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 APPLE INC.

9
 10 UNITED STATES DISTRICT COURT
 11 NORTHERN DISTRICT OF CALIFORNIA
 12 SAN JOSE DIVISION

13 **THE APPLE IPOD iTUNES ANTI-**
 14 **TRUST LITIGATION**

Case No. C 05 00037 JW (HRL)
C 06-04457 JW (HRL)

**APPLE'S REPLY IN SUPPORT OF
 MOTION TO DISMISS OR,
 ALTERNATIVELY, FOR SUMMARY
 JUDGMENT**

Date: May 10, 2010
 Time: 9:00 a.m.
 Courtroom: 8, 4th Floor

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1 **INTRODUCTION**

2 In the wake of this Court’s prior orders, plaintiffs are reduced to arguing that the antitrust
3 laws prohibit Apple from updating its anti-piracy software to stop hackers. Plaintiffs’ argument is
4 insufficient as a matter of law and foreclosed by indisputable facts.

5 **Apple’s motion to dismiss:** It is not an antitrust violation for a company to adhere to its
6 lawful decision to use proprietary anti-piracy software. For this reason, plaintiffs’ claim fails as a
7 matter of law under Rule 12(b)(6). Plaintiffs argue in essence that while *Foremost Pro* permits
8 Apple to use proprietary software even if the result is that Apple’s products worked better
9 together than with competitors’ products, that case prohibits Apple from doing anything to
10 maintain or restore that software’s integrity. Nothing in *Foremost Pro* supports that illogical
11 interpretation. Just as it was lawful for Apple to adopt its own software, it was also lawful for
12 Apple to repair and continue to use that software.

13 **Apple’s motion for summary judgment:** In any event, the undisputed facts show that
14 plaintiffs’ claim is invalid. As plaintiffs concede, Apple was contractually obligated to remedy
15 security breaches by hacks that stripped content protection, and the software updates at issue here
16 were made to ensure compliance with this requirement. If Apple did not stop those hacks, its
17 ability to continue offering music to consumers would be jeopardized, depriving consumers of
18 what plaintiffs concede is the “huge benefit” of obtaining music on the iTunes Store.

19 Rather than disputing those dispositive points, plaintiffs argue that Apple was not
20 contractually required to stop RealNetworks’ Harmony program. But that is beside the point,
21 because Apple was required to stop hacks that caused security breaches by stripping content
22 protection. Regardless of the effect on Harmony, these updates cannot be the basis of a Section 2
23 claim for three independent reasons. First, the software updates were not willful exclusionary
24 conduct and they were supported by valid business reasons, because Apple was contractually
25 obligated to stop security breaches and, independently, because the hacks violated the DMCA.
26 Second, as demonstrated by the Ninth Circuit’s recent *Tyco* decision, an alleged monopolist is
27 entitled to update and improve its product even if the result is that competitors’ products no
28 longer work with the updated product. Third, any attempt to keep Harmony in operation after the

1 FairPlay redesign would have required cooperation between Apple and RealNetworks. Absent
2 narrow circumstances not present here, Section 2 does not impose any duty on rivals to cooperate
3 and a claim under Section 2 cannot be based on a refusal to deal.

4 Plaintiffs' Rule 56(f) application should be denied. Plaintiffs do not even attempt to
5 identify any specific facts that will prevent summary judgment. No amount of discovery will
6 change the dispositive facts noted above.

7 **I. THE MOTION TO DISMISS SHOULD BE GRANTED FOR THE REASONS**
8 **PREVIOUSLY STATED BY THIS COURT.**

9 Plaintiffs' Section 2 claim should be dismissed as a matter of law because the allegation
10 that products are more convenient to use with each other than with a competitor's product is, as
11 *Foremost Pro* held, of "no assistance" in stating a Section 2 claim. *See* Mot., pp. 8-10; *Foremost*
12 *Pro Color, Inc. v. Eastman Kodak Co.*, 703 F.2d 534, 543-44 (9th Cir. 1983). As this Court
13 ruled, "[t]he increased convenience of using the [iPod and iTS music] together due to
14 technological compatibility does not constitute anticompetitive conduct under either *per se* or rule
15 of reason analysis." Dkt. 274, pp. 9-10.

16 Plaintiffs argue (pp. 5-6) that the *Foremost Pro* principle should be limited to the
17 introduction of a new product and not apply to subsequent changes to that product. This
18 argument underscores that they are not challenging Apple's decision to use proprietary DRM
19 technology but only challenging updates to that technology to maintain or restore its
20 functionality. In doing so, however, they do not dispute the key point that the competitive effect
21 of using DRM is the same whether they are challenging Apple's initial decision or later updates.
22 Just as it was lawful for Apple to use its proprietary DRM to encrypt the labels' music, it was
23 lawful for Apple to repair its DRM when the encryption method was hacked. Mot., pp. 8-9

24 Constricting *Foremost Pro* as plaintiffs urge would thwart innovation just as much as
25 prohibiting incompatible products from the outset. The very aim of the antitrust laws is to
26 promote innovation, including by encouraging companies to create "an infrastructure that renders
27 them uniquely suited to serve their customers." *Verizon Commc'ns Inc. v. Law Offices of Curtis*
28 *V. Trinko, LLP*, 540 U.S. 398, 407 (2004). As *Foremost Pro* makes clear, creating technological

1 incompatibilities actually “increases competition” by providing a choice among technologies and
2 an incentive to develop other products of advanced technology. *See* Mot., p. 9. Those salutary
3 effects would be fleeting if *Foremost Pro* applied only at launch.

4 Plaintiffs’ assertion (p. 6) that they should prevail based on the *Kodak* and *Tyco* cases is
5 erroneous. Neither case involved a company’s decision simply to adhere to its initial, lawful
6 product design. To the contrary, Kodak changed its long-standing practice and stopped selling
7 parts to independent service operators after one of them won a contract with the State of
8 California. *Image Tech. Servs., Inc. v. Eastman Kodak Co.*, 125 F.3d 1195, 1213-14 (9th Cir.
9 1997). And Tyco, after gaining monopoly power, changed its product so that, for the first time, it
10 did not work with competitors’ complementary products. *Allied Orthopedic Appliances, Inc. v.*
11 *Tyco Health Care Group LP*, 592 F.3d 991, 998-1003 (9th Cir. 2010). Even then, the Ninth
12 Circuit **rejected** the Section 2 claim, holding that “a design change that improves a product by
13 providing a new benefit to consumers does not violate Section 2 absent some associated
14 anticompetitive conduct.” *Id.* at 998-99. In addition, *Tyco* demonstrates that plaintiffs’ claim
15 fails at the threshold step—unlike the *Tyco* plaintiffs, plaintiffs here do not and could not allege
16 that the FairPlay redesign changed the level of interoperability from the level that existed when
17 iTS was introduced. With no change in the competitive impact, maintaining the functionality of
18 Apple’s anti-piracy software is just as lawful as the initial decision to adopt that software.

19 Plaintiffs’ observation (p. 7) that conduct that is lawful for non-monopolists can be
20 unlawful for monopolists is a truism, because Section 2 applies only to monopolists. But offering
21 technologically related products that are incompatible with rivals’ products is permissible for all
22 companies, alleged monopolists and non-monopolists alike. Indeed, Kodak was an alleged
23 monopolist when it introduced its technologically related products—conduct that *Foremost Pro*
24 found pro-competitive and permissible under Section 2.

25 Contrary to plaintiffs’ argument (p. 7), Apple is not seeking “immun[ity] from antitrust
26 scrutiny because FairPlay was proprietary or was used in part to protect intellectual property
27 interests.” Rather, the Section 2 claim fails because, as this Court held, the fact that Apple’s
28

1 products are more interoperable with each other than with competitors' products is simply not
2 anticompetitive. *See* Mot., pp. 8-10.

3 **II. SUMMARY JUDGMENT IS PROPER.**

4 Alternatively, the indisputable facts show that Apple's software updates did not violate
5 Section 2. [REDACTED]

6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]

11 [REDACTED] *See* Mot., pp. 5-6.

12 Based on these facts—none of which plaintiffs dispute with any evidence—Apple is
13 entitled to summary judgment for the three independent reasons noted above: (1) the software
14 updates were not willful exclusionary conduct, and Apple had valid business reasons to issue
15 them; (2) the updates were product improvements and thus under *Tyco* cannot give rise to Section
16 2 liability; and (3) Apple has no antitrust duty to deal with RealNetworks.

17 **A. The Updates Were Issued To Stop Hacks And Ensure Compliance With The**
18 **Label Agreements.**

19 For the first ground for summary judgment, the two dispositive facts are that [REDACTED]
20 [REDACTED]
21 [REDACTED] and (2) the labels' contracts required Apple to
22 remedy breaches to FairPlay as a condition for continuing to offer music. Based on these two
23 facts, Apple indisputably had a valid business reason for the challenged updates—it could not
24 continue to offer music without complying with the labels' requirement to fix security breaches,
25 and the hacks were illegal under the DMCA.

26 As to the first fact—[REDACTED]
27 [REDACTED]—plaintiffs are silent. They fail to address it and
28 offer no evidence to contradict it. Thus, it is undisputed.

1 As to the second fact—that Apple was contractually obligated to remedy security
2 breaches—plaintiffs initially argue (p. 11) that it is “without factual support” and “contradicted
3 by the evidence.” [REDACTED]

4 [REDACTED]
5 [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]

10 Rather than disputing these dispositive points, plaintiffs argue (p.11) that Apple was not
11 required to issues software updates directed at Harmony. But that is irrelevant because the
12 updates at issue here were directed at the content protection-stripping hacks. Nor do plaintiffs
13 dispute that the reason Harmony failed to work after the FairPlay update was because Harmony
14 was based on the encryption method of the original FairPlay.

15 Plaintiffs’ assertion (p. 11) that the record labels approved of Harmony and favored
16 interoperability is also meaningless. Whatever the labels may have thought of Harmony or
17 interoperability, plaintiffs admit that the labels required content protection. Indeed, they cite a
18 2006 statement by Warner Records’ chairman (Dkt. 166-17, Ex. 15): “Let me be clear: We
19 advocate the continued use of DRM in the protection of our and of our artists’ intellectual
20

21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED]
25 [REDACTED]
26 [REDACTED]
27 [REDACTED]
28 [REDACTED]

1 property. The notion that music does not deserve the same protection as software, television,
2 film, video games and other intellectual property . . . is completely without logic or merit.”²

3 Moreover, because of the requirement imposed by the major labels, it is irrelevant
4 whether, as plaintiffs argue (pp. 11, 24), the “non-major record labels ever required Apple to issue
5 any software updates” or to use DRM in the first place. Apple still had contractual obligations to
6 the major labels to fix FairPlay when its security was breached or risk losing the right to offer
7 their substantial body of music.

8 In addition, the hacks that stripped content protection by circumventing FairPlay clearly
9 violated the DMCA. Mot., pp. 10-11. This provides an additional basis for finding that Apple
10 was entitled to update its software. Although they assert that Apple “overstates the scope of the
11 DMCA” (p. 16), plaintiffs do not actually argue that the hacks were lawful. Nor could they. As
12 plaintiffs concede (p. 16), the very purpose of the DMCA is to prohibit circumvention of
13 technological protection measures like FairPlay that control access to copyrighted music. Illegal
14 circumvention is precisely what these hacks did. Plaintiffs point to “reverse engineering”
15 exceptions but, on their face and under the case law, the exceptions apply only to circumventing
16 access control measures for certain “computer programs” under limited circumstances, not
17 copyrighted digital works like music.³

18 ² Plaintiffs’ related argument (p. 18) that “DRM and interoperability are not mutually
19 exclusive concepts” also misses the mark. If someone made a generic DRM that worked
20 flawlessly with any and all music stores and players, interoperability might be possible. But that
21 possibility would not mean the antitrust laws **require** interoperability. As this Court correctly
held, *Foremost Pro* rejects any such notion.

22 ³ See *Universal City Studios, Inc. v. Reimerdes*, 82 F. Supp. 2d 211, 218 (S.D.N.Y. 2000)
23 (holding that “Section 1201(f) permits reverse engineering of copyrighted computer programs
24 only and does not authorize circumvention of technological systems that control access to other
25 copyrighted works, such as movies”); see also H.R. Rep. No. 551 (Part 2), 105th Cong., 2d Sess.
26 43 (July 22, 1998) (“Section [1201](f) applies to computer programs as such, . . . and not to works
27 generally, such as music or audiovisual works”). The two cases cited by plaintiffs, *Chamberlain*
28 and *Lexmark*, are inapplicable. They did not involve circumvention that facilitated infringement
of a copyrighted work. *Chamberlain Group Inc. v. Skylink Techs. Inc.*, 381 F.3d 1178, 1195-
1204 (Fed. Cir. 2004); *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 387 F.3d 522, 546-
49 (6th Cir. 2004). Here, plaintiffs do not dispute that stripping FairPlay facilitated infringement
by giving access to, and enabling unrestricted copying and distribution of, the labels’ copyrighted
works. See, e.g., *Universal City Studios v. Reimerdes*, 111 F. Supp. 2d 294, *aff’d* 273 F.3d 429

(continued)

1 For these reasons, Apple was indisputably entitled to issue software updates to stop these
2 hacks. Thus, Apple is entitled to summary judgment on the ground that the software updates
3 were not exclusionary and were supported by valid business reasons.

4 **B. The software updates were product improvements under *Tyco*.**

5 As a further independent ground for summary judgment, Apple’s software updates are
6 permissible under *Tyco* because they clearly improved the product. Mot., pp. 13-14. These
7 updates helped ensure that Apple remained in compliance with its contractual obligations to the
8 labels. Otherwise, Apple’s ability to continue offering that music would be at risk, depriving
9 consumers of what plaintiffs concede is the “huge benefit” of purchasing music through the
10 iTunes Store. Mot., p. 3.

11 Plaintiffs agree that under *Tyco* any improvement is sufficient to defeat a Section 2 claim
12 because the court does not balance the degree of product improvement against the degree of
13 alleged anticompetitive effects. See Mot., p. 15; Opp., p. 10 n.3. Instead, plaintiffs argue that
14 Apple’s software update “could hardly be considered an ‘improved product design.’” Opp., p. 10,
15 n.3; see also *id.*, p. 11 (incorrectly arguing that Apple did not provide any evidentiary “support”
16 that iTunes 4.7 provided a “new benefit to consumers”). If plaintiffs’ position is that the software
17 update did not provide **any** benefit, they are obviously incorrect. The redesigned FairPlay
18 benefited consumers by ensuring that the major record labels continued to supply music to Apple
19 and that the iTunes Store could stay in business.⁴ If plaintiffs are instead claiming that the
20 updates did not provide a **new** benefit, they are both incorrect and using the wrong standard. It
21 would be like saying that redesigning a computer program so that it does not crash is not an
22 improvement because it does not provide any benefit other than continued use of the program.

23 [REDACTED]

24 [REDACTED] See Robbin Decl., ¶ 7.

25 _____
26 (2d Cir. 2001) (holding unlawful the “DeCSS” program, which stripped the content protection on
the studios’ movie files to allow unrestricted copying and distribution of those movies).

27 ⁴ iTunes 4.7 added various new features as well. Robbin Decl., ¶ 7; Kiernan Decl., Ex. 2
28 (describing added iPod photo support and ability to hide duplicate music files).

1 With no answer to these dispositive points, plaintiffs again seek to divert. As plaintiffs
2 note (p. 10), Apple did not want to use DRM in the first place and now sells music without DRM.
3 Those facts do not help plaintiffs. What is relevant, and undisputed, is that—at the time of the
4 updates—Apple had a contractual obligation to use DRM and to close security breaches if it
5 wanted to continue offering the labels’ music.⁵

6 The *Microsoft* case cited by plaintiffs (p. 12) does not change this conclusion. Integrating
7 Microsoft’s operating system and browser might not have been a product improvement. But
8 redesigning FairPlay to stop hacks and enable Apple to continue to offer music to consumers
9 indisputably was. This ground, alone, is sufficient for summary judgment under *Tyco*.

10 **C. Apple Had No Antitrust Duty to Deal With RealNetworks.**

11 Alternatively, the Section 2 claim fails because any attempt to keep Harmony in operation
12 would have required cooperation between Apple and RealNetworks. As shown in Apple’s
13 motion (pp. 15-19), absent narrow circumstances that do not apply here, Section 2 does not
14 impose any duty on rivals to cooperate. Indeed, “[c]ooperation is a *problem* in antitrust, not one
15 of its obligations.” *Schor v. Abbott Labs.*, 457 F.3d 608, 610 (7th Cir. 2006).

16 In response, plaintiffs erroneously claim (p. 13) that Apple “has provided no evidence to
17 demonstrate that such cooperation would be required” for Harmony to continue to work. To the
18 contrary, as summarized in Apple’s motion (pp. 5-6), the Robbin declaration (¶¶ 11-12) sets forth
19 in detail why cooperation would be required. [REDACTED]

20 [REDACTED]
21 [REDACTED]

22 [REDACTED] Plaintiffs offer nothing to refute Apple’s showing, or to raise a triable issue.

23 Plaintiffs also argue that if trying to keep Harmony in operation would have required
24 inter-company cooperation, then it was a violation of Section 2 for Apple not to so cooperate.

25 _____
26 ⁵ Also diversionary is plaintiffs’ assertion (p. 1) that Apple updated its software for the
27 “purpose” of excluding competition. Not only is that assertion unsupported by any evidence, but
28 plaintiffs do not dispute that *Tyco* rejected alleged anticompetitive intent as a permissible basis
for finding a Section 2 violation. *See Mot.*, p. 14 & n.11.

1 That argument is wrong as a matter of law. *Trinko* holds that even alleged monopolists generally
2 have no duty to cooperate with a rival. Post-*Trinko* cases are virtually uniform that “the sole
3 exception to the broad right of a firm to refuse to deal with its competitors” arises when a
4 company has voluntarily entered into—and then unilaterally terminates—a prior course of dealing
5 with that competitor. See Mot., p.18 and n.15. Plaintiffs have no answer to the five cases from
6 the Second, Ninth and Eleventh Circuits or the leading antitrust treatise that Apple cited for that
7 proposition. So they ignore those authorities, except for one which they misconstrue.⁶ They also
8 ignore the three-part rationale of *Trinko* which underscores why no duty to deal with
9 RealNetworks exists. See Mot., pp. 16-18. As *Tyco* reiterates, even an alleged monopolist “has
10 no duty to help its competitors survive or expand when introducing an improved product design.”
11 592 F.3d at 1002; Mot., p. 13.⁷

12 *MetroNet Servs. Corp. v. Qwest Corp.*, 383 F.3d 1124 (9th Cir. 2004), does not establish a
13 different threshold standard. To the contrary, it held that even if an alleged monopolist
14 unilaterally changes a pre-existing, voluntary course of dealing, it still does not face Section 2
15 liability unless, as plaintiffs note (p. 15), it “sets its retail price at an unprofitable level in the short
16 run merely to exclude competition in the long run.” Here, plaintiffs meet neither the threshold
17 requirement (unilaterally changing a pre-existing course of dealing) nor the additional one
18 (setting price at short-term, unprofitable level). As discussed in Apple’s motion (p. 19), Qwest

19
20 ⁶ Plaintiffs cite *Kodak* as holding that a “pretextual” refusal to deal is actionable. In fact,
21 the express predicate for liability was that Kodak had changed an “established pattern of
22 distribution” for providing parts to independent service organizations. 125 F.3d at 1211; Mot., p.
23 18, n.15.

24 Nor does this Court’s ruling on the *Tucker* complaint assist plaintiffs. That decision was
25 issued before the Ninth Circuit made clear in *Tyco* that liability under section 2 does not turn on
26 alleged bad intent (see Mot., p. 14) and before the Second Circuit’s decision in *In re Elevator*
27 *Antitrust Litig.*, 502 F.3d 47 (2d Cir. 2007), confirming that a prior course of dealing is required.
28 Moreover, the Court’s ruling pertained to plaintiffs’ original claim that Apple was required to
make its products interoperable, not the current claim that its software updates were unlawful.

⁷ Contrary to plaintiffs’ further argument (p. 14), Apple need not prove that dealing with
RealNetworks “would have been detrimental to the security of Apple’s products.” [REDACTED]
[REDACTED], application of *Trinko* does
not depend on any such showing.

1 changed its dealings with MetroNet to prevent it from continuing to obtain a volume discount.
2 The Ninth Circuit held that the change did not violate Section 2 because Qwest was simply
3 seeking to maintain the business strategy it had originally adopted. *MetroNet*, 383 F.3d at 1133.
4 The same is true here. *Accord Elevator Antitrust Litig.*, 502 F.3d at 49 (rejecting refusal to deal
5 liability despite allegation that the defendants had “intentionally design[ed]” their product to be
6 incompatible with competitors’ products).

7 Plaintiffs argue (p. 13) that it would be “possible” for Apple to cooperate with
8 RealNetworks because Apple cooperated with HP and Motorola in other respects. But nothing in
9 Section 2 jurisprudence suggests that rivals must cooperate whenever it is possible for them to do
10 so. Quite the contrary, the antitrust laws discourage cooperation and impose no such duty.⁸

11 **III. PLAINTIFFS’ STATE LAW CLAIMS ARE SIMILARLY UNFOUNDED.**

12 Although plaintiffs assert (p. 21) that it is “generally preferable” for a federal court to
13 remand state law claims when federal law claims are dismissed, they do not attempt to show that
14 is appropriate in the circumstances of this case. Here, the state law claims are similar to and
15 based on the same facts as the federal law claims. The case has been pending for five years in the
16 federal court, the forum selected by plaintiffs. And the issues are fully briefed. In these
17 circumstances, retaining jurisdiction and deciding the state law claims furthers the interests of
18 economy and comity (*Harrell v. 20th Century Ins. Co.*, 934 F.2d 203, 205 (9th Cir. 1991)) and
19 avoids the “waste of judicial resources.” *Imagineering, Inc. v. Kiewit Pac. Co.*, 976 F.2d 1303,
20 1309 (9th Cir. 1992).

21 **A. Cartwright Act.**

22 As shown in Apple’s motion (p. 20), the Cartwright Act does not include any counterpart
23 to Section 2 of the Sherman Act dealing with single-firm conduct as opposed to combinations and
24

25 ⁸ In any event, as shown by plaintiffs’ description and the documents they cite (p. 14), the
26 HP and Motorola deals were quite unlike Harmony. HP simply sold iPods under the HP brand
27 and pre-installed the iTunes jukebox application on HP computers. Motorola sold certain phones
28 that could download and play iTunes music. Neither of those arrangements involved trying to make
another company’s music with its own DRM play on iPods, with all the complexities that would
entail.

1 conspiracies. Plaintiffs’ argument to the contrary is meritless. *See Dimidowich v. Bell & Howell*,
2 803 F.2d 1473, 1478 (9th Cir. 1986) (holding that plaintiff’s monopoly claim was “not cognizable
3 under the Cartwright Act, for it fails to allege any combination”). In any event, plaintiffs do not
4 suggest that, if the Cartwright Act were to reach single-firm conduct, its standards would be any
5 different from Section 2 standards. Accordingly, because the Section 2 claims are invalid, the
6 identical claim even if it were cognizable under the Cartwright Act would also fail.

7 **B. Unfair Competition Law.**

8 Plaintiffs assert that their UCL claim is based not only on their Section 2 claim but also on
9 the claim that Apple undertook “specific aggressive actions to entrench its monopolies” and to
10 overcharge iPod customers. But that is just using different words to describe the same conduct as
11 their Section 2 claim. Under *Chavez v. Whirlpool Corp.*, 93 Cal. App. 4th 363, 375 (2001), where
12 “the same conduct is alleged to be both an antitrust violation and an ‘unfair’ business act or
13 practice for the same reason—because it unreasonably restrains competition and harms
14 consumers—the determination that the conduct is not an unreasonable restraint of trade
15 necessarily implies that the conduct is not ‘unfair’ toward consumers.” That is the end of the
16 matter as shown by the cases applying *Chavez* cited in Apple’s motion (p. 21, n.16) and ignored
17 by plaintiffs.

18 **C. Consumers Legal Remedies Act.**

19 Plaintiffs concede that their challenge to iPod pricing is not actionable under the CLRA.
20 They now assert (p. 20) that Apple’s “usage rules and upgrade requirements” are
21 “unconscionable.” No such allegations are made in their amended complaint. Nor would any
22 such allegations state a claim, even if they had been made. *See, e.g., Belton v. Comcast Cable*
23 *Holdings, LLC*, 151 Cal. App. 4th 1224 (2007).

24 **D. Common Law Monopolization.**

25 As shown in Apple’s motion (p. 22), California law does not recognize a common law
26 monopolization claim. In arguing to the contrary, plaintiffs rely on cases predating the two
27 federal court cases applying California law that Apple cited. Plaintiffs have no answer to the
28 reasoning of those more recent cases and Apple’s other authority. In any event, plaintiffs do not

1 contend that a claim that is insufficient under Section 2 would be actionable under any such
2 common law claim. Thus, this claim should fare no better than the federal law claims.

3 **IV. PLAINTIFFS DO NOT SATISFY RULE 56(F).**

4 To defer the Rule 56 motion, it is not enough that plaintiffs think that undiscovered
5 evidence will “shed light on the contested issues related to Apple’s willful conduct” (p. 23), that
6 they “would like to obtain” information “to more fully respond” to Apple’s motion (p. 24) or that
7 they think discovery will “likely reveal additional sources of information that will likewise need
8 to be evaluated.” Roach Decl., ¶ 18. Rather, they must show that “specific facts” exist that are
9 “‘essential’ to resist the summary judgment motion” (*California v. Campbell*, 138 F.3d 772, 779
10 (9th Cir. 1998)) and that those facts “would prevent summary judgment.” *Yue v. Chordiant*
11 *Software, Inc.*, 2009 WL 4931679, *6 (N.D. Cal. Dec. 21, 2009) (J. Ware).⁹

12 Plaintiffs do not purport to meet this standard. They refer (p. 23) to broad topics for
13 discovery like “Apple’s negotiations and contracts with record labels” and “the technical aspects
14 of Apple’s software updates.” But they fail to identify any specific fact they hope to discover,
15 much less any specific fact that will preclude summary judgment. In particular, they do not
16 identify any fact that could contradict the showing that the major labels’ contracts required Apple
17 to remedy security breaches. That is what the contracts expressly say, as plaintiffs concede.
18 Likewise, plaintiffs do not identify any fact that could contradict the showing that iTunes 4.7 was
19 a product improvement. Nor do they identify any fact showing that Harmony could have
20 continued to work without cooperation between Apple and RealNetworks—the threshold issue on
21 the alternative *Trinko* ground for summary judgment. Plaintiffs’ counsel’s declaration adds
22 nothing of substance, and is insufficient for the reasons set forth in the accompanying Apple’s
23 counsel’s accompanying declaration.

24 _____
25 ⁹ See also *Nat’l Union Fire Ins. Co. of Pittsburgh, PA v. Seagate Tech., Inc.*, 2005 WL
26 894704, *4 (N.D. Cal. April 18, 2005) (J. Ware) (denying Rule 56(f) request where party “failed
27 to show how additional discovery would preclude summary judgment against it”), rev’d on other
28 grounds, 233 Fed. Appx. 614 (9th Cir. 2007); *Home Diagnostics Inc. v. Lifescan, Inc.*, 120
F.Supp.2d 864, 869 (N.D. Cal. 2000) (J. Ware) (party required to state “specifically what
information...would preclude summary judgment”).

1 Instead of attempting to comply with the correct Rule 56(f) standard, plaintiffs argue for a
2 more lenient standard. They rely (p. 22) on a 12-year old unpublished Ninth Circuit opinion,
3 purporting to cite it “pursuant” to Ninth Circuit Rule 36-3. In fact, that Rule bars citation of pre-
4 January 1, 2007 unpublished opinions except for limited purposes inapplicable here.¹⁰ Nor did
5 *Clark v. Capital Credit & Collection Servs., Inc.*, 460 F.3d 1162 (9th Cir. 2006) establish a more
6 lenient rule. It cited the standard applied in *Garrett v. City and County of San Francisco*, which
7 explained that “[u]nder Rule 56(f), an opposing party must make clear what information is sought
8 and how it would preclude summary judgment.” 818 F.2d 1515, 1518 (9th Cir. 1987). That
9 standard has been repeatedly applied by the Ninth Circuit. *See, e.g., Ontiveros v. Kernan*, 2010
10 WL 829012 (9th Cir. Mar. 9, 2010); *Moos-Holling v. Bayer Corp. Disability Plan*, 2010 WL
11 582604, *1 (9th Cir. Feb. 18, 2010); *Yue*, 2009 WL 4931679, *6 (N.D. Cal. 2009); *Seagate Tech.*,
12 2005 WL 894704 at *4.¹¹

13 In short, plaintiffs fail to carry their burden under Rule 56(f) of showing that discovery is
14 needed to obtain specific facts that will preclude summary judgment.

22 ¹⁰ The exceptions are “when relevant under the doctrine of law of the case or rules of claim
23 preclusion or issue preclusion, . . . for factual purposes, such as to show double jeopardy,
24 sanctionable conduct, notice, entitlement to attorneys’ fees, or the existence of a related case,
25 . . . in a request to publish a disposition or order, . . . or in a petition for panel rehearing or
rehearing en banc.” Ninth Cir. Rule 36-3.

26 ¹¹ Attempting to avoid this well-established requirement, plaintiffs cite *Clement v. Kaiser*
Foundation Health Plan, Inc., 2004 WL 3049753 (C.D. Cal. Dec. 17, 2004), a case in which the
27 court did not rule on plaintiff’s Rule 56(f) request, instead granting summary judgment based on
28 preemption. *Id.* at *3. Plaintiffs also cite a Fifth Circuit case, which cannot change the 56(f)
standard used in this Circuit.

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CONCLUSION

For these reasons, Apple’s motion to dismiss or for summary judgment should be granted.

Dated: April 12, 2010

JONES DAY

By: /s/ Robert A. Mittelstaedt
Robert A. Mittelstaedt

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