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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: *Somers v. Apple, Inc.*, Case No. C 07-6507 JW	Case No. C 07-6507 JW REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S SUPPLEMENTAL MOTION FOR CLASS CERTIFICATION OF A RULE 23(B)(2) CLASS AND APPOINTMENT OF CLASS COUNSEL JUDGE: The Hon. James Ware DATE: November 23, 2009 TIME: 9:00 a.m. CTRM: 8, 4th Floor

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

I. INTRODUCTION

Apple raises only two arguments in its Opposition to Plaintiff's Supplemental Memorandum: that disgorgement predominates over injunctive relief and that plaintiff's state law claims raise individualized issues.[1] Both propositions are wrong.

II. CERTIFICATION UNDER RULE 23(b)(2) IS WARRANTED HERE

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 Rule (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).

A. Disgorgement Does Not Predominate

Plaintiff Somers seeks certification of a Rule (b)(2) class that includes all purchasers of iTMS music and video tracks. This class includes a subclass of purchasers who have paid Apple since March 2009 to convert their DRM- protected music files to DRM-free files, or, in Apple's terms, to give them replacement DRM-free files for those they have already purchased. This equitable remedy is separate and apart from the damages Plaintiffs have sought pursuant to Rule 23(b)(3) certification, the overcharge for iPods. It is secondary to, and flows naturally from, the primary purpose of Rule (b)(2) certification in this case, which is an injunction prohibiting Apple from requiring an additional payment for DRM-free music tracks, and its maintenance of DRM on video

[1] Apple incorporates the its arguments from its prior briefing in the direct purchaser action. Instead of repeating arguments already made by the direct purchasers in response to apple's arguments, plaintiffs incorporate the arguments already made by plaintiffs' in that action. See docket numbers

tracks, constitutes illegal monopolization of the market for media players. If Plaintiffs prevail, the class will be able to obtain DRM-free music and video files without paying a charge. But relief to the class would not be complete if the class members who already have paid that charge are not given a refund.

Courts, including courts in the Ninth Circuit, have long held that classes certified pursuant to Rule 23(b)(2) can recover damages. For example, plaintiffs in *Williams v. Owens-Illinois, Inc.*, 665 F.2d 918 (9th Cir. 1982), sought damages as part of their Section 1981 claim concerning their employers' employment and promotion practices.

> It is true that this court has adopted the view that legal remedies which are incidental to a request for injunctive relief may be included as a part of the (b)(2) claim. *Society for Individual Rights, Inc. v. Hampton*, 528 F.2d 905, 906 (9th Cir. 1975); *Elliott v. Weinberger*, 564 F.2d 1219, 1228 (9th Cir. 1977); *see* Proposed Rules of Civil Procedure, Advisory Committee's Note to proposed Rule 23, 39 F.R.D. 98, 102 (1966) ((b)(2) designation not appropriate where "final relief relates exclusively or predominantly to money damages" (emphasis supplied)); 7A Wright & Miller, *Federal Practice and Procedure* § 1775, at 22-23 (1972).

Id. at 928-29. The Ninth Circuit in *Williams*, differentiated between back pay, which is an appropriate remedy under Rule 23(b)(2), and punitive and compensatory damages, which generally are not, because of the more complicated inquiry they involve. Back pay "was properly viewed as either equitable or as a legal remedy incidental to an equitable cause of action and accordingly not sufficient to create a right to jury trial." *Id.* at 929.

Similarly, in *Probe v. State Teachers' Retirement System*, 780 F.2d 776, 780 (9th Cir. 1986), plaintiffs sought certification of a class of male public school teachers who were eligible for a state pension annuity, and who alleged that the annuity discriminated on the basis of sex in allocating benefits, in violation of Title VII. The district court certified a Rule 23(b)(2) class (only), and ruled for plaintiffs, ordering defendant to equalize the benefits for male and female retirees. *Probe v. State*

Teachers' Retirement System, 1981 U.S. Dist. LEXIS 17213, *18 (C.D. Cal. Sept. 14, 1981). Defendant challenged the award of damages to a Rule 23(b)(2) class:

> STRS argues that this action may not proceed as a class action under Rule 23(b)(2) because Plaintiffs request damages as well as injunctive relief. This argument is without merit. Class actions certified under Rule 23(b)(2) are not limited to actions requesting only injunctive or declaratory relief, but may include cases that also seek monetary damages. . . . Although plaintiffs request money damages in this suit, such a claim is merely incidental to their primary claim for injunctive relief to prohibit the use of sex-based mortality tables. Thus, plaintiffs' request for money damages does not prevent class certification under Rule 23(b)(2).[2]

Another leading case endorsing monetary relief pursuant to Rule 23(b)(2) certification is *Allison v. Citgo Petroleum Corp*., 151 F.3d 402 (5th Cir.1998). *Allison* followed the Ninth Circuit's decision in *Williams*, holding that "monetary relief predominates in (b)(2) class actions unless it is incidental to requested injunctive or declaratory relief." *Id.* at 415 (citing *Williams,* 665 F.2d at 928-29). The *Allison* court noted the Advisory Committee Notes to Rule 23, which state that Rule 23(b)(2) certification "'does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages.' Fed. R. Civ. P. 23 (advisory committee notes) (emphasis added). This commentary implies that the drafters of Rule 23 believed that at least some form or amount of monetary relief would be permissible in a (b)(2) class action."[3]

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[2] *Probe v. State Teachers' Retirement System*, 780 F.2d 776, 780 (9th Cir. 1986) (citing *EEOC v. General Telephone Co.*, 559 F.2d 322, 334 (9th Cir. 1979); Wright & Miller, Federal Practice and Procedure § 1775 at 23-24 (1972)). The Court of Appeals noted that all such relief was retroactive in nature, because it was based on prior employee contributions. It was for independent reasons that the district court did not require defendant to reimburse past contributions; the court concluded that the employer was not on notice by prior judicial decisions that its practices were unlawful. *See id.* at 782. Otherwise, it appears that the court would have ordered reimbursement to equalize benefits already paid under Rule 23(b)(2).

[3] *Id.* at 411 (citing *Pettway v. American Cast Iron Pipe Co*., 494 F.2d 211, 257 (5th Cir. 1974)). *See also Eubanks v. Billington*, 110 F.3d 87, 92 (D.C. Cir. 1997) (addressing notice and opt-out rights in (b)(2) classes); *Crawford v. Honig*, 37 F.3d 485, 487 (9th Cir. 1994) (same); *Zimmerman v. Bell*, 800 F.2d 386, 389-90 (4th Cir. 1986); *In re School Asbestos Litigation*, 789 F.2d 996, 1008 (3d Cir. 1986) ("Plaintiffs here seek mandatory injunctive relief in the form of certain remedial action and restitution for expenditures already incurred to ameliorate asbestos hazards …. The district court did not rule out the possible application of equitable remedies at some stage of the proceeding but concluded that a (b)(2) certification was not appropriate at this time."); *Holmes v. Continental Can*

The *Allison* court defined "incidental damages" as "damages that flow directly from liability to the class as a whole on the claims forming the basis of the injunctive or declaratory relief." *Id.* at 415.

> Such damages should at least be capable of computation by means of objective standards and not dependent in any significant way on the intangible, subjective differences of each class member's circumstances. Liability for incidental damages should not require additional hearings to resolve the disparate merits of each individual's case; it should neither introduce new and substantial legal or factual issues, nor entail complex individualized determinations. Thus, incidental damages will, by definition, be more in the nature of a group remedy, consistent with the forms of relief intended for (b)(2) class actions.

Id. at 415; *See also Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211, 257 (5th Cir. 1974) (allowing plaintiffs to recover back pay in a Rule 23(b)(2) class action as part of equitable relief sought).

The iTMS refund clearly fits this definition of "incidental damages." A class refund of the amount Apple exacted is applicable to a readily ascertainable subclass of purchasers. The injury is unitary and common, and requires no individual determinations. Indeed, determination of the amount owed to any class member is simply a matter of a refund, a mere clerical exercise, not one requiring expert analysis, or even any math. *See Eubanks v. Billington*, 110 F.3d 87, 95 (D.C. Cir. 1997) (stating that damages under Rule (b)(2) would not be appropriate where class seeks to recover back pay to be allocated based on individual injuries).[4]

Even the cases Defendant cites, such as *Mahfood v. QVC, Inc.*, 2008 U.S. Dist. LEXIS 105229 (C.D. Cal. Sept. 22, 2008), agree that a "request for sizable monetary damages does not automatically defeat [a] claim for 23(b)(2) certification." *Id.* at *11 (citing *Dukes v. Wal-Mart, Inc.*, 509 F.3d 1168, 1186 (9th Cir. 2007); *Molski v. Gleich*, 318 F.3d 937, 956 (9th Cir. 2003)). The

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Co., 706 F.2d 1144, 1155 (11th Cir. 1983); *Jenkins v. United Gas Corp.*, 400 F.2d 28, 34 n.14 (5th Cir. 1968).

[4] Should the court deem it necessary, it also can exercise its discretionary powers through a separate certification of the damages phase of the trial under Rule 23(b)(3). *See Beck v. Boeing Co.*, 203 F.R.D. 459 (W.D. Wash. 2001).

question is whether monetary relief is the "essential goal" of the equitable relief sought. *Id.* The same is true of *Pickett v. IBP, Inc.*, 182 F.R.D. 647 (M.D. Ala. 1998), which Defendant cites. The *Pickett* court further stated the prevailing rule, which is that plaintiffs can seek monetary damages under Rule 23(b)(2), but monetary damages cannot be the "exclusive or predominant relief sought," and "[t]he determination of which type of relief is predominant is a matter within the sound discretion of the court." *Id.* The court refused to allow certification under Rule 23(b)(2) because plaintiffs sought compensatory and punitive damages. *Id.* at 657.

B. State Law Claims Raise Common Issues of Fact and Law

Contrary to Apple's assertions, Plaintiff's state law claims raise common issues. First, Apple is incorrect. Plaintiff's damages claims are incidental to injunctive relief. Certification of an injunctive relief class remains appropriate in the absence of monetary relief where "reasonable plaintiffs would bring the suit to obtain" injunctive relief, and such 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). The relief sought is not a disguised damages claim (see discussion above), rather it is necessary to remedy the ongoing wrongdoing alleged. While Apple boasts that it no longer sells DRM protected music, it conveniently ignores the billions of still DRM protected files that continue to burden class members. Reasonable plaintiffs would bring suit to unlock their iTMS libraries. All of the class would benefit from such relief. And of course such persons are readily ascertainable since Apple requires all iTMS users to register before they can download the iTMS music store software.

Secondly, Apple asserts that the cost to "unlock" class members DRM-protected files would be inequitable. However, no such data has been produced to date to support such assertion and, in any event, whether this relief is equitable is more properly a merits consideration. Moreover, it is quite possible that Apple has a technological "fix" not yet disclosed to Plaintiffs. Indeed, Apple swaps out encrypted files with unencrypted files now. Regardless, as a class certification matter, if Apple is found to have engaged in anticompetitive behavior, such a finding will be a classwide issue (as will issues of equity) appropriate for class treatment. Apple does not contend otherwise.

Finally, Plaintiff's state law omissions and misrepresentation claims are not inherently individualized. As the California Supreme Court recently ruled, a plaintiff need not show individualized reliance on specific misrepresentations to satisfy Proposition 64's requirements. *In re Tobacco II Cases,* 46 Cal. 4th 298, 328 (2009). Rather, a plaintiff is not required to plead "with an unrealistic degree of specificity" that the plaintiff relied on specific or particular advertisements or statements. *Id*. Indeed, it is well-settled that reliance may be inferred on a classwide basis. *See Vasquez v. Superior Court,* 4 Cal. 3d 800, 814-15 (1971) (inference of reliance may arise as to an entire class where there has been a common misrepresentation upon which person could be expected to reasonably rely); *see also Occidental Land, Inc. v. Superior Court,* 18 Cal. 3d 355, 363 (1976). As set forth in Plaintiff's opening memorandum, Plaintiff alleges that Apple violates state law because it "does not inform the purchasers of its products that it has deliberately made them incompatible with the products of its competitors." Complaint ¶ 112; Supplemental Memo at 16-17 (Docket No. 83).

III. CONCLUSION

An injunctive class is appropriate in this case. Accordingly, the Court should grant plaintiff's motion for class certification, certify the proposed nationwide class pursuant to Federal Rule of Procedure 23(b)(2), appoint plaintiff as the class representative and appoint the firms of Zeldes & Haeggquist, LLP and Mehri & Skalet, PLLC as Indirect Purchaser Class Counsel.

DATED: November 9, 2009

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 9, 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 November 9, 2009.

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