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28UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA**ZACK WARD, ET AL.,**

Plaintiffs,

v.

**APPLE INC.,**

Defendant.

Case No. 12-cv-05404-YGR

**ORDER GRANTING IN PART DENYING IN  
PART DEFENDANT'S MOTION FOR  
SUMMARY JUDGMENT**

Re: Dkt. Nos. 78, 126

Plaintiffs Ward and Buchar bring this putative class action against defendant Apple Inc. alleging violations of Section 2 of the Sherman Act for a conspiracy to monopolize trade in the market for iPhone voice and data services. (Dkt. No. 1, "Comp.")

On December 15, 2015, the Court denied Apple's motion to dismiss, but indicated that it would entertain a motion for summary judgment solely on the issue of the existence of a relevant market for antitrust purposes. (Dkt. No. 72.) Apple filed such motion on February 2, 2016. (Dkt. No. 78.) The Court heard oral arguments on the motion on March 29, 2016, and ordered the parties to conduct additional discovery, deferring ruling thereon. (Dkt. Nos. 97, 100.) With the benefit of additional discovery, the parties filed supplemental briefs in September and October of 2016. (Dkt. Nos. 112, 118.)<sup>1</sup>

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<sup>1</sup> On November 21, 2016, plaintiffs filed an administrative motion to supplement the summary judgment record and file a sur-reply. (Dkt. No. 126.) Having considered such motion, and for good cause appearing, the Court **GRANTS** plaintiffs' administrative motion.

1           Having considered the pleadings, the papers and exhibits submitted on the motion, and oral  
2 arguments held on January 31, 2017, and for the reasons set forth more fully below, the Court  
3 finds that plaintiffs have raised sufficient facts to show the existence of an antitrust market, albeit  
4 more narrow than plaintiffs contemplate. Accordingly, the Court **GRANTS IN PART** and **DENIES IN**  
5 **PART** Apple’s motion for summary judgment.<sup>2</sup>

6           **I. BACKGROUND**

7           Plaintiffs seek to represent a class of persons who purchased iPhones and paid for voice  
8 and data service from AT&T between October 19, 2008 and February 3, 2011 (the “Class  
9 Period”). Plaintiffs bring a single claim against Apple under Section 2 of the Sherman Act,  
10 alleging that Apple conspired with AT&T to monopolize an aftermarket for iPhone voice and data  
11 services. For purposes of the instant motion, Apple contends that no such illegal antitrust  
12 aftermarket exists under applicable laws and economic theories. The following undisputed facts  
13 are relevant to such argument and plaintiffs’ claims to the contrary:

14           Apple launched its original cellular telephone, the iPhone 2G, on June 29, 2007. (Dkt. No.  
15 83-8, Fenger Decl. ¶ 8.) Prior to such launch, Apple and AT&T entered into an agreement by  
16 which AT&T would be the exclusive provider of cellular voice and data service for the iPhone in  
17 the United States (the “Agreement”). (*Id.* at ¶ 9.)<sup>3</sup> By the terms of the Agreement, the exclusivity  
18 period was to end five years after the effective date of the Agreement, i.e. August 10, 2011. (Dkt.  
19 No. 83-9 at 2, 5.) The Agreement also allowed either party to terminate the Agreement for  
20 convenience and upon notice, prior to the second anniversary of the iPhone’s commercial launch.  
21 (*Id.* at 19.) Thus, given that the iPhone’s commercial launch was June 29, 2007 (Fenger Decl. ¶  
22 8), AT&T was only guaranteed to be the exclusive provider for the iPhone until June 29, 2009.

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25           <sup>2</sup> In connection with the parties’ filings on this motion, they submitted administrative  
26 motions to file parts of their briefs and certain exhibits under seal. (Dkt. Nos. 83, 90, 111, 117,  
and 125.) The Court addresses each of those motions by separate order.

27           <sup>3</sup> During the periods relevant to the instant action, similar exclusivity provisions between  
28 cellular phone manufacturers and service and data providers were common in the industry, at least  
for limited periods of time. (*See* Fenger Decl. ¶¶ 2–3; Dkt. No. 111-8, Wilkie Decl. ¶ 27.)

1 In June 2008, around the time the second generation of iPhones was being released (the  
2 iPhone 3G), Apple and AT&T modified the Agreement to include a different and specific  
3 termination date, namely December 31, 2010. The amendment to the Agreement also provided for  
4 a significant change to the manner in which Apple earned revenues from the sales of the iPhone.  
5 Under the original Agreement, Apple shared in the revenues earned by AT&T from its sales of  
6 voice and data service for iPhones. (Dkt. No. 83-9 at 6–7.) The amendment eliminated revenue  
7 sharing and replaced it with a subsidy model, through which AT&T agreed to subsidize the cost of  
8 the iPhone if the buyer agreed to enter into a two-year service contract. (Dkt. No. 83-10 at 3–5.)<sup>4</sup>

9 Prior to, and during the Class Period, Apple and AT&T advertised both that AT&T would  
10 be the exclusive provider of voice and data service for the iPhone (at least in the United States)  
11 and that consumers were required to purchase a two-year contract with AT&T to activate the  
12 iPhone. (Dkt. No. 80-1 at 2.) Such information also appeared in the following: (i) the box in  
13 which the iPhone was sold (Dkt. No. 80-2 at 2); (ii) certain websites related to Apple and AT&T  
14 (Dkt. No. 120-4); and (iii) a pop-up screen during the iPhone activation process (Dkt. No. 79-1 at  
15 3). In light of these disclosures and the subsidy model in place during the Class Period, the iPhone  
16 was essentially sold bundled together with a two-year service plan through AT&T.<sup>5</sup> Relevant  
17 here, the two-year service plan contracts entered into between consumers and AT&T allowed  
18 consumers to terminate their plans with AT&T upon payment of a \$175 termination fee. (Dkt.  
19 No. 82-3 at 11.) Additionally, in such a case, the contract allowed AT&T to recover “any  
20 handsets and accessories purchased with” the service plan. (*Id.*)

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<sup>4</sup> During the Class Period, the parties agree that such a subsidy model was the industry standard by which “virtually all cellular phones” have been sold in the United States. (Dkt. No. 111-6 at 7, Issue 1, Fact 17.)

<sup>5</sup> Plaintiffs submitted evidence suggesting that, at least in some circumstances, gaps existed between when consumers purchased an iPhone and when they activated or purchased AT&T service for the same. (*See, e.g.*, Dkt. No. 111-2 at 2 (indicating that the average delay between purchase and activation for iPhones from June through September 2007 was two days).) However, for the reasons stated herein, the Court finds such gaps irrelevant for the purposes of determining whether a relevant antitrust market exists for iPhone voice and data services.

1 Notwithstanding the foregoing, plaintiffs have also produced evidence suggesting that the  
2 unlock codes for the iPhones, necessary to enable the iPhone's use with other carriers, were not  
3 released by AT&T until April 2012. (Dkt. No. 113-9 at 2.) Notably, until the exclusivity  
4 agreement formally ended in December 2010, iPhones were produced to function only on the  
5 Global System for Mobile communication network ("GSM"). (Fenger Decl. ¶ 7.) At the time,  
6 two major United States networks existed for cellular service, namely the GSM network and the  
7 Code Division Multiple Access network ("CDMA"). (See Dkt. No. 111-8, Wilkie Decl. at ¶¶ 10–  
8 11.) During the Class Period, generally, phones built to operate on the GSM network were limited  
9 to AT&T or T-Mobile as providers while those built to operate on the CDMA network were  
10 limited to using either Sprint or Verizon. (*Id.*) Thus, some evidence suggests that consumers who  
11 purchased a GSM-compatible iPhone prior to December 31, 2010 still had to remain on the AT&T  
12 network until April 2012, or else purchase a new phone.<sup>6</sup> Additionally, an open factual question  
13 remains as to whether iPhone purchasers were aware that AT&T and Apple would refuse to  
14 unlock their phones for purposes of international travel.<sup>7</sup>

15 **II. LEGAL FRAMEWORK FOR SUMMARY JUDGMENT**

16 Summary judgment is appropriate when no genuine dispute as to any material fact exists  
17 and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). A party  
18 seeking summary judgment bears the initial burden of informing the court of the basis for its  
19 motion, and of identifying those portions of the pleadings, depositions, discovery responses, and  
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21 <sup>6</sup> A dispute of fact exists as to whether the GSM-compatible iPhones could fully operate  
22 on the T-Mobile network during the Class Period. However, such dispute is not material to the  
23 Court's ruling on Apple's motion, and thus, the Court need not address the same at this time. (*See*  
24 Dkt. No. 111-6 at 3, Issue 1, Fact 6.)

25 <sup>7</sup> In this regard, Dr. Wilkie opined thus: "Cellular carriers, including ATTM, customarily  
26 unlock a GSM phone when a customer travels overseas. This allows customers to replace the SIM  
27 card with a card from a local cellular carrier and thus avoid international roaming fees. However,  
28 ATTM has refused to unlock iPhones. Consumers who paid anticompetitive foreign roaming  
charges to ATTM suffered a common impact. I understand that ATTM has developed a  
methodology that it has used to compensate some iPhone customers who have paid such foreign  
roaming charges. I anticipate that, following further discovery, I will be able to evaluate ATTM's  
methodology and determine how many iPhone customers have been partially or fully compensated  
by ATTM so that I can calculate the economic damages resulting from ATTM's anticompetitive  
roaming charges." (Dkt. No. 111-8, Wilkie Decl. ¶ 70.)

1 affidavits that demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v.*  
2 *Catrett*, 477 U.S. 317, 323 (1986). Material facts are those that might affect the outcome of the  
3 case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The “mere existence of *some*  
4 alleged factual dispute between the parties will not defeat an otherwise properly supported motion  
5 for summary judgment; the requirement is that there be no *genuine* issue of *material* fact.” *Id.* at  
6 247–48 (dispute as to a material fact is “genuine” if sufficient evidence exists for a reasonable jury  
7 to return a verdict for the non-moving party) (emphases in original).

8         Where the moving party will have the burden of proof at trial, it must affirmatively  
9 demonstrate that no reasonable trier of fact could find other than for the moving party. *Soremekun*  
10 *v. Thrifty Payless, Inc.*, 509 F.3d 978, 984 (9th Cir. 2007). On an issue where the opposing party  
11 will bear the burden of proof at trial, the moving party can prevail merely by pointing out to the  
12 district court that the opposing party lacks evidence to support its case. *Id.* If the moving party  
13 meets its initial burden, the opposing party must then set out “specific facts” showing a genuine  
14 issue for trial in order to defeat the motion. *Id.* (quoting *Anderson*, 477 U.S. at 250). The  
15 opposing party’s evidence must be more than “merely colorable” and must be “significantly  
16 probative.” *Anderson*, 477 U.S. at 249–50. Further, that party may not rest upon mere allegations  
17 or denials of the adverse party’s evidence, but instead must produce admissible evidence that  
18 shows a genuine issue of material fact exists for trial. *Nissan Fire & Marine Ins. Co., Ltd. v. Fritz*  
19 *Cos., Inc.*, 210 F.3d 1099, 1102–03 (9th Cir. 2000); *Nelson v. Pima Cmty. College Dist.*, 83 F.3d  
20 1075, 1081–82 (9th Cir. 1996) (“mere allegation and speculation do not create a factual dispute”);  
21 *Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 922 (9th Cir. 2001) (“conclusory  
22 allegations unsupported by factual data are insufficient to defeat [defendants’] summary judgment  
23 motion”).

24         When deciding a summary judgment motion, a court must view the evidence in the light  
25 most favorable to the non-moving party and draw all justifiable inferences in its favor. *Anderson*,  
26 477 U.S. at 255; *Hunt v. City of Los Angeles*, 638 F.3d 703, 709 (9th Cir. 2011). However, in  
27 determining whether to grant or deny summary judgment, a court need not “scour the record in  
28 search of a genuine issue of triable fact.” *Keenan v. Allan*, 91 F.3d 1275, 1279 (9th Cir. 1996)

1 (internal quotations omitted). Rather, a court is entitled to “rely on the nonmoving party to  
2 identify with reasonable particularity the evidence that precludes summary judgment.” *See id.*;  
3 *Carmen v. San Francisco Unified Sch. Dist.*, 237 F.3d 1026, 1031 (9th Cir. 2001) (“The district  
4 court need not examine the entire file for evidence establishing a genuine issue of fact, where the  
5 evidence is not set forth in the opposing papers with adequate references so that it could  
6 conveniently be found.”). Ultimately, “[w]here the record taken as a whole could not lead a  
7 rational trier of fact to find for the nonmoving-party, there is no genuine issue for trial.”  
8 *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (citation  
9 omitted).

10 **III. ANTITRUST AFTERMARKETS UNDER *KODAK* AND *NEWCAL***

11 To prove a conspiracy to monopolize in violation of Section 2, plaintiffs must prove four  
12 elements: “(1) the existence of a combination or conspiracy to monopolize; (2) an overt act in  
13 furtherance of the conspiracy; (3) the specific intent to monopolize; and (4) causal antitrust  
14 injury.” *Paladin Assocs., Inc. v. Montana Power Co.*, 328 F.3d 1145, 1158 (9th Cir. 2003).  
15 Additionally, plaintiffs must prove both that a “relevant market exists and that the defendant has  
16 power within that market.” *Newcal Indus., Inc. v. Ikon Office Sol.*, 513 F.3d 1038, 1044 (9th Cir.  
17 2008). Here, plaintiffs assert that the “relevant market” is the aftermarket for iPhone voice and  
18 data services, arguing that Apple’s undisclosed exclusivity arrangement with AT&T illegally  
19 created a monopoly in the same. (Dkt. No. 90-4 at 7.)

20 Plaintiffs’ claims emanate from the Supreme Court’s watershed decision in *Eastman*  
21 *Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451 (1992), which created a new avenue  
22 for plaintiffs to allege a relevant antitrust market. In *Kodak*, the Supreme Court addressed the  
23 juxtaposition of a defendant’s market power in the primary equipment market, or lack thereof,  
24 with the possibility of market power in derivative aftermarkets. *Id.* at 455. The Supreme Court  
25 held that competition in the primary equipment market does not necessarily preclude antitrust  
26 liability in certain circumstances for derivative aftermarkets. *Id.* at 471.

27 The markets addressed in *Kodak* involved the following: (i) a primary market for  
28 photocopiers and micrographic equipment and (ii) a derivative aftermarket for service and

1 replacement parts for such equipment. *Id.* With respect to the latter, beginning in the early 1980s,  
2 independent service organizations (“ISOs”) unrelated to the Eastman Kodak Company began  
3 repairing and servicing Kodak equipment. *Id.* at 457. However, in the late 1980s, Kodak  
4 implemented a new policy in which it would only sell replacement parts for its machines to  
5 “buyers of Kodak equipment who use Kodak service or repair their own machines,” effectively  
6 eliminating ISO competition in the service aftermarket. *Id.* at 458. The ISOs filed suit against  
7 Kodak claiming that it had “unlawfully monopolized and attempted to monopolize the sale of  
8 service for Kodak machines.” *Id.*

9         The district court granted summary judgment in favor of Kodak and the Ninth Circuit  
10 reversed holding that Kodak had “sufficient economic power in the tying product market [parts] to  
11 restrain competition appreciably in the tied product market [service].” *Id.* at 460. The Ninth  
12 Circuit further held that it was enough that the ISOs had “presented evidence of actual events from  
13 which a reasonable trier of fact could conclude that . . . competition in the [equipment] market  
14 does not, in reality, curb Kodak’s power in the parts market.” *Id.* On appeal, the Supreme Court  
15 acknowledged that the tying arrangement alleged in the complaint could be a violation of the  
16 antitrust laws if the “seller has ‘appreciable economic power’ in the tying product market and if  
17 the arrangement affects a substantial volume of commerce in the tied market.” *Id.* at 462. Kodak  
18 did not dispute that its arrangement affected a substantial volume of interstate commerce but  
19 argued that (i) its activities were not a tying arrangement and (ii) in any event, it did not exercise  
20 appreciable economic power in the tying market. *Id.*

21         The second of these arguments is most relevant to the instant motion. Kodak contended  
22 that it could not exercise the necessary market power for a Sherman Act violation because  
23 competition existed in the equipment market. *Id.* at 465. Specifically, Kodak argued that any  
24 exercise of market power in the market for parts and service “at least would be offset by a  
25 corresponding loss in profits from lower equipment sales as consumers began purchasing  
26 equipment with more attractive service costs.” *Id.* at 466. The Supreme Court held that, as a  
27 matter of law, the “fact that the equipment market imposes a restraint on prices in the aftermarket  
28 by no means disproves the existence of power in those markets.” *Id.* at 471 (holding that there “is

1 no immutable physical law—no ‘basic economic reality’—insisting that competition in the  
2 equipment market cannot coexist with market power in the aftermarkets”).

3 The Supreme Court thus proceeded to the narrower question of whether, under the  
4 circumstances in *Kodak*, the assertion of power in the aftermarket was unreasonable. *Id.* *Kodak*’s  
5 central theory was that higher service prices would lead to a drop in equipment sales. *Id.* at 472.  
6 However, the evidence in the record revealed otherwise. The Supreme Court found persuasive the  
7 ISOs’ explanation that the existence of “significant information and switching costs” could “create  
8 a less responsive connection between service and parts prices and equipment sales,” thus allowing  
9 *Kodak* to exercise market power in the former even where competition existed in the latter. *Id.* at  
10 473 (explaining that for the “service-market price to affect equipment demand, consumers must  
11 inform themselves of the total cost of the ‘package’—equipment, service, and parts—at the time of  
12 purchase; that is, consumers must engage in accurate lifecycle pricing”).

13 With regard to information costs, the Supreme Court explained: “Given the potentially  
14 high cost of information and the possibility that a seller may be able to price discriminate between  
15 knowledgeable and unsophisticated consumers, it makes little sense to assume, in the absence of  
16 any evidentiary support, that equipment-purchasing decisions are based on an accurate assessment  
17 of the total cost of equipment, service, and parts over the lifetime of the machine.” *Id.* at 475–76.  
18 With regard to switching costs, the Supreme Court stated that a “seller profitably could maintain  
19 supracompetitive prices in the aftermarket if the switching costs were high relative to the increase  
20 in service prices, and the number of locked-in customers were high relative to the number of new  
21 purchasers.” *Id.* at 476. On such bases, the Supreme Court held that there was a question of fact  
22 “whether information costs and switching costs foil the simple assumption that the equipment and  
23 service markets act as pure complements to one another.” *Id.* at 477.

24 The Supreme Court’s decision in *Kodak* thus created the framework within which courts  
25 have addressed antitrust liability in the context of derivative aftermarkets. The Ninth Circuit  
26 grappled with the same in analyzing the existence of a relevant antitrust aftermarket in *Newcal*.  
27 There, parties leased name-brand copier equipment to commercial customers and also provided  
28 service “contracts for the maintenance of that equipment during the term of the lease.” *Id.* at 1043.



1 The plaintiff in *Newcal* alleged that the defendant exercised illegal market power over the  
2 aftermarket for lease-end service contracts by amending “customers’ lease agreements and service  
3 contracts without disclosing that the amendments would lengthen the term of the original  
4 contract.” *Id.*

5 The district court dismissed the action, finding that the plaintiff had failed to allege a  
6 relevant antitrust market, and the Ninth Circuit reversed. *Id.* at 1044. In so reversing, the Ninth  
7 Circuit acknowledged three antitrust principles: First, “the law permits an antitrust claimant to  
8 restrict the relevant market to a single brand of the product at issue.” *Id.* at 1048. Second,  
9 antitrust claims cannot rest on “market *power* that arises solely from contractual rights that  
10 consumers knowingly and voluntarily gave to the defendant.” *Id.* (emphasis in original).<sup>8</sup> Third,  
11 given the law allows an “inquiry into whether a consumer’s selection of a particular brand in the  
12 competitive market is the functional equivalent of a contractual commitment,” the analysis should  
13 center on whether such consumers entered into certain transactions “knowing that they were  
14 agreeing to such a commitment.” *Id.* at 1049.

15 Against this legal framework, both parties cite approvingly to an article published not long  
16 after the Supreme Court’s decision in *Kodak*, which lays out four different economic  
17 circumstances in which an antitrust market could manifest. *See* Carl Shapiro, *Aftermarkets and*  
18 *Consumer Welfare: Making Sense of Kodak*, 63 Antitrust L.J. 483 (Winter 1995). Of particular  
19 relevance to the situation at bar is Shapiro’s “surprise” theory of antitrust aftermarkets.<sup>9</sup> “The  
20 surprise theory starts from the assumption that buyers in the aftermarket are vulnerable, and asks  
21 whether the equipment manufacturer will find it profitable to unexpectedly change its policies so  
22 as to exploit them.” *Id.* at 488. Shapiro explains that under this theory, injury would occur if

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24 <sup>8</sup> The Ninth Circuit in *Newcal* acknowledges that where “alleged market power flows from  
25 contractual exclusivity,” an antitrust aftermarket is not created. *Id.* at 1050 (citing *Queen City*  
26 *Pizza, Inc. v. Domino’s Pizza, Inc.*, 124 F.3d 430 (3d Cir. 1997) and *Forsyth v. Humana, Inc.*, 114  
27 F.3d 1467 (9th Cir. 1997)). Apple, however, concedes that it does not fall under *Newcal*’s safe  
28 harbor for contractually created rights. Thus, the Court does not address such issues further.

<sup>9</sup> The parties have not focused on the other three theories: (i) costly information; (ii)  
limited manufacturer commitment; and (iii) price discrimination.

1 “buyers had anticipated or relied on competitive aftermarkets, but some change in the  
2 manufacturer’s policies blocked that competition.” *Id.*

3 Thus, with this background in mind, the Court turns to an analysis of whether the particular  
4 circumstances surrounding sales of the iPhone and purchasing service from AT&T during the  
5 proposed Class Period gave rise to an antitrust aftermarket, and if so, to what extent.

6 **IV. DISCUSSION**

7 To assert a relevant antitrust market in the secondary market, plaintiffs first argue the  
8 existence of a separate and distinct secondary market. Said differently, plaintiffs claim that the  
9 primary purchase of the iPhone created a locked-in base of consumers who were then forced to  
10 purchase iPhone voice and data services from AT&T, i.e. the secondary market.<sup>10</sup> To support this  
11 argument, plaintiffs claim, as they must, that the purchase of the iPhone and the service contracts  
12 were temporally distinct transactions.

13 The Court disagrees. To the extent any temporal disconnect existed between the purchase  
14 of the iPhone and the activation of AT&T services, the Court finds the period insignificant.<sup>11</sup>  
15 Although some buyers may not have activated their iPhone and AT&T service for several days  
16 after purchasing the iPhone, the purchase of the initial two-year contract was essentially linked to  
17 the purchase of the iPhone. Apple produced several pieces of evidence indicating that a minimum  
18 “new two-year wireless service plan with AT&T” was “required to activate all iPhone features,  
19 including iPod features.” (Dkt. No. 80-2 at 2; *see also* Dkt. No. 79-1 at 3.) Plaintiffs themselves  
20 were aware when they purchased their iPhones that they also had to enter into a service agreement  
21 with AT&T. (Dkt. No. 126-2, Ward Dep. Tr. 68:19–69:11; Dkt. No. 126-3, Buchar Dep. Tr.

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23 <sup>10</sup> Plaintiffs further argue that an aftermarket was also created by Apple and AT&T’s  
24 refusal to unlock the iPhone during the two-year contract after users paid a termination fee.  
25 However, given the evidence of disclosures and information available to the consumers  
26 surrounding the sale of the iPhone, and the subsidy model in effect during the Class Period, the  
27 Court is not persuaded. Consumers explicitly locked themselves into a two-year agreement with  
28 AT&T, knowing that the same would be required to utilize the cellular capabilities of the iPhone.  
Additionally, the two-year service contract with AT&T included a provision that consumers may  
have to return their handsets should they terminate the plan prematurely.

<sup>11</sup> Plaintiffs note that discovery documents revealed that the average delay between  
purchase of the iPhone and activation of AT&T services was 1.5 days.

1 16:15–17:12.) Thus, at least with respect to the initial two-year agreement with AT&T, no  
2 evidence has been proffered that a “surprise” existed leading to a market hostage to defendant.  
3 Information regarding the need to purchase a two-year AT&T service plan was widely known, and  
4 plaintiffs have put forward no evidence to the contrary. *See, e.g., Newcal*, 513 F.3d at 1049  
5 (finding that the primary product market included the equipment lease and initial service contract  
6 and that the secondary product market consisted of the replacement equipment and lease-end  
7 service contracts).

8 Plaintiffs next argue that where, as in *Newcal*, the sales are tied, a market existed because  
9 of the “surprise” caused by the existence of a secret, five-year exclusivity agreement between  
10 Apple and AT&T. Plaintiffs’ first expert, Dr. Simon Wilke, opined as part of the initial opposition  
11 to Apple’s motion for summary judgment that this surprise effectively locked-in “iPhone  
12 customers for a substantial period beyond the term specified in their agreements with [AT&T].”  
13 (Dkt. No. 111-10 at 4, ¶¶ 2, 8 (finding that “iPhone customers did not agree at the time they signed  
14 the service contract with [AT&T] to make [AT&T] their exclusive iPhone carrier for a period of  
15 time extending beyond the two-year term of that contract”); *see also* Dkt. No. 111-8 at 21, ¶ 33  
16 (describing that the market power could be exercised by “withholding information regarding the  
17 five-year term of the Apple/[AT&T] agreement, thereby causing iPhone customers who entered  
18 into two-year agreements to either (1) stop using their iPhones for telecommunications purposes,  
19 or (2) continue to use [AT&T] after their two-year agreement expired, effectively locking in  
20 iPhone customers for a substantially longer period”).) Discovery has undermined plaintiffs’  
21 theory. The evidence now shows that the “five-year exclusivity deal” between Apple and AT&T  
22 never materialized. Summary judgment on this theory is therefore appropriate.

23 Given the lack of evidence, plaintiffs’ replacement expert, Dr. Frederick Warren-Boulton,  
24 adds nothing to plaintiffs’ arguments based on the five-year exclusivity theory. However, he does  
25 offer an additional theory that a market existed *after* the expiration of the two-year contract. (*See*  
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1 Dkt. No. 114-1 at 12, ¶ 11.)<sup>12</sup> With respect to this claim, plaintiffs have submitted evidence  
2 showing that defendant may have manipulated a market for service plans where defendant failed  
3 or refused to unlock the phones after the expiration of the two-year commitment for either  
4 domestic or international use. (*See* Dkt. No. 113-9 at 2.)<sup>13</sup>

5 The Court agrees as to this more narrow theory. Even though Apple was no longer bound  
6 to create iPhones that could only function on the GSM network after 2010, those who purchased  
7 iPhones prior to the end of exclusivity still had to remain on the GSM network. These consumers  
8 could have expected to switch to another GSM provider, like T-Mobile, at the end of the two-year  
9 contract with AT&T. However, as plaintiffs’ evidence suggests, AT&T did not begin providing  
10 unlock codes for such phones until April 2012. Consequently, these consumers would have been  
11 locked into renewing AT&T service, or else lose the cellular capabilities of their iPhones. In this  
12 context, the Court **DENIES** summary judgment with regard to any such claims.

13 Finally, the Court addresses Apple’s argument that summary judgment should be granted  
14 generally and as a matter of law based solely on the failure to include all economic substitutes in  
15 the market definition. The Court disagrees. *Newcal* held the law “permits an antitrust claimant to  
16 restrict the relevant market to a single brand of the product at issue.” *Newcal*, 513 F.3d at 1048.  
17 In evaluating the market at issue, courts look to various factors. No one factor is dispositive. *See*  
18 *Red Lion Medical Safety, Inc. v. Ohmeda, Inc.*, 63 F. Supp. 2d 1218, 1231–32 (E.D. Cal. 1999)  
19 (finding that a policy change is not necessarily required to sustain an aftermarket antitrust claim).

20 In summary, the Court finds that with regard to the sale of the iPhone and the purchase of  
21 the initial two-year service plan with AT&T, there is no relevant antitrust aftermarket.

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<sup>12</sup> Dr. Warren-Boulton also suggests that a lock-in is created for consumers who believed they could terminate their contract with AT&T and transfer to another carrier after paying a termination fee. However, for the reasons previously discussed, such argument does not persuade.

<sup>13</sup> As previously discussed, there also appears to be a question as to whether consumers were aware that neither AT&T nor Apple would unlock their phones during the initial two-year contract for the purposes of international use. Although plaintiffs have not sufficiently developed this argument, the Court recognizes that there may be viable claims in this regard.

1 Accordingly, with respect to that issue, the Court **GRANTS** summary judgment in favor of Apple.  
2 With respect to the more narrow claims discussed herein, summary judgment is **DENIED**.

3 **V. CONCLUSION**


4 As set forth above, the Court **GRANTS IN PART** and **DENIES IN PART** Apple's motion for  
5 summary judgment. Thus, the case may move forward within the framework set forth in this  
6 Order.

7 The Court further **SETS** a case management conference for **Monday, May 1, 2017 at 2:00**  
8 **p.m.** Parties shall file an updated case management conference statement.

9 This Order terminates Docket Numbers 78 and 126.

10 **IT IS SO ORDERED.**

11 Dated: March 22, 2017



**YVONNE GONZALEZ ROGERS**  
**UNITED STATES DISTRICT COURT JUDGE**