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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

THE APPLE IPOD ITUNES ANTI-TRUST LITIGATION This Document Relates To: ALL ACTIONS.	Lead Case No. C-05-00037-JW(RS) CLASS ACTION PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION FOR RECONSIDERATION OF RULE 23(b)(2) CLASS Judge: Hon. James Ware Date: October 5, 2009 Time: 9:00 a.m. Ctrm: 8 – 4th Floor

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Plaintiffs Somtai Troy Charoensak, Mariana Rosen, and Melanie Tucker (collectively "Plaintiffs") respectfully submit this memorandum in opposition to Defendant Apple, Inc.'s ("Apple" or "Defendant") Motion for Reconsideration of Rule 23(b)(2) Class, (Dkt. No. 245) ("Def's Motion").

I. INTRODUCTION

In its July 17, 2009 Order Directing Parties to Submit Further Briefing (Dkt. No. 228) ("Order"), the Court requested additional briefing concerning Plaintiffs' certified injunctive relief Class. Specifically, the Court sought briefing regarding: (1) the intersection of claims being asserted by the direct purchasers in this case and the indirect purchasers in *Somers v. Apple, Inc.*, No. 07-cv-6507 JW (N.D. Cal.); (2) the class definition; and (3) the form of injunctive relief sought. Order at 2-3. Plaintiffs filed a response to the Court's questions (Dkt. No. 238), as well as this motion to modify the injunctive relief class to include purchasers of iTunes Store ("iTMS") files (Dkt. No. 236). Apple filed this motion for reconsideration.

Through this motion Apple asks the Court to decertify the injunctive relief Class. Apple's motion however fails to identify new facts or law or a single individual issue which would necessitate decertification. Instead, Apple reargues contentions already considered by the Court in opposition for class certification and raises several red herrings in an effort to distract the Court from the relevant issues. Importantly, Apple fails to demonstrate either how its voluntary removal of FairPlay from newly purchased iTMS music files defeats Plaintiffs' claim for injunctive relief, or why the Class is not entitled to injunctive relief. For the reasons stated below, Apple's motion for reconsideration of the Court's December 22, 2008 order certifying an injunctive relief class should be denied.

II. LEGAL STANDARD

Any order by the district court which does not terminate the action may be reconsidered under Fed. R. Civ. P. 54(b). "Reconsideration is appropriate if the district court: (1) is presented with newly discovered evidence, (2) committed clear error or the initial decision was manifestly unjust, or (3) if there is an intervening change in controlling law." *School Dist. No. 1J v. AC&S, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993). Similarly, Local Rule 7-9(b) permits reconsideration of a

court's order only if: (1) a material difference in fact or law exists from that which was presented to the court before entry of the original order; (2) there has been an emergence of new material facts or a change of law; or (3) there was a manifest failure by the court to consider material facts or dispositive legal arguments. L.R. 7-9(b). Motions for reconsideration shall not repeat arguments made in conjunction with the Court's original order. L.R. 7-9(c).

III. THE INJUNCTIVE RELIEF PLAINTIFFS SEEK IS NOT MOOTED BY APPLE'S VOLUNTARY REMOVAL OF DRM FROM NEWLY PURCHASED ITMS MUSIC FILES

Apple suggests that its removal of FairPlay from newly-purchased iTMS music files since the Court's certification of the injunctive relief Class is a "new" fact providing basis for reconsideration. *See* Def's Motion at 7. However, Apple fails to demonstrate that this "new" fact moots Plaintiffs' claim for injunctive relief. Although Plaintiffs are not required at this stage to identify all aspects of relief they will seek if they prevail on the merits (*see Shook v. Bd. of Cty. Comm'rs of Cty. of El Paso*, 543 F.3d 597, 605-06 (10th Cir. 2008)), Plaintiffs seek a broader range of injunctive relief than simply having Apple remove FairPlay on a going-forward basis. *See* Def's Motion at 7 (stating that Plaintiffs only "asserted that injunctive relief was proper to force Apple to stop selling iTS content that cannot be played on competing players"). In fact, in their motion for class certification, Plaintiffs sought to enjoin Apple from: (a) rendering online digital audio and video recordings sold through the iTMS inoperable with portable players other than iPod; and (b) to "unlock" the iTMS recordings previously purchased so that they may be played on portable players other than iPods.[1] Class Cert. Motion at 10. Neither form of requested injunctive relief is mooted by Apple now selling DRM-free music.[2]

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[1] *See* Notice of Motion and Motion for Class Certification and Appointment of Class Counsel, (Dkt. No. 165), ("Class Cert. Motion").

[2] While Plaintiffs have identified viable injunctive relief should they prevail on the merits, this is certainly not the only feasible injunctive relief. Indeed, courts are encouraged to be creative in cases such as this which seek to create interoperability among products. *See* Philip J. Weiser, *Regulating Interoperability: Lessons from AT&T, Microsoft, and Beyond*, 76 Antitrust L.J. 271, 293 (2009) ("[I]t is incumbent on enforcers and courts to utilize increased creativity as to what institutional strategies can enable behavioral remedies to succeed."); *see also McCarthy v. Recordex*

While Apple now sells iTMS music files without FairPlay, ***billions*** of previously purchased music files still contain the restriction, making them unusable for direct playback on any other portable media device than an iPod. *See* Press Release, Apple, *iTunes Store Tops Over Five Billion Songs Sold* (Jun. 19, 2008) (available at http://www.apple.com/pr/library/2008/06/19itunes.html). Consumers who have purchased these files are still required to purchase an iPod for direct playback on a portable digital media player. Additionally, if their current iPod breaks or is lost, they are still forced to purchase another iPod to play their previously-purchased files because iPods are still the only portable digital media players which can directly play iTMS FairPlay-encrypted files.[3] CC, ¶44. The only option these Class members currently have is to pay Apple an additional $0.30 a song or 30% of the purchase price of the album. *See* Press Release, Apple, *Changes Coming to the iTunes Store* (Jan. 6, 2009) (available at http://www.apple.com/pr/library/2009/01/06itunes.html). These fees are in addition to the $0.99 per song and $9.99 per album they already paid Apple in the first place. *See* Press Release, Apple, *Apple Launches the iTunes Music Store*, (April 28, 2003) (available at http://www.apple.com/pr/library/2003/apr/28musicstore.html). Even Apple admits this is a steep price to pay. *See* Def's Motion at 13.

Additionally, all video files sold through iTMS remain encrypted and are thus, inoperable with competing players. To the extent a purchaser may be able to play newly purchased iTMS music files on a competing portable player, he or she is still forced to use an iPod for playback of all iTMS video files or previously purchased iTMS music files. And, again, this restriction still exists on ***billions*** of songs.

Moreover, even if Apple could demonstrate that it has ceased acting anticompetitively entirely, it could not meet the heavy burden necessary to demonstrate that its voluntary cessation of allegedly anticompetitive conduct will not recur in the future. *See United States v. W.T. Grant Co.*, *Serv., Inc.*, 80 F.3d 842, 856 (3d Cir. 1996) ("injunctive remedy [under Clayton Act] is a more flexible and adaptable tool for enforcing the antitrust laws than the damage remedy").

[3] Consolidated Complaint for Violations of Sherman Antitrust Act, Clayton Act, Cartwright Act, California Unfair Competition Law, Consumer Legal Remedies Act, and California Common Law of Monopolization, (Dkt. No. 107), ("CC").

345 U.S. 629, 633, 73 S. Ct. 894 (1953) (""'the case may nevertheless be moot if the defendant can demonstrate that 'there is no reasonable expectation that the wrong will be repeated." The burden is a heavy one."); *see also United States v. Oregon State Med. Soc'y*, 343 U.S. 326, 333, 72 S. Ct. 690 (1952) ("When defendants are shown to have settled into a continuing practice . . . violative of antitrust laws, courts will not assume that it has been abandoned without clear proof."). The language in the current Terms of Service permits Apple to "impose new or additional rules, policies, terms, or conditions" at any time, there is no guarantee that Apple will not impose a similar restriction in the future should it believe it is in its competitive advantage to do so. *See* iTMS Terms of Service, ¶21, available at http://www.apple.com/legal/itunes/us/terms.html#SERVICE (last visited September 13, 2009). Without injunctive relief, Apple is free to impose similar technological restrictions in the future.

Apple continues to use FairPlay on preexisting iTMS music files and all iTMS video files. It has also continued its practice of updating its software to maintain the "lock" between iTMS files and iPods.[4] *See, e.g.*, Ian Paul, *iTunes 9 Breaks Palm Pre Sync (Again)*, (Sep. 10, 2009) (available at http://www.pcworld.com/article/171729/itunes_9_breaks_palm_pre_sync_again.html). Apple's voluntary removal of FairPlay from some files is simply not sufficient to cure its anticompetitive practices. *See, e.g.*, CC, ¶¶51-55; *see also Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1176 n.16 (9th Cir. 2007) (injunctive relief available even after conduct ended "because Amazon.com has not established 'that the allegedly wrongful behavior cannot reasonably be expected to recur'"); *see also Gen. Cinema Corp. v. Vista Distrib. Co., Inc.*, 532 F. Supp. 1244, 1275 n.13 (C.D. Cal. 1982) (sufficient threat of injury demonstrated where Defendant vehemently denied that its past conduct

[4] Plaintiffs are conducting discovery now on Apple's updates. The fact that merits discovery is continuing reveals the impropriety of this motion. *See Labrie v. UPS Supply Chain Solutions, Inc.*, No. C08-3182 PJH, 2009 WL 723599, at *4-*5 (N.D. Cal. Mar. 18, 2009) (reconsideration of certified class is improper before merits discovery).

was anticompetitive despite Defendant's current cessation of the practice); Response to July 17, 2009 Order[5]; July 17, 2009 Order, at 3-4.

Class members remain "locked-in" to using an iPod for direct playback of their previously purchased iTMS music files and all video files and thus, injunctive relief remains necessary and appropriate.

IV. CERTIFICATION OF THE RULE 23(b)(2) CLASS WAS PROPER

Apple also raises several arguments that the Court has already considered in the briefing regarding certification of the injunctive relief Class. Without any new law to cite, Apple seems to suggest that the Court did not adequately consider its arguments in its opposition to class certification. There is simply no reason to revisit them. However, considered again, these arguments fail once more. Moreover, Apple's contentions that Plaintiffs' requested injunctive relief amounts to damages and the burden imposed on Apple by the injunctive relief is too great are merits contentions considered and rejected previously by the Court. Finally, Plaintiffs have adequately demonstrated that the Class of iPod purchasers and iTMS purchaser (as newly defined) are entitled to injunctive relief.[6]

A. Plaintiffs' Request for Both Monetary and Injunctive Relief Does Not Defeat Certification of a 23(b)(2) Class

Citing the same case law as in its opposition to class certification, Apple reargues that certification of a Rule 23(b)(2) class is inappropriate because Plaintiffs also allege monetary damages. Def's Motion at 8-9; *see* Apple's Memorandum in Opposition to Motion for Class Certification, (Dkt. No. 181), at 24. Not only is this improper on a motion for reconsideration (*see* L.R. 7-9(c)), it is an insufficient basis to defeat class certification under Rule 23(b)(2). *Linney v. Cellular Alaska P'ship*, 151 F.3d 1234, 1240 n.3 (9th Cir. 1998) (holding that "'class actions

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[5] Direct Purchaser Plaintiffs' Memorandum in Response to Court's July 17, 2009 Order as to Injunctive Relief Sought, (Dkt. No. 238), ("Response to July 17, 2009 Order").

[6] The injunctive relief Class as defined in Plaintiffs' motion to modify is defined as: All persons or entities in the United States (excluding federal, state, and local government entities, Apple, its directors, officers, and members of their families) who: (a) purchased an iPod from Apple or (b) purchased audio or video files from the iTMS since April 28, 2003. (Dkt. No. 236).

certified under Rule 23(b)(2) are not limited to actions requesting only injunctive relief or declaratory relief, but may include cases that also seek monetary damages'") (quoting *Probe v. Teachers' Ret. Sys.*, 780 F.2d 776, 780 (9th Cir. 1986)). Indeed, courts routinely certify injunctive relief classes where monetary damages are also alleged. *See, e.g.*, *In re NASDAQ Market-Makers Antitrust Litig.*, 169 F.R.D. 493, 517 (S.D.N.Y. 1996) (pursuit of antitrust damages under the Sherman Act alone is insufficient to defeat certification of Rule 23(b)(2)); *see also Daly v. Harris*, 209 F.R.D. 180, 200 (D. Haw. 2002) ("punitive and treble damages do not render the monetary component predominant").

Certification under Rule 23(b)(2) is unsuitable only when "the appropriate final relief relates exclusively or predominately to money damages." Fed. R. Civ. P. 23, Adv. Comm. Notes on 1966 Amend. The Ninth Circuit has refused to adopt a bright-line test to determine predominance because such a rule "would nullify the discretion vested in the district courts through Rule 23." *Molski v. Gleich*, 318 F.3d 937, 950 (9th Cir. 2003). Instead, the Ninth Circuit has stated that certification of a 23(b)(2) class remains proper even in the absence of monetary relief, where "'reasonable plaintiffs would bring the suit to obtain'" injunctive relief, and such injunctive relief "'would be both necessary and appropriate [if] the plaintiffs . . . succeed on the merits.'" *Dukes v. Wal-Mart, Inc.*, 509 F.3d 1168, 1187-88 (9th Cir. 2007) (quoting *Molski*, 318 F.3d at 950 n.15). This is a fact specific inquiry.[7] *Molski*, 318 F.3d at 950.

Here, if Plaintiffs succeed on the merits, the injunctive relief sought is necessary. Plaintiffs' injunctive relief Class as modified consists of both iPod purchases and purchasers of iTMS files.

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[7] Both *Molski* and *Zinser, v. Accufix Research Inst., Inc.*, 253 F.3d 1180 (9th Cir. 2001), cited by Apple, actually support Plaintiffs' position. In *Molski*, the court affirmed certification of a 23(b)(2) class finding that injunctive relief was predominant because defendant "acted in a manner generally applicable to the class." *Molski*, 318 F.3d at 950. The same is true here; Apple imposed the identical technological restriction on all iPods and iTMS purchases. CC, ¶¶41, 42, 74. In *Zinser*, the court affirmed denial of certification of a 23(b)(2) class for medical monitoring where plaintiffs sought a reserve fund for past and future damages and compensation for future medical treatment, as well as research into alternative methods of treatment for plaintiffs. *Zinser*, 253 F.3d at 1196. The court found that this research was merely incidental to damages. *Id.* By contrast here, Plaintiffs seek removal of the anticompetitive conduct that caused their injury and not merely inquiry into how plaintiffs can be remedied. CC, Prayer for Relief.

Plaintiffs allege that Apple engaged in anticompetitive conduct by encrypting iTMS files with FairPlay in order to restrict consumer choice in the purchase of portable digital media players. CC, ¶¶41, 42. Plaintiffs allege further that Apple continues to issue software updates that foreclose competition in the markets for portable digital media players and downloaded audio and video files. *Id.*, ¶¶51-55. If Plaintiffs are successful in proving that this conduct is in fact anticompetitive and illegal, injunctive relief is necessary to remedy Apple's current use of FairPlay on video files and previously purchased music files, imposition of similar technological restrictions in the future, and release of software updates intended to maintain the "lock."

Additionally, Apple's anticompetitive conduct is ongoing such that, even in the absence of monetary recovery, a reasonable purchaser of an iPod or iTMS files would bring this suit to enjoin Apple. *See* Def's Motion at 8. Apple concedes that the requested injunctive relief, removing FairPlay from pre-existing music files, is extremely valuable to Class members. *Id.* at 13. Without such relief, class members are forced to pay additional fees to Apple for removal of FairPlay from these music files and have no option with regard to their video files. The injunctive relief is indeed valuable and thus, reasonable Plaintiffs would seek such relief.

The same was true in *Bautista-Perez v. Holder*, No. C 07-4192 TEH, 2009 WL 2031759 (N.D. Cal. Jul. 9, 2009). There Plaintiffs alleged the Department of Justice and Homeland Security charged fees in excess of the statutory maximum for registration for "Temporary Protected Status." *Id.* at *1. Plaintiffs sought injunctive relief to end the overcharge practice and monetary relief in the amount of the excessive fees. *Id.* The court found certification of a 23(b)(2) class appropriate despite the claim for monetary damages because injunctive relief would be necessary to prevent Defendant from illegally collecting excessive fees in the future. *Id.* at *11. The court also found that even if monetary relief were not available, a reasonable Plaintiff would bring a claim for injunctive relief because the alleged illegal conduct was ongoing. *Id.*

Similarly, in *NASDAQ*, Plaintiffs alleged Defendants, market-makers on the NASDAQ exchange, acted anticompetitively to fix spreads on class members' securities. *NASDAQ*, 169 F.R.D. at 502. Plaintiffs alleged further that Defendants continued to act anticompetitively and thus, if not enjoined would continue to injure members of the class. *Id.* at 516. The court certified an injunctive

relief class despite Plaintiffs' claim for monetary damages, and found that in the event Plaintiffs were able to prove Defendant violated the Sherman Act, injunctive relief would "be necessary to ensure that [class members] are not harmed in the future by Defendants' anticompetitive conduct." *Id.* at 517.

As in *Bautista* and *NASDAQ*, Plaintiffs here have demonstrated that, if they succeed on the merits, injunctive relief will be necessary and appropriate because Apple's anticompetitive conduct of imposing FairPlay on previously purchased music files and all video files is continuing. Without injunctive relief, injury to Plaintiffs and the Class will continue. Moreover, Plaintiffs have demonstrated that in the absence of monetary recovery, reasonable Plaintiffs would file suit for injunctive relief because without court intervention, purchasers are only able to remove FairPlay from previously-purchased music files at a substantial monetary cost and their video files remain locked.

Apple also suggests that Plaintiffs are attempting to "shoehorn" their damages action into the Rule 23(b)(2) framework. Def's Motion at 8-9 (citing *Bolin v. Sears, Roebuck & Co.*, 231 F.3d 970, 976 (5th Cir. 2000)). However *Bolin* is inapposite. In *Bolin*, the district court certified a 23(b)(2) class of bankrupt debtors alleging illegal post-bankruptcy collection practices by Sears under several causes of action. *Id.* at 972. The Fifth Circuit found that where monetary damages and injunctive relief for each cause of action are intermingled, certification under 23(b)(2) only is inappropriate because it denies class members notice and the opportunity to opt-out afforded by certification under 23(b)(3). *Id.* at 976. In holding that certification under 23(b)(2) was an abuse of discretion, the court remanded for determination of whether certification would be appropriate under 23(b)(3) or a "modified class" under both 23(b)(2) and (b)(3). *Id.* at 979. The same concerns do not arise here. [8]

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[8] Moreover, the court in *Bolin* relied heavily on *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402 (5th Cir. 1998) which the Ninth Circuit expressly declined to follow. *See Molski*, 318 F.3d at 949 ("we refuse to adopt the approach set forth in *Allison*"). The *Allison* court adopted a bright-line test requiring all non-incidental damages to be considered predominant for purposes of Rule 23(b)(2). *Allison*, 151 F.3d at 413-15. By contrast, the Ninth Circuit in *Molski* adopted a fact specific inquiry that permits for discretion vested in the district courts by Rule 23. *Molski*, 318 F.3d at 949-50.

A damages Class of iPod purchasers has been certified and that Class will receive notice and the opportunity to opt out. *See* Class Cert. Order, at 13.

Additionally, a 23(b)(2) Class of iPod and iTMS purchasers is particularly suitable given Apple's uniform conduct across the Class. Fed. R. Civ. P. 23(b)(2) ("A class action may be maintained if . . . the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole."); *see also Linney*, 151 F.3d at 1240 n.3 (affirming certification of 23(b)(2) class where Defendant's conduct was uniform to the class). Thus, any injunctive relief would be common to the Class.

Apple's other authority is similarly unhelpful. *See* Def's Motion at 8-9. *Wren v. RGIS Inventory Specialists*, 256 F.R.D. 180 (N.D. Cal. 2009) and *Sepulveda v. Wal-Mart Stores, Inc.*, 237 F.R.D. 229 (C.D. Cal. 2006), both employment cases, involved former and current employees who brought suit seeking recovery of unpaid wages and injunctive relief for violations of federal and state labor laws. *Wren*, 256 F.R.D. at 184-85; *Sepulveda*, 237 F.R.D. at 232. Both courts found that certification under 23(b)(2) was inappropriate because the named Plaintiffs were former employees who did not have standing to obtain injunctive relief. *Wren*, 256 F.R.D. at 211; *Sepulveda*, 237 F.R.D. at 246. "In the employment context, courts routinely deny class certification under Rule 23(b)(2) where the named Plaintiff is a former employee and therefore will not benefit from the requested injunctive relief." *Kurihara v. Best Buy Co., Inc.*, No. C 06-01884 MHP, 2007 WL 2501698, at *8 (N.D. Cal. Aug. 30, 2007). By contrast, here, Class members have purchased an iPod and iTMS files containing FairPlay and thus would be entitled to injunctive relief to remove FairPlay encryption from ***all*** iTMS files.[9] *See* Merrick Decl., Ex. 1 at 22:1-3 (Deposition of Somtai Charoensak, taken January 12, 2007); Merrick Decl., Ex. 2 at 27:14-15 (Deposition of Mariana Rosen, taken January 24, 2007); Merrick Decl., Ex. 3 at 77:24-78:10 (Deposition of Melanie Tucker, taken October 26, 2007). Additionally, as discussed above, Class members would be entitled to

[9] *See* Declaration of Thomas R. Merrick in Support of Plaintiffs' Opposition to Defendant's Motion for Reconsideration of Rule 23(b)(2) Class, filed concurrently ("Merrick Decl.").

injunctive relief to prevent Apple from issuing software updates or imposing restrictions in the future that are intended to restrict consumer choice in portable digital media players.

Plaintiffs need not demonstrate, as Apple contends, that the injunctive relief would benefit every member of the Class. Def's Motion at 8; *see Rodriguez v. Hayes*, No. 08-56156, __ F.3d __ , 2009 WL 2526622, at *13 (9th Cir. Aug. 20, 2009) (23(b)(2) does not require the court "to examine the viability or bases of class members' claims for declaratory and injunctive relief, but only to look at whether class members seek uniform relief from a practice applicable to all of them"); *Walters v. Reno*, 145 F.3d 1032, 1047 (9th Cir. 1998) ("It is sufficient if class members complain of a pattern or practice that is generally applicable to the class as a whole. Even if some class members have not been injured by the challenged practice, a class may nevertheless be appropriate."). Because Apple's anticompetitive conduct is common to the Class as a whole, certification under 23(b)(2) was appropriate.

B. Requiring Apple to Remove FairPlay from Previously Purchased iTMS Music Files Does Not Amount to Damages

Apple contends that because it charges purchasers for the "DRM-free" version of music files they purchased with FairPlay encryption, Class members would be receiving "free" music if FairPlay is removed from these files at no charge. Def's Motion at 7, 9. This argument completely misses the point of this litigation and the purpose of injunctive relief.

In order to obtain injunctive relief, Plaintiffs must first demonstrate a violation of the antitrust laws. *Catlin v. Wash. Energy Co.*, 791 F.2d 1343, 1350 (9th Cir. 1986). Plaintiffs must also demonstrate that Defendant's illegal conduct is continuing. *See Reyn's Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741, 749 (9th Cir. 2006) (allegations of continuing harm and continuing acts required for injunctive relief under Clayton Act). If Plaintiffs are successful on the merits, then the injunctive relief will seek to terminate Defendant's ongoing anticompetitive conduct and to end the continuing or threatened harm. *See In re New Motor Vehicles Canadian Export Antitrust Litig.*, No. MDL 1532, 2006 WL 623591, at *7 (D. Me. Mar. 10, 2006) ("If the Plaintiffs succeed in proving that Defendants' conduct violates the antitrust laws, and that the violation threatened or threatens loss or damages and is likely to continue, then injunctive relief is appropriate, and appropriate to the

class as a whole."); *see also Datagate, Inc. v. Hewlett-Packard Co.*, 941 F.2d 864, 869-70 (9th Cir. 1991) (injunctive relief is appropriate to address a threat of injury to Plaintiff).

Here, Plaintiffs must first prove that Apple's use of FairPlay and software updates are anticompetitive and illegal. CC, ¶¶41, 42, 51-55. If Plaintiffs are successful on the merits, then the injunctive relief will focus on ending Apple's ongoing use of FairPlay on previously purchased iTMS music files and all video files and protecting Class members from injury in the future. This includes complete removal of FairPlay (the anticompetitive conduct) from Class members ***previously purchased*** files. There is no reason why Class members should be required to pay Apple for this relief. *See* Def's Motion at 9. If Plaintiffs are successful on the merits, Apple should be required to cease its anticompetitive conduct entirely, at no additional cost to Plaintiffs and Class members.[10] *See In re Warfarin Sodium Antitrust Litig.*, 214 F.3d 395, 402 (3d Cir. 2000) ("Unless enjoined, [Defendant's] unlawful conduct will continue unchecked and the class will continue to bear the financial brunt of the antitrust violations.").

C. iPod Purchasers, Like iTMS Purchasers, Are Entitled to Injunctive Relief

Apple contends that iPod purchasers are not entitled to injunctive relief because it is speculative whether they would be harmed in the future. Def's Mem. at 10. While Section 4 of the Clayton Act requires proof of loss, Section 16 requires only a threat of loss. *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 109-111, 107 S. Ct. 484 (1986). To be entitled to injunctive relief under Section 16 a Plaintiff need only demonstrate "a significant threat of injury from [a] . . . violation of the antitrust laws. . . ." *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 130, 89 S. Ct. 1562 (1969); *Parks v. Watson*, 716 F.2d 646, 662 (9th Cir. 1983).

Here, an injunctive relief Class made up of both iPod purchasers and iTMS purchasers, can demonstrate a significant threat of injury as a result of Apple's continuing anticompetitive conduct. As discussed above, Apple acts anticompetitively by continuing to impose FairPlay restrictions on

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[10] Plaintiffs do not seek, as a part of the injunctive relief class, reimbursement for previously purchased "upgrades" of iTMS files. *See* Def's Motion at 9.

previously purchased iTMS music files and all video files, and by issuing software updates which restrict consumer choice in portable digital media players. *See* discussion *supra*, §IV.A. Without court intervention Apple is free to continue to impose these restrictions on Plaintiffs requiring continued use of an iPod for direct playback of their existing iTMS purchases. Thus, Plaintiffs, purchasers of both iPods and iTMS files containing FairPlay encryption remain locked into use of an iPod indefinitely until the FairPlay encryption is removed.

Apple contends that Plaintiffs are not entitled to injunctive relief because whether they would purchase an iPod in the future is speculative. Def's Motion at 10. In contrast to *In re Mercedes-Benz Antitrust Litig.*, 213 F.R.D. 180, 186 (D.N.J. 2003), where Plaintiffs sought injunctive relief for a wrong that occurred at the time of purchase of the product, here, Plaintiffs seek injunctive relief for conduct that is ongoing because Plaintiffs own iTMS music files which are still encrypted with FairPlay.[11] Thus, it is not speculative whether Plaintiffs will purchase an iPod in the future because they own FairPlay encrypted music files which cannot be played unless they own an iPod.

Plaintiffs are not required to demonstrate that every iPod owner will benefit from the injunctive relief. Indeed, Rule 23(b)(2) does not require the Court "to examine the viability or bases of class members' claims for declaratory and injunctive relief, but only to look at whether class members seek uniform relief from a practice applicable to all of them. As [the Ninth Circuit has] previously stated, 'it is sufficient to meet the requirements of Rule 23(b)(2) that 'class members complain of a pattern or practice that is generally applicable to the class as a whole.'" *Rodriguez*, 2009 WL 2526622, at *13. Whether each class member would ultimately benefit from the requested relief is irrelevant so long as all Class members seek identical relief from a single practice. *Id.* As discussed above, Plaintiffs have demonstrated that Apple's anticompetitive conduct of imposing

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[11] The same is true for *Janda v. T-Mobile, USA, Inc.*, No. C 05-03729 JSW, 2008 WL 4847116, at *4 (N.D. Cal. Nov. 7, 2008), also cited by Apple. Def's Motion at 10. In *Janda*, plaintiffs sought to enjoin defendant's billing practices for a product they no longer owned. *Id.* Here, Plaintiffs still own the relevant products for which Apple continues to impose its allegedly anticompetitive technological restrictions.

technological restrictions on iTMS files and iPods was common to the Class and any injunctive relief addressing this conduct would be uniform to the Class.

Nor are Plaintiffs required to demonstrate that they are the most effective Class representatives from among those that have suffered loss. Def's Motion at 11. Because injunctive relief does not pose the same threat of multiplicity of suits or duplicative recoveries that a damages claim does, the Court need not consider those dangers in making its determination that Plaintiffs are entitled to injunctive relief. *See Cargill*, 479 U.S. at 111 n.6 ("because standing under §16 raises no threat of multiple suits or duplicative recoveries, some of the factors other than antitrust injury that are appropriate to a determination of standing under §4 are not relevant under §16").

D. Any Cost Imposed by Removal of Apple's Anticompetitive Conduct is Outweighed by the Benefit to the Class

Apple also makes the absurd argument that should Plaintiffs succeed in demonstrating that Apple's conduct is anticompetitive, Apple should not be required to cease acting anticompetitively because it would be too expensive. *See* Def's Motion at 13. Apple suggests that even if it is found to be acting in violation of federal antitrust laws, Plaintiffs and Class members should continue to incur the cost of its illegal conduct.

Citing *Abeyta v. Taos*, 499 F.2d 323, 328 (10th Cir. 1974), Apple argues that the benefit injunctive relief may provide to Class members that requires Apple to provide free upgrades is outweighed by the cost to Apple. Def's Motion at 13. First, this misstates the relief sought. As discussed above, Plaintiffs do not seek "free" upgrades – they seek removal of FairPlay from their video files and previously purchased music files. Plaintiffs also seek to enjoin Apple from imposing similar restrictions in the future and from issuing software updates designed to restrict consumer choice in portable digital media players and foreclose competition. Class Cert. Motion at 10. The fact that Apple currently charges purchasers an additional fee to obtain files free from Apple's anticompetitive conduct more clearly demonstrates the need for relief and certainly does not support allowing Apple to continue its illegal conduct.

Additionally, *Abeyta* is distinguishable. In *Abeyta*, Plaintiff, a former police officer, filed suit against the city seeking reinstatement and back wages. *Abeyta*, 499 F.2d at 325. After being

discharged by the police chief, Plaintiff appealed, the town council held a hearing and subsequently voted in favor of termination. *Id.* Plaintiff contended that the hearing did not afford him due process because the voting process was improperly conducted. *Id.* at 328. In affirming the trial court's holding that, even though the vote was procedurally improper, equitable relief was still inappropriate, the court held that equitable relief in the form of reinstatement and back wages would impose a significant burden on the city "whose actions were in good faith." *Id.*

The same is not true here. If Plaintiffs succeed on the merits in demonstrating that Apple acted anticompetitively, it cannot also be said that Apple acted in good faith. In contrast to the city's unintentional procedural mistake, Plaintiffs allege that Apple's conduct is intentional and is designed to restrict consumer choice in portable digital media players, foreclose competition, and obtain and maintain monopoly power. Thus, any burden of imposing equitable relief would squarely fall on Apple, not customers who have already paid Apple for their downloads.

Apple also contends that even if Plaintiffs can demonstrate at this stage that the injunctive relief is appropriate, which they have, Plaintiffs are still required to demonstrate the injunctive relief would have an effect on the price of iPods. Def's Motion at 13-14. Apple argues that Plaintiffs cannot do this because they have not proposed a method susceptible to common proof. *Id.* This is an incorrect statement of the law. Under Section 16 of the Clayton Act, Plaintiffs are only required to demonstrate injury as a result of Apple's antitrust violation. *See* 15 U.S.C. §26 ("Any person . . . shall be entitled to sue for and have injunctive relief . . . against threatened loss or damage by a violation of the antitrust laws . . . ."). If Plaintiffs are able to prove their choice in portable digital media players was restricted because of Apple's use of FairPlay on iTMS files, they will be entitled to injunctive relief. Moreover, at the class certification stage, Plaintiffs have demonstrated through their expert that methods common to the Class can be used to demonstrate injury on a classwide basis.[12] *See* Class Cert. Sweeney Decl., Ex. 1 at 34-47.

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[12] *See* Declaration of Bonny E. Sweeney in Support of Plaintiffs' Motion for Class Certification and Appointment of Class Counsel, (Dkt. No. 166), ("Class Cert. Sweeney Decl.").

Moreover, if Apple genuinely believed a common method was not available to demonstrate injury to the Class, it should have raised it in its opposition to Plaintiffs' motion for class certification. *See* L.R. 7-9(c). To the extent Apple previously raised this argument, the Court considered it and rejected it. Apple presents no new facts or law and thus, presentation of this argument here is entirely improper.

E. The Certified Class Properly Includes iTMS Video Purchasers

The injunctive relief Class appropriately includes purchasers of iTMS video files. As discussed above and as alleged in the Complaint, all video files purchased on iTMS are encrypted with the same FairPlay restriction. CC, ¶24. This conduct is generally applicable across the Class and thus, injunctive relief is particularly appropriate. *See Rodriguez*, 2009 WL 2526622, at *13 (requirements of 23(b)(2) met where Plaintiffs complain of a pattern or practice that is generally applicable to the class as a whole). Indeed, the very practice complained of with regard to iTMS music files, application of FairPlay restrictions, is the same practice complained of with regard to iTMS video files. CC, ¶24. Any injunctive relief would be uniformly applied to any Class member who purchased video files. It is not necessary that all Class members would be entitled to this relief. *Rodriguez*, 2009 WL 2526622, at *13.

V. CONCLUSION

For the reasons stated above, Defendant's Motion for Reconsideration of Rule 23(b)(2) Class should be denied.

DATED: September 14, 2009

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CERTIFICATE OF SERVICE

I hereby certify that on September 14, 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 September 14, 2009.

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