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12 Co-Lead Counsel for Plaintiffs

13
 14 UNITED STATES DISTRICT COURT
 15 NORTHERN DISTRICT OF CALIFORNIA
 16 SAN JOSE DIVISION

| | |
|---------------------------------------|----------------------------------|
| 17 THE APPLE IPOD ITUNES ANTI-TRUST) | Lead Case No. C-05-00037-JW(HRL) |
| 18 LITIGATION) | |
| 19 _____) | <u>CLASS ACTION</u> |
| 20 This Document Relates To:) | DECLARATION OF THOMAS R. |
| 21 ALL ACTIONS.) | MERRICK IN SUPPORT OF MOTION FOR |
| _____) | ADDITIONAL DISCOVERY PURSUANT |
| | TO RULE 56(f) |

22 Judge: Hon. James Ware
 23 Date: May 10, 2010
 24 Time: 9:00 am
 Location: 8, 4th Floor

25 **REDACTED**

28

1 I, THOMAS R. MERRICK, declare as follows:

2 1. I am an attorney duly licensed to practice before all of the courts of the State of
3 California. I am an associate at the law firm of Robbins Geller Rudman & Dowd LLP, Co-Lead
4 Counsel for Plaintiffs in this action. I make this declaration on personal knowledge in support of
5 Plaintiffs' motion for additional discovery pursuant to Rule 56(f) of the Federal Rules of Civil
6 Procedure.

7 2. I have personal knowledge of the procedural history of this action, the scope of
8 discovery Plaintiffs require in order to fully respond to Apple's summary judgment motion, and the
9 reasons the discovery is necessary. I also have personal knowledge of the parties' meet and confer
10 efforts.

11 3. On December 28, 2009, Plaintiffs served their Second Set of Requests for Production
12 of Documents and Second Set of Interrogatories. Declaration of Paula M. Roach Pursuant to 56(f)
13 of the Rules of Civil Procedure in Support of Plaintiffs' Opposition to Apple's Motion to Dismiss or,
14 Alternatively, for Summary Judgment ("Roach Decl."), ¶13. On February 28, 2010, the Court
15 directed the parties that discovery was open and reaffirmed that "Plaintiffs may proceed with
16 discovery at this time." Dkt. No. 324 at 2; *see also* Roach Decl., ¶14.

17 4. Despite its duty to produce responsive documents to all of the requests, Apple refused
18 to do so until Plaintiffs specified which discovery was needed to respond to Apple's motion for
19 summary judgment. On February 26, 2010, during a telephonic meet and confer, Apple stated that it
20 was not going to respond to all of the requests in Plaintiffs' second set of discovery because it was
21 still of the opinion that discovery should be stayed pending the Court's ruling on Apple's dispositive
22 motion. Plaintiffs disagreed with this position but in an effort to move discovery forward
23 expeditiously, identified the discovery requests for which responsive discovery was required to
24 provide an adequate response.

25 5. Apple has stated that production concerning these requests will be completed by the
26 end of May, 2010.

27 6. On March 22, 2010, the day Plaintiffs filed their opposition to Apple's alternative
28 motion for summary judgment, Apple produced documents related to a subset of Plaintiffs' Rule

1 30(b)(6) document requests served on April 9, 2009. Apple represented that this was the last batch
2 of documents responsive to the subset of 30(b)(6) requests. However, on April 21, 2010, Plaintiffs
3 received a production of an additional 147 pages of documents responsive to these requests.

4 7. Plaintiffs have completed review of the Rule 30(b)(6) production to date and have
5 sought production of additional documents pursuant to the original requests, including information
6 concerning Apple's understanding of how Harmony works technically; specifications, design
7 documents and diagrams regarding those changes in FairPlay that broke Harmony; documents that
8 describe the relationship between iTunes software updates and iPod firmware updates; documents
9 that indicate how certain of Apple's observations concerning Harmony affected the FairPlay
10 redesign; source code related to iTunes software updates 4.6 and 4.7; and source code related to
11 iTunes software updates (other than 4.6 and 4.7) and iPod firmware updates that addressed the
12 software that Apple describes as "hacks." On April 22, 2010, during a meet and confer, Apple
13 indicated that it would consider producing some of this information related to the FairPlay redesign
14 in iTunes 4.7. The parties continue to meet and confer on the issue. However, at this point, it is
15 unclear when Apple's Rule 30(b)(6) related production will be complete.

16 8. On April 5, 2010, Apple produced nine additional amendments to the original
17 contracts with the major labels in response to Plaintiffs' second set of requests, served on December
18 28, 2009. To date, Apple has not produced any additional communications with the labels
19 concerning the contracts.

20 9. On April 8, 2010, Apple produced two contracts between Apple and Motorola in
21 response to Plaintiffs' second set of requests, served on December 28, 2009.

22 10. [REDACTED]
23 [REDACTED]
24 [REDACTED]
25 [REDACTED]
26 [REDACTED]
27 [REDACTED]
28 [REDACTED]

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11. Attached hereto are true and correct copies of the following documents:

- Exhibit A: Letter from Thomas Merrick to Robert Mittelstaedt, dated June 18, 2009 [portions filed under seal];
- Exhibit B: Email between Paula Roach and David Kiernan, dated August 3, 2009; and
- Exhibit C: Letter from Thomas Merrick to David Kiernan, dated April 19, 2010 [portions filed under seal].

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed this 26th day of April, 2010, at San Diego, California.

s/ Thomas R. Merrick
THOMAS R. MERRICK

CERTIFICATE OF SERVICE

I hereby certify that on April 26, 2010, 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 April 26, 2010.

s/ Thomas R. Merrick

Thomas R. Merrick

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Manual Notice List

The following is the list of attorneys who are **not** on the list to receive e-mail notices for this case (who therefore require manual noticing). You may wish to use your mouse to select and copy this list into your word processing program in order to create notices or labels for these recipients.

- (No manual recipients)