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7 Attorneys for Defendant  
 APPLE INC.

8  
 9 UNITED STATES DISTRICT COURT  
 10 NORTHERN DISTRICT OF CALIFORNIA  
 11 SAN JOSE DIVISION

12  
 13 **THE APPLE IPOD iTUNES ANTI-  
 TRUST LITIGATION**

**Case No. C 05-00037 JW  
 C 06-04457 JW**

**ADMINISTRATIVE MOTION TO SET  
 BRIEFING SCHEDULE**

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 18 The parties have reached an impasse on a schedule for briefing Apple's motion to  
 19 decertify the Rule 23(b)(3) class and for deposing each side's expert in connection with the  
 20 motion. Accordingly, Apple requests that the Court issue an order adopting the schedule set forth  
 21 herein.

22 In continuing the hearing on this motion from October 5 to November 9, with briefing to  
 23 be completed by October 19, the Court provided a total of seven weeks for briefing and  
 24 depositions of the experts relied on by the parties. Apple's proposed schedule equitably allocates  
 25 the available time between plaintiffs and Apple. It gives plaintiffs **five** weeks to depose Apple's  
 26 expert and file their opposition. It gives Apple **two** weeks to depose plaintiffs' expert and file its  
 27 reply.  
 28



**Plaintiffs' Refusal**

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2 Plaintiffs declined Apple's offer to advance the deposition date of Apple's expert, and  
3 refused to agree to any date for filing their opposition brief including any expert declaration  
4 before October 12. Although they asserted that their lead counsel has other commitments before  
5 then, they have not stated that all of their other attorneys of record are unavailable. Indeed, with  
6 five other law firms having appeared for plaintiffs with five lawyers actively participating in this  
7 case for plaintiffs, it would be difficult for plaintiffs to maintain that they cannot complete an  
8 opposition brief in the five weeks between August 31 and October 5.

9 At the same time, plaintiffs have advised that their expert will not be available for  
10 deposition between October 12 (when they say they will file their opposition papers) and October  
11 19 (when Apple's reply brief must be filed under the Court's order).

12 In short, plaintiffs are seeking to backtrack on their stipulation to make their expert  
13 available for deposition before Apple's reply is due. They are insisting on seven weeks from  
14 when Apple's brief was filed which includes four weeks after the original due date for their brief.

15 Plaintiffs' proposal is unacceptable and unreasonable on two counts. First, it would deny  
16 Apple the opportunity to depose the expert on whom plaintiffs intend to rely for their opposition,  
17 contrary to plaintiffs' stipulation that they would present their expert for deposition before  
18 Apple's reply is due. Second, even if the expert were available, plaintiffs' proposal would give  
19 Apple only seven days to review plaintiffs' opposition and the expert report, depose the expert,  
20 and prepare its reply papers. Given the complexity of the issues that plaintiffs are likely to raise  
21 in their opposition and the time required for deposition and preparing the reply, the one week  
22 period on which plaintiffs insist is unreasonably short. This is particularly unacceptable where  
23 the Court's schedule provides a total of seven weeks for the parties to divide. Six weeks for  
24 plaintiffs and one week for Apple is inequitable by any measure, particularly where plaintiffs  
25 failed to file the brief on the date it was originally due, before the Court continued the hearing  
26 date.

1 **Apple's Proposed Schedule**

2 Apple requests that plaintiffs be ordered to file their opposition papers no later than  
3 October 5 and to make their expert available for deposition on October 9. Indeed, given the  
4 amount of time plaintiffs have already had, an earlier due date of October 1 would not be  
5 unreasonable. An October 5 deadline would give plaintiffs five weeks to prepare their papers,  
6 including five days after they depose Apple's expert on September 30. And it gives Apple two  
7 weeks for its reply, including deposing plaintiffs' expert.<sup>1</sup>

8 Plaintiffs oppose this request, taking the position that the Local Rules allow the moving  
9 party only one week for reply no matter how much time the Court may provide for briefing. In  
10 our experience, however, when the Court continues the hearing date, counsel frequently agree on  
11 some allocation of the extra time rather than the moving party taking all of it, particularly when  
12 depositions need to be scheduled at the same time. Here, the schedule proposed by plaintiffs is  
13 unworkable for the added reason that their expert is not available for deposition if they delay  
14 filing their brief until a week before the Court-ordered date for completion of briefing.

15 For these reasons, Apple requests that the Court adopt the schedule set forth in the  
16 accompanying proposed order.

17 Dated: September 22, 2009

Respectfully submitted,

18 Jones Day

19 By: /s/ Robert A. Mittelstaedt

20 Robert A. Mittelstaedt

21 Counsel for Defendant  
22 APPLE INC.

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27 <sup>1</sup> Under the normal 35-day hearing schedule, the opposing party has twice as long to  
28 prepare its opposition as the moving party has for its reply. Under Apple's proposal, Apple  
would have slightly less than that allocation.