ZELDES & HAEGGQUIST, LLP
HELEN I. ZELDES (220051)
ALREEN HAEGGQUIST (221858)
625 Broadway, Suite 906
San Diego, CA 92101
Telephone: 619/342-8000
Fax: 619/342-7878
helenz@zhlaw.com
alreenh@zhlaw.com

MEHRI & SKALET, PLLC
STEVEN A. SKALET (admitted *pro hac vice*)
CRAIG L. BRISKIN (admitted *pro hac vice*)
1250 Connecticut Ave NW, Suite 300
Washington, DC 20036
Telephone: 202/822-5100
Fax: 202/822-4997
sskalet@findjustice.com
cbriskin@findjustice.com

Attorneys for Plaintiff Stacie Somers

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

THE APPLE IPOD ITUNES ANTI-TRUST LITIGATION, This Document Relates To: *Somers v. Apple, Inc.*, Case No. C 07-6507 JW	Case No. C 07-6507 JW SUPPLEMENTAL MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S MOTION FOR CLASS CERTIFICATION OF A RULE 23(B)(2) CLASS AND APPOINTMENT OF CLASS COUNSEL JUDGE: The Honorable James Ware DATE: October 5, 2009 TIME: 9:00 a.m. CTRM: 8, 4th Floor

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

Page

Page

OTHER AUTHORITIES

Plaintiff Stacie Somers submits this Supplemental Class Certification Memorandum in response to the Court's July 17, 2009 Order Directing Parties to Submit Further Briefing ("Order").

I. INTRODUCTION

In its July 17, 2009 Order, this Court requested clarification from the direct and indirect plaintiffs about the intersection of claims asserted in the respective cases, the class definitions in both cases and the form of relief sought in both cases. Specifically, the court asked the parties to explain: 1) whether the injunctive relief plaintiffs seek enjoining Apple from charging consumers to remove Digital Rights Management ("DRM") from previously purchased music from the iTunes Music Store ("iTMS") is affected since Apple stopped its practice of placing DRM on iTMS purchases; 2) how a class of iPod purchasers can obtain equitable relief in the form of free access to DRM-free iTMS music and video files; and 3) if injunctive relief is available under the operative theories of liability since tying, at least on a per se basis is no longer a part of either case. Order at 2-3.

A. The Intersection of Claims Asserted & Class Definition

Both the direct and indirect purchaser Plaintiffs brought claims for tying, monopolization, attempted monopolization and unfair business practices. However, because the focus of the briefing to date has been primarily on the tying claims, and because the plaintiffs in both cases alleged that the iPod was the tied product, the parties' focus on class certification has been on the iPod. Upon consideration of the Court's Order, the indirect purchaser Plaintiff believes the class definition requested in her class certification motion was too narrow and should have included not only indirect purchasers of iPods, but as she pled in her complaint, also "all purchasers of audio or video files from the iTMS since December 31, 2003." To the extent that the direct purchasers also seek modification of their class definition to include purchasers of iTMS files, membership in the two iTMS classes overlaps.

B. The Form of Relief Sought by Somers

Plaintiff alleges that the fundamental problem with Apple's conduct is that, for six years, it sold music and video on iTMS that cannot be played on any portable media player other than the iPod. And while Apple recently stopped selling DRM-encoded music files, it still engages in several practices that lock customers into the iPod. First, it still encodes video files with DRM, which continues to tie iTMS purchasers to the iPod. Second, Apple charges class members 30¢ a song, or 30% of the album price, to remove the DRM protection from previous purchases (or, to receive a DRM-free version of those songs).[1] Finally, there is recent evidence that although Apple no longer sells music encoded with DRM, it continues to take affirmative steps to make iTMS downloads incompatible with other players. *See* Marin Perez, "Apple Blocks Palm Pre's iTunes Compatibility," *Information Week*, July 16, 2009 ("Apple warned a few weeks ago that newer versions of iTunes would not provide syncing functionality with non-Apple media players."), Haeggquist Decl., Ex. 2.

Thus, Plaintiff seeks the following injunctive relief for indirect iPod purchasers, as wells as iTMS purchasers: 1) removal of DRM from video files sold on iTMS; 2) an order enjoining Apple from continuing to charge consumers to remove DRM from music files they previously purchased from iTMS; and 3) an order enjoining Apple from taking any affirmative steps to stop non-Apple devices from syncing with iTunes. Plaintiff also seeks to modify its class definition to include a subclass of iTMS purchasers that since April 2007 paid Apple monies to remove DRM from music files they previously purchased from iTMS and seeks disgorgement of the monies paid on behalf of these class members.

---

[1] *See* Apple Website, "Changes Coming to the iTunes Store," Jan. 6, 2009, available at http://www.apple.com/pr/library/2009/01/06itunes.html, attached as Exhibit 1 to the Declaration of Alreen Haeggquist in Support of Supplemental Memorandum of Points and Authorities in Support of Plaintiff's Motion for Class Certification of a Rule 23(b)(2) Class and Appointment of Class Counsel ("Haeggquist Decl.").

II. LEGAL STANDARD FOR INJUNCTIVE RELIEF

To certify a class action under Rule 23(b)(2), the plaintiff must set forth prima facie facts that support the four requirements of Rule 23(a): (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy of representation. *Dunleavy v. Nadle*, 213 F.3d 454, 462 (9th Cir. 2000) (internal quotations omitted). The court must then consider whether an injunctive relief class is maintainable under Rule 23(b)(2). Pursuant to Rule 23(b)(2), and this Court's Order, Plaintiff moves for certification as follows:

> A class of all persons or entities in the United States (excluding federal, state and local governmental entities, Apple, its directors, officers and members of their families) who purchased an iPod indirectly from Apple or who purchased music and/or video content from Apple's iTunes Music Store;[2] and
>
> A subclass of all persons or entities in the United States (excluding federal, state and local governmental entities, Apple, its directors, officers and members of their families), who purchased music and/or video content from Apple's iTunes Music Store, and, since April 2007, paid Apple to provide them with DRM-free versions of the files they had previously purchased from the iTunes Music Store.

A. The Requirements of Rule 23(a) are Readily Satisfied Here

For the reasons set forth in Plaintiff's motion for class certification, and incorporated as though fully set forth herein, the requirements of Rule 23(a) are satisfied. Defendant did not contest any of these requirements, and the Court did not rule otherwise in its class certification rulings.

1. Numerosity

It is undisputed that the numerosity requirement is easily satisfied as to both iTMS and iPod purchasers, who number in the millions.[3] While the exact number of iTMS purchasers who have paid for DRM-free files since April 2007 is unknown, even if the figure were only 0.01% of

---

[2] This is the same class definition alleged in Plaintiff's Complaint. Complaint at ¶27.

[3] *See* December 22, 2008, Order of the Court at 5, Dkt. No. 213 ("December 22, 2008 Order"); Press Release, *Apple iTunes Now Number Two Music Retailer in the U.S.* (Feb. 26, 2008) (available at http://apple.com/pr/library/2008/02/26itunes.html), Haeggquist Decl., Ex. 3.

all purchasers (50 million x .01% = 5,000),[4] that number would still be well above the minimum threshold for numerosity. *See* December 22, 2008, Order at 3 ("A class of one thousand members 'clearly satisfies the numerosity requirement.'") (quoting *Sullivan v. Chase Inv. Servs., Inc*. 79 F.R.D. 246, 257 (N.D. Cal. 1978)).

2. Commonality

Commonality requires "questions of law or fact common to the class." Rule 23(a)(2). The commonality requirement is generally construed liberally; the existence of one or only a few common legal and factual issues may satisfy the requirement. *See Dukes v. Wal-Mart, Inc.*, 474 F.3d 1214, 1225 (9th Cir. 2007) (citing 1 Herbert B. Newberg & Alba Conte, *Newberg on Class Actions* § 3:10 at 271 (4th ed. 2002); *Hanlon v. Chrysler Corp.*, 150 F.3d 1011 (9th Cir. 1998)). As set forth in the Complaint, common issues include but are not limited to the following: the definition of the relevant markets, Apple's market power within these markets, whether Apple has monopolized and continues to monopolize the relevant markets, whether Apple's conduct cause antitrust injury to Plaintiff and class members, whether the contractual conditions Apple imposes on its customers are unconscionable and the appropriateness of injunctive relief. Complaint ¶ 30.

3. Typicality

The typicality requirement requires that "the claims or defenses of the representative parties are typical of the claims or defenses of the class[.]" Rule 23(a)(3). "[R]epresentative claims are 'typical' if they are reasonably co-extensive with those of absent class members; they need not be substantially identical." *Hanlon*, 150 F.3d at 1020. The typicality requirement is satisfied when "other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct." *Hanon v. Data Products Corp.*, 976 F.2d 497, 508 (9th

---

[4] *See* Press Release, *Apple iTunes Now Number Two Music Retailer in the U.S.* (Feb. 26, 2008) (available at http://apple.com/pr/library/2008/02/26itunes.html), Haeggquist Decl., Ex. 3.

Cir. 1992). In this case, Plaintiff's and the proposed class members' claims all arise from Apple's alleged conduct preventing the music and video files it sold on iTMS from being played on any other portable media player other than its own iPod, its monopolization of the market for portable media players, and unfair business practices. In this case, Plaintiff's claims are identical to that of absent class members, which is far more than Rule 23(a) requires. In addition, Plaintiff purchased DRM-protected online digital audio files directly from Apple. *See* June 17, 2008 Deposition of Stacie Somers at 35:12-14; 59:25-60:8, Haeggquist Decl., Ex. 4.

4. Adequacy

To meet the requirement of adequacy of representation, "the class representatives must not have interests antagonistic to the unnamed class members" and "the representative must be able to prosecute the action 'vigorously through qualified counsel.'" *Glass v. UBS Financial Services, Inc.*, 2007 WL 221862 (N.D. Cal 2007) (citing *Lerwill v. Inflight Motion Pictures, Inc.*, 582 F.2d 507, 512 (9th Cir. 1978)).

Plaintiff's interests are aligned with those of the absent class members. Plaintiff's counsel have invested considerable time since the initiation of the litigation gathering evidence, formulating legal theories, reviewing documents, and working with an economic expert. Plaintiff's counsel are experienced in antitrust and consumer law, and class action litigation, as set forth in the declaration and firm resumes submitted with Plaintiff's Motion for Class Certification. *See* Declaration of Alreen Haeggquist Submitted in Support of Plaintiff's Motion for Class Certification on February 20, 2009 at Ex. 3.

B. Rule 23(b)(2) Certification

Rule 23(b)(2) allows for certification of a class for injunctive relief where "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." A (b)(2) class should be certified for injunctive and declaratory relief claims "if the class members complain of a pattern or practice that is generally applicable to the class as a whole." *Walters v. Reno*, 145 F.3d 1032, 1047 (9th Cir. 1998).

Courts commonly certify injunctive relief classes in antitrust cases, in keeping with the "private attorney general" purposes of the antitrust laws.[5] Injunctive relief is available regardless of the outcome of a plaintiff's proof of money damages.[6] Even where a defendant agrees to discontinue an anticompetitive practice, or has ceased it in part, injunctive relief may be appropriate.[7] In fashioning injunctive relief, the court should be guided by "vindicat[ing] the important interest in free competition." *Continental Airlines v. United Airlines*, 136 F. Supp. 2d 542, 549 (E.D. Va. 2001).

The two basic requirements of Rule 23(b)(2) are clearly met here. First, Defendant has refused to remove the DRM on video files sold through iTMS and remove DRM from previous iTunes downloads without significant cost to class members, allegations generally applicable to the class. Second, injunctive and declaratory relief are appropriate in that they provide the necessary and appropriate remedy for the violations Plaintiff has alleged: Apple's failure to remove DRM on video files from iTMS and its establishment of a substantial fee (approximately 30% of the original price) to receive DRM-free versions of previous iTMS purchases continues to prevent iTMS purchasers from choosing non-Apple media players. Making the DRM-free media files available at no charge, would remove this anticompetitive barrier to competition in the market for portable media players.

---

[5] *See* Rules Advisory Committee Notes to 1966 Amendments to Rule 23 ("Subdivision (b)(2) is not limited to civil-rights cases. Thus an action looking to specific declaratory relief could be brought by a numerous class of purchasers, say retailers of a given description, against a seller alleged to have undertaken to sell to that class at prices higher than those set for other purchasers . . .."). *See also In re Catfish Antitrust Litig*., 826 F. Supp. 1019 (N.D. Miss. 1993); *Northwestern Fruit Co. v. A. Levy & J. Zentner Co.*, 116 F.R.D. 384, 388 (E.D. Cal. 1986); *Stavrides v. Mellon Bank, N.A.*, 69 F.R.D. 424 (W.D. Pa. 1975).

[6] *See, e.g., Blue Cross & Blue Shield United v. Marshfield Clinic*, 152 F.3d 588, 590-92 (7th Cir. 1988); *Virginia Vermiculite, Ltd. v. W.R. Grace & Co.-Conn*., 108 F. Supp. 2d 549, 60-2 (W.D. Va. 2000).

[7] *See Zenith Radio Corp. v. Hazeltine Research*, 395 U.S. 100, 132-33 (1969) (quoting *NLRB v. Express Publishing Co*., 312 U.S. 426, 436 (1941) ("We see no reason that the federal courts, in exercising the traditional equitable powers extended to them by § 16, should not respond to the 'salutary principle that, when one has been found to have committed acts in violation of a law, he may be restrained from committing other related unlawful acts.'").

Courts commonly consider whether the suit is primarily one concerning monetary damages under Rule 23(b)(3) in considering whether to certify a (b)(2) class. The Court has already concluded that is not the case here. *See* December 22, 2008, Class Certification Order at 11 ("the Court finds that such monetary relief is secondary in nature to Plaintiffs' broader desire to force Defendant to make iTMS-purchased media interoperable with a variety of portable digital media players.") Moreover, it certainly is not true where Plaintiff moves only for certification of a (b)(2) class.

The relief for the injunctive relief classes Plaintiff seeks to certify is equitable in nature. First, Plaintiff seeks an order enjoining Apple from restricting iTMS downloads in the future in any way that would make them incompatible with competing media players on behalf of all iPod and iTMS purchasers. Second, Plaintiff seeks disgorgement on behalf of a subclass of iTMS purchasers for all amounts they paid to Apple since April 2007 for DRM-free music files or to have their files converted to DRM-free. "Once the conduct of the defendant makes such injunctive or declaratory relief appropriate, the fully panoply of the court's equitable powers is introduced." Conte & Newberg, *Newberg on Class Actions* § 4:14 (discussing cases). One court considering the matter stated the inquiry as follows:

> the drafters of Rule 23(b)(2) clearly contemplated that classes seeking monetary relief can be certified under (b)(2) in some circumstances. Specifically, the advisory committee notes to Rule 23(b)(2) note that the subsection "does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages." Thus, in cases such as this, where monetary relief is sought in addition to declaratory and injunctive relief, the propriety of (b)(2) certification turns largely on one question: does the final relief relate "predominantly" to money damages?[8]

---

[8] *Jones v. Ford Motor Credit Co*., 2005 U.S. Dist. LEXIS 5381, *68-69 (S.D.N.Y. Mar. 31, 2005). *See also Feltner v. Columbia Pictures Television, Inc*., 523 U.S. 340, 352 (1998) (noting that actions for monetary relief such as disgorgement of improper profits are "equitable" in nature); *see also Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 86 (1989) (White, J., dissenting) ("This Court has not accepted the view that any award of monetary relief must necessarily be legal relief. We have previously recognized that actions to disgorge improperly gained profits, to return funds rightfully belonging to another, or to submit specific funds wrongfully withheld, are all equitable actions -- even though the relief they seek is monetary -- because they are restitutionary in nature.").

It is clear that Plaintiff's equitable claim for disgorgement does not predominate over her claims for injunctive and declaratory relief. While disgorgement is an important form of relief, it is clearly secondary to the injunctive goal of making all iTMS downloads DRM-free and not charging to remove DRM from previously purchased iTMS downloads, which will be the case whether the sub-class obtains disgorgement or not.

The amounts Plaintiff seeks to disgorge are amounts certain, and are traceable to each and every class member who paid them, by reference to Defendant's iTMS records. It will require no complicated calculations or formulas. The relief sought flows naturally from Plaintiff's claim that charges for DRM-free tracks are anticompetitive, class members should not have had to pay them, and Defendant should not be allowed to retain them.[9]

III. PLAINTIFF AND THE CLASSES ARE ENTITLED TO INJUNCTIVE RELIEF BASED ON THE CLAIMS ALLEGED

California law authorizes courts to impose injunctions that require defendants to take affirmative actions. "[T]he power to prevent the use or employment of false advertising and unfair business practices necessarily includes the power to correct false impressions built up by prior advertising, and the power to deter future violations. ... One way to accomplish these goals is to order a violator to take affirmative action." *Consumers Union*, 4 Cal. App. 4th at 966, 975 ("a trial court has the authority to order the placement of a warning on a commercial product to remedy the past effects of false advertising and unfair business practices"); *see also Chabner v. United of Omaha Life Ins. Co.*, 225 F.3d 1042, 1053 (9th Cir. 2000) (court has authority under UCL to order insurance company to rewrite its insurance policy to conform to law); *Colgan v. Leatherman Tool Group, Inc.*, 135 Cal. App. 4th 663, 680, 701 (2006) (manufacturer ordered to "publish for 12 weeks in nine national magazines and 47 California newspapers notices of its deceptive labeling and advertising practices"). "While an injunction against future violations might have some deterrent effect, it is only a partial remedy since it does not correct the

[9] In the alternative, Plaintiff seeks these same amounts as damages pursuant to Rule 23(b)(3) under the Cartwright Act and CLRA.

consequences of past conduct. An order which commands [a party] only to go and sin no more simply allows every violator a free bite at the apple." *Hewlett v. Squaw Valley Ski Corp*., 54 Cal. App. 4th 499, 540 (1997) (quoting *Consumers Union*, 4 Cal. App. 4th at 972-73). "Injunctive relief 'may be as wide and diversified as the means employed in perpetration of the wrongdoing."' *Id.* (quoting *People v. Casa Blanca Convalescent Homes, Inc.*, 159 Cal. App. 3d 509, 536 (1984)).

Plaintiff's monopolization, attempted monopolization, UCL and CLRA claims all entitle Plaintiff and the classes to the following injunctive relief: 1) removal of DRM from video files available on iTMS; 2) enjoining Apple from continuing to charge consumers to remove DRM from music previously purchased so that it will be DRM-Free; and 3) restoration of all monies class members paid since April 2007 to have the DRM removed from their existing music files.

A. Plaintiff's Monopolization & Attempted Monopolization Claims Entitle Plaintiff and The Classes to Injunctive Relief

The injunctive relief Plaintiff seeks through her monopolization and attempted monopolization claims not only benefits iPod purchasers, but also benefits iTMS purchasers, which is why Plaintiff seeks to modify the class definition to include iTMS purchasers as it was originally alleged in the Complaint.

Obviously iPod purchasers who also purchased music from iTMS will benefit from the injunctive relief Plaintiff seeks since they will be able to play their media files purchased from iTMS on the portable media player of their choice. Even iPod purchasers who never purchased music or video files from iTMS will benefit from the injunctive relief Plaintiff seeks. These class members also suffered harm because they were forced to pay supracompetitive prices for Apple's iPod. By preventing class members who purchased audio and video files from iTMS from playing their music and videos on competitors' portable media players, Apple has been able to maintain monopoly power in the digital music player market and charge supracompetitive prices. Complaint ¶ 74.

Regardless, "[t]he fact that some class members may have suffered no injury or different injuries from the challenged practice does not prevent the class from meeting the requirements of

Rule 23(b)(2)." *Rodriguez v. Hayes*, __ F. 3d __, 2009 WL 2526622, *13 (9th Cir. 2009) (finding requirements of a Rule 23(b)(2) class were satisfied even though some class members might not have been entitled to the injunctive relief sought since all class members sought relief from a single practice).

Section 16 of the Clayton Act provides that "[a]ny person, firm, corporation, or association shall be entitled to sue for and have injunctive relief . . . against threatened loss of damage by a violation of the antitrust laws . . . when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity." 15 U.S.C. § 26. "Injunctive remedies under Section 16 of the Clayton Act may be as broad as necessary to terminate the illegal conduct, prevent or eliminate its consequences, and ensure that violations do not recur." American Bar Association, *Antitrust Law Developments (Sixth)* at 851 (citing *California v. American Stores Co.*, 495 U.S. 271, 281 (1990) (stating that there are no restrictions to the injunctive relief a private plaintiff may obtain under Section 16, and that traditional equity principles govern the grant of injunctive relief)). Injunctive relief can encompass preliminary and permanent injunctions, and is even broad enough to encompass divestiture. The fashioning of relief should be guided not just by the need of the private plaintiff, but also "the high purpose of enforcing the antitrust laws." *Zenith Radio Corp. v. Hazeltine Research*, 395 U.S. 100, 131 (1969).

B. Plaintiff and The Classes Are Entitled To Injunctive Relief Under The UCL & CLRA Claims

While the focus of the case has been the antitrust claims alleged, Plaintiff also seeks certification of her consumer claims under the UCL and CLRA. Apple's conduct constitutes an unfair business practice ***separate and apart*** from being an antitrust violation. Under the UCL, for example, an unfair business practice occurs when the practice "offends an established public policy or when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers." *Podolsky v. First Healthcare Corp.*, 50 Cal. App. 4th 632, 634 (1996). Under the CLRA, Plaintiff alleges that Apple has included unconscionable provisions in its contracts. Complaint at ¶119. Courts have "broad equitable powers" to remedy deceptive

conduct under both the UCL and CLRA. *See Fletcher v. Security Pacific Nat'l Bank*, 23 Cal.3d 442, 450 (1979) ("By this language the Legislature obviously intended to vest the trial court with broad authority to fashion a remedy that would effectively 'prevent the use ... of any practices which violate [the] chapter [proscribing unfair trade practices]' and deter the defendant, and similar entities, from engaging in such practices in the future;" *see also Friedman v. 24 Hour Fitness*, 580 F. Supp. 2d 985, 995 (N.D. Cal. 2008) (a plaintiff seeking injunctive relief under the CLRA functions "as a private attorney general, enjoining future deceptive practices on behalf of the general public"). "Probably because ... unfair practices can take many forms, the Legislature has given the courts the power to fashion remedies to prevent their 'use or employment' in whatever context they may occur." *Consumers Union of U.S., Inc. v. Alta-Dena Certified Dairy*, 4 Cal. App. 4th 963, 972 (1992). The court may fashion relief to fit the facts before it." *UFW of Am. v. Dutra Farms*, 83 Cal. App. 4th 1146, 1165 (2000) (quoting *People v. Custom Craft Carpets, Inc.*, 159 Cal. App. 3d 676, 684 (1984)). Under the UCL, the court "may make such orders or judgments ... as may be necessary to prevent the use or employment by any person of any practice which constitutes unfair competition." Cal. Bus. & Prof. Code § 17203; *see Consumers Union*, 4 Cal. App. 4th at 967 (the court granted preliminary injunction restraining defendant's advertising practices and, later, permanent injunction requiring defendant to place a warning on its product).

Plaintiff alleges Apple violated the UCL because "in its pursuit of monopoly pricing [Apple] has made its products less useful to consumers and prevented them from choosing which companies to do business within the relevant markets based on the merits of each company's products." Complaint ¶ 111. In addition, Plaintiff claims Apple's conduct is fraudulent and unfair because "it does not inform the purchasers of its products that it has deliberately made them incompatible with the products of its competitors. Apple has deceived consumers who reasonably believed they could purchase Online Music and Online Video from any store to play on Apple's Portable Music Player products, and likewise that the Online Video and Online Music they purchase from the Music Store are compatible with any standard Portable Music

Player. This belief is reasonable under the circumstances given that consumers when purchasing media products are accustomed to the fact that the CDs, DVDs, audio cassettes, and VHS cassettes they purchase from any American store are compatible with any standard CD, DVD, audio cassette, and VHS cassette player." Complaint ¶ 112. Apple's size, completely dominant market share and unreasonable and unfair technological restrictions, place it in a greatly unequal bargaining position relative to consumers. Apple unconscionably exploits this unequal bargaining power by imposing prices, contractual terms and one sided technological restrictions in to contracts with consumers. Complaint ¶ 122. Plaintiff alleges Apple violated the CLRA by "inserting an unconscionable provision in the contract." Complaint ¶ 119. The contractual terms apply to class members uniformly. Under the CLRA Plaintiff would be entitled to damages for Apple's unconscionable contractual terms and one-sided technological restrictions. C.C.P. § 1770(a)(19).

In fashioning injunctive and equitable relief to fit the facts and theories of liability alleged, the Court could order: Apple to remove the DRM from its video files, remove DRM from class members' existing libraries without charging them for the conversion and order Apple to disgorge the profits it has reaped from charging class members to convert their libraries since April 2007.

IV. CONCLUSION

For all of the reasons stated herein, Plaintiff respectfully requests that the Court grant her motion for class certification, certify the proposed nationwide class pursuant to Federal Rule of Procedure 23(b)(2), and appoint the firms of Zeldes & Haeggquist, LLP and Mehri & Skalet, PLLC as Indirect Purchaser Class Counsel.

DATED: August 31, 2009

Respectfully submitted,

ZELDES & HAEGGQUIST, LLP
HELEN I. ZELDES
ALREEN HAEGGQUIST

s/ Alreen Haegguist
ALREEN HAEGGQUIST

625 Broadway, Suite 906
San Diego, CA 92101
Telephone: 619/342-8000
Fax: 619/342-7878

MEHRI & SKALET, PLLC
STEVEN A. SKALET
CRAIG L. BRISKIN
1250 Connecticut Ave NW, Suite 300
Washington, DC 20036
Telephone: 202/822-5100
Fax: 202/822-4997

Attorneys for Plaintiff Stacie Somers and the Proposed Classes

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/ Alreen Haeggquist
ALREEN HAEGGQUIST

ZELDES & HAEGGQUIST, LLP
HELEN I. ZELDES
ALREEN HAEGGQUIST
625 Broadway, Suite 906
San Diego, CA 92101
Telephone: 619/342-8000
Fax: 619/342-7878

Email Addresses: helenz@zhlaw.com
alreenh@zhlaw.com

MAILING INFORMATION FOR CASE C 07-06507

Electronic Mail Notice List

The following are those who are currently on the list to receive e-mail notices for this case.

- **Craig L. Briskin**
  cbriskin@findjustice.com, Pleadings@findjustice.com
- **Alreen Haeggquist**
  alreenh@zhlaw.com
- **Robert Allan Mittelstaedt**
  ramittelstaedt@jonesday.com, ybennett@jonesday.com
- **Tracy Strong**
  tstrong@jonesday.com, dharmon@jonesday.com
- **Elaine Wallace**
  rchavez@jonesday.com, ewallace@jonesday.com, clok@jonesday.com
- **Helen I. Zeldes**
  helenz@zhlaw.com

Manual Notice List

The following is the list of attorneys who are not on the list to receive e-mail notices for this case (who therefore require manual noticing).

Steven A. Skalet
Mehri & Skalet, PLLC
1250 Connecticut Avenue NW, Suite 300
Washington, DC 20036