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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

THOMAS WILLIAM SLATTERY, Individually, And On Behalf Of All Others Similarly Situated,

Plaintiff,

v.

APPLE COMPUTER, INC.,

Defendant.

Case No. C 05 00037 JW

APPLE COMPUTER, INC.'S MOTION TO DISMISS CLASS ACTION COMPLAINT

Date: March 21, 2005

Time: 9:00 A.M.

Place: Courtroom 8, 4th Floor

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NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on March 21, 2005 at 9 a.m., or as soon thereafter as counsel may be heard, in Courtroom 8, 4th floor of the above-captioned Court, defendant Apple Computer, Inc. (Apple) will bring on for hearing this motion for an order, pursuant to Federal Rule of Civil Procedure 12(b)(6), dismissing the Class Action Complaint filed by Thomas Slattery on January 3, 2005.

RELIEF SOUGHT

Apple seeks an order, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, dismissing the Complaint with prejudice for failure to state a claim.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION.

This action, which attacks Apple's iPod and iTunes Music Store (iTMS) as antitrust violations, is premised on a fundamental misunderstanding of the antitrust laws. It seeks to inhibit Apple from engaging in the very creativity and competition that those laws are designed to encourage. The complaint is meritless on its face, and should be dismissed.

Through innovation and ingenuity, Apple has designed consumer offerings—the iTunes Music Store and the iPod—that have tapped into an enormous, previously unmet consumer demand. The iTunes Music Store, launched in 2003, is Apple's pioneering solution to the pernicious problem of music piracy. It enables consumers to purchase digital music files online—lawfully, conveniently and inexpensively. The iPod, introduced two years earlier, is Apple's sleek and highly popular version of a portable hard drive digital music player which has won accolades worldwide. Pioneering new lines of consumer services and developing superior products are exactly what the antitrust laws are intended to promote. *See Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004) (recognizing that the antitrust laws "safeguard the incentive to innovate"). Indeed, Apple is a prime example of how innovation has benefited consumers and our economy, from introducing the first personal computer in 1977 to now developing the first successful online music service.

While the iPod and iTMS have enjoyed widespread consumer acceptance and fostered exponential growth in consumer demand, they are not the only alternatives for consumers in either of these nascent, emerging arenas. Companies as substantial as Microsoft, Napster, Sony, RealNetworks, Walmart and others offer digital music at numerous online sites. Rio, Creative, Nokia, Panasonic, Sony and others offer their own versions of portable digital music players.

There would be nothing wrong with Apple designing a portable player that played only music from iTMS (or vice versa). But that is not what Apple has done. The reality, known to all iPod owners and nowhere denied in the complaint, is that anyone can buy an iPod and use it to play music obtained from any number of sources—**without ever buying a single track of music from iTMS**. Likewise, music downloaded from iTMS can be played on any computer or CD player—**without ever buying an iPod**. In short, one need not purchase an iPod to play music from iTMS, and one need not purchase music from iTMS to use an iPod.

Recognizing this reality as an owner of an iPod, plaintiff Thomas Slattery tries to plead around it. His allegations, however, are insufficient on their face to state any cause of action. The first two counts allege, in conclusory fashion, that Apple unlawfully tied the purchase of iTMS music to the purchase of an iPod, and vice versa. But he does not and cannot allege a key element of unlawful tying, *i.e.*, that Apple refuses to sell iPods to consumers unless they also download music from iTMS, or that Apple permits only iPod owners to download music from iTMS. Thus, his allegations are insufficient to state a claim for unlawful tying.

The third and fourth counts, for monopolization, allege in essence that if Apple would license its intellectual property to competitors, there would be more compatibility between music from online services and portable hard drive digital players. That claim is defective in two incurable ways. First, Slattery does not allege facts showing that Apple has monopoly power in either alleged market (legal online music and portable digital music players with hard drives). His allegations that Apple has a large share of what he concedes are new markets with numerous competitors is insufficient. Particularly given the entry that has occurred in these alleged markets, Slattery does not and cannot allege that entry barriers foreclose competition. Second, as the Supreme Court held last term in *Trinko,* the antitrust laws do not require any company, even a

"monopolist," to deal with competitors absent a pre-existing, voluntary course of dealing. Here, Slattery admits that Apple has followed a consistent policy of not licensing the intellectual property at issue. Thus, the monopolization claim fails as a matter of law.

The fifth and sixth counts allege an antitrust theory—"monopoly leveraging"—that the Ninth Circuit has explicitly rejected. Those counts also fail as attempt to monopolize claims, because Slattery has not pled the requisite specific intent to monopolize or any cognizable predatory or anticompetitive conduct.

Finally, the related state law claims in the seventh through tenth counts fall of their own weight with the collapse of the federal claims. They should be dismissed on the merits.

II. THE COMPLAINT.

According to the complaint, consumers historically purchased music in the form of records, tapes and compact discs from traditional "brick and mortar" music stores. ¶ 12. With the advent of the Internet, the demand for obtaining music in digital format online emerged. *Id.* The legality of the initial methods of doing so was challenged in the Napster litigation, the outcome of which highlighted the need for legitimate outlets for purchasing music online. *Id.*.

In April 2003, Apple launched iTMS—two years after introducing the alleged tying or tied product, the iPod. ¶¶ 13, 22. To access iTMS, consumers log onto the "iTunes site" where they can browse music recordings and purchase individual songs (at 99 cents per song) instead of entire CDs. ¶¶ 13, 14, 16. The purchased music is downloaded to the consumer's computer, where it is stored for further use. ¶ 14.

At some undisclosed time, Slattery purchased digital music from iTMS and downloaded it to the hard drive of his computer. ¶¶ 9, 14. He could play that music on his computer and CD player. ¶¶ 39, 42. If he wished to "portably enjoy" the music, he alleges that the iPod was the only product that could "directly" play it. ¶¶ 9, 27, 41 and 72. In that sense, he claims he was "forced" to buy an iPod. ¶ 9.

Slattery alleges two relevant product markets in the United States: a purported market for legal online sales of digital music files (which excludes all other sources of music), and a purported market for portable hard drive digital music players (which excludes all other portable

players such as CD players, players with flash or removable memory and all other means of playing music). ¶ 11. He acknowledges that Apple faces competition in each alleged market (even under his artificially narrow definition). For portable hard drive digital music players, he points to "Rio, iRiver, Creative, Archos, e.Digitial, RCA, Panasonic, Nokia, Tatung, Epson, Gateway, and others." ¶ 24. For legal online sales of music, he admits that Apple's competitors include "Napster, Walmart.com, Musicmatch, RealPlayer, Buy.com, Sony Connect, eMusic, Music Rebellion, Audio Lunch Box, Live Downloads, and Bleep among others." ¶ 21. He omits Microsoft's MSN music website. Although he alleges that Apple has a large share of the two narrowly-defined alleged markets, he claims no barriers to entry.

Slattery alleges three pairs of purported antitrust violations: tying in violation of § 1 of the Sherman Act (Counts I and II); monopolization in violation of § 2 of the Sherman Act (Counts III and IV); and "monopoly leveraging" in violation of § 2 (Counts V and VI). The only difference between the two counts in each pair is that they reverse the allegedly tying and tied products or the allegedly monopolized market. The state law claims (Counts VII-X) are tag-along analogs to his federal claims and rely on the same allegations of tying and monopolization.

III. THE LEGAL STANDARD.

Under Federal Rule of Civil Procedure 12(b)(6) a cause of action that fails to state a claim upon which relief can be granted must be dismissed. "All material allegations in the complaint are to be taken as true and construed in the light most favorable to the non-moving party." *Sanders v. Kennedy*, 794 F.2d 478, 481 (9th Cir. 1986). Conclusory allegations are disregarded. *See In re VeriFone Secs. Litig.*, 11 F.3d 865, 868 (9th Cir. 1993). Legal conclusions pled as facts may be disregarded. *JM Computer Servs., Inc. v. Schlumberger Techs., Inc.* 1996 WL 241607, *2 (N.D. Cal. 1996).

IV. ARGUMENT.

A. Slattery's Tying Allegations Fail to State a Claim.

A tying arrangement is "an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product." *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 5-6 (1958) (footnote omitted). "[W]here the buyer is free to take either

product by itself there is no tying problem." *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 12 n.17 (1984) (quoting *North Pac. Ry. Co.*, 356 U.S. at 6 n.4.). No tying exists where the buyer purchases the second product on account of its "intrinsic superiority" rather than any coercion by the seller. *North Pac. Ry Co.*, 356 U.S. at 10-11; *see also Robert's Waikiki U-Drive, Inc. v. Budget Rent-A-Car Sys., Inc.*, 732 F.2d 1403, 1407 (9th Cir. 1984) (no tying where an airline and a rental car company offered a package deal with discounted rates on airfare and rental car fees but consumers were free to purchase airline travel and rental car services separately, albeit at a higher price).

Slattery's allegations do not meet this standard. Most fundamentally, he does not allege that Apple refuses to sell iPods to consumers unless they also agree to download music from iTMS, or that Apple refuses to permit consumers to download music from iTMS unless they also buy an iPod. Nor does he contend that music downloaded from iTMS can only be played on an iPod, or that only iPods can play music from iTMS. Indeed, he acknowledges that music from iTMS can be played on computers and CD players (some of which are portable, of course) and, inferentially, that it can be played indirectly on other portable players. ¶ 9 (can be played "directly" only on iPod); ¶ 42 (can be played on computer and CD player); ¶ 23 ("one" use is portable digital player). Conversely, he acknowledges, again in a backhanded way, that iPods can indirectly play music from sources other than iTMS (¶¶ 9, 27, 72)—such as importing music from the consumer's CD library.[1]

At most, therefore, Slattery's complaint is that if he wants to play music from iTMS in one particular way—direct playback on a portable digital player with a hard drive—an iPod is the most practical and effective, or the "intrinsically superior," option. It is only in that sense that he claims that he was "forced" to buy an iPod and music from iTMS. ¶ 9. As a matter of law, his

[1] Slattery does not explain what he means by "direct" in alleging that only iPods "directly" play music from iTMS (*e.g.*, ¶ 9) and that only iTMS music can be played "directly" on iPods (*e.g.*, ¶ 27). Presumably, he is referring to the fact that music from online music services can be burned to a CD and played on most if not all CD players or digital music players. We assume that the absence of the modifier "direct" in otherwise identical allegations (*e.g.*, ¶¶ 38-39) is inadvertent. In any event, given the separate availability of iPods and iTMS music and the other options for playing music from iTMS and on iPods, it does not matter what music can be played directly or indirectly on which portable player.

allegations are insufficient to establish an unlawful tying arrangement. *See Foremost Pro Color, Inc. v. Eastman Kodak Co.*, 703 F.2d 534 (9th Cir. 1983).

In *Foremost Pro Color*, the Ninth Circuit considered a tying challenge to Kodak's decision to introduce its Instamatic camera, a new film and developing process, and the equipment necessary to process the new film, all at the same time. A competitor alleged an unlawful tying arrangement because the new Kodak system was "incompatible" with existing products. *Id.* at 544. Affirming dismissal for failure to state a claim, the Ninth Circuit held that the rationale underlying tying claims did not apply to so-called "technological ties." A "technological interrelationship among complementary products" does not constitute the type of coerced or forced purchase of two products that constitute unlawful tying. *Id.* at 542. The claim that the "effective use" of one product "necessitates purchase of some or all of the others" is insufficient where the products are separately available for purchase. *Id.* at 543. "Any other conclusion would unjustifiably deter the development and introduction of those new technologies so essential to the continued progress of our economy." *Id.* "Quite obviously, a firm that pioneers new technology will often introduce the first of a new product type along with related, ancillary products that can only be utilized effectively with the newly developed technology." *Id.* at 542. In short, the Ninth Circuit held that "the introduction of technologically related products, even if incompatible with the products offered by competitors, is alone neither a predatory nor anticompetitive act." *Id.* at 544.

Slattery does not even allege that the "effective use" of iTMS music or an iPod "necessitates" the purchase of the other. Given the other ways to play iTMS music and to obtain music for an iPod, Slattery could not possibly make that allegation. Even if he could, it would still be insufficient under *Foremost* because even where "effective use" of one product "necessitates purchase of some or all of the others," there is no unlawful tying so long as the products are separately available for purchase. Indisputably, one can buy and use an iPod without downloading a single track from iTMS. And one can buy and listen to any number of tracks from iTMS without buying or using an iPod.

In accord is *Innovation Data Processing, Inc. v. IBM Corp.*, 585 F. Supp. 1470 (D.C.N.J. 1984), in which a data recovery software company brought a tying claim against IBM. The key issue was whether IBM had tied sales of its data recovery software (DFDSS) to a package of software updates (IPOJ), by including it in the integrated version of IPOJ. The competitor alleged that although the various pieces of software could be licensed separately, IBM had tied DFDSS to IPOJ "as a practical matter" because customers would want "to avoid the technical and administrative problems" of licensing competing data recovery software. *Id.* at 1474. The district court granted summary judgment to IBM:

> "[A]s a matter of law, in the absence of evidence that the purchase of the alleged tied product was required as a condition of sale of the alleged tying product -- rather than merely as a prerequisite for practical and effective use of the tying product -- [plaintiff] has failed to show the requisite coercion necessary to establish a per se illegal tying arrangement."

Id. at 1475-76.[2]

Thus, because he does not and cannot allege that Apple refuses to sell iPods to consumers who do not download music from iTMS, or vice versa, Slattery's tying claim is insufficient as a matter of law, and Counts I and II should be dismissed.[3]

B. **Slattery's Monopolization Allegations Do Not State a Claim.**

A monopolization claim requires sufficient factual allegations showing (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident. *See Trinko*, 540 U.S. at 407, *citing United States v.*

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[2] *See also Monsanto Co. v. Scruggs,* 342 F. Supp. 2d 568, 578 (N.D. Miss. 2004) ("Defendants fall short of demonstrating that Monsanto forces its seed partners to buy Roundup herbicide in order to obtain a desired license. Although the provision at issue forecloses seed partners from using glyphosate-based herbicides other than Roundup, Monsanto's seed partners are under no compulsion to buy Roundup. The seed partners remain free to refrain from the use of any glyphosate-based herbicide. They are likewise free to use any non-glyphosate herbicide they choose.")

[3] Slattery's class definition recognizes implicitly the absence of any legally cognizable tie. Because some iPod owners never obtain any music from iTMS and, conversely, some consumers obtain music from iTMS but never buy an iPod, the purported class is defined to consist only of those who did both. ¶¶ 1, 56.

Grinnell Corp., 384 U.S. 563, 570-71 (1966). Slattery's monopolization claims (Counts III and IV) rest on Apple's decision not to license its Digital Rights Management (DRM) software to competitors. To comply with usage rules imposed by major record companies that own the music rights, all legal online music services encrypt, with the assistance of a DRM, the digital music files they sell. Most online services use a DRM developed by Microsoft called Windows Media Audio or WMA DRM.[4] Apple developed and uses its own DRM called FairPlay.

Counts III and IV are deficient as a matter of law in two respects.

1. **The market power allegations are inadequate as a matter of law.**

Slattery's allegations of market power in the two alleged markets are deficient. As to the purported market for legal online sales of digital music files, Slattery alleges that Apple has unrestrained pricing power, but he bases that assertion solely on the allegation that other competitors have small market shares. ¶¶ 20-21. As to the alleged market for hard drive digital music players, Slattery again relies solely on market shares without even alleging that Apple's pricing is unrestrained. ¶ 24. He alleges no barriers to entry or expansion by Apple's competitors in either alleged market. Nor could he given his admission that Apple faces a dozen or more competitors in each alleged market. ¶¶ 21, 24. He also does not allege that Apple can exclude competition in either alleged market.

Naked allegations of market share are insufficient to establish monopoly power. *See American Prof'l Testing Serv., Inc. v. Harcourt Brace Jovanovich Legal and Prof'l Publ'ns, Inc.*, 108 F.3d 1147, 1154 (9th Cir. 1997) ("Even if Harcourt has a high market share, neither monopoly power nor a dangerous probability of achieving monopoly power can exist absent evidence of barriers to new entry or expansion."); *Rebel Oil Co. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1439 (9th Cir. 1995), *cert. denied*, 516 U.S. 987 (1995) ("mere showing of substantial or even dominant market share" is insufficient; must show that "new rivals are barred from entering the market"); *Los Angeles Land Co. v. Brunswick Corp.*, 6 F.3d 1422, 1425 (9th Cir. 1993) ("proof of its [defendant's] 100% market share does not demonstrate that it had the power to

[4] *See, e.g.*, http://www.iht.com/articles/2005/01/23/yourmoney/music24.html (Microsoft's version of DRM is "already the standard," quoting the CEO of Napster's parent).

control prices or exclude competition in the absence of any evidence that it could prevent entry of other market participants"); *Oahu Gas Serv. v. Pacific Res., Inc.*, 838 F.2d 360, 366 (9th Cir. 1988) (high market share does not imply monopoly power "in a market with low entry barriers or other evidence of a defendant's inability to control prices or exclude competitors"); *Ticketmaster Corp. v. Tickets.com, Inc.*, 2003 WL 21397701, *4 (C.D. Cal. 2003) ("[s]ize alone or heavy market share alone does not make one a monopolist (or in danger of becoming one)").

Market share is a particularly suspect measure in new and emerging markets, where the pioneer by definition starts with a large market share, indeed 100% in cases where the first company in effect creates the market. *See Metro Mobile CTS, Inc. v. NewVector Communications, Inc.*, 892 F.2d 62, 63 (9th Cir. 1989) ("NewVector's 100% share of the wholesale market during the headstart period is insufficient to establish market power. 'Blind reliance on market share, divorced from commercial reality, [can] give a misleading picture of a firm's actual ability to control prices or exclude competition.'") (citation omitted); *Metronet Servs. Corp. v. Qwest Corp.*, 2001 WL 765167, *5 (W.D. Wash. 2001) (granting summary judgment on monopoly claims because although Qwest had a 95% market share it was "highly unlikely that Qwest's high market share confers upon it market power" where the market was less than five years old and other competitors were entering rapidly) *aff'd on other grounds*, *Metronet Servs. Corp. v. Qwest Corp.*, 383 F.3d 1124, 1126 (9th Cir. 2004).

Slattery's allegations do not withstand a motion to dismiss. *See Rutman Wine Co. v. E. & J. Gallo Winery*, 829 F.2d 729, 736 (9th Cir. 1987) (affirming grant of motion to dismiss where plaintiff failed to allege monopoly power with requisite specificity). As a matter of law, it is impossible to monopolize markets with no alleged entry barriers, particularly with existing competitors like Microsoft, Sony, Napster, Gateway, Panasonic, Nokia and the other substantial companies that offer online music services or manufacture and sell portable digital music players.

2. **The alleged refusals-to-deal are permitted under § 2.**

If Slattery could overcome the defects in his monopoly power allegations, his monopolization claims would still fail because they allege only lawful refusals-to-deal. Well aware of the impact of *Trinko* on refusal-to-deal claims from the dismissal of an earlier case

brought by his counsel,[5] Slattery avoids using the refusal-to-deal nomenclature. But that is exactly what his claims are. He alleges that Apple has "refused to license its FairPlay DRM or otherwise let any other manufacturer of portable hard drive digital music players gain interactive access to files sold" by iTMS. ¶ 44.[6] But Apple's refusal to deal with competitors in this way does not state a claim under the antitrust laws.

In *Trinko*, the Supreme Court affirmed the *Colgate* rule that "the Sherman Act 'does not restrict the long recognized right of [a] trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal.'" *Trinko*, 540 U.S. at 408, *quoting United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919). The Court explained that "mere possession of monopoly power" is "not only not unlawful; it is an important element of the free-market system." *Id.* at 407. Allowing firms to reap the rewards of their superior products and business acumen "induces risk taking that produces innovation and economic growth." *Trinko*, 540 U.S. at 407. The Court explained that "[f]irms may acquire monopoly power by establishing an infrastructure that renders them uniquely suited to serve their customers." *Id.* Requiring such firms to "share the source of their advantage" is problematic for several reasons. *Id.* at 407-08. First, it is in "some tension with the underlying purpose of antitrust law, since it may lessen the incentive for the monopolist, the rival, or both to invest in those economically beneficial facilities." *Id.* Second, "[e]nforced sharing . . . requires antitrust courts to act as central planners, identifying the proper price, quantity, and other terms of dealing—a role for which they are ill-suited." *Id.* at 408. Finally, "compelling negotiation

[5] Order Granting Defendants' Motion for Summary Judgment; Denying Plaintiffs' Motion for Summary Judgment; and Denying Motions to Exclude Evidence and to Stay, filed March 4, 2004, *Stein v. Pacific Bell Telephone Company*, No. C 00-2915 SI, Northern District of California, *14. A copy of this Order is submitted in the Appendix.

[6] Although the complaint is cryptic, plaintiff does not and cannot dispute that the major record companies require online music services to use some form of DRM to enforce the usage rules imposed as a condition of granting a license to the services, thereby protecting their intellectual property and copyright interests in the music. Like Microsoft's WMA DRM, which most online services license from Microsoft, Apple's FairPlay DRM is essentially an encrypted security system to ensure that the consumer's use of music files is consistent with the contract between the record companies and the online service. While the complaint's attempt to make DRM seem sinister is inaccurate, it is ultimately irrelevant to this motion to dismiss for the reasons discussed in the text.

between competitors may facilitate the supreme evil of antitrust: collusion." *Id.* "To safeguard the incentive to innovate," the Court emphasized that "the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive ***conduct***." *Id.* at 407 (emphasis in original).

The Court stressed that the exceptions in which a refusal to cooperate with rivals may constitute anticompetitive conduct are narrow: "We have been very cautious in recognizing such exceptions, because of the uncertain virtue of forced sharing and the difficulty of identifying and remedying anticompetitive conduct by a single firm." *Id.* at 408. The Court described the exception permitted in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985), as "at or near the outer boundary of § 2 liability." *Id.* at 409. In *Aspen Skiing*, defendant owned three of four mountains in a popular skiing area. For years, defendant had cooperated with plaintiff, who owned the fourth mountain, to offer joint, multi-day, all-area ski tickets. After demanding an increasing larger share of the proceeds from the tickets, defendant canceled the joint tickets. Defendant went so far as to refuse to permit plaintiff to buy defendant's tickets at retail prices. *Id.* at 593-94. The Court upheld a jury verdict for plaintiff, reasoning that the jury could reasonably conclude that defendant "elected to forgo these short-run benefits because it was more interested in reducing competition . . . over the long run by harming its smaller competitor." *Id.* at 608.

In *Trinko*, the Court contrasted the facts before it with the key aspects of *Aspen Skiing*. First, in *Aspen Skiing* the defendant had voluntarily entered into a course of dealing and "had cooperated for years" with its competitor, after which it had unilaterally terminated a voluntary relationship. This was central to the Court's decision because the prior course of dealing was presumed to be profitable and abandoning it suggested a willingness to foresake short-term profits to achieve an anticompetitive end. *See Trinko*, 540 U.S. at 409. By contrast, in *Trinko,* there was no allegation that "Verizon voluntarily engaged in a course of dealing with its rivals, or would ever have done so absent statutory compulsion." *Id.*

The Court also pointed to a "more fundamental" difference between the two cases. In *Aspen Skiing*, "what the defendant refused to provide to its competitor was a product that it

already sold at retail" whereas in *Trinko*, "the services allegedly withheld are not otherwise marketed or available to the public." *Id.* at 410. Instead, granting access meant that "[n]ew systems must be designed and implemented" at "considerable expense and effort." *Id.*

These differences between *Aspen Skiing* and *Trinko* compelled the Court to find that "Verizon's alleged insufficient assistance in the provision of service to rivals is not a recognized antitrust claim under this Court's existing refusal-to-deal precedents." *Id.*

The *Trinko* analysis disposes of Slattery's monopolization claims. First, as in *Trinko*, Slattery is not alleging that Apple cut off a voluntary course of dealing. Instead, he asserts that Apple has "steadfastly" refused to deal with its competitors. This dooms his claim. *See Covad Communications Co. v BellSouth Corp.*, 374 F.3d 1044, 1049 (11th Cir. 2004) ("*Trinko* now effectively makes the unilateral termination of a voluntary course of dealing a requirement for a valid refusal-to-deal claim under *Aspen*"). Second, as in *Trinko*, Slattery does not claim that Apple is refusing to provide competitors with a product that it is selling to the public at retail. His refusal-to-deal claims are premised on Apple's failure to license its FairPlay DRM to competitors. He does not allege that Apple provides such licenses to the public. For these reasons, Slattery's allegations fail to state a valid claim for monopolization under § 2.

The same policy reasons cited by the Supreme Court apply here. As in *Trinko*, forcing Apple to deal with rivals "may lessen the incentive" for Apple or rivals to innovate and invest in "economically beneficial facilities." *Trinko*, 540 U.S. at 408. It would require antitrust courts "to act as central planners, identifying the proper price, quantity, and other terms of dealing—a role for which they are ill-suited." *Id.* And, theoretically at least, forcing Apple to negotiate with rivals "may facilitate the supreme evil of antitrust: collusion." *Id.*

The *Trinko* approach is particularly compelling where the refusal-to-deal is a refusal to license intellectual property. Courts have repeatedly held that § 2 does not require even a dominant firm to create competition against itself within its own technology by licensing intellectual property to rivals. In *Independent Serv. Orgs. Antitrust Litig.*, 203 F.3d 1322, 1326 (Fed. Cir. 2000), the Federal Circuit held that refusals to license are beyond the reach of the Sherman Act, absent a showing of tying, sham litigation or fraud in obtaining the intellectual

property rights. Even if market power results from control of a patent, such "market power does not impose on the intellectual property owner an obligation to license the use of that property to others." *Independent Serv. Orgs. Antitrust Litig.*, 203 F.3d at 1326 (citations omitted) (declining invitation to examine Xerox's subjective motivation in asserting its right to exclude under the copyright law for pretext in absence of allegation that copyrights obtained unlawfully or allegations of copyright misuse). No such showing is possible here. Only tying is even alleged and, as shown above, there is no cognizable tie.[7]

Slattery's allegations regarding a competitor, RealNetworks, underscore that Apple did not voluntarily engage in a course of dealing with rivals. According to the complaint, RealNetworks cracked the code in Apple's FairPlay DRM so that music from RealNetworks Music Store could be played directly on the iPod without the intermediary step of burning to a CD. ¶¶ 47-50.[8] Apple was "stunned" by RealNetworks' decision to adopt "the tactics and ethics of a hacker" and, according to the complaint, updated its iPod software to prevent this circumvention of its DRM. ¶¶ 49-50. Hacking is not what the Supreme Court had in mind in referring to a voluntary, presumably profitable course of dealing, the termination of which is presumably motivated by anti-competitive intent and may constitute an actionable refusal-to-deal. Under *Trinko*, RealNetworks' efforts to force dealing do not create an antitrust duty on Apple to cooperate and facilitate dealing on a going forward basis, particularly where RealNetworks pays nothing and simply free rides on the economic rewards of Apple's innovation. *See Morris Communications Corp. v. PGA Tour, Inc.*, 364 F.3d 1288, 1296 (11th Cir. 2004), *citing Seagood*

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[7] In one case where a refusal to license gave rise to § 2 liability (albeit pre-*Trinko*), the defendant had voluntarily dealt with competitors and allegedly changed its policies over time based on its desire to exclude increasingly aggressive competitors. *See Image Tech. Servs., Inc. v. Eastman Kodak Co.*, 125 F.3d 1195 (9th Cir. 1997). If that decision survives *Trinko* and *Independent Serv. Org.*, which is doubtful, it still does not help Slattery because he does not and cannot allege any voluntary course of dealing with respect to FairPlay DRM, let alone a termination thereof.

[8] Using euphemisms for hacking, Slattery alleges that RealNetworks "managed to independently analyze the firmware" in the iPod, "was able to discern" Apple's software code, and inserted a "corresponding code" into its own song files so that music from its own online store could play on the iPod. ¶ 47.

Trading Corp. v. Jerrico, Inc., 924 F.2d 1555, 1573 (11th Cir. 1991) ("[I]t 'is not a function of the antitrust laws' to equip plaintiffs with defendants' competitive advantages.").

In short, Slattery alleges nothing more than a consistent refusal by Apple to license its intellectual property. That claim is insufficient as a matter of law and should be dismissed.

C. **The Ninth Circuit Does Not Recognize Monopoly Leveraging Claims**.

In Count V, Slattery accuses Apple of violating § 2 by engaging in "monopoly leveraging"—that is, using iTMS's purported monopoly power in legal online sales of digital music files to achieve a monopoly for the iPod in the portable hard drive digital music player market. Evidently uncertain of that claim, the next count, Count VI, alleges the reverse (just like the other pairs of alleged violations discussed above). The fundamental infirmity of both counts is that the Ninth Circuit has rejected the "monopoly leveraging doctrine as an independent theory of liability under Section 2." *Alaska Airlines, Inc. v. United Airlines, Inc.*, 948 F.2d 536, 547 (9th Cir. 1991); *see also Santa Cruz Med. Clinic v. Dominican Santa Cruz Hosp.*, 1995 WL 853037, *2 (N.D. Cal. 1995) (plaintiff voluntarily dismissed leveraging claims in light of *Alaska Airlines* decision). Indeed, Judge Illston so held in dismissing, without leave to amend, a monopoly leveraging claim in another case brought by Slattery's counsel. *See Stein v. Pacific Bell Tel. Co.*, 173 F. Supp.2d 975, 983 (N.D. Cal. 2001). This is consistent with the Supreme Court's recognition in *Trinko* that "monopoly leveraging" is not an independent claim but must meet the requirements for attempted monopolization. *Trinko*, 540 U.S. at 415 n.4. The elements of that offense are: "(1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power." *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456 (1993) (citing multiple cases). Slattery's complaint does not adequately allege facts for any of these elements, never mind all three.

The anticompetitive conduct necessary to support such a claim cannot be conduct that otherwise passes muster under the Sherman Act. As *Trinko* held, a refusal-to-deal is not anticompetitive conduct except in the narrow circumstance not here pled. *See also Z-Tel Communications, Inc. v. SBC Communications, Inc.*, 331 F.Supp.2d 513, 543 (E.D. Texas 2004)

(recognizing that "the absence of legally cognizable anticompetitive conduct" motivated *Trinko*'s rejection of the leveraging claim). Here, Slattery alleges no cognizable anticompetitive conduct. His tying claims fail, as shown above, because there is no tie. *See supra*, pp. 4-7. His refusal-to-deal claims suffer a similar fate because Slattery can point to no obligation to deal, and his claims fall far outside the narrow confines of *Aspen Skiing*.

Slattery's complaint also fails to allege the requisite "specific intent" to monopolize. Although the complaint grouses extensively about Apple's conduct, it never alleges that the conduct was undertaken with the "specific intent to destroy competition or build monopoly" which "is essential to guilt for the mere attempt." *California Computer Prods., Inc. v. IBM*, 613 F.2d 727, 736 (9th Cir. 1979) (citations omitted).

Finally, Slattery fails to allege that there is a dangerous probability that Apple will succeed in achieving a monopoly. Allegations of high market share do not satisfy this element. *See American Prof'l Testing Serv.,* 108 F.3d at 1154, and other cases cited *supra* at pp. 8-9.

For these reasons, Slattery's monopoly leveraging claims, even if construed as attempt to monopolize claims, should be dismissed without leave to amend.

D. **The State Law Claims Are Meritless As A Matter of Law.**

The state law claims suffer the same defects as the federal antitrust claims, as well as additional infirmities. Like the federal claims, they should be dismissed with prejudice.

1. **The Cartwright Act does not reach unilateral activity such as alleged monopolization.**

The Cartwright Act, codified in California Business & Professions Code §§ 16700-16770, generally prohibits the formation of trusts that "create or carry out restrictions in trade or commerce." Cal. Bus. & Prof. C. § 16720(a). Restrictions are wrongful only if carried out by a "trust" which is a "combination of capital, skill or acts by two or more persons." Cal. Bus. & Prof. C. § 16720. The Cartwright Act does not reach unilateral acts, *i.e.*, acts taken by a single company. It does not contain the equivalent of section 2 of the Sherman Act. *See Dimidowich v. Bell & Howard,* 803 F.2d 1473, 1478 (9th Cir. 1988) (holding that claims for unilateral conduct are not "cognizable under the Cartwright Act."); *National Credit Reporting Assoc., Inc. v.*

Experian Information Solutions, Inc., 2004 WL 1888769, *3 (N.D.Cal. 2004) (dismissing monopolization claim brought under Cartwright Act, on ground that that "California's antitrust laws do not address such unilateral, monopolization conduct"). Here, Slattery's monopolization and attempted monopolization claims allege only unilateral conduct of Apple and thus do not state a claim under the Cartwright Act.

2. **The tying, common law monopolization and UCL claims fall with the federal claims.**

The tying allegations fail to state a claim under the Cartwright Act for the reasons stated *supra* at pp. 4-7. *Oakland-Alameda County Builders' Exchange v. F.P. Lathrop Constr. Co.*, 4 Cal. 3d 354, 361-62, n.3 (1971) (federal cases interpreting the Sherman Act are applicable in construing Cartwright Act as applied to tying claims); *Morrison v. Viacom, Inc.*, 66 Cal. App. 4th 534, 541 (1998) (tying case noting that "[f]ederal law interpreting Sherman Antitrust Act section 1 (15 U.S.C. § 1) is useful when addressing issues arising under section 16720 [the Cartwright Act]"). Accordingly, the Cartwright Act claim should be dismissed on the merits.

The purported "common law monopolization" claim does not add anything. Assuming *arguendo* that such a claim exists, its elements would not differ from the federal monopolization claims. As shown above, those federal claims are insufficient as a matter of law. So too is any common law claim.

The Unfair Competition Law (UCL) claim, California Business & Professional Code §§ 17200 et seq., suffers the same fate. The California Supreme Court's decision in *Cel-Tech Communications, Inc. v. Los Angeles Cellular Tel. Co.*, 20 Cal. 4th 163 (1999), as applied in *Chavez v. Whirlpool Corp.*, 93 Cal. App. 4th 363 (2001), governs this claim. *See also Churchill Village, L.L.C. v. Gen'l Elec. Co.*, 169 F. Supp.2d 1119, 1130 (N.D. Cal. 2000) (finding *Cel-Tech* equally applicable in consumer actions). The UCL prohibits, to the extent relevant here, unlawful and unfair business practices. Slattery alleges that the same conduct that is the basis of his antitrust claims is also the basis of his UCL claim. ¶¶ 95-96. As shown above, that conduct is lawful and, for the reasons stated in *Chavez*, it cannot be considered "unfair."

In *Chavez* , plaintiff challenged Whirlpool's policy of not dealing with distributors that failed to comply with its suggested resale prices as violations of the Cartwright Act and the UCL. Sustaining a demurrer, the Court first held that Whirlpool had a right to refuse to deal based on the *Colgate* doctrine which, as noted in the discussion of *Trinko*, protects a company's "right to select with whom to do business and on what terms." *Chavez*, 93 Cal. App. 4th at 370. On that basis, the Court held that Whirlpool's conduct was permissible under the Cartwright Act. Turning to the UCL claim, the Court held as a matter of law that "conduct that is permissible under the *Colgate* doctrine is neither unlawful nor 'unfair' under the unfair competition law." *Id.* at 367; *see also id.* at 375. The Court reasoned that if conduct that allegedly restrains competition and harms consumers does not violate the antitrust laws, it cannot be considered "unfair" to consumers. Permitting 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." *Id.* In accord is *Aguilar v. Atlantic Richfield Company*, 25 Cal. 4th 826, 866 (2001) (where antitrust claim is dismissed on the merits, "derivative" UCL claim asserting the same conspiracy must be dismissed as well).

As in *Chavez* and *Aguilar*, Slattery relies on the same conduct for his antitrust and UCL claims, and contends that it restrains competition and harms consumers. ¶¶ 96-97. As shown above, the challenged conduct is lawful and protected by the *Colgate* doctrine as applied in *Trinko.* Thus, his UCL counts do not state a valid claim and should be dismissed.

Because the common law monopolization and UCL counts (and the unjust enrichment claim discussed next) are intertwined with the federal claims, it is appropriate for this Court to dismiss them on the merits rather than permitting plaintiff to refile in state court.

3. **Slattery's unjust enrichment claim is contrary to established law.**

Under California law, an unjust enrichment claim does not lie where, as here, plaintiff alleges that he purchased a product in a transaction that creates a contract. *Paracor Fin., Inc. v. General Elec. Capital Corp.*, 96 F.3d 1151, 1167 (9th Cir. 1996) (holding that under California law, unjust enrichment is action in quasi-contract which does not lie when valid contract defines rights of parties); *Gerlinger v. Amazon.com, Inc.*, 311 F. Supp.2d 838, 856 (N.D. Cal. 2004). In

Gerlinger, a consumer purchased books over the Internet sued Amazon and Borders for antitrust violations and unjust enrichment. Because the purchases created contracts between the buyer and seller under California Commercial Code §§ 2106(1) and 2204(1), the Court dismissed the unjust enrichment claim. "An action based on quasi-contract [such as unjust enrichment] cannot lie where a valid contract covering the same subject matter exists between the parties." *Gerlinger,* 311 F. Supp. 2d at 856 (citations omitted).

Slattery alleges that he purchased music from the iTMS and, later, an iPod from Apple. ¶¶ 9, 56, 60. As in *Gerlinger*, each transaction created a contract between Slattery and Apple. Accordingly, Slattery's quasi-contract claim for unjust enrichment fails as a matter of law.

V. CONCLUSION.

For these reasons, the complaint should be dismissed in its entirety, and the dismissal should be without leave to amend because the defects are incurable.

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Respectfully submitted,

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