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20 UNITED STATES DISTRICT COURT
 21
 22 NORTHERN DISTRICT OF CALIFORNIA
 23
 24 SAN JOSE DIVISION

25 THE APPLE IPOD ITUNES ANTI-TRUST)	Lead Case No. C-05-00037-JW
26 LITIGATION)	
27 _____)	<u>CLASS ACTION</u>
28 This Document Relates To:)	PLAINTIFFS' OPPOSITION TO
29 ALL ACTIONS.)	ADMINISTRATIVE MOTION TO
_____)	CONSIDER WHETHER CASES SHOULD
	BE RELATED

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1 Pursuant to Local Rules 3-12(e) and 7-11(b), Plaintiffs Melanie Tucker, Somtai Troy
2 Charoensak and Mariana Rosen (“the iPod Plaintiffs”) respectfully submit this opposition to the
3 Motion to Consider Whether Cases Should Be Related (“the Holman motion”), filed on October 12,
4 2007 by the named plaintiffs in the action captioned *Holman v. Apple, Inc.*, No. C 07-CV-05152-RS
5 (“Holman”).¹

6 This Court should deny the request to relate the Holman action to the present action, *The*
7 *Apple iPod iTunes Anti-Trust Litigation*, No. C 05-00037 JW (“iPod”). The Local Rules for the
8 Northern District of California provide that cases should only be related when:

9 (1) The actions concern substantially the same parties, property, transaction or event;
10 and

11 (2) It appears likely that there will be an unduly burdensome duplication of labor
and expense or conflicting results if the cases are conducted before different Judges.

12 Civ. L.R. 3-12 (a)(1)-(2).

13 Neither of these requirements is met. The parties are different, and the events and
14 transactions giving rise to the suits are not substantially the same. Indeed, the only commonality is
15 that Holman names Apple as a defendant and relies in part on antitrust laws. The iPod Plaintiffs
16 brought their action on behalf of a class of iPod purchasers against Apple only, while Holman seeks
17 to represent iPhone purchasers against Apple, AT&T and 50 Doe defendants. The parties are thus
18 not substantially the same. Further, the iPod Plaintiffs allege that Apple unlawfully obtained and
19 maintains a monopoly in the markets for digital music players and online music and video, and tied
20 the sale of iPods to its sales of online music and video. Holman, in contrast, alleges that Apple tied
21 the sale of AT&T’s wireless voice and data *services* to its sale of the iPhone. Given the differing
22 factual bases of the cases, no labor would be duplicated or conflicting results would be possible if
23 the cases were conducted before different judges. The Holman motion should be denied.

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25 ¹ The Holman motion was incorrectly filed in *Tucker v. Apple Computer Inc.*, No. 06-04457,
26 contrary to this Court’s March 21, 2007 Order Consolidating Related Cases; Appointing Co-Lead
27 Counsel which designated the earlier-filed action the lead case, and also contrary to Local Rule 3-
28 12(b), which states that related case motions must be filed in the docket of the “earliest-filed case.”
The Holman Plaintiffs also failed to follow Local Rule 7-11(a) by not filing a proposed order and by
not filing either a stipulation or declaration explaining why a stipulation could not be obtained.

1 **I. THE HOLMAN ACTION INVOLVES DIFFERENT DEFENDANTS AND**
2 **IS BROUGHT ON BEHALF OF A DIFFERENT CLASS**

3 The Holman and iPod actions do not involve the same parties. The Holman action names as
4 defendants Apple, Inc (“Apple”), AT&T Mobility LLC, and “Does 1-50, inclusive” while the iPod
5 action names Apple as its single defendant. *See* Class Action Complaint for Damages, Injunctive
6 Relief and Restitution, filed on October 5, 2007 (“Holman complaint”), ¶¶4,5. Nor do the Holman
7 and iPod actions involve the same or even “substantially the same” proposed plaintiff classes.
8 Holman was filed on behalf of a class consisting of those who “bought and implemented” Apple’s
9 iPhone cellular telephone, from “June 29, 2007 to the date of judgment in this action” and “sustained
10 damages as a result.” Holman complaint, ¶63. The iPod Plaintiffs, however, seek to represent a
11 damages class consisting of all persons who purchased an iPod directly from Apple starting on April
12 28, 2003, and an injunctive relief class consisting of anyone who purchased an iPod or purchased
13 audio or video files from Apple. *See* Consolidated Complaint for Violations of Sherman Antitrust
14 Act, Clayton Act, Cartwright Act, California Unfair Competition Law, Consumer Legal Remedies
15 Act and California Common law of Monopolization, filed April 19, 2007 (“iPod complaint”), ¶¶26,
16 31-32.

17 **II. THE HOLMAN AND IPOD ACTIONS INVOLVE DIFFERENT**
18 **QUESTIONS OF LAW AND FACT**

19 The iPod Plaintiffs allege that Apple unlawfully tied iPods to digital media downloads. The
20 iPod action does not, in contrast to Holman, include any claims of conspiracy. *See*, Holman
21 complaint, ¶¶20,34,38-44. The iPod claims were upheld twice by this Court in two orders denying
22 Apple’s motions to dismiss.²

23 By contrast, Holman centers around claims that Apple conspired with AT&T to force iPhone
24 purchases to only utilize their iPhones on AT&T’s cellular telephone network by use of
25 technological locks, and that Apple and AT&T retaliated against consumers who broke these locks.
26 *See* Holman complaint ¶¶35, 44-57. Thus, given the different factual predicates of even the antitrust

27 ² *See Slattery v. Apple Computer, Inc.*, No. C05-0037, 2005 WL 2204981 (N.D. Cal. Sept. 9,
28 2005); *Tucker v. Apple Computer, Inc.*, 493 F. Supp. 2d 1090 (N.D. Cal. 2007).

1 claims in the Holman and iPod actions, no risk of inconsistent adjudication is possible, as Local Rule
2 3.12 requires before cases can be related.

3 Further, the Holman action seeks damages using novel common law tort theories. The fifth
4 claim for relief in Holman is for “Computer Trespass/Trespass to Chattels” and seeks “direct and
5 consequential damages” of “no less than \$200 million” and “punitive damages in an amount of no
6 less than \$600 million.” Holman complaint, ¶¶101, Prayer ¶¶2,3,5. In its sixth claim for relief
7 Holman seeks an accounting of all improper earnings. *Id.*, ¶¶103-105. No such claims for similar
8 relief are sought by the iPod Plaintiffs. Indeed, Holman’s counsel admitted in a press release that its
9 “computer trespass” punitive damage claim is a “relatively new theory.”³

10 **III. RELATING THE IPOD AND HOLMAN ACTIONS WOULD UNFAIRLY**
11 **DELAY AND COMPLICATE THE IPOD ACTION**

12 If the Holman action is related to any other pending case, it is not the iPod action, but *Li v.*
13 *Apple Inc.*, No. C 07 04005 LDW ETB, filed on September 24, 2007 in the Eastern District of New
14 York and asserting similar antitrust claims against Apple and AT&T on behalf of another iPhone
15 purchaser. Given that there are now iPhone antitrust cases pending against AT&T, Inc. and Apple in
16 more than one judicial district, these cases will likely be subject to motions for transfer and
17 consolidation before the Judicial Panel on Multidistrict Litigation. If the iPod action is related to the
18 Holman action litigation, the iPod Plaintiffs justifiably fear they will be forced to file opposition
19 motions and then travel to argue before Judicial Panel on Multidistrict Litigation against motions to
20 transfer and consolidate the iPod action before the Panel’s hearing on the iPhone Multidistrict
21 Litigation. Far from preventing a duplication of labor and expense, relating the iPod and Holman
22 actions would very likely needlessly impose additional labor burdens and expenses on the iPod
23 Plaintiffs, and might even disrupt the iPod litigation by causing it to be stayed and/or transferred to
24 another judicial district.

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26
27 ³ See “Apple and AT&T Sued for \$1.2 Billion Over iPhone” Press Release dated October 10,
28 2007, available at <http://www.appleclassaction.net>.

1 **IV. CONCLUSION**

2 For the foregoing reasons, the iPod Plaintiffs respectfully request the Court decline to order
3 that the Holman and iPod actions be related.

4 DATED: October 15, 2007

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 16, 2007, 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 October 16, 2007.

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