility. And for Rule 23 purposes, he need only provide a
7 reliable method to establish the existence of antitrust impact and injury, and then
8 show that class-wide damages are susceptible to common proof. *See Lytle v.*
9 *Nutramax Lab’s, Inc.*, 114 F.4th 1011, 1026–27 (9th Cir. 2024). His “calculations
10 need not be exact.” *Comcast Corp. v. Behrend*, 569 U.S. 27, 35 (2013). They need
11 only provide “some basis from which to estimate reasonably, and without undue
12 speculation, the damages flowing from the antitrust violations.” *Moore v. Jas. H.*
13 *Matthews & Co.*, 682 F.2d 830, 836 (9th Cir. 1982). Dr. Schwartz’s market share
14 estimate, as utilized in his but-for analysis, however limited it might be in
15 predicting real world outcomes, meets this standard.

16 **3.1.4 Steam Key activity is irrelevant to Dr. Schwartz’s opinions.**

17 Dr. Schwartz also concludes that Valve’s commission on Steam Store sales in
18 a competitive market would be █████ percent, rather than the █████ it recently
19 averaged.¹¹ Dkt. Nos. 182-1, 343 ¶¶ 352, 377. Dr. Schwartz did not factor in Steam

20 ¹¹ Dr. Schwartz determined this by averaging the overall commission rate on Steam
21 Store sales from the beginning of the proposed class period, January 28, 2017,
22 through December 31, 2022. *See, e.g.*, Dkt. No. 343 ¶¶ 36, 82, 308, 334, 352, 400.
23 Presumably, data beyond 2022 was unavailable to Dr. Schwartz. According to
Valve’s expert, though, its average rate is slightly lower, averaging █████ percent.
Dkt. No. 233-1 ¶ 155.

1 Keys in determining these amounts. *See* Dkt. No. 343 ¶¶ 332–410. Valve contends
2 this is error. Dkt. No. 321 at 12–13.

3 Steam Keys are unique alphanumeric codes used to access Steam-enabled
4 games, which Valve provides to video game companies to distribute as they see fit.
5 Dkt. No. 343 ¶¶ 45–47. Steam Keys allow gamers to access Steam-enabled games
6 without purchasing them through the Steam Store. *Id.* Sometimes game companies
7 give Steam Keys away; sometimes they charge. *Id.* ¶ 45. This varies by video game
8 and game company, as does the number of Keys which Valve provides at its
9 discretion. *Id.* ¶ 46. According to Dr. Schwartz, Valve makes Steam Keys available
10 to protect its market position and bring new customers into Steam. *Id.* ¶ 47.

11 To assess antitrust impact and injury, Valve suggests that Steam’s
12 commission rate must include the revenue it generates on *all* Steam-enabled games,
13 including those distributed outside the Steam Store through Steam Keys. *See* Dkt.
14 Nos. 321 at 12–13, 363 at 3–5. If true, this would mean Valve’s effective commission
15 rate is much lower than Dr. Schwartz’s calculation. *Id.* But this ignores the fact that
16 Valve utilizes a revenue share model, with Steam Store sales as the driver. It is
17 through this mechanism that Valve allegedly exacts its antitrust toll from the
18 putative class. *See* Dkt. No. 343 ¶¶ 332–410.

19 In addition, Valve’s argument skates over antitrust netting requirements.
20 Dr. Schwartz surmises that in a competitive market, Valve would continue to
21 provide Steam Keys. Dkt. No. 348-1 ¶¶ 180–85. If anything, to maintain its
22 competitive position, Valve would need to provide more Keys than it does now. *See*
23 Dkt. No. 383-1 ¶ 16. This means that there is no legal basis to net the savings

1 provided to the putative class through Steam Keys (sales commissions *not* paid)
2 against Valve’s allegedly inflated Steam Store commissions. *See Los Angeles Meml.*
3 *Coliseum Commn. v. Nat’l Football League*, 791 F.2d 1356, 1370 (9th Cir. 1986) (in
4 determining antitrust damages, plaintiffs need not net savings they would incur
5 regardless of the antitrust conduct against the harm associated with that conduct);
6 *see also In re Glumetza Antitrust Litig.*, 336 F.R.D. 468, 480 (N.D. Cal. 2020) (the
7 antitrust impact is determined at the time of overcharge—later savings are
8 irrelevant) (citing *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481, 489
9 (1968)). Again, according to Dr. Schwartz, Valve would provide Keys irrespective of
10 whether it charged inflated commissions. *See* Dkt. No. 348-1 ¶¶ 180–85.

11 **3.1.5 Dr. Schwartz’s passthrough approach satisfies Rule 702.**

12 For purposes of determining class-wide antitrust impact and injury,
13 Dr. Schwartz estimated what portion of the savings from a reduced (*i.e.*,
14 competitive) commission a video game company might pass through to game
15 consumers. *See* Dkt. No. 343 ¶¶ 379–97. If they were to pass through all of it, there
16 would be no antitrust impact or injury.

17 Because a competitive market does not presently exist, Dr. Schwartz
18 compared the prices certain companies charged on a selection of Steam Store games
19 before and after Valve adopted its present volume discount policy. *Id.* From this
20 information, Dr. Schwartz could see how much savings those companies passed on
21 to consumers. What he found was, on average, they passed through █████ percent
22 of their savings. Dkt. Nos. 182-1, 343 ¶ 397. Dr. Schwartz then used this figure to
23 gauge the impact and injury Valve’s alleged antitrust conduct caused publishers.

1 Dkt. No. 343 ¶¶ 379–97.

2 Valve challenges the statistical method Dr. Schwartz used to select games for
3 his analysis, focusing on the sample size and his practice of removing outliers. Dkt.
4 No. 321 at 13–15. But as Dr. Schwartz explains, companies are highly likely to
5 retain at least a portion of their savings. *See* Dkt. No. 348-1 ¶ 253–54. He applied
6 an average passthrough, negating the need for individualized inquiry about
7 antitrust impact and injury. *Id.*

8 This type of sampling largely fits what other courts have permitted in a
9 similar context. *See, e.g., In re Broiler Chicken Grower Antitrust Litig. (No. II)*, No.
10 6:20-MD-02977-RJS-CMR, 2024 WL 2117359, at *18 (E.D. Okla. May 8, 2024); *In re*
11 *Takata Airbag Prod. Liab. Litig.*, No. 15-MD-02599-MORENO, 2022 WL 4594123,
12 at *5 (S.D. Fla. July 19, 2022). So this Court considers it to be generally accepted.
13 Statistical averaging is a “generally reliable econometric technique to control for the
14 effects of the differences among class members and isolate the impact of the alleged
15 antitrust violations on the prices paid by class members.” *Olean Wholesale Grocery*
16 *Coop., Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651, 677 (9th Cir. 2022).

17 In summary, Dr. Schwartz’s methods are reliable and within the norms for
18 admission, as provided by Rule 702. At bottom, Valve’s critiques go to the weight of
19 the evidence, rather than admissibility. *See Apple iPod iTunes Antitrust Litig.*, No.
20 05-cv-0037-YGR, 2014 WL 4809288, at *4 (N.D. Cal. Sept. 26, 2014).

21 **3.2 Plaintiffs’ motion for Class Certification.**

22 Plaintiffs move to certify a class of game companies (or persons) who paid a
23

1 commission to Valve to sell their games on Steam from January 2017 through
2 present. *See generally* Dkt. No. 256.

3 To certify a class action under Rule 23, Plaintiffs must show (1) the class is so
4 numerous that joinder is impracticable, (2) there are common questions of law or
5 fact, (3) the claims or defenses of the representatives are typical of those of the
6 class, and (4) the representatives will fairly and adequately protect the interests of
7 absent class members. FED. R. CIV. P. 23(a); *see Mazza v. Am. Honda Motor Co.*, 666
8 F.3d 581, 588 (9th Cir. 2012). If the Rule 23(a) requirements are met, the proposed
9 class must also satisfy at least one of the three requirements found in Rule 23(b).

10 Plaintiffs seeks to certify a (b)(3) class. To do so, they must establish that “questions
11 of law or fact common to the class members predominate over any questions
12 affecting only individual members, and that a class action is superior to other
13 available methods for fairly and efficiently adjudicating the controversy.” FED. R.
14 CIV. P. 23(b)(3).

15 The decision to certify a class is within the Court’s discretion. *Vinole v.*
16 *Countrywide Home Loans, Inc.*, 571 F.3d 935, 944 (9th Cir. 2009). In determining
17 whether Plaintiffs have carried their burden by a preponderance of the evidence,
18 the Court must conduct a “rigorous analysis.” *Gen. Tel. Co. of Sw. v. Falcon*, 457
19 U.S. 147, 161 (1982). This inquiry may “entail some overlap with the merits” but
20 only if it overlaps with the Rule 23 requirements. *Ellis v. Costco Wholesale Corp.*,
21 657 F.3d 970, 981 (9th Cir. 2011).

22 In opposing certification, Valve objects to Plaintiffs’ market definition; it also
23 attacks whether Plaintiffs have shown sufficient Rule 23(b)(3) commonality and

1 predominance. *See* Dkt. No. 319 at 6–36. None of Valve’s critiques, however, are
2 enough to defeat certification.

3 **3.2.1 Plaintiffs present a cogent market.**

4 Plaintiffs allege that Valve, through Steam, holds and maintains monopoly
5 power in the PC video game digital distribution market. *See, e.g.*, Dkt. No. 127 ¶ 52.
6 Valve suggests Plaintiffs’ market definition is “incoherent” because it excludes other
7 game forms (such as console and mobile games) and other distribution methods
8 (such as brick-and-mortar stores, cloud gaming, and multi-game subscription
9 models). Dkt. No. 319 at 6–8. But Plaintiffs present significant evidence supporting
10 their market definition. *See, e.g.*, Dkt. Nos. 257 ¶¶ 21–121, 343 ¶¶ 16–28 (Professor
11 Joost Rietveld, Ph.D. and Dr. Schwartz’s expert reports). To be sure, Valve presents
12 countervailing evidence, Dkt. No. 344 ¶¶ 22–57, 84–133, but it is simply not
13 convincing.

14 As Plaintiffs’ experts make clear, downloaded PC games are materially
15 distinct from other forms. This is based on the purchase and game play experience
16 (such as the hardware inputs and outputs, the computing capacity of the PC itself,
17 the opportunities for game customization, the lack of latency that downloaded
18 games offer, and the game play experience). *See, e.g.*, Dkt. No. 257 ¶¶ 49–61, 66–82,
19 104, 108, 109, 116–21. This matches both the regulatory view and even Valve’s, as it
20 has outlined in other venues. *Id.* ¶¶ 63, 65.

21 **3.2.2 Numerosity, typicality, adequacy, and superiority are**
22 **satisfied.**

23 Valve does not contest that Plaintiffs satisfy numerosity, typicality, adequacy

1 of representation, or superiority. *See generally* Dkt. No. 319 at 21–36. Nor would it
2 appear that Valve reasonably could.

3 As to numerosity, “[w]here the exact size of the class is unknown, but general
4 knowledge and common sense indicate that it is large, the numerosity requirement
5 is satisfied.” *In re Abbott Laboratories Norvir Anti-Tr. Litig.*, No. C 04-1511 CW,
6 2007 WL 1689899, at *6 (N.D. Cal. June 11, 2007) (internal quotation omitted). “[I]n
7 general, a class include[ing] at least 40 members” is sufficient. *Rannis v. Recchia*,
8 380 F. App’x 646, 651 (9th Cir. 2010); *see also Troy v. Kehe Food Distrib., Inc.*, 276
9 F.R.D. 642, 652 (W.D. Wash. 2011) (certifying a class of 43 to 54 workers). Plaintiffs
10 submit un rebutted evidence that the proposed class consists of thousands of game
11 developers or publishers. Dkt. Nos. 182-1, 343 ¶ 399. This is enough to satisfy
12 numerosity.

13 As to typicality, at issue is “whether other members have the same or similar
14 injury, whether the action is based on conduct not unique to the named plaintiffs,
15 and whether other class members have been injured by the same course of conduct.”
16 *Ellis*, 657 F.3d at 984 (cleaned up). In the antitrust context, typicality is established
17 when “all class members allege the same antitrust violation.” *In re Qualcomm*
18 *Antitrust Litig.*, 328 F.R.D. 280, 295 (N.D. Cal. 2018) (citing *In re High-Tech*
19 *Employee Antitrust Litig.*, 985 F. Supp. 2d 1167, 1181 (N.D. Cal. 2013)); *see* Joseph
20 McLaughlin, *Typicality—Application of typicality requirement to particular cases—*
21 *Antitrust*, McLaughlin on Class Actions: Law and Practice § 4:21 (20th ed. 2023).
22 Here, the alleged antitrust conduct—imposition of an alleged PMFN—is the same
23 for each member of the putative class. *See* Dkt. Nos. 127 ¶¶ 156–388, 343 ¶¶ 150–

1 240. Typicality is satisfied.

2 As to adequacy of representation, the Court examines whether the named
3 plaintiffs and their counsel have any conflicts of interest with other class members
4 and whether they will prosecute the action vigorously on behalf of the class. *Ellis*,
5 657 F.3d at 985. This requires “an absence of antagonism between representatives
6 and absentees and a sharing of interest between representatives and absentees.” *Id.*
7 (cleaned up). The Court knows of no such antagonism, nor has Valve suggested any.
8 *See generally* Dkt. No. 319 at 21–36. And as Plaintiffs explain, Wolfire and Dark
9 Catt both share a common injury as putative class members (allegedly inflated
10 commissions). *See* Dkt. No. 256 at 23–24. Wolfire and Dark Catt will adequately
11 represent their game company peers.

12 As for superiority, the Court must find that a “class action is superior to other
13 available methods for fairly and efficiently adjudicating the controversy.” FED. R.
14 CIV. P. 23(b)(3). When undertaking this inquiry, the Court considers (1) the interest
15 of individuals within the class in controlling their own litigation, (2) the extent and
16 nature of any pending litigation commenced by or against the class involving the
17 same issues, (3) the convenience and desirability of concentrating the litigation in a
18 particular forum, and (4) the manageability of the class action. *See* FED. R. CIV. P.
19 23(b)(3)(A)–(D); *Zinzer v. Accufix Rsch. Inst., Inc.*, 253 F.3d 1180, 1190 (9th Cir.
20 2001). This analysis must “focus on the efficiency and economy elements of the class
21 action so that cases allowed under subdivision (b)(3) are those that can be
22 adjudicated most profitably on a representative basis.” *Id.*

23 Given the complexity of the legal and evidentiary issues raised in this

1 consolidated suit, resolving them in a uniform manner through a class action is
2 superior to resolving them through individual suit(s). Moreover, this is the most
3 appropriate forum to do so. Valve admits that its headquarters is within this
4 district. *See* Dkt. No. 128 ¶ 34. And while individual gamers have filed additional
5 suits against Valve in this district,¹² this does not defeat the notion that a class
6 action remains a superior vehicle for resolving the claims presented here, and if
7 anything, supports this notion. The Court reserves judgment, for now, on whether
8 further consolidation is warranted.

9 **3.2.3 Valve’s attacks on commonality and predominance are
10 unpersuasive.**

11 Commonality requires that the “class members’ claims depend upon a
12 common contention such that determination of its truth or falsity will resolve an
13 issue that is central to the validity of each claim in one stroke.” *Mazza*, 666 F.3d at
14 588 (internal citation omitted). The key inquiry is not whether a plaintiff has raised
15 common questions but whether “class treatment will generate common *answers* apt
16 to drive the resolution of the litigation.” *Abdullah v. United States Sec. Assocs., Inc.*,
17 731 F.3d 952, 957 (9th Cir. 2013) (emphasis in original) (internal citation omitted).
18 Every question of law or fact need not be common to the class. Rather, all Rule
19 23(a)(2) requires is “a single significant question of law or fact.” *Id.* (internal
20 citation omitted). The existence of “shared legal issues with divergent factual

21 ¹² *See Elliott v. Valve Corp.*, Case No. 2:24-cv-1218-JNW, Dkt. No. 1 (W.D. Wash
22 August 9, 2024) (putative antitrust class action brought by individuals who
23 successfully challenged the enforceability of Valve’s gamer arbitration provision);
Hepler et al. v. Valve Corp., No. 2:24-cv-01735-JNW (W.D. Wash.), and *Drake et al.*
v. Valve Corp., No. 2:24-cv-01743-MLP (W.D. Wash.).

1 predicates is sufficient, as is a common core of salient facts coupled with disparate
2 legal remedies within the class.” *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th
3 Cir. 1998) (amended).

4 Predominance “tests whether a proposed class is sufficiently cohesive to
5 warrant adjudication by representation.” *Amchem Prods., Inc. v. Windsor*, 521 U.S.
6 591, 615–16 (1997) (cleaned up). This inquiry presumes the existence of common
7 factual or legal issues required under Rule 23(a)’s “commonality” element and
8 instead “focuses on the relationship between the common and individual issues.”
9 *Hanlon*, 150 F.3d at 1023. “When common questions present a significant aspect of
10 the case and they can be resolved for all members of the class in a single
11 adjudication, there is a clear justification for handling the dispute on a
12 representative rather than on an individual basis.” *Id.*

13 In attacking commonality and predominance, Valve takes a buckshot
14 approach. *See generally* Dkt. No. 319. Its specific arguments include the following:
15 (a) Plaintiffs cannot establish the existence of a PMFN Policy through common
16 evidence; (b) alleged antitrust impact, injury, and damages are too particularized to
17 allow for class treatment; and (c) the statute of limitations presents sufficient
18 individualized issues to preclude a predominance finding. *Id.* at 8–36. As described
19 below, none of Valve’s arguments are compelling.

20 a. Plaintiffs present common evidence of a PMFN Policy.

21 Valve admits that its standard distribution agreement requires content
22 parity; but it contends this only applies to DLC, not applications (*i.e.*, games). Dkt.
23 No. 242 at 14–15. According to the agreement, game companies that sell games

1 within and outside Steam, and who also distribute DLC for that game, must
2 maintain “material parity” between their Steam and non-Steam customers. Dkt.
3 No. 182-18¹³ at 6. Frankly, this provision is not a model of clarity, as its meaning is
4 open to interpretation. But Plaintiffs present Rule 30(b)(6) testimony suggesting
5 that Valve understands it to require content parity in all instances, not just for
6 DLC. *See* Dkt. No. 182-33¹⁴ at 15. This is common proof of a content parity
7 requirement.

8 As to price parity, as mentioned above, *see supra* Part 3.1.2, Plaintiffs present
9 evidence that Valve communicates this portion of the PMFN Policy in a roundabout
10 manner and through various means. *See* Dkt. No. 343 ¶¶ 157–67. They include
11 certain contract terms associated with providing Steam Keys, one-off discussions
12 with game companies, and various messages in industry forums. *Id.* All this
13 contributes to a common industry understanding of Valve’s price-parity expectation.
14 *See* Dkt. Nos. 343 ¶ 320, 348-1 ¶¶ 18–21. This is sufficient, under the rule of
15 reason,¹⁵ to establish common evidence of a price parity expectation that drives
16

17 ¹³ Docket 182-18 is a sealed unredacted version of Docket Number 204-18. *See* Dkt.
18 Nos. 198, 236, 237 (motion to seal and resulting order).

19 ¹⁴ Docket Number 182-33 is a sealed unredacted version of Docket Number 204-33.
See Dkt. Nos. 198, 236, 237 (motion to seal and resulting order).

20 ¹⁵ The rule of reason is a burden-shifting framework used to gauge whether non-per
21 se anticompetitive conduct violates the Sherman Act. *See Amex*, 585 U.S. at 541–42.
22 While the rule of reason is mainly a merits determination, it applies with equal
23 force in assessing whether an antitrust case satisfies Rule 23. *See, e.g., In re Beer*
Distrib. Antitrust Litig., 188 F.R.D. 557, 563 (N.D. Cal. 1999); *Kamakahi v. Am.*
Soc’y. for Reprod. Med., 305 F.R.D. 164, 174 (N.D. Cal. 2015). It thus implicates
issues of commonality and predominance.

1 common market behavior. *See Epic Games, Inc. v. Apple, Inc.*, 67 F.4th 946, 974
2 (9th Cir. 2023); *see In re High-Tech Employee Antitrust Litig.*, 985 F. Supp. 2d at
3 1172 (discussing the notion of industrywide or “common impact[s]”).

4 b. Common issues drive the inquiry about antitrust impact, injury, and
5 damages.

6 As to the antitrust impact of Valve’s supposed PMFN Policy, Valve provides a
7 litany of challenges to Plaintiffs’ theories. They include examples of games selling
8 for less off Steam and testimony from game companies explaining why they prefer
9 keeping their game prices uniform across platforms (*i.e.*, to meet consumer
10 expectations). *See* Dkt. No. 319 at 27–28 (citing Dkt. Nos. 322-10 at 18, 322-24 at 9,
11 344 ¶¶ 287–97). None of this defeats predominance. Rather, this evidence raises
12 common questions about the class-wide response to Valve’s alleged PMFN
13 expectation, an issue which predominates over any individualized questions. *See*
14 *Amgen Inc. v. Connecticut Ret. Plans and Tr. Funds*, 568 U.S. 455, 466 (2013) (“the
15 focus of Rule 23(b)(3) is on the predominance of common *questions*”) (emphasis in
16 original).

17 Concerning antitrust injury, Valve contends that Plaintiffs cannot “meet
18 their predominance burden” to “prove that antitrust impact is ‘capable of being
19 established through a common body of evidence, applicable to the whole class.’” Dkt.
20 No. 319 at 29 (citing *Olean Wholesale Grocery Coop., Inc.*, 31 F.4th at 666). In
21 support, Valve makes the same arguments it did in moving to exclude
22 Dr. Schwartz’s testimony: (a) the import of Steam Keys cannot be ignored, (b)
23 Plaintiffs have no means of accurately determining pass through, and (c) any

1 antitrust overcharge must be offset by the benefits received. *See id.* at 29–34. Those
2 arguments are no more persuasive for purposes of Rule 23(b)(3) than they were for
3 purposes of Rule 702. *See supra* Part 3.1.4–3.1.5. Through Dr. Schwartz’s
4 testimony, Plaintiffs establish a common antitrust injury: inflated Steam Store
5 commissions that all class members must pay. *See* Dkt. Nos. 343 ¶¶ 241–397; 348-1
6 ¶¶ 160–95; 383-1 ¶¶ 9–14, 29–34.

7 Finally, as to antitrust damages, Valve suggests Plaintiffs cannot measure
8 them across the entire class. *See* Dkt. No. 319 at 34–36. In support, it repeats the
9 methodological challenges raised against Dr. Schwartz’s testimony. *Compare id.*;
10 *with* Dkt. No. 321 at 3–6, 12–15. As before, those arguments fail here. At this stage,
11 Plaintiffs may utilize statistical means to estimate antitrust injury across the class.
12 The apportionment of damages to individual class members is not required. *See In*
13 *re Glumetza Antitrust Litig.*, 336 F.R.D. at 479 (“[a]ntitrust plaintiffs may satisfy
14 the predominance requirement by using a model that estimates the damages
15 attributable to the antitrust injury, even if more individualized determinations are
16 needed later to allocate damages among class members.”) (quoting *In re Suboxone*
17 *(Buprenorphine Hydrochlorine and Naloxone) Antitrust Litig.*, 967 F.3d 264, 269 (3d
18 Cir. 2020)). Said another way, “[t]he need for individual damages calculations does
19 not, alone, defeat class certification.” *Vaquero v. Ashley Furniture Indus., Inc.*, 824
20 F.3d 1150, 1155 (9th Cir. 2016).

21 c. The statute of limitations for antitrust claims does not defeat
22 predominance.

23 Finally, Valve suggests that, because the antitrust statute of limitations is

1 four years, and the proposed class period extends beyond that to January 28, 2017,
2 individualized inquiry is required to establish when each putative class member
3 was first harmed by Valve’s alleged conduct. *See* Dkt. No. 319 at 24–27 (citing 15
4 U.S.C. § 15b). Valve contends that individualized inquiries would be required to
5 determine when each class member first heard of the PMFN. *Id.* at 25. This is
6 because the continuing violation doctrine would not apply if premised on the
7 “passive receipt” of revenue derived from Valve’s alleged anticompetitive conduct,
8 rather than an “overt act of enforcement.” *Id.* at 26 (quoting *Eichman v. Fotomat*
9 *Corp.*, 880 F.2d 149, 160 (9th Cir. 1989)). But Plaintiffs point to common proof of
10 Valve’s overt acts occurring within the proposed class period. *See* Dkt. No. 347 at
11 20–21 (citing Dkt. No. 343 ¶¶186 n.503, 187 n.505, 191). The anticompetitive effect
12 of these acts present common issues that predominate. Moreover, even if the statute
13 did present individualized issues, this alone would not be enough to defeat
14 predominance. *See Williams v. Sinclair*, 529 F.2d 1383, 1388 (9th Cir. 1975); *Nitsch*
15 *v. Dreamworks Animation SKG Inc.*, 315 F.R.D. 270, 308 (N.D. Cal. 2016).

16 In summary, none of Valve’s commonality and predominance attacks defeat
17 class certification.

18 **3.3 Plaintiffs’ Request for the Appointment of Class Counsel.**

19 The Court previously appointed numerous attorneys as Interim Co-Lead
20 Class Counsel in this matter. *See* Dkt. No. 92. Plaintiffs now ask that those same
21 attorneys be appointed Co-Lead Class Counsel for the rest of the case (through
22 trial). *See* Dkt. No. 256 at 35. In considering this request, the Court must consider:
23

1 (1) “the work counsel has done in identifying or investigating potential claims in the
2 action”; (2) “counsel’s experience in handling class actions, other complex litigation,
3 and the types of claims asserted in the action”; (3) “counsel’s knowledge of the
4 applicable law”; and (4) “the resources that counsel will commit to representing the
5 class[.]” FED. R. CIV. P. 23(g)(1)(A). To date, interim class counsel have pursued the
6 putative class’s claims in an effective, collaborative, and well-resourced manner.
7 This matches their collective performance in other large class actions. *See* Dkt. Nos.
8 204-80, 204-81, 204-82, 204-83. The Court sees no reason that, if reappointed,
9 interim class counsel’s performance would not continue just like it has to date.

10 4. CONCLUSION

11 In sum, the Court GRANTS Plaintiffs’ motion for class certification and the
12 appointment of co-lead class counsel, Dkt. No. 256, DENIES Valve’s motion to
13 exclude, Dkt. No. 321, and ORDERS as follows:

- 14 1. The following class is certified:

15 All persons or entities who, directly or through an agent, paid a
16 commission to Valve in connection with the sale or use of a game
17 on the Steam platform on or after January 28, 2017, and
18 continuing through the present until the effects of its scheme are
19 eliminated (the “Class Period”), and where either (1) the person
20 or entity was based in the United States and its territories or (2)
21 the game was purchased or acquired by a United States-based
22 consumer during the Class Period. Excluded from the Class are
23 (a) Defendant, its parents, subsidiaries, affiliate entities, and
employees, and (b) the Court and its personnel.

- 21 2. Wolfire and Dark Catt are appointed class representatives; and

- 22 3. The firms below are appointed Co-Lead Class Counsel:

1 Quinn Emanuel Urquhart & Sullivan, LLP; Constantine Cannon
2 LLP; Lockridge Grindal Nauen P.L.L.P.; and Wilson Sonsini
3 Goodrich & Rosati, P.C.

4 The case management schedule, which the Court previously adopted, Dkt.
5 No. 98, remains in force. The Court will defer setting a schedule beyond summary
6 judgment until it disposes of such motions, currently due 180 days from today. *See*
7 *id.* at 2.

8 This ruling has no bearing on a putative consumer class, as described in this
9 and related cases. *See* Dkt. No. 370; *Elliott*, Case No. 2:24-cv-1218-JNW, Dkt. No. 1;
10 *Drake*, No. 2:24-cv-01743-JNW, Dkt. No. 1; *Hepler*, No. 2:24-cv-01735-JNW, Dkt.
11 No. 1.

12 Dated this 25th day of November, 2024.

13 

14 Jamal N. Whitehead
15 United States District Judge
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