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APPLE INC.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

STACIE SOMERS, On Behalf of Herself and All Others Similarly Situated,

Plaintiff,

v.

APPLE INC.,

Defendant.

Case No. C 07-06507 JW

DEFENDANT'S RESPONSE TO PLAINTIFF'S SUPPLEMENTAL MEMORANDUM RE RULE 23(B)(2) CLASS

Date: November 9, 2009
Time: 9:00 A.M.
Place: Courtroom 8, 4th floor

This Court's July 17 order invited Apple to move to reconsider certification of the Rule 23(b)(2) class in the direct purchaser case, which Apple has done. In addition to the briefing on that motion, the direct purchasers and indirect purchaser have filed largely duplicative memoranda seeking to justify their injunctive relief claim. In both cases, plaintiffs argue that injunctive relief is proper even though Apple no longer sells any music with DRM, and they request that their proposed class definition be amended to include consumers who have purchased iTS music without buying iPods. Apple has responded to these arguments at length in its memoranda filed in the direct purchaser case in support of Apple's motion to reconsider (Dkt. 245) and in opposition to the direct purchasers' motion to amend their class definition (Dkt. 255). Rather than repeat those same points here in response to the same arguments raised in Somers' supplemental memorandum, Apple respectfully refers the Court to its earlier filed memoranda.[1]

In this brief, Apple will confine its response to two additional points raised by Somers, both of which only confirm that an injunctive relief class is improper. Somers' claim that Apple should "disgorge" money paid by iTS customers to obtain DRM-free versions of music previously downloaded is a request for payment of money. It is not injunctive relief and thus is no basis for certifying a class under Rule 23(b)(2). This is true whether based on antitrust or non-antitrust state law claims. Moreover, the state law non-disclosure and unconscionability claims raise inherently individual issues about what a consumer knew or expected—which explains why Somers did not seek certification of an injunctive relief class on those claims when she moved for certification.

Disgorgement

Like the direct purchasers, Somers asserts that Apple should be required to give to iTS purchasers, at no charge, DRM-free versions of iTS files they previously purchased. As Apple explained in the direct purchaser case, this is a disguised request for monetary relief and thus is not a proper basis for certification under Rule 23(b)(2). To try to avoid that problem, the direct

[1] Apple also refers the Court to its reply memorandum in support of its motion to reconsider the Rule 23(b)(2) class. In accord with the Court's recent scheduling order (Dkt. 258), Apple will file that memorandum on October 12.

purchasers have asserted that their request is prospective only and that they are not seeking, "as part of an injunctive relief class," reimbursement of money already paid to obtain DRM-free upgrades. *See* Dkt. 253, p. 11 n.10. Even as so limited, however, the request that Apple provide DRM-free files at no cost to consumers would be "substantially equivalent to a judgment . . . for damages in the amount necessary to buy" such files. *James v. City of Dallas, Tex.*, 254 F.3d 551, 572 & n.25 (5th Cir. 2001). Plaintiffs cannot obtain class certification under Rule 23(b)(2) simply by recasting a damages claim as one for injunctive relief.

Unlike the direct purchasers, Somers makes no pretense of arguing that she is seeking only injunctive relief. Instead, she affirmatively states that she intends to seek reimbursement of amounts previously paid. To that end, she requests not only that her class be expanded to include all iTS purchasers but also that a subclass be created of iTS purchasers who have already paid for "DRM-free versions of files they had previously purchased." Supp. Mem. at 3. Somers' memorandum thus removes any doubt about the nature of the relief she is seeking—it is monetary damages, not injunctive relief.

Rather than try to justify this remedy as injunctive, Somers asserts that such purchasers are entitled to "disgorgement" of the amounts paid, which she asserts is an "equitable" remedy rather than a "legal" one for damages. *Id.* at 7-8. The relevant distinction under Rule 23(b)(2), however, is not between equitable and legal remedies. It is between "injunctive relief . . . respecting the class as a whole" (Rule 23(b)(2)) and claims for monetary relief. Only the former can support a 23(b)(2) class. *See Pickett v. IPB, Inc.*, 182 F.R.D. 647, 656-57 (M.D. Ala. 1998) ("[A]lthough disgorgement is an equitable remedy, this remedy does not qualify as injunctive relief. . . . Therefore, the Plaintiffs' request for compensatory and punitive damages, whether stemming from disgorgement or not, is not the type of relief contemplated by Rule 23(b)(2)."); *Mahfood v. QVC, Inc.*, 2008 WL 5381088, at *4 (S.D. Cal. Sept. 22, 2008) (denying class certification under Rule 23(b)(2) because plaintiff requested monetary relief such as "disgorgement of profits"); *The Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 226 F.R.D. 456, 468 (S.D.N.Y. 2005) (claim for constructive trust and disgorgement is "ill-disguised

claim for damages" and "the sort of sham request for injunctive relief " that "cannot support a Rule 23(b)(2) certification.").

Because Somers' request for DRM-free music at no charge—whether framed as purported injunctive relief or "disgorgement"—is not a proper injunctive relief claim, Somers' request for a Rule 23(b)(2) class fails for that reason alone. Her only other claim for injunctive relief is that Apple be ordered to stop putting DRM on its current music and video sales. That request is unfounded for the reasons explained in the direct purchaser case.[2]

State law claims

Somers asserts that a Rule 23(b)(2) class is at least proper for her state law claims under the Unfair Competition Law and the Consumers Legal Remedies Act. She argues that those claims support injunctive relief because they allege that Apple's conduct "constitutes an unfair business practice ***separate and apart*** from being an antitrust violation." Supp. Mem. at 10 (emphasis in original). This argument fails for at least two reasons.

First, the impropriety of a Rule 23(b)(2) class here does not turn on whether the underlying claims are for antitrust violations or for something else. The problem is that the type of relief plaintiffs are seeking is not a proper basis for a Rule 23(b)(2) class, regardless of the theory under which they seek it. As Apple has demonstrated (Dkt. 245, 255), plaintiffs' purported claim for injunctive relief does not support a Rule 23(b)(2) class because (1) it is not the predominant purpose of these suits, (2) it is a disguised claim for damages, (3) it will not benefit all or substantially all of the alleged class, (4) even under plaintiffs' theory, the persons it would be benefit, if any, are not ascertainable, and (5) it would be inequitable because the cost to Apple would be disproportionate to any conceivable benefit to any consumer. None of these

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[2] Somers suggests that, wholly apart from any use of DRM, Apple should be enjoined from taking steps to prevent "non-Apple devices from syncing with" the iTunes jukebox application. Supp. Mem. at 2. Somers' complaint, however, does not allege that the antitrust laws (or any other law) require that other companies be able to use the iTunes software to put music on their devices. Nor does the ability to sync with the iTunes jukebox have anything to do with making "iTMS files incompatible with other players." *Id.* Consumers with other players need only use the jukebox application for that player to load music onto their player.

defects is unique to plaintiffs' antitrust claims. They apply just as much to any claims under the UCL or CLRA.

Second, plaintiff's state law non-disclosure and unconscionability theories are not suitable for class treatment even apart from the nature of the relief plaintiff seeks, because they turn on inherently individualized issues regarding what individual consumers "reasonably believed" or whether their expectations were frustrated. *See, e.g.*, *Quacchia v. DaimlerChrysler Corp.*, 122 Cal. App. 4th 1442 (2004) (affirming denial of class certification of non-disclosure claim under UCL); *Caro v. Procter & Gamble Co.*, 18 Cal. App. 4th 644 (1993) (same). No doubt recognizing as much, Somers did not argue in her class certification motion that these theories were proper for class treatment. Her belated attempt to use these claims to salvage a Rule 23(b)(2) class is both untimely and meritless.

CONCLUSION

For these reasons, the requested injunctive relief class under Rule 23(b)(2) should be denied.

Dated: September 28, 2009

Respectfully submitted,

JONES DAY

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