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8 UNITED STATES DISTRICT COURT  
 9  
 10 NORTHERN DISTRICT OF CALIFORNIA

11 **THOMAS WILLIAM SLATTERY,**  
 12 **Individually, And On Behalf Of All**  
 13 **Others Similarly Situated,**

14 **Plaintiff,**

15 v.

16 **APPLE COMPUTER, INC.,**

17 **Defendant.**

**Case No. C 05 00037 JW**

**CLASS ACTION**

**APPLE COMPUTER, INC.'S REPLY IN  
 SUPPORT OF ITS MOTION TO DISMISS  
 CLASS ACTION COMPLAINT**

Date: March 21, 2005  
 Time: 9:00 a.m.  
 Place: Courtroom 8, 4<sup>th</sup> floor

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1 **I. INTRODUCTION.**

2 Misstating the applicable law, Slattery's opposition brief advocates an unprecedented  
3 legal standard that would punish the very innovation and development of superior products that  
4 the antitrust laws are designed to encourage. Slattery does not dispute that the major record  
5 companies require legitimate online music services to use some form of Digital Rights  
6 Management to protect the record companies' intellectual property rights. He quarrels only with  
7 Apple's decision to develop its own proprietary DRM—as opposed to licensing Microsoft's  
8 DRM—and to not license it to rivals. As shown in Apple's opening brief the antitrust laws are  
9 intended to “safeguard the incentive to innovate,” and not even alleged monopolists are required  
10 to “share the source of their advantage” except in limited circumstances not here present. *Verizon*  
11 *Communications Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398, 407, 415 (2004).

12 Not only is Slattery's challenge to Apple's decision to follow its own course meritless as a  
13 matter of law, his brief considerably overstates the consequences of that course. Apple's use of  
14 its own DRM does not mean that music from its online music store, iTMS, can be played only on  
15 an iPod. As Slattery's complaint conceded, music from iTMS can be downloaded and played not  
16 only directly on computers but indirectly on competitors' portable hard drive digital music  
17 players. This indirect method is accomplished by burning the music onto a CD and “ripping” it  
18 back to a computer. Likewise, iPod owners can transfer music from sources other than the iTMS  
19 to their iPods. All of this occurs without any need for any iTMS consumer to purchase an iPod or  
20 vice versa. *See* Def. Br., p. 5 fn.1. Slattery's complaint, in essence, is that if Apple licensed its  
21 FairPlay DRM to competitors, it would facilitate playing iTMS music directly rather than  
22 indirectly on competitors' portable hard drive digital music players and, conversely, competitors'  
23 music could be played directly on the iPod, without any intermediary step. Although his brief  
24 tries to obscure the point, Slattery is making the very narrow claim that Apple's adoption of  
25 FairPlay forces an intermediary step when the iPod is used with music purchased online from a  
26 competitor or when music purchased from the iTMS is played on a competitor's device.

27 Against this backdrop, Slattery's causes of action are insufficient as a matter of law. As to  
28 the tying claim, the threshold defect is that, as the complaint shows, Apple offers iPods for sale

1 regardless of whether the consumer also downloads music from iTMS, and vice versa. In other  
2 words, Apple sells iPods separate from music from the iTMS music store with no strings or  
3 conditions attached to either. And the complaint concedes that iPods and music from iTMS can  
4 be used independently of each other. No court has ever found an unlawful tying arrangement in  
5 these circumstances; such a finding would be contrary to decades of antitrust jurisprudence.

6 As to the monopolization or attempted monopolization claims, they are barred both  
7 because Slattery does not and cannot allege any barriers to entry and because his refusal-to-  
8 license claims are barred by *Trinko*. Without barriers to entry, Apple has no power to exclude  
9 competitors, which is a bedrock element for these claims. To avoid *Trinko*, Slattery's brief tries  
10 to recharacterize his claims as something other than refusal to deal. But his complaint makes  
11 clear that that is exactly what he is claiming: "Apple has steadfastly refused to license its  
12 Fairplay DRM or otherwise let any other manufacturer of portable hard drive digital music  
13 players gain interactive access to files sold by Apple through iTunes." Compl., ¶ 44.

14 Contrary to Slattery's argument, *Trinko* cannot be distinguished on the ground that it did  
15 not involve "affirmative acts to shut out competitors." *See* Opp. Br. p. 17. Just like this  
16 complaint and the complaint filed by Slattery's counsel in *Stein v. Pacific Bell*, 173 F.Supp.2d  
17 975 (N.D. Cal. 2001), the *Trinko* complaint alleged affirmative acts to impede competitors. Just  
18 as the Supreme Court affirmed dismissal in *Trinko* and Judge Illston dismissed the *Stein*  
19 complaint (in a decision that Slattery ignores), this complaint merits dismissal for the same  
20 reasons.

21 The only state law claim for which Slattery offers more than a conclusory argument is his  
22 unjust enrichment claim. Judge Patel, however, properly rejected the same arguments in another  
23 case by Slattery's lawyers with reasoning that applies with equal force here. *Infra* at 13-145.

24 **II. SLATTERY'S TYING ALLEGATIONS DO NOT STATE A CLAIM: A TIE**  
25 **REQUIRES A TIE.**

26 Slattery's tying claim suffers multiple, incurable defects. First and most fundamentally,  
27 he does not and cannot allege that Apple offers iPods and music from iTMS only as a package  
28 and refuses to provide them separately. Indeed, he concedes that they are separately available.

1 Absent an allegation that two products are offered together at such a steep discount that  
2 individual availability is illusory (and Slattery makes no such allegation), the concession that the  
3 two products are separately available ends the analysis. Second, Slattery admits that iPods and  
4 iTunes music can be used independently of each other. Thus, he cannot possibly claim that  
5 consumers were tacitly forced to buy one product in order to use the other, even if that were the  
6 test for tying (which it is not). Third, his narrow claim, focusing on just one use of iTunes music  
7 or the iPod, is insufficient given the separate availability and other independent uses of iPods  
8 and iTunes music. Fourth, the complaint concedes that iTunes music can be played “indirectly” on  
9 competitors’ portable digital players, and that music from competing online services can be  
10 played “indirectly” on iPods, further making it impossible to claim that consumers were forced  
11 to buy iPods and download iTunes as a package.

12 For each of these reasons, Slattery’s tying claims must be dismissed.

13 **A. Slattery Concedes That The Alleged Tying And Tied Products Are Separately**  
14 **Available.**

15 Slattery begins (p. 5) by misstating Apple’s position. Apple’s position, taken verbatim  
16 from the seminal Supreme Court decisions, is that a tying arrangement is “an agreement by a  
17 party to sell one product but only on the condition that the buyer also purchases a different (or  
18 tied) product” and that “where the buyer is free to take either product by itself there is no tying  
19 problem.” Def. Br., pp. 4-5 (citations omitted).

20 Significantly, Slattery does not and cannot contend that his allegations satisfy this  
21 standard. To the contrary, his complaint admits that iPods and music from iTunes are separately  
22 available. They were introduced in the marketplace 18 months apart, and Slattery bought his iPod  
23 separately from downloading music from iTunes. *Id.* at 3. His opposition brief also admits (p. 5)  
24 that they can be purchased separately. Those admissions defeat his tying claim.

25 So Slattery resorts to diversion. He claims (p. 6), without citation, that Apple argued that  
26 no tie exists when the two products are sold separately “irrespective of the restrictions imposed on  
27 such ‘separate sales.’” In fact, Apple did not make that argument. But having set up this straw  
28 man, Slattery attempts to strike it down by citing several cases in which tying was found where

1 defendant's "pricing policy" made purchasing the tying and tied products as a package the "only  
2 viable economic option." See Opp. Br., pp. 5-8. The logic of those cases is that a tie may exist  
3 when the price advantage of purchasing the products as a package is so great that no one would  
4 purchase them separately, thus making the separate availability illusory. Unlike those cases,  
5 however, Slattery does not allege that Apple's pricing policy forces a package sale. Indeed, he  
6 admits that the price of music on Apple's online music store is a flat 99 cents per track—with no  
7 allegation that the price varies depending on whether the consumer also buys an iPod. Nor does  
8 he claim that the price of an iPod varies depending on whether the consumer downloads music  
9 from iTunes. In short, Slattery does not and cannot contend that Apple's pricing policy forces  
10 consumers to obtain iPods and music from iTunes as a package.<sup>1</sup>

11 Slattery argues (p. 9) that an illegal tie occurs unless the two products are separately  
12 available to consumers "on a basis as favorable as" the two products together, with the  
13 implication that this test is not limited to pricing effects. As support, however, he cites only  
14 *Advance Business Systems & Supply Co. v. SCM Corp.*, 415 F.2d 55, 62 (4<sup>th</sup> Cir. 1969) where the  
15 price of separately using defendant's copier with a rival's supplies was so high that the Court  
16 concluded that the copier and supplies "cannot realistically be regarded as separately available."  
17 Nothing in that or any other case suggests that tying can be found absent package pricing that is  
18 so extreme that the separate availability of the products is illusory. See, e.g., *Ways & Means v.*  
19 *IVAC Corp.*, 506 F. Supp. 697, 701 (N.D. Cal. 1979) (holding that theoretical separate availability  
20 will not defeat tying allegation where, as a result of the package pricing, "the only viable  
21 economic option" is to purchase the tying product and the tied product in a single package).  
22 Applying Slattery's reading of *Advance Business* would not only be unprecedented but would  
23 lead to absurd results. As Slattery interprets it, it would mean that a company could not make  
24 complementary products that work better with each other than with competitors' versions even if

25 <sup>1</sup> Slattery also claims (p. 5), again without citation, that Apple's position is that the conditioning  
26 of sale of the tying product on the purchase of the tied product must be explicit, a position not  
27 advanced in Apple's moving papers. His admission that the two products are separately  
28 available—and the reality that consumers buy iPods every day without downloading music from  
iTunes, and vice versa—makes it impossible for him to claim that Apple offers them only as a  
package, whether explicit or otherwise.

1 the products are offered separately. No case suggests that that is the law. Indeed the Supreme  
2 Court has rejected that approach, holding that no tying arrangement exists where the buyer  
3 purchases the second product on account of its “intrinsic superiority.” *North Pac. Ry. Co. v.*  
4 *United States* 356 U.S. 1, 11 (1958). Otherwise, every time a seller of a product with market  
5 power also sold accessories that enhanced the usefulness of that product and were superior to  
6 those sold by its competitors, it would be liable for tying. The negative impact of such a rule on a  
7 company’s incentive to innovate and develop superior products needs no elaboration.<sup>2</sup>

8 In sum, Slattery’s allegations do not state a claim for unlawful tying in that he concedes  
9 that the two products are separately available and he does not allege that Apple’s pricing makes  
10 the separate availability illusory.

11 **B. Slattery Concedes That iPods And Music From iTunes Can Be Used**  
12 **Separately.**

13 Slattery concedes (p. 8) that iPods and iTunes music are not dependent on each other and  
14 can be used separately, *e.g.*, iTunes music can be played on devices other than iPods, and iPods  
15 can play music from sources other than iTunes such as a consumer’s CD library. He argues,  
16 however, that these other uses are irrelevant to the tying analysis because some consumers also  
17 may want to play iTunes music on portable digital players with hard drives. But Slattery’s  
18 quotation from *Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2, 21 n.30 (1984)  
19 answers his own argument. As the Supreme Court explained: “[w]e have often found  
20 arrangements involving functionally linked products **at least one of which is useless without the**  
21 **other** to be prohibited tying devices.” *Id.* (emphasis added). That is a key reason why the issue of  
22

23 \_\_\_\_\_  
24 <sup>2</sup> Slattery urges an absurdly unrealistic hypothetical where only Ford-manufactured gasoline can  
25 be used in Ford vehicles going more than 20 mph. There are significant differences between that  
26 extreme hypothetical and this case. First, iPods and iTunes music can be used separately in  
27 significant ways. Indeed, the iPod plays all types of music even if it is not downloaded from  
28 iTunes. As noted, consumers purchased iPods for 18 months before iTunes even existed.  
Conversely, music from iTunes can be played in a number of ways without ever owning an iPod.  
Second, Slattery’s complaint admits that the iPod can play music from iTunes competitors  
indirectly and that by burning a CD music from iTunes can be played on devices other than the  
iPod. No indirect alternative exists in Slattery’s Ford example.

1 separate use is relevant. Here, as noted, Slattery concedes that iPods and music from iTunes can  
2 be put to separate uses. See Def. Br., p. 3.<sup>3</sup>

3 **C. Slattery's Narrow Claim, Focused On One Particular Use**  
4 **of iTunes Music, Is Insufficient To State A Tying Claim.**

5 Slattery's claim, as noted, is that if he wants to play iTunes music in one particular way—  
6 on a digital music player with a hard drive, portably and directly, without the intermediate step of  
7 burning a CD—he must use an iPod. In other words, he contends that consumers obtain more  
8 functionality if they obtain digital music and a digital music player from Apple, compared with  
9 obtaining one from Apple and the other from a competitor. But these facts do not make  
10 purchasing the iPod and music from iTunes together the “only viable economic option,” nor do  
11 they establish that Apple's actions amount to a refusal to sell one without the other. Absent  
12 allegations sufficient to make such a showing, Slattery's claim fails. As stated in *Innovation Data*  
13 *Processing, Inc. v. IBM Corp.*, 585 F. Supp. 1470 (D.N.J. 1984):

14 “[A]s a matter of law, in the absence of evidence that the purchase of the alleged tied  
15 product was required as a condition of sale of the alleged tying product—rather than  
16 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.”

17 *Id.* at 1475-76. Because it is not a tie when an alleged tied product is simply a prerequisite for the  
18 practical use of the allegedly tying product, it follows that it cannot be a tie when the alleged tied  
19 product is a prerequisite for only one of multiple uses of the allegedly tying product. And that is  
20 all that Slattery has alleged.

21 Slattery attempts to avoid the *Innovation Design* holding by arguing (p. 13 n.2) that it was  
22 in the context of granting summary judgment for defendant. But the legal standard is what  
23 matters, and it is clear he cannot meet it, whether at the pleading or proof stage. In accord is  
24 *Monsanto Co. v. Scruggs*, 342 F. Supp. 2d 568, 578 (N.D. Miss. 2004), cited in Def. Br., p. 7, n.2,

25 \_\_\_\_\_  
26 <sup>3</sup> Nothing in *Microsoft v. U.S.*, 253 F.3d 34 (D.C. Cir. 2001) *en banc*, supports Slattery's theory.  
27 There, the allegation the Court relied on was not simply that Microsoft's browser worked better  
28 with its operating system. It was instead that Microsoft physically integrated the browser in the  
operating system and refused to allow most OEMs to uninstall the browser or consumers to  
choose another browser. *Id.* at 66. No such allegations are made here.

1 where the court rejected a tying claim because defendant required purchase of the alleged tied  
2 product in only certain circumstances, *i.e.*, if seed purchasers wanted to use a glyphosate-based  
3 herbicide. With no answer to this decision, Slattery ignores it.

4 *Foremost Pro Color, Inc. v. Eastman Kodak Co.*, 703 F.2d 534, 545 (9th Cir. 1983) sets  
5 forth the same legal standard as *Innovation Data*, and Slattery's attempt to distinguish it is  
6 unavailing. First, although *Foremost* addressed a *per se* claim, the distinction between *per se* and  
7 rule of reason claims in the tying area is irrelevant for this analysis. The presence of a tie is  
8 essential under any theory, and that is what is missing in Slattery's complaint. Second, while the  
9 *Foremost* court noted the absence of any allegation that Kodak intended to compel consumers to  
10 purchase the new Instamatic camera and the processing system as a package, the court added: "It  
11 is of no legal import that Foremost chooses to characterize the technological incompatibilities of  
12 the 110 system with the products offered by Kodak's competitors . . . as a form of technological  
13 predation." *Id.* at 545. The principle announced in *Foremost* is that developing a system of  
14 "technologically interrelated products" does not create tying liability "even if the new products  
15 are incompatible with the products then offered by the competition and effective use of any one  
16 of the new products necessitates purchase of some or all of the others." *Id.* at 543. That is  
17 precisely what Slattery is claiming, and it is insufficient to state a claim.<sup>4</sup>

18 Slattery's citation to *Response of Carolina v. Leasco Response*, 537 F.2d 1307  
19 (5<sup>th</sup> Cir. 1976), a case ruling for the defendant on a tying claim, does not support his complaint.  
20 Indeed, *Leasco* found no tie for the same reason that there is no tie here: the franchise and  
21 hardware lease at issue were separately available, as are the iPod and music from iTMS. *See id.*  
22 at 1328-1330. The Court's observation that had Leasco taken steps to make separate purchasing  
23 of the hardware useless, the result may have been different, does not help Slattery. He admits that  
24 both the iPod and music from iTMS have uses unrelated to each other.<sup>5</sup>

25 <sup>4</sup> Slattery argues (p. 1) that Apple requires consumers to "agree not to buy complementary  
26 products from a source other than Apple." Nothing in the complaint supports that argument.  
Apple does not extract any agreement from its customers not to buy competitors' products.

27 <sup>5</sup> Contrary to Slattery's implication (p. 10), *Lexmark Int'l. v. Static Control Components*, 387  
28 F.3d 522 (6th Cir. 2004) was a Digital Millennium Copyright Act case, not an antitrust case. Nor  
did it "indicate," let alone hold, that the antitrust laws require a company to design its products to

1 In short, Slattery's complaint that, for one of their multiple uses, the iPod and iTunes music  
2 work with each other more effectively or "directly" than if either is used with competitors'  
3 devices or music services does not give rise to antitrust liability.

4 **D. Slattery's Concession of Indirect Interoperability Is A Further Reason Why**  
5 **There Is No Tie.**

6 As noted in Apple's opening brief (p. 5 and n.1), the complaint admits implicitly that  
7 music downloaded from iTunes can be played "indirectly" on portable hard drive digital music  
8 players other than iPods, and iPods can "indirectly" play music downloaded from competing  
9 online music services. As noted, this is accomplished by burning a CD and "ripping" it back to a  
10 computer. In his opposition brief, Slattery ignores that concession and pretends that his  
11 complaint alleges that an iPod is the only portable hard drive digital music player on which iTunes  
12 music can be played, directly or indirectly. But Slattery cannot avoid the admission in his  
13 complaint that indirect interoperability exists. Thus, his real claim is that even though iTunes  
14 music can be played, either directly or indirectly, on a wide array of devices, an iPod is the only  
15 portable digital music player with a hard drive that can play the music without the intermediate  
16 step of burning a CD. With the concession that iTunes music can be played "indirectly" on other  
17 portable hard drive digital players, Slattery's claim is even further removed from any cognizable  
18 tying claim.

19 For these reasons, Counts I and II must be dismissed.

20 **III. SLATTERY'S MONOPOLIZATION ALLEGATIONS DO NOT STATE A**  
21 **CLAIM.**

22 As shown in defendant's opening brief, Slattery's monopolization claims suffer two  
23 incurable, independent defects. First, he does not and cannot allege the existence of barriers to  
24

25 (continued...)

26 be compatible with industry standards (which is what Slattery means by "insert[ing] lock-out  
27 devices.") It simply held that the DMCA did not apply to a competitor's effort to circumvent a  
28 technological measure designed to control access to defendant's consumer product. *See id.* at  
529.

1 entry in either of the alleged product markets. Without entry barriers, no monopolization can  
2 exist. Second, even if he properly alleged monopoly power, the allegations of exclusionary  
3 conduct on which his complaint is built are insufficient as a matter of law. His complaint reduces  
4 to a claim that Apple uses a proprietary DRM system that it has “steadfastly” refused to license to  
5 competitors. That claim that is barred by the Supreme Court’s recent decision in *Trinko*.

6 **A. A Naked Allegation Of High Market Share Is Insufficient To Establish**  
7 **Market Power, Particularly In A Rapidly Developing Market.**

8 Contrary to Slattery’s argument (pp. 14-16), *Cost Management Services, Inc. v.*  
9 *Washington Natural Gas Co.*, 99 F.3d 937 (9th Cir. 1996), does not hold that mere allegations of  
10 a high market share is sufficient to allege monopoly power. Indeed, the Ninth Circuit observed  
11 that “it is true that market share standing alone does not automatically equate to market power.”  
12 *Id.* at 950. The Court found the complaint sufficient only because plaintiff’s allegation of market  
13 power did “not rest entirely on its market share allegation” but added that defendant had engaged  
14 in a certain exclusionary pricing practice as well. *Id.* at 950-51. Here, by contrast, Slattery’s  
15 showing of monopoly power depends exclusively on Apple’s market share and the corresponding  
16 market share of competitors, and thus is inadequate.

17 Slattery’s argument (p. 15) about the procedural posture of cases establishing the  
18 insufficiency of market share alone misses the point. These cases establish the necessary  
19 elements of an antitrust claim, which do not vary with the procedural posture of a case.

20 Tacitly recognizing the inadequacy of his market share allegations, Slattery strains (p. 16)  
21 to read barriers of entry into his complaint, which alleges none. Slattery relies on an allegation  
22 that the songs available from Apple’s iTunes Music Store are subject to copyright by the songs’  
23 owners as a barrier to entry. But the complaint does not allege that these copyrights function as a  
24 barrier to entry. *See* Complaint, ¶ 51 (making no reference to the copyrights as a barrier to entry).  
25 Given Slattery’s acknowledgement that Sony, Walmart, Napster and others (including Microsoft)  
26 in fact have entered the business of online digital music stores, he cannot possibly allege in good  
27 faith that they have been barred entry by the need to obtain copyright permission from song  
28

1 owners. *See* Complaint, ¶ 21 (acknowledging that the number of competitors in the legal online  
2 music market alleged by Slattery now exceed a dozen).

3 **B. Trinko Governs Slattery's Claims.**

4 If Slattery had sufficiently alleged market power, his monopolization claim would still fail  
5 because he has not alleged actionable exclusionary conduct. *Trinko*, 540 U.S. at 407 (market  
6 power without anticompetitive conduct does not violate the antitrust laws). Slattery's basic claim  
7 is that Apple has not adopted the Microsoft DRM industry standard that would make its products  
8 interconnect or interoperate with competitors' products, and has not licensed its own proprietary  
9 DRM to others. *See* Def. Br., p. 8 at n.4 and p. 10, n.6. In other words, Apple has refused to deal  
10 with its competitors, a claim that falls squarely within *Trinko*.

11 Slattery tries to distinguish *Trinko* by arguing (p. 17) that "Verizon had not taken any  
12 affirmative act to shut out competition." In fact, precisely such an allegation was the linchpin of  
13 plaintiff's claim in that case. In *Trinko*, plaintiff alleged that Verizon had deliberately thwarted  
14 competitors' ability to interconnect with and use Verizon's facilities by delaying their orders or  
15 leaving them unfilled "as part of an anticompetitive scheme to discourage customers from  
16 becoming or remaining customers of competitive LECs, thus impeding competitive LECs' ability  
17 to enter and compete in the market for local telephone service." *Trinko*, 540 U.S. at 404-05. In  
18 short, the complaint alleged that "Verizon denied interconnection services to rivals in order to  
19 limit entry." *Id.* at 407. Slattery's argument that none of this alleged conduct was "affirmative"  
20 is fanciful.

21 Slattery's claim of exclusionary conduct is no different. He alleges that Apple, by the way  
22 it has designed its system using a proprietary DRM (*i.e.*, "rigging" the encoding format allegedly  
23 used to protect the copyright) and by refusing to license its proprietary DRM to competitors,  
24 denied competitors the ability to interconnect their products and services with Apple's. As in  
25 *Trinko*, the pivotal question is whether Apple has an antitrust duty to do so. Slattery articulates  
26 no legal principle that would give rise to such a duty, and *Trinko* teaches that there is none. As  
27 detailed in Apple's opening brief, (pp. 9-13), absent a prior course of dealing that would bring  
28 Apple within the narrow exception articulated by *Aspen Skiing Co. v. Aspen Highland Skiing*

1 *Corp.*, 472 U.S. 585 (1985), *Trinko* recognizes Apple’s right to “exercise [its] own independent  
2 discretion as to parties with whom [it] will deal.” *Trinko*, 540 U.S. at 408, citing *United States v.*  
3 *Colgate & Co.*, 250 U.S. 300 (1919); see also *Covad Communications Co. v BellSouth Corp.*, 374  
4 F.3d 1044, 1049 (11th Cir. 2004) (“*Trinko* now effectively makes the unilateral termination of a  
5 voluntary course of dealing a requirement for a valid refusal-to-deal claim under *Aspen*”).

6 Slattery asserts (p. 20, n.4) that if *Trinko* applies, Apple’s conduct nonetheless would be  
7 unlawful because Apple initially adopted an “open source” unprotected format (called AAC) and  
8 only added a protective DRM when competitors began offering music that could be played on the  
9 iPod. First, as the absence of any citation in his footnote suggests, these allegations are not in the  
10 complaint. In fact, they are contrary to the complaint which alleges that FairPlay DRM was  
11 added to every music file at iTMS and which seeks damages for all consumers from the outset of  
12 iTMS. Complt., ¶¶ 39, 56. In any event, under *Trinko*, Slattery must allege a voluntary course of  
13 dealing between Apple and its competitors, not between Apple and the licensor of the AAC  
14 format that Apple allegedly “rigged.” Because Slattery cannot point to a voluntary, cooperative  
15 arrangement between Apple and its competitors that Apple terminated, Slattery’s allegations do  
16 not state a claim cognizable under *Trinko*.

17 Nor did RealNetworks’ attempt to force dealings with Apple create an obligation on  
18 Apple’s part to continue those dealings. Slattery does not dispute that if RealNetworks hacked  
19 into Apple’s software code and inserted a “corresponding code” into its song files, it would not  
20 create the type of voluntary course of dealing that is a necessary predicate to refusal-to-deal  
21 liability under *Trinko*. He disputes only the characterization of RealNetworks as a “hacker.” But  
22 his claim fares no better using the exact words of the complaint. According to the complaint  
23 (¶ 47), RealNetworks “managed to independently analyze the firmware” in the iPod, “was able to  
24 discern” Apple’s software code, and “armed with this knowledge” was able to “insert a  
25 “corresponding code” into its own song files. Whether described in those euphemistic terms or  
26 called “hacking,” that conduct is not the type of voluntary dealing required by the Supreme Court  
27 as the predicate for liability under *Trinko*. Apple’s efforts to prevent competitors from  
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1 “discerning” its software code and circumventing it does not constitute termination of a voluntary  
2 course of dealing.<sup>6</sup>

3 There is another independent reason why Slattery’s allegations are insufficient to state a  
4 claim for refusal to deal under *Trinko*. The “more fundamental” difference between *Aspen*  
5 *Skiing*, in which liability was found, and *Trinko*, in which the claim was dismissed under Rule  
6 12(b)(6), was that the defendant in *Aspen Skiing* refused to provide its competitor what it was  
7 selling to the public at retail, while in *Trinko* the interconnection services that Verizon withheld  
8 from competitors were not available to the public. *See* Def. Br., pp. 11-12. Slattery cannot meet  
9 this requirement. He does not allege that Apple is licensing its FairPlay DRM to the public, so  
10 under *Trinko* his claim that Apple is refusing to license it to competitors does not state an antitrust  
11 violation. With no response to this point, Slattery ignores it.

12 For these reasons, Counts III and IV must be dismissed.

13 **IV. SLATTERY CANNOT PURSUE A STAND-ALONE MONOPOLY LEVERAGING**  
14 **CLAIM. HIS ATTEMPTED MONOPOLIZATION CLAIM FAILS AS A**  
15 **MATTER OF LAW.**

16 Slattery’s treatment of his “monopoly leveraging” is an exercise in diversion. Apple’s  
17 position, stated in its opening brief (pp. 14-15), is that the Ninth Circuit and the Supreme Court  
18 do not recognize a stand-alone claim for monopoly leveraging; that a plaintiff must allege the  
19 elements of attempted monopolization; and that Slattery had failed to do so. In his opposition,  
20 Slattery accuses Apple of the “most blatant misstatement of the law,” arguing that the Ninth  
21 Circuit had rejected monopoly leveraging as an independent theory but permitted claims for  
22 attempted monopolization. That, however, is exactly what Apple said in its opening brief. So in  
23 4 1/2 pages of diversionary rhetoric, Slattery ends up only conceding our point: that under the

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26 <sup>6</sup> Slattery’s two cases—*In re IBM Peripheral EDP Devices Antitrust Litigation*, 481 F. Supp.  
27 965, 968 (N.D. Cal. 1979), *aff’d sub nom. Transamerica Comp. Co., Inc. v. IBM*, 698 F.2d 1377  
28 (9th Cir. 1988) and *C.R. Bard, Inc. v. M3 Sys., Inc.*, 157 F.3d 1340, 1347, 1382 (Fed. Cir.  
1998)—do not change the analysis. Both predate *Trinko* and defendants in both cases had prior  
voluntary courses of dealing which were terminated.

1 decisions of the Supreme Court and the Ninth Circuit, no claim of monopoly leveraging exists  
2 separate from the required elements of monopolization or attempted monopolization.

3 What Slattery fails to address is Apple's showing that his complaint does not sufficiently  
4 allege the elements of attempted monopolization. The anticompetitive conduct necessary to  
5 support an attempted monopolization claim cannot be conduct that otherwise passes muster under  
6 the Sherman Act. As shown in Apple's opening brief (pp. 14-15), Slattery fails to allege any  
7 cognizable anticompetitive conduct or the other requisite elements of an attempt claim. Apart  
8 from saying he disagrees (Opp., p. 24), Slattery offers no argument on this point. Accordingly,  
9 Counts V and VI must be dismissed.

10 **V. SLATTERY'S RELATED STATE LAW CLAIMS SHOULD ALSO BE**  
11 **DISMISSED ON THE MERITS.**

12 Slattery effectively abandons (p. 24) his Cartwright Act claims based on alleged unilateral  
13 monopoly conduct. Because the Cartwright Act has no section 2 analog, unilateral conduct  
14 claims are not cognizable under the Cartwright Act. *See Dimidowich v. Bell & Howard*, 803 F.2d  
15 1473, 1478 (9th Cir. 1988). Slattery does not challenge this conclusion.

16 Although the Cartwright Act encompasses tying claims, Slattery's state law tying  
17 allegations fail for the same reasons as their Sherman Act counterparts, *see infra*, pp. 2-8.

18 Slattery's common law monopoly claim and unfair competition law claim must likewise  
19 be dismissed because Slattery acknowledges that those claims depend upon the same theories as  
20 the federal claims which, as shown above, fail as a matter of law.

21 Finally, Slattery does not dispute that, as Judge Patel held in another case brought by his  
22 counsel, *Gerlinger v. Amazon.com, Inc.*, 311 F. Supp.2d 838, 856 (N.D. Cal. 2004), an unjust  
23 enrichment claim "cannot lie where a valid express contract covering the same subject matter  
24 exists between the parties." Nor does he dispute that his purchases created contracts between him  
25 and Apple under the California Commercial Code. He argues (pp. 24-25) instead that those  
26 contracts are invalid and unenforceable because they purportedly violated the federal antitrust  
27 laws. That argument is wrong because the enforceability of fully performed contracts is not  
28 affected by alleged illegality based on antitrust violations. *See Electroglas, Inc. v. Dynatex Corp.*,

1 473 F. Supp. 1167, 1170 (N.D. Cal. 1979) (violation of federal antitrust laws is not a valid  
2 defense to a breach of contract claim to avoid payment for goods received pursuant to contract,  
3 citing *Kelly v. Kosuga*, 358 U.S. 516, 520-21 (1959)).

4 Finally, Slattery conclusorily argues (p. 24) that he can plead inconsistent causes of action  
5 under Rule 8(e)(2), Fed. Rules Civ. Proc. Although he does not elaborate, he evidently means  
6 that he could plead both that he did have a contract with Apple (for purposes of giving him  
7 standing for his antitrust claim) and that he did not have such a contract (for purposes of his  
8 unjust enrichment claim). His complaint does not make the latter allegation. But if it did, it  
9 would be improper for reasons stated by Judge Patel in *Gerlinger*, a decision that he ignores:

10 Even though Rule 8(e)(2) of the Federal Rules of Civil Procedure allows a party to state  
11 multiple, even inconsistent claims, it does not alter a substantive right between the parties  
12 and accordingly does not allow a plaintiff invoking state law to [assert] an unjust  
13 enrichment claim while also alleging an express contract. [citations omitted]. As a result,  
14 plaintiff cannot assert his unjust enrichment claim in the alternative.

15 *Gerlinger*, 311 F.Supp.2d at 856. As in *Gerlinger*, Slattery alleges that he bought an iPod from  
16 Apple and obtained music from Apple's online music store, conduct that creates express contracts  
17 between him and Apple. That allegation is implicitly incorporated in the unjust enrichment  
18 claim. If he now pleads that he did not buy an iPod from Apple, he would be giving up his claim  
19 for standing to assert an antitrust claim. And if he did not buy an iPod from Apple, he would  
20 have no basis for an unjust enrichment claim either.

21 Thus, Counts VII through X must be dismissed.  
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1 **VI. CONCLUSION.**

2 For these reasons and those set forth in Apple's opening brief, the motion to dismiss the  
3 complaint should be granted.

4  
5 Dated: March 7, 2005

JONES DAY

6  
7 By: /s/ Robert Mittelstaedt *ARS*

8 Robert A. Mittelstaedt  
9 Counsel for Defendant  
APPLE COMPUTER, INC.

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