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13 UNITED STATES DISTRICT COURT
 14 NORTHERN DISTRICT OF CALIFORNIA
 15 SAN JOSE DIVISION

16 THE APPLE IPOD ITUNES ANTI-TRUST) Lead Case No. C-05-00037-JW(RS)
 17 LITIGATION)
) CLASS ACTION

18)
 19 This Document Relates To:) NOTICE OF MOTION AND MOTION TO
) MODIFY INJUNCTIVE RELIEF CLASS
 20 ALL ACTIONS.) DEFINITION TO INCLUDE iTMS
) PURCHASERS

21 Judge: Hon. James Ware
 22 Date: October 5, 2009
 23 Time: 9:00 a.m.
 24 Ctrm: 8 – 4th Floor

28

1 TO: ALL PARTIES AND THEIR ATTORNEYS OF RECORD

2 PLEASE TAKE NOTICE that on October 5, 2009 at 9:00 a.m., in Courtroom 8, 4th Floor of
3 the above-entitled Court, located at 280 South 1st Street, San Jose, California, Plaintiffs Somtai Troy
4 Charoensak, Mariana Rosen, and Melanie Tucker (collectively “Plaintiffs”), will, and hereby do,
5 respectfully move the Court to modify the injunctive relief class definition to include iTMS
6 purchasers.

7 **I. INTRODUCTION**

8 The Court in its Order of July 17, 2009 (Dkt. No. 228) has correctly pointed out that the
9 injunctive relief class of purchasers of iPods directly from Apple certified by order dated December
10 22, 2008 (Dkt. No. 196) (“Cert. Order”) is somewhat underinclusive, for it does not encompass a
11 second category of customers included in the plaintiff class alleged in the Complaint: purchasers of
12 online digital audio or video files from Apple through its iTunes Music Store (“iTMS”) who have
13 not also purchased an iPod either directly from Apple or at all. *See* Consolidated Complaint for
14 Violations of Sherman Antitrust Act, Clayton Act, Cartwright Act, California Unfair Competition
15 Law, Consumer Legal Remedies Act, and California Common Law of Monopolization, filed April
16 19, 2007 (“Complaint”) (Dkt. No. 107), ¶31. Because Apple’s alleged misconduct effectively limits
17 their choice of portable digital players on which to play their iTMS purchases, these purchasers share
18 with the existing injunctive relief class of iPod purchasers the same interest in: (a) enjoining Apple’s
19 continued anticompetitive use of certain technological restrictions (“Fairplay”) in video files as a
20 means to monopolize or attempt to monopolize the portable player market; and (b) remedying
21 Apple’s past anticompetitive use of Fairplay in audio and video files by “unlocking” purchased files
22 so that they may be played on the purchaser’s portable player of choice. As shown below, all of the
23 Rule 23 prerequisites to certification of an injunctive relief class of iTMS purchasers are satisfied for
24 the same reasons as in the case of the iPod injunctive relief class. The Court should, therefore,
25 modify the definition of the existing injunctive relief class as follows:

26 All persons or entities in the United States (excluding federal, state, and local
27 government entities, Apple, its directors, officers, and members of their families)

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1 who: (a) purchased an iPod from Apple or (b) purchased audio or video files from
2 the iTunes since April 28, 2003.¹

3 *Gen. Telephone Co. of Sw. v. Falcon*, 457 U.S. 147, 160 , 102 S. Ct. 2364 (1982) (“Even after a
4 certification order is entered, the judge remained free to modify it in . . . light of subsequent
5 development in the litigation.”).

6 **II. SUMMARY OF THE iTMS INJUNCTIVE RELIEF CLASS CLAIMS**

7 Plaintiffs contend that Apple unlawfully rendered the digital audio and video files sold
8 through iTunes incompatible with portable players other than its own iPod player, so as to use its
9 massive market power in the former market to monopolize or attempt to monopolize the latter
10 market. Complaint, ¶¶ 21-22, 24.² “Consumers, locked into Apple’s monopoly in the Online Music
11 market, are subject to . . . unannounced, unilateral, and one-sided changes to their rights to listen to
12 the music they purchased from Apple by Apple’s enormous market power.” *Id.*, ¶55. Plaintiffs have
13 accordingly alleged monopolization and attempted monopolization claims under Section 2 of the
14 federal Sherman Act (Counts Two and Three) and under California’s Common Law (Count Seven),
15 and have challenged Apple’s conduct under California’s Unfair Competition Law (Count Five) and
16 California’s Consumer Legal Remedies Act (Count Six).

17 The Court has certified an injunctive relief class of purchasers of iPods directly from Apple,
18 regardless of whether they purchased iTunes files. (Dkt. No. 198) Although the Rule 23(b)(2)
19 injunctive relief class likely encompasses most of the customers adversely affected by Apple’s
20 alleged misconduct, iTunes purchasers who did not purchase an iPod are similarly constrained in their
21 choice of portable players by Apple’s actions to defeat interoperability. If Apple’s conduct is proven
22 unlawful, such iTunes purchasers would be as entitled as iPod purchasers to injunctive relief in the
23 form of: (a) removal of Fairplay from their past purchases of iTunes audio and video files; and (b) an

24
25 ¹ This definition is the same as defined in the Complaint and the Court’s December 22, 2008
Certification Order. Cert. Order at 13; Complaint, ¶31.

26 ² Plaintiffs’ Section 1 rule of reason tying claim is currently before the Court on Apple’s Rule
27 12(c) motion for judgment on the pleadings. Should the Court deny that motion, Plaintiffs intend to
28 seek class-wide relief for that claim as well.

1 order prohibiting Apple from imposing Fairplay or other technological restrictions impeding
2 interoperability on future purchases of iTMS audio and video files.³

3 **III. LEGAL ARGUMENT**

4 The decision to certify a class is committed to the discretion of the court within the
5 guidelines of Rule 23. Cert. Order at 3. Plaintiffs bear the burden of establishing that each of the
6 four requirements of Rule 23(a) and at least one of the requirements of Rule 23(b) have been met.
7 *Id.* at 3-4.

8 **A. The Requirements of Rule 23(a) Are Met**

9 **1. Numerosity**

10 Numerosity is satisfied if the proposed class is such that joinder of all members is
11 “impracticable.” *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998). Apple has sold
12 over 5 billion digital music files from April 28, 2003 to present. *See* Press Release, Apple, *iTunes*
13 *Store Tops Over Five Billion Songs Sold* (June 19, 2008) (available at
14 <http://www.apple.com/library/2008/06/19itunes.html>). In February 2008, Apple announced that it
15 had over 50 million iTMS customers. *See* Press Release, Apple, *Apple iTunes Now Number Two*
16 *Music Retailer in the U.S.* (Feb. 26, 2008) (available at [http://apple.com/pr/library/2008/02/](http://apple.com/pr/library/2008/02/26itunes.html)
17 [26itunes.html](http://apple.com/pr/library/2008/02/26itunes.html)). As with the iPod injunctive relief class, here there is no basis for Apple to contest, or
18 for the Court to doubt, numerosity. Cert. Order at 5.

19 **2. Commonality**

20 Recognizing that the commonality requirement is to be “construed permissively,” the Court
21 in certifying the iPod injunctive relief class found the requirement satisfied as to Plaintiffs’
22 monopoly and attempted monopoly claims because for each claim Plaintiff will be required to prove
23 the existence of the relevant markets, Apple’s willful acquisition of maintenance of monopoly power
24 within those markets and anticompetitive injury – all questions surrounding Apple’s behavior

26 ³ While Apple is currently selling iTMS music files without Fairplay, if Plaintiffs succeed in
27 this litigation they will seek injunctive relief prohibiting Apple from once again using FairPlay or
28 other technological restrictions to limit iTMS interoperability with non-iPod portable devices.

1 deemed “undoubtedly common to the class.” Cert. Order at 5, 7-8. The proposed iTMS injunctive
2 relief class raises the same common issues of market definition, market power and antitrust injury.

3 **3. Typicality**

4 Typicality requires that the claims and defenses of the representative parties be “reasonably
5 co-extensive with those of absent class members; they need not be substantially identical.”
6 Cert. Order at 8 (quoting *Hanlon*, 150 F.3d at 1020). Here, again, typicality is as readily satisfied as
7 in the iPod injunctive relief class, because all three named Plaintiffs purchased online digital audio
8 and video files directly from Apple.⁴ Ex. 1, Deposition of Somtai Charoensak, taken January 12,
9 2007 at 22:1-3; Ex. 2, Deposition of Mariana Rosen, taken January 24, 2007 at 27:14-15; Ex. 3,
10 Deposition of Melanie Tucker, taken October 26, 2007 at 77:24-78:10. In no way is the iTMS
11 injunctive relief claim premised on conduct unique to any particular Plaintiff, and all have been
12 injured by the same alleged course of conduct by Apple in imposing the challenged technological
13 restrictions on the iTMS purchases. Cert. Order at 8-9.

14 **4. Adequate Representation**

15 In certifying the iPod injunctive relief class, the Court found that Plaintiffs had retained
16 competent counsel, participated extensively in the discovery process, and lacked any conflict of
17 interest with absent class members. Cert. Order at 9. These requirements are necessarily satisfied as
18 to the iTMS injunctive relief class as well, involving as they do the same class representatives and
19 the same class counsel.

20 **B. The Requirements of Rule 23(b)(2) Are Met**

21 As with the iPod injunctive relief class, Plaintiffs “seek a determination of Defendant’s
22 liability, followed by injunctive relief to prohibit [Apple] from restricting the interoperability
23 between iTMS media purchases and non-iPod portable digital media players.” Cert. Order at 10;
24 Complaint, ¶58. As the Court previously recognized, assuming that Plaintiffs are able to establish

26 ⁴ All references to “Ex.” and “Exs.” are to the Declaration of Thomas R. Merrick in Support of
27 Plaintiffs’ Motion to Modify Injunctive Relief Class Definition to Include iTMS Purchasers, filed
28 concurrently.

1 liability for Apple’s restrictive technology practices, injunctive relief would be appropriate to halt
2 the practices and “unlock” the media already purchased from iTunes so that it may be played on non-
3 iPod portable players. Cert. Order at 10.

4 Furthermore, the Court rejected Apple’s contention that the existence of a money damages
5 class somehow precluded the certification of an injunctive relief class under Rule 23(b)(2), a
6 proposition the Ninth Circuit has similarly repeatedly rebuffed. Cert. Order at 10-11 (citing *Probe v.*
7 *State Teachers’ Retirement Sys.*, 780 F.2d 776, 780 n.3 (9th Cir. 1986); *Molski v. Gleich*, 318 F.3d
8 937, 949-50 (9th Cir. 2003)). Plaintiffs do not assert any money damages claim based on iTunes
9 purchases. Complaint, ¶32 (damages class limited to iPod purchasers).⁵ Plaintiffs’ “first and
10 foremost goal” (Cert. Order at 11) remains bringing an end to Apple’s restrictive technology
11 practices (Complaint, ¶58) – a goal already partially accomplished when Apple in 2009 ceased
12 adding DRM to all iTunes music files. However, Apple continues: (a) to charge iTunes purchasers to
13 remove the DRM from earlier purchased audio files; and (b) to maintain all interoperability
14 restrictions on its current sales of iTunes video files. Further, Apple could at any time re-impose
15 DRM on iTunes music files, or add other technological restrictions limiting interoperability. The
16 need for class-wide injunctive relief from Apple’s anticompetitive technological restrictions remains,
17 and that need extends to those iTunes purchasers who have not purchased an iPod. See §II, Direct
18 Purchaser Plaintiffs’ Memorandum in Response to Court’s July 17, 2009 Order as to Injunctive
19 Relief Sought, filed concurrently.

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27 ⁵ Accordingly, Plaintiffs do not seek any modification the class of direct iPod purchasers
28 certified by the Court under Rule 23(b)(3). Cert. Order at 13.

1 **IV. CONCLUSION**

2 The proposed iTMS injunctive relief class is no less certifiable than the existing iPod
3 injunctive relief class. Plaintiffs' Motion to modify the injunctive relief class definition to include
4 iTMS purchasers who have not purchased an iPod is therefore well-taken, and should be granted.

5 DATED: August 31, 2009

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CERTIFICATE OF SERVICE

I hereby certify that on August 31, 2009, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses denoted on the attached Electronic Mail Notice List, and I hereby certify that I have mailed the foregoing document or paper via the United States Postal Service to the non-CM/ECF participants indicated on the attached Manual Notice List.

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on August 31, 2009.

s/ Thomas R. Merrick
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