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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

THE APPLE IPOD ITUNES ANTI-TRUST LITIGATION This Document Relates To: ALL ACTIONS.	Lead Case No. C-05-00037-JW(HRL) CLASS ACTION PLAINTIFFS' OPPOSITION TO APPLE INC.'S MOTION FOR PROTECTIVE ORDER PREVENTING THE DEPOSITION OF STEVE JOBS JUDGE: Hon. Howard R. Lloyd DATE: January 18, 2011 TIME: 10:00 a.m. CTRM: 2 – Fifth Floor

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STATUTES, RULES AND REGULATIONS

I. INTRODUCTION

This Court should reject Apple's attempt to shield CEO Steve Jobs from providing deposition testimony. Mr. Jobs has first-hand knowledge of matters directly at issue in this monopolization case that cannot be gleaned from any other source. [redacted]

Apple does not come close to meeting its heavy burden of showing "good cause" for a protective order under Rule 26(c) of the Federal Rules of Civil Procedure.[1] A high-level corporate officer may be shielded from deposition only where "'the officer has no first hand knowledge of the facts of the case or where the officer's testimony would be repetitive.'" *Google Inc. v. Am. Blind & Wallpaper Factory, Inc.*, No. C 03-5340 JF(RS), 2006 U.S. Dist. LEXIS 67284, at *10 n.3 (N.D. Cal. Sept. 6, 2006) (allowing deposition of Google founder where testimony revealed founder may have been involved in policy change at issue). Broad allegations of harm, unsubstantiated by specific examples or articulated reasoning, do not satisfy Rule 26(c). *Kennedy v. Jackson Nat'l Life Ins. Co.*, No. C 07-0371 CW (MEJ), 2010 U.S. Dist. LEXIS 47866, at *3 (N.D. Cal. Apr. 22, 2010); *Beckman Indus., Inc. v. Int'l Ins. Co.*, 966 F.2d 470, 476 (9th Cir. 1992). "A court should not prohibit a relevant deposition 'absent extraordinary circumstances' because such a prohibition would 'likely be in error.'" *Lexington Ins. Co. v. Sentry Select Ins. Co.*, No. 1:08-cv-1539 LJO GSA, 2009 U.S. Dist. LEXIS 122184, at *8 (E.D. Cal. Dec. 17, 2009) (quoting *Salter v. Upjohn Co.*, 593 F.2d 649, 651 (5th Cir. 1979)). Here, Plaintiffs can readily demonstrate that Mr. Jobs possesses unique knowledge of critical issues and that such testimony will not be repetitive.

Apple has utterly failed to support its motion with specific examples of how a deposition of Mr. Jobs would constitute undue hardship, or provide any support for its contention that Mr. Jobs has no unique knowledge of relevant issues. Contrary to established precedent, Apple has also failed to provide an affidavit from Mr. Jobs showing he has no unique first-hand knowledge of matters

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[1] Unless otherwise noted, citations are omitted and emphasis is added.

relevant to the issues in the case. This failure strongly counsels against granting Apple's motion. *See Zamora v. D'Arrigo Bros. Co. of Cal.*, No. C 04-00047 JW (HRL), 2007 WL 806518, at *6 (N.D. Cal. Mar. 15, 2007) (protective order denied where defendant failed to submit an affidavit swearing that the individual to be deposed did not have the information sought); *Lexington*, 2009 U.S. Dist. LEXIS 122184 (protective order denied where no affidavit submitted and potential deponents possessed relevant personal knowledge).

For the reasons set forth below, this Court should deny Apple Inc.'s Motion for a Protective Order Preventing the Deposition of Steve Jobs (Dkt. No. 396) and permit Plaintiffs to depose Mr. Jobs.

II. BACKGROUND

Plaintiffs are iPod purchasers who allege that Apple unlawfully maintained its dual monopolies in the markets for portable digital media players and digital audio downloads by using pretextual software and firmware updates that were intended to, and had the effect of, excluding competitors from the markets. Dkt. No. 322 (Amended Consolidated Complaint for Violations of Sherman Antitrust Act, Clayton Act, Cartwright Act, California Unfair Competition Law, Consumers Legal Remedies Act, and California Common Law of Monopolization). As a result, Apple has been able to maintain its monopolies longer than would otherwise have been possible, and has been able to charge supracompetitive prices for iPods. *Id.*, ¶¶81-84, 88. Plaintiffs allege that when Apple launched its online digital audio downloads store (now called the iTunes Store) in 2003, it decided to use a proprietary Digital Rights Management ("DRM") system called FairPlay – rather than other, widely-used open systems – in order to lock iTunes Store customers into using the iPod. *Id.*, ¶¶38-52. As a result, until recently, digital audio downloads purchased from other internet sites (such as Amazon.com or Walmart.com) could not play directly on an iPod. *Id.*, ¶¶68-72. Similarly, songs purchased from the iTunes Store could not play directly on any portable digital media player other than the iPod. *Id.*

Until the major recording labels that license content to Apple decided to abandon DRM in order to open up the digital audio download market and reduce Apple's dominance, Apple jealously guarded its closed-loop system.[2] *Id.*, ¶¶48-51; *see also* Ex. 1 (Apple_AIIA00090405). Apple rejected requests to license FairPlay and vehemently and publicly shut down legitimate and legal efforts by would-be rivals to make their products interoperable with Apple's. Dkt. No. 322, ¶¶48-51.

On July 26, 2004, RealNetworks, Apple's competitor in the sale of digital audio downloads, announced that songs legally sold through its online store could be played directly on the iPod, in addition to other competing portable digital music media. *Id.*, ¶53; *see also* Ex. 2 (Apple_AIIA00090441-443). RealNetworks used technology, referred to as Harmony, to convert its Helix DRM into DRM that was compatible with Apple's iPod. Dkt. No. 322, ¶¶53. RealNetworks' announcement was significant because it represented the first real threat to Apple's monopoly in the digital audio download market. At the time of the RealNetworks announcement, Apple controlled [redacted] of the portable digital media player market. Ex. 3 (Apple_AIIA00099408). Thus, in order to compete in the digital audio download market, any would-be competitor had to make its music directly playable on the iPod. That was precisely what RealNetworks accomplished, legally and with the full endorsement of the recording labels that license content to Apple. Ex. 1 (Apple_AIIA00090405).

RealNetworks immediately began selling its audio downloads for as low as 49 cents per-track, far cheaper than Apple's 99 cent per-track price. Dkt. No. 322, ¶¶54-55. [redacted] Ex. 3 (Apple_AIIA00099408).

Apple's response to Harmony was swift and punishing. In a disparaging public statement [redacted] Apple denounced its competitor as hacker-like and warned RealNetwork and its customers (as well as any other would-be

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[2] All references to "Ex." and Exs." are to the Declaration of Alexandra S. Bernay in Support of Plaintiffs' Opposition to Apple Inc.'s Motion for a Protective Order Preventing the Deposition of Steve Jobs, ("Bernay Decl."), filed concurrently herewith.

competitors) that songs purchased from RealNetworks would likely stop playing on iPods in the future because Apple intended to update its software and firmware. Dkt. No. 322, ¶59; *see also* Ex. 1 (Apple_AIIA00090405-07); Ex. 4 (Apple_AIIA00093875-76); Ex. 5 (*Apple Accuses RealNetworks of Hacking*).

True to its word, beginning with the release of iTunes version 4.7 in October 2004, Apple's updates to the iPod and iTunes software and firmware prevented songs downloaded from RealNetworks' music store from being played on iPods. Dkt. No. 322, ¶60. As a result, Apple was able to maintain its dual monopolies in the portable digital media player and digital audio download markets, and thereby maintain its supracompetitive pricing of the iPod, until at least March 31, 2009. *Id.*, ¶¶62, 67-72.

Apple argues that it broke Harmony's interoperability with the iPod not because of any anticompetitive intent, but rather because its contractual obligations with the recording labels required it to issue firmware and software updates periodically to thwart music piracy. Breaking Harmony, according to Apple, was merely a side effect of these necessary updates. Dkt. No. 325, 329 (Apple's Motion to Dismiss or, Alternatively, for Summary Judgment).

However, discovery to date demonstrates that Apple issued unnecessary and non-improving iTunes and iPod software and firmware updates for the purpose of excluding RealNetworks and other potential rivals, and that Apple's asserted justifications for these updates are pretextual. As the principal case Apple relies on makes clear, a monopolist that modifies its product in a manner that excludes competitors is afforded deference under Section 2 of the Sherman Act ***only*** if that product design change provides an added benefit to consumers or is otherwise supported by procompetitive justifications. *Allied Orthopedic Appliances Inc. v. Tyco Health Care Group LP*, 592 F.3d 991, 998-99 (9th Cir. 2010) ("changes in product design ***are not immune*** from antitrust scrutiny and in certain cases may constitute an unlawful means of maintaining a monopoly under Section 2"). [redacted]

[redacted] *See* Ex. 1 (Apple_AIIA00090405).

Plaintiffs can prevail on their Section 2 claims against Apple if they can prove – as supported by discovery to date – that Apple's asserted procompetitive justifications for the updates that disabled Harmony are pretextual. *See Image Tech. Servs., Inc. v. Eastman Kodak Co.*, 125 F.3d 1195, 1212 (9th Cir. 1997) ("A plaintiff may rebut an asserted business justification by demonstrating either that the justification does not legitimately promote competition or that the justification is pretextual."). As Judge Ware found in his order denying Apple's motion for summary judgment on Plaintiffs' Section 2 claims, "the temporal proximity between RealNetwork's announcement of its iPod-compatible Harmony technology in July 2004 and the release of iTunes 4.7, which ended that compatibility, in October 2004 ***raises questions about the real purpose of Defendant's software redesign*** that Plaintiffs should at least have an opportunity to explore through additional discovery." Dkt. No. 377 at 12-13. Plaintiffs are therefore entitled to probe key witnesses' understanding of, and asserted justifications for, issuing the updates that disabled Harmony. *Image Tech.*, 125 F.3d at 1219 ("Evidence regarding the state of mind of [defendant's] employees may show pretext, when such evidence suggests that the proffered business justification played no part in the decision to act.").

III. ARGUMENT

A. [redacted]

Apple's documents and witnesses demonstrate that Mr. Jobs was centrally involved in the principal issues in this case.[3] [redacted]

[3] While other witnesses may also testify about some of the emails and statements that will be the subject of Mr. Jobs' examination, "[t]he mere fact . . . that other witnesses may be able to testify as to what occurred at a particular time or place does not mean that a high-level corporate officer's testimony would be 'repetitive.' Indeed, it is not uncommon for different witnesses to an event to have differing recollections of what occurred." *First Nat'l Mortg. Co. v. Fed. Realty Inv. Trust*, No. C 03-02013 RMW (RS), 2007 U.S. Dist. LEXIS 88625, at *6 (N.D. Cal. Nov. 19, 2007).

1. [redacted]

As recent deposition testimony and documents only recently produced by Apple reveal,[4] [redacted] Ex. 6 (Robbin Tr. at 115:14-22); Ex. 7 (Cue Tr. at 19:14-19). [redacted] Ex. 8 (Apple_AIIA00320482), Ex. 9 (Apple_AIIA00093477). [redacted] Ex. 10 (Apple_AIIA00098491). [redacted]

[4] Apple faults Plaintiffs for not identifying by Bates number the documents about which it seeks to question Mr. Jobs (*see* Dkt. No. 396 at 4-5), but Plaintiffs have more than met their burden. During meet and confer negotiations, which stretched on for more than a month, Plaintiffs provided a number of examples of the general topics on which they intend to examine Mr. Jobs, and reminded Apple's attorneys that Apple had produced several key documents written by or sent to Mr. Jobs. Bernay Decl., ¶¶4, 6, 10, 12.

[redacted] Ex. 11 (Apple_AIIA00098511).

[redacted]

Ex. 8 (Apple_AIIA00320482). [redacted]

[redacted] Ex. 9 (Apple_AIIA00093477).

2. [redacted]

[redacted] *See, e.g.*, Ex. 2 (Apple_AIIA00090441); Ex. 7 (Cue Tr. at 125:1-24).

[redacted]

[redacted]

Ex. 4 (Apple_AIIA00093875). [redacted]

> We are stunned that Real has adopted the tactics and ethics of a hacker to break into the iPod, and we are investigating the implications of their actions under the DMCA and other laws. We strongly caution Real and their customers that when we update our iPod software from time to time it is highly likely that Real's Harmony technology will cease to work with current and future iPods.

Ex. 5 (*Apple Accuses RealNetworks of Hacking*).

[redacted] Ex. 4 (Apple_AIIA00093875) [redacted] Ex. 6 (Robbin Tr. at 115:14-22); Ex. 7 (Cue Tr. at 19:14-22, 20:4-21:1, 37:21-39:22, 49:13-51:15). [redacted] Mr. Jobs' knowledge and state of mind [redacted] information that can be gained from no other source – is therefore critical. *See Image Tech.*, 125 F.3d at 1219 ("Evidence regarding the state of mind of [defendant's] employees may show pretext, when such evidence suggests that the proffered business justification played no part in the decision to act."). *See also* Ex. 3 (Apple_AIIA00099408) [redacted]

[redacted]

[redacted]

B. Depositions of High-Level Executives Are Routinely Granted Where the Executives Have Unique, Personal Knowledge

Apple claims depositions of a corporation's top executive are rarely allowed. This is not true. While cognizant of the potential for "abuse or harassment" of top executives, the overwhelming weight of authority holds that where, as here, an executive has personal knowledge regarding the litigation not readily obtainable from other sources, a protective order will not issue. "[W]hen a witness has personal knowledge of facts relevant to the lawsuit, even a corporate president or CEO is subject to deposition." *WebSideStory, Inc. v. NetRatings, Inc.*, No. 06cv0408 WQH (AJB), 2007 U.S. Dist. LEXIS 20481, at *7 (S.D. Cal. Mar. 22, 2007).[5]

The Ninth Circuit's seminal decision in *Blankenship v. Hearst Co.*, 519 F.2d 418 (9th Cir. 1975), is directly on point. In that case, the Ninth Circuit held that the district court erred when it denied plaintiffs' bid to depose George Hearst, publisher of the Los Angeles Herald Tribune. According to the defendants, Mr. Hearst would not have information relevant to plaintiff's antitrust claims that plaintiff could not learn from other sources. *Id.* at 429. The Ninth Circuit rejected that argument. As the Court recognized, "[u]nder the liberal discovery principles of the Federal Rules defendants were required to carry a ***heavy burden*** of showing why discovery was denied." *Id.* The defendants' assertion that Mr. Hearst had no information unavailable elsewhere, countered by plaintiff's suggestions regarding evidence he might know, was insufficient to satisfy that burden. *Id.* The Ninth Circuit ordered that the deposition proceed.

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[5] *Celerity, Inc. v. Ultra Clean Holding, Inc.*, No. C 05-4374 MMC (JL), 2007 U.S. Dist. LEXIS 8295 (N.D. Cal. Jan. 25, 2007), relied on by Apple, is unavailing. In that case, the court granted the motion for a protective order pending other methods of discovery and held that the defendant could renew the motion should those other means of discovery prove inadequate. *Id.* at *15. Critically, in that case, there was no evidence of documents written by the executives dealing with matters central to the litigation. Instead there were allegations only that the executive "participated" in an acquisition of another company and that the executive had been at the company for some length of time and would therefore have knowledge regarding sales of products. This is a far cry from the detailed and specific evidence of Mr. Jobs unique and relevant first-hand knowledge set forth in this brief.

Following *Blankenship*, district courts within this District have regularly denied motions to prevent the depositions of high-ranking officers with relevant knowledge. Indeed, Mr. Jobs was deposed in another Section 2 case in this District, despite Apple's unsuccessful motion for a protective order. In *PT Technologies v. Apple Computer*, No. 98-cv-01804 (N.D. Cal.), United States Magistrate Judge Maria-Elena James denied Apple's motion for a protective order even though Mr. Jobs submitted a declaration attesting that he was not "the most knowledgeable" about the licensing program at issue. Ex. 12 (*PT Technologies*, Order Denying Defendant Apple's Motion for a Protective Order, dated December 7, 2000) at 2. The Court found "Defendant Apple has not established that Steve Jobs does not have unique and highly relevant information to the claims at bar." *Id.* The *PT Technologies* court further found the burden on Mr. Jobs did not outweigh the need for his deposition and that written questions would not provide Plaintiffs with the opportunity to assess Mr. Jobs testimony as a percipient witness. *Id.*

In *PT Technologies*, plaintiffs had far less evidence tying Mr. Jobs to the challenged conduct than Plaintiffs do here, relying on testimony about Mr. Jobs' role in the licensing program at issue. *Id.* [redacted] Ex. 6 (Robbin Tr. at 115:4-116:7; 176:7-177:15); Ex. 7 (Cue Tr. at 19:14-22, 49:13-51:15).

District courts regularly deny motions to protect corporate heads from depositions where those individuals have personal knowledge of issues relevant to the case. *DR Sys. v. Eastman Kodak Co.*, No. 08cv699-H (BLM), 2009 U.S. Dist. LEXIS 83755, at *8 (S.D. Cal. Sept. 14, 2009) (protective order denied where corporate executive had some personal knowledge of topics relevant to claims and defenses at issue); *First Nat'l Mortg. Co.*, 2007 U.S. Dist. LEXIS 88625, at *7 (where executive may have "at least some relevant personal knowledge," the protective order was denied); *First United Methodist Church of San Jose v. Atl. Mut. Ins. Co.*, No. C-95-2243 DLJ, 1995 U.S. Dist. LEXIS 22469, at *6 (N.D. Cal. Sept. 19, 1995) (granting motion to compel deposition of company president, holding, "where a corporate officer has first hand-knowledge of important, relevant, and material facts in the case the deposition should be allowed"); *Detoy v. City & County of*

San Francisco, 196 F.R.D. 362 (N.D. Cal. 2000) (San Francisco Chief of Police ordered to sit for deposition, since he had personal knowledge of facts relevant to the case).

Courts in other circuits reach the same conclusion when the person to be deposed has personal knowledge relevant to the lawsuit. *See* Ex. 13 (*In re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation*, No. 1:05-md-1720-JG-JO, Order Denying Motion for Protective Order (E.D.N.Y. Sept. 16, 2008) (denying protective order precluding the deposition of JP Morgan Chase & Co. Chairman and CEO James L. Dimon)); *Six W. Retail Acquisition, Inc. v. Sony Theatre Mgmt. Corp.*, 203 F.R.D. 98, 104 (S.D.N.Y. 2001) (CEO deposed in antitrust case where he participated in meetings and there was ample evidence of the CEO's "hands-on involvement in various aspects" of the conduct at issue in the case); *Naftchi v. New York Univ. Med. Ctr.*, 172 F.R.D. 130 (S.D.N.Y. 1997) (ordering president of NYU medical center to appear for deposition since he had personal knowledge).

Apple's cases are unpersuasive and actually support Plaintiffs' position. In *Serrano v. Cintas Corp.*, No. 04-40132, 2010 U.S. Dist. LEXIS 57624 (E.D. Mich. June 10, 2010), the CEO submitted a sworn declaration stating that he had no knowledge regarding many of the issues in the litigation. *Id.* at *9. Of course, no such declaration could be submitted by Mr. Jobs here because the record plainly demonstrates he has first-hand knowledge regarding matters central to Plaintiffs' case. Moreover, in that out-of-circuit case, the only purported knowledge the CEO possessed was based on excerpts from a speech at an annual meeting. *Id.* at *10. [redacted][6]

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[6] *Cardenas v. Prudential Ins. Co. of Am.*, No. 99-1421 (JRT/FLN), 2003 U.S. Dist. LEXIS 9510 (D. Minn. May 16, 2003), also relied on by Apple, fares no better. That case from the Eighth Circuit merely stands for the proposition that where it has not been shown that the senior executive has any unique knowledge or where the "same information" can be obtained through less intrusive means, a deposition of a senior executive may be restricted. Here, Plaintiffs have demonstrated Mr. Jobs possesses relevant unique information and that this information is not available via other means.

C. Plaintiffs' Deposition Notice Was Timely

This Court should reject Apple's suggestion that Plaintiffs unduly delayed in their request to depose CEO Jobs, as any delay is due solely to Apple's delinquencies. Even though this case has been pending since 2005, Apple has only recently began producing documents relevant to the merits of Plaintiffs' claims.[7] In the last four weeks, Apple has produced ***more than 1 million pages*** of documents in response to Plaintiffs' long-standing discovery requests, most dating back to May 2009. Bernay Decl., ¶14. [redacted]

Plaintiffs informed Apple on November 3, 2010 that it intended to depose Mr. Jobs, and met and conferred with Apple in telephone conferences on November 5 and November 9, and in correspondence on November 12 and 16. Bernay Decl., ¶¶2-6. Plaintiffs originally noticed the deposition for November 30, 2010, but agreed to take that date off calendar to permit further meet and confer discussions on the issue. Ex. 14 (Plaintiffs' Notice of Deposition of Steve Jobs, dated November 9, 2010). Plaintiffs re-noticed the deposition for the last day of discovery to ensure defendant Apple would have enough time to prepare Mr. Jobs and to clear his schedule. Ex. 15 (Plaintiffs' Amended Notice of Deposition of Steve Jobs, dated November 24, 2010). Plaintiffs also wanted to ensure that other depositions of lower-level executives would occur prior to Mr. Jobs' deposition in an effort to guard against unnecessarily repetitive testimony from Mr. Jobs.

Gutescu v. Carey Int'l, Inc., No. 01-4026-CIV-MARTINEZ/SIMONTON, 2003 U.S. Dist. LEXIS 27502 (S.D. Fla. June 24, 2003), is similarly unavailing. That case from Florida stands for the proposition that where the corporate executive has no unique, superior or first-hand knowledge, a motion to compel may be denied. In *Gutescu* there was no indication that the executive had any knowledge regarding plaintiff's claim, let alone unique, superior or first-hand knowledge. *See also Porter v. Eli Lilly and Co.*, No. 1:06-cv-1297-JOF, 2007 WL 1630697 (N.D. Ga. June 1, 2007) (declining to order deposition where plaintiffs made no effort to explain the executive's personal knowledge or inability to get the information via other means).

[7] Initially, Apple was obligated by the Court's Order only to respond to discovery requests pertaining to class certification. Dkt. No. 128 (Order Re Plaintiffs' Motion for Administrative Relief). Even after that bifurcation order was lifted, Apple continued to delay, insisting that it was not obligated to respond to discovery until its pending motion to dismiss or for summary judgment was decided. *See* Dkt. No. 347 (Declaration of Paula M. Roach Pursuant to Rule 56(f) of the Federal Rules of Civil Procedure in Support of Plaintiffs' Opposition to Apple's Motion to Dismiss or Alternatively, for Summary Judgment), ¶¶9-15.

During meet and confer negotiations, Plaintiffs explained that Mr. Jobs has unique personal knowledge regarding issues at the heart of Plaintiffs' case and explained that he drafted a number of documents produced by Apple that are relevant to the claims in the case. Bernay Decl., ¶¶4, 6, 10, 12.

[redacted] Ex. 6 (Robbin Tr. at 115:4-116:7, 176:7-177:15); Ex. 7 (Cue Tr. at 19:14-22, 20:4-21:1, 37:21-39:22, 49:13-51:15, 125:1-24).

IV. CONCLUSION

As Apple's own authority recognizes, Mr. Jobs' "prestigious position is an unimpressive paper barrier shielding him from the judicial process." *Mulvey v. Chrysler Corp.*, 106 F.R.D. 364, 366 (D.R.I. 1985). Because Mr. Jobs possesses relevant first-hand information about issues critical to this case that is unavailable from other sources, defendant's motion for a protective order must be denied.

DATED: December 20, 2010

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 20, 2010, I authorized the electronic filing of 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 caused to be 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 December 20, 2010.

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