

# EXHIBIT 4

1                                    IN THE UNITED STATES DISTRICT COURT  
2                                    FOR THE NORTHERN DISTRICT OF CALIFORNIA  
3                                    SAN JOSE DIVISION

4  
5                                    ) C-05-0037-JW  
6                                    )  
7                                    ) "THE APPLE IPOD ITUNES  
8                                    ) ANTI-TRUST LITIGATION."  
9                                    ) DECEMBER 16, 2008  
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COPY

14                                   THE PROCEEDINGS WERE HELD BEFORE  
15                                   THE HONORABLE UNITED STATES DISTRICT  
16                                   JUDGE JAMES WARE

17                                   A P P E A R A N C E S :

18                                   FOR THE PLAINTIFFS: COUGHLIN, STOIA, GELLER, RUDMAN &  
19                                   ROBBINS  
20                                   BY: BONNY E. SWEENEY  
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(APPEARANCES CONTINUED ON THE NEXT PAGE.)

OFFICIAL COURT REPORTER: IRENE RODRIGUEZ, CSR, CRR  
CERTIFICATE NUMBER 8074

1 FIVE OF THOSE CEMETERIES ACTUALLY REQUIRED THAT A  
2 PERSON WHO WANTED TO PURCHASE A CEMETERY LOT ALSO  
3 PURCHASED A MARKER.

4 THE NINTH CIRCUIT HELD THAT THAT WAS  
5 SUFFICIENT. AND THE NINTH CIRCUIT SAID THAT  
6 RELYING UPON THE LEADING SUPREME COURT TYING CASES,  
7 THE COURT SAID THE NINTH CIRCUIT, OUR READING OF  
8 THE SUPREME COURT'S OPINIONS SUPPORTS THE VIEW THAT  
9 COERCION MAY BE IMPLIED FROM A SHOWING THAT AN  
10 APPRECIABLE NUMBER OF BUYERS HAVE ACCEPTED  
11 BURDENSOME TERMS SUCH AS THE TYING PRODUCT MARKET.

12 COERCION OCCURS WHEN THE BUYER MUST  
13 ACCEPT THE TIED ITEM AND FOREGO POSSIBLY DESIRABLE  
14 SUBSTITUTES.

15 WE ALSO CITED A NUMBER OF OTHER CASES  
16 SUPPORTING THE POINT MADE BY THE NINTH CIRCUIT IN  
17 MOORE. FOR EXAMPLE, THE BAFUS CASE, WHICH WE CITE  
18 IN OUR PAPERS, YOUR HONOR, CERTIFIED A CLASS ON THE  
19 BASIS THAT THERE WAS AN APPRECIABLE NUMBER OF  
20 BUYERS WHO WERE INFLUENCED BY THE TIE RATHER THAN  
21 AN ABSOLUTE REQUIREMENT THAT EACH AND EVERY MEMBER  
22 OF THE PROPOSED CLASS WAS BOUND BY THE TIE.

23 APPLE ALSO MAKES THE ARGUMENT THAT THE  
24 TYING CLAIM CAN'T BE CERTIFIED BECAUSE OF WHAT IT  
25 REFERS TO AS THE PACKAGE THEORY OF DAMAGES.

1           APPLE RELIES ON AN ELEVENTH CIRCUIT CASE  
2 WHICH CITES THE NINTH CIRCUIT'S SIEGLE CASE FOR THE  
3 PROPOSITION THAT, WELL, IN SOME CASES A TIE  
4 ACTUALLY REDUCES -- HAS THE EFFECT IT MAY INCREASE  
5 THE PRICE OF THE TIED PRODUCT, BUT IT HAS THE  
6 EFFECT OF REDUCING THE PRICE OF THE TYING PRODUCT.

7           IN OTHER WORDS, APPLE SAYS HERE YOU HAVE  
8 TO DETERMINE WHETHER THE ITUNES VIDEO AND DIGITAL  
9 DOWNLOADS WAS DECREASED AS A RESULT OF THE TIE.

10           WELL, THAT ISN'T REALLY A CORRECT  
11 STATEMENT OF THE LAW IN THE NINTH CIRCUIT.

12           THE SIEGLE CASE INVOLVED THE CLASS. THE  
13 NINTH CIRCUIT DID NOT OVERTURN THE CLASS DECISION  
14 NOR DID THE NINTH CIRCUIT OVERTURN THE LIABILITY  
15 JUDGMENT IN FAVOR OF THE PLAINTIFFS. RATHER, THE  
16 NINTH CIRCUIT SAID THAT YOU HAVE TO TAKE THIS INTO  
17 ACCOUNT IN CALCULATING THE AMOUNT OF DAMAGES.

18           SO IT IS MERELY A DAMAGES QUESTION AND AS  
19 BLACKIE AND MANY OTHER NINTH CIRCUIT AND MANY OTHER  
20 NORTHERN CALIFORNIA CASES HAVE HELD, EVEN IF THERE  
21 ARE DAMAGES ISSUES, THAT DOES NOT PRECLUDE  
22 CERTIFICATION OF A CLASS.

23           NOW, MOREOVER, THE SIEGLE CASE WAS A  
24 LITTLE UNUSUAL BECAUSE THERE THERE WAS NO PRICE FOR  
25 THE ALLEGED TYING PRODUCT. THE SO-CALLED TYING

1 PRODUCT WAS THE USE OF THE TRADEMARK NAME CHICKEN  
2 DELIGHT WHICH APPARENTLY HAD VALUE IN THE MARKET.

3 HERE, OF COURSE, PLAINTIFFS AND MEMBERS  
4 OF THE CLASS PAID MONEY FOR THEIR ITUNES DIGITAL  
5 VIDEO AND MUSIC DOWNLOADS.

6 WE ALSO HAVE A CLAIM FOR MONOPOLIZATION  
7 BOTH FOR ATTEMPTED MONOPOLIZATION AND MONOPOLY  
8 MAINTENANCE OR CREATION.

9 NOW, APPLE DOESN'T REALLY ADDRESS THIS  
10 ARGUMENT AT ALL IN THEIR PAPERS. APPLE MERELY SAYS  
11 THAT IT'S BASED ON OUR TYING THEORY, AND,  
12 THEREFORE, IT FAILS FOR THE SAME REASONS.

13 WELL, IN FACT, PLAINTIFFS HAVE ALLEGED A  
14 MONOPOLIZATION CLAIM THAT DON'T RELY SOLELY ON  
15 THEIR TYING CLAIMS.

16 THERE ARE SEVERAL DIFFERENT ASPECTS OF  
17 APPLE'S CONDUCT THAT PLAINTIFFS CONTEND ARE AND  
18 WERE ANTICOMPETITIVE.

19 AND AS WE EXPLAINED IN OUR PAPERS, ALL OF  
20 THE ELEMENTS OF THE PLAINTIFFS' MONOPOLIZATION AND  
21 ATTEMPTED MONOPOLIZATION CLAIMS WILL BE PROVEN  
22 RELYING ON EVIDENCE THAT IS COMMON TO THE CLASS  
23 BECAUSE IT IS PRINCIPALLY, IF NOT ENTIRELY,  
24 EVIDENCE THAT IS IN THE HANDS OF APPLE.

25 FIRST THE PLAINTIFF HAS TO SHOW THAT

1 BE PROVED ON A CLASS WIDE BASIS OR WHETHER IT  
2 REQUIRES INDIVIDUAL PROOF.

3 THE COURT: THAT I THINK IS THE ISSUE.  
4 AND SO THE QUESTION THAT YOU'RE ASKING ME TO  
5 RECONSIDER IS WHETHER OR NOT THE MARKET LEVEL  
6 COERCION IS PERMISSIBLE IN THIS CASE, AND I'M  
7 WILLING TO THINK ABOUT THAT MORE BECAUSE I DO THINK  
8 THAT THAT IS AN IMPORTANT ISSUE TO ANSWER.

9 BUT IF I ANSWER THAT IT IS PERMISSIBLE,  
10 DO YOU HAVE AN ARGUMENT THAT THERE IS NO MARKET  
11 LEVEL COERCION?

12 MR. MITTELSTAEDT: THE ARGUMENT AT THAT  
13 POINT IS HOW ARE THEY GOING TO PROVE MARKET LEVEL  
14 COERCION? THEY NEED TO COME UP WITH A METHOD TO  
15 PROVE THIS ON A CLASS WIDE BASIS AND THEY HAVEN'T  
16 SUGGESTED ANY.

17 IT'S, YOU KNOW, WHETHER IT'S  
18 INDIVIDUAL --

19 THE COURT: I THINK BY DEFINITION, MARKET  
20 LEVEL COERCION IS CLASS WIDE.

21 MR. MITTELSTAEDT: WELL, BUT HOW DO THEY  
22 PROVE COERCION?

23 IF I'M RIGHT THAT THE ELEMENTS OF THEIR  
24 COERCED CONSUMER ARE AS SET FORTH HERE ON CHART  
25 NUMBER 2, AND LET'S ADD TO IT WHAT I THINK IS

1           IMPLICIT AND WHAT WAS SUGGESTED BY YOUR HONOR THAT  
2           YOU HAVE TO KNOW THAT IF YOU BURN AND RIP, THEN YOU  
3           CAN PLAY THE MUSIC ON A COMPETING PLAYER, LET'S ADD  
4           THAT.    THAT'S ANOTHER INDIVIDUAL ISSUE.

5                    AND IN ORDER TO PROVE THAT I WAS COERCED  
6           OR IN ORDER TO PROVE THAT, YOU KNOW, THE MARKET WAS  
7           COERCED.   AND AGAIN, THE MARKET IS JUST A BUNCH OF  
8           INDIVIDUALS.

9                    AND THERE'S -- YOU KNOW, IF YOU CAN'T  
10          PROVE THAT I WAS COERCED WITHOUT ASKING ME AND  
11          EXPLORING MY CIRCUMSTANCES, YOU CAN'T GET AWAY FROM  
12          THAT.   THE PLAINTIFFS CAN'T GET AROUND THAT BY JUST  
13          SAYING, WELL, WE'RE NOT GOING TO LOOK AT  
14          INDIVIDUALS.   WE'RE GOING TO LOOK AT EVERYBODY AS A  
15          GROUP BECAUSE WHEN YOU LOOK AT EVERYBODY AS A  
16          GROUP, YOU STILL HAVE TO FIND OUT, YOU KNOW, WHY  
17          DID YOU BUY YOUR IPOD?   WERE YOU HAPPY TO BUY YOUR  
18          IPOD?

19                    I MEAN, SOME PEOPLE BUY AN IPOD BECAUSE  
20          IT WORKS WELL WITH THE MUSIC STORE AND THEY'RE  
21          DELIGHTED AND THEY WOULD NEVER BUY A COMPETING  
22          PLAYER EVEN IF IT WAS AS EASY TO USE WITH THE MUSIC  
23          STORE AS THE IPOD BECAUSE THE IPOD IS A REALLY  
24          GREAT DEVICE.

25                    SAME REASON ON CHART NUMBER 1.   PEOPLE

1 BUY AN IPOD WITHOUT REGARD TO THE MUSIC STORE.

2 SO YOU NEED TO ASK INDIVIDUAL BY  
3 INDIVIDUAL AND THAT'S WHY, YOU KNOW, I'M NOT SAYING  
4 TYING LAWS SHOULDN'T KEEP UP WITH THE TIMES BUT AN  
5 ESSENTIAL ELEMENT OF TYING LAW AND CLASS  
6 CERTIFICATION IS CAN YOU PROVE IT ON A CLASS WIDE  
7 BASIS AND THEY DON'T HAVE A METHOD FOR DOING THAT,  
8 ESPECIALLY IF YOU NEED INDIVIDUAL COERCION, BUT  
9 EVEN IF YOU CALL IT MARKET COERCION, IT'S STILL A  
10 GROUP OF INDIVIDUALS.

11 YOUR HONOR, LET ME JUST HIT TWO OTHER  
12 POINTS QUICKLY. IT'S NOT RIGHT THAT COERCION IS  
13 OUR ONLY ARGUMENT AS AN INDIVIDUAL ISSUE. AS  
14 COUNSEL RECOGNIZES THIS NET OVERCHARGE IS ALSO A  
15 REASON THAT THEY DON'T RECOGNIZE THAT THEY  
16 ADDRESSED IT. BUT WE SAY THE NEED TO PROVE PROOF  
17 OF INJURY OR THE FACT OF DAMAGE IN THE NINTH  
18 CIRCUIT THAT NEEDS TO BE PROVED IN A TYING CASE ON  
19 A PACKAGE BASIS. AND CHART NUMBER 7 SUMMARIZES THE  
20 LAW ON THAT.

21 AND THE BASIC IDEA, AS SET FORTH BY THE  
22 FREELAND CASE, THE AT & T CASE IN THE SOUTHERN  
23 DISTRICT OF NEW YORK, IF A TIE CAUSES A BUYER TO  
24 PAY MORE THAN THE MARKET PRICE FOR THE TIED  
25 PRODUCT, THE BUYER IS MOST LIKELY PAYING LESS THAN



1 THE PRICE THAT THE SELLER COULD OTHERWISE CHARGE  
2 FOR THE TYING PRICE.

3 IN OTHER WORDS, THE PRICE ON THE FIRST  
4 PRODUCT IS LOWER AND THAT'S BASIC ECONOMIC THEORY  
5 FOR THE REASONS SET FORTH IN THE FREELAND CASE.

6 FREELAND DENIES CLASS CERTIFICATION  
7 BECAUSE THE PLAINTIFF WAS UNABLE TO IDENTIFY A  
8 METHOD TO DEMONSTRATE THAT THAT HAD NOT HAPPENED.

9 AND THE REASON THAT'S IMPORTANT IS A  
10 CONSUMER IS NOT DAMAGES, IS NOT INJURED IF, IN  
11 FACT, THERE'S BEEN A LOWERING OF THE PRICE ON THE  
12 MUSIC WHICH IS OFFSET IN ANY INCREASE IN THE PRICE  
13 OF THE IPOD. THAT'S THE LAW OF THE NINTH CIRCUIT  
14 IN THE SIEGLE CASE AND THE ELEVENTH CIRCUIT CASE WE  
15 CITE THERE IN THE BOTTOM BULLET SHOWS THAT. AND IT  
16 INTERPRETS AND APPLIES THE NINTH CIRCUIT SIEGLE  
17 RULE.

18 THE COURT: WELL, I WANT TO LEARN A LOT  
19 MORE ABOUT THAT. IN OTHER WORDS, IF THE TIED -- IF  
20 A TIE CAUSES A BUYER TO PAY MORE THAN THE MARKET  
21 PRICE FOR THE TIED PRODUCT, THE BUYER IS MOST  
22 LIKELY PAYING LESS THAN THE PRICE THE SELLER COULD  
23 PROFITABLY CHARGE.

24 SO THAT IS -- IS THAT MORE OR LESS THAN  
25 MARKET FOR THE TYING PRODUCT?

1 MR. MITTELSTAEDT: LESS, LESS.

2 THE COURT: LESS THAN MARKET?

3 MR. MITTELSTAEDT: YES. AND THE IDEA IS  
4 THAT ON DAY ONE YOU'RE SELLING THE FIRST PRODUCT.

5 THE COURT: BUT HOW DOES THAT FOLLOW  
6 THERE'S NO DAMAGE? WHAT IF YOU REDUCE IT BY A  
7 NICKEL AND SOMETHING ELSE IS SOLD AT A PREMIUM, HOW  
8 DOES THAT MEAN THAT THERE IS NO DAMAGE?

9 MR. MITTELSTAEDT: YEAH, IT DEPENDS ON  
10 THE SIZE OF THE OVERCHARGE AND THE SIZE OF THE --  
11 THE SIZE OF THE OVERCHARGE AND THE SIZE OF THE  
12 UNDERCHARGE IF YOU WILL.

13 THE COURT: RIGHT.

14 MR. MITTELSTAEDT: AND THE RELATIVE  
15 NUMBER OF UNITS THAT YOU BUY OF EACH.

16 THE COURT: YES.

17 MR. MITTELSTAEDT: AND SO IN THE VISA  
18 CASE THE PLAINTIFFS' EXPERT CAME IN AND SAID THAT  
19 THERE'S NO UNDERCHARGE ON THE FIRST PRODUCT. AND  
20 SO THE COURT SAID, OKAY, WE DON'T HAVE A PROBLEM  
21 WITH A NET OVERCHARGE.

22 AND HERE WHEN I ASKED PROFESSOR NOLL,  
23 WHAT ABOUT THE PRICE OF MUSIC, WAS THAT LOWERED?  
24 AND HE SAID HE HASN'T STUDIED IT, HE DOESN'T  
25 PROPOSE TO STUDY IT AND HE'S NOT GOING TO OFFER AN

1 OPINION ON THAT.

2 SO THE BURDEN ON THE PLAINTIFFS IN THE  
3 NINTH CIRCUIT AND THE ELEVENTH CIRCUIT IS TO SHOW  
4 THAT THERE WAS A NET OVERCHARGE TAKING INTO  
5 ACCOUNT, IN OUR CASE, THE AMOUNT OF MUSIC THAT AN  
6 INDIVIDUAL CONSUMER BOUGHT, THE AMOUNT OF THE  
7 UNDERCHARGE ON THAT, AND COMPARED WITH THE NUMBER  
8 OF IPODS THAT THE PERSON BOUGHT AND THE OVERCHARGE  
9 ON THAT.

10 THE COURT: WHY SHOULD I DEAL WITH THIS  
11 AT THE CLASS CERTIFICATION?

12 MR. MITTELSTAEDT: WELL, FOR THE VERY  
13 REASON, YOUR HONOR, THAT THE PLAINTIFFS DON'T DEAL  
14 WITH IT.

15 THE REASON THEY DON'T DEAL WITH IT IS  
16 THAT THE ONLY WAY TO ESTABLISH THIS FACT OF INJURY  
17 IN A REGIME WHERE THE NET OVERCHARGE MUST BE SHOWN  
18 ON A PACKAGE BASIS IS TO GO CONSUMER BY CONSUMER.

19 IT RAISES INDIVIDUAL QUESTIONS, WHICH IS  
20 WHAT THE FREELAND CASE HELD AND THAT'S WHY FREELAND  
21 DENIED CERT. THE PLAINTIFFS RECOGNIZE THAT BECAUSE  
22 THE RELATIVE AMOUNT OF PURCHASES MATTERS IN THIS  
23 NET OVERCHARGE APPROACH, YOU HAVE TO GO INDIVIDUAL  
24 BY INDIVIDUAL TO SEE WHETHER THEY BOUGHT ENOUGH  
25 MUSIC TO MAKE UP FOR THE OVERCHARGE ON THE IPOD.

1 THAT'S AN INDIVIDUAL QUESTION.

2 THERE'S NO CLASS WIDE WAY TO DO IT OR AT  
3 LEAST THEY HAVEN'T PROPOSED ANY. AND THAT'S WHY AS  
4 I SAY PROFESSOR NOLL JUST SAYS I'M NOT GOING TO  
5 WORRY ABOUT THAT.

6 THE SECOND ARGUMENT ON FACT OF DAMAGES  
7 LEADS TO THE SAME CONCLUSION. THE PLAINTIFFS AGREE  
8 THAT AT LEAST ONE WAY OF PROVING TYING DAMAGES IS  
9 TO LOOK AT THE DIFFERENCE OF PRICE BETWEEN THE IPOD  
10 YOU WERE FORCED TO BUY AND THE COMPETING PLAYER YOU  
11 WANTED TO BUY.

12 THAT'S WHAT THE LESSIG CASE DOES, AND  
13 THAT'S WHAT THE GRAY CASE ALSO CITED DOES AND  
14 THAT'S A RELATIVELY STRAIGHTFORWARD METHOD OF  
15 PROVING DAMAGES.

16 THEY DON'T DO THAT. AND THE REASON THEY  
17 DON'T DO THAT IS THAT, TOO, RAISES INDIVIDUAL  
18 QUESTIONS.

19 AS SET FORTH IN OUR PREVIOUS ORDER TO  
20 PROVE THAT, YOU HAVE TO GO INDIVIDUAL BY INDIVIDUAL  
21 SAYING WHAT PLAYER DID YOU WANT TO USE AND DID YOU  
22 WANT TO BUY AN IPOD AND WHAT WAS THE DIFFERENCE IN  
23 PRICE AND THAT RAISES AN INDIVIDUAL QUESTION AND SO  
24 THEY DON'T DO THAT.

25 THAT'S ANOTHER REASON WHY THE CLASS --