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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

THE APPLE IPOD ITUNES ANTI-TRUST LITIGATION	Lead Case No. C-05-00037-JW(HRL)
	CLASS ACTION
This Document Relates To: ALL ACTIONS.	PLAINTIFFS' REPLY IN SUPPORT OF MOTION RE SCHEDULING AND OPPOSITION TO APPLE'S CROSS-MOTION TO EXTEND TIME FOR APPLE'S RENEWED RULE 56 MOTION
	Judge: Hon. James Ware DATE: TBD TIME: 9:00 a.m. CTRM: 8, 4th floor

I. INTRODUCTION

Apple has demonstrated no reason why the filing of its motion for summary judgment should be delayed and its arguments opposing Plaintiffs' motion regarding scheduling are baseless. Any claimed prejudice to Apple (and there is none) in submitting its renewed motion for summary judgment on January 17, 2011, is wholly due to Apple's own decision to delay the vast majority of its document and data production until the last month of discovery. Apple previously agreed with Plaintiffs regarding a stipulation on deposition discovery, which was submitted to the Court, and had no issues with a proposed joint stipulation regarding extending class certification deadlines. Apple's tactical decision at the eleventh hour to make the extension of both the class certification and deposition schedules contingent on the Court's extension of the summary judgment schedule, and the distortion of the record in support, is nothing less than sharp practices.

In an effort to set the record straight without further burdening the Court, Plaintiffs' reply in support of extending the schedule for class certification and the taking of depositions and opposition to Apple's motion to extend the summary judgment schedule are set forth below.

II. PLAINTIFFS' MOTION TO EXTEND THE CLASS CERTIFICATION AND DEPOSITION SCHEDULE SHOULD BE GRANTED

A. Plaintiffs Demonstrated Good Cause that the Class Certification Deadlines Should be Extended

As detailed in their brief filed on January 7, 2011, Plaintiffs have provided good cause to extend the deadline for filing their renewed class certification motion based on Apple's massive and last-minute production of documents and data. *See* Dkt. No. 432. As Plaintiffs explained, Apple produced much of the data and documents required for Plaintiffs' expert damages analysis at the very end of (and now even after the close of) the December 20, 2010 discovery cut-off. As Plaintiffs previously detailed, between November 15 and December 20, 2010, Apple produced 1,493,245 pages of documents as compared to the 113,706 pages of documents produced in the previous three years of class and merits discovery. *See* Declaration of Bonny E. Sweeney in Support of Motion Regarding Scheduling and Opposition to Apple's Cross-Motion to Extend Time for Apple's Renewed Rule 56 Motion, filed concurrently ("Sweeney Decl."), ¶2. Most of the 1.4 million pages of documents were responsive to document requests Plaintiffs served on Apple in 2009. *Id.* Apple

also produced nearly all of the data required by Plaintiffs' experts in the last month that was similarly in response to requests served on Apple in 2009. *Id.* As a result, Plaintiffs' counsel and experts have not yet been able to complete their review of Apple's production, much less conduct the kind of analysis contemplated for Plaintiffs' class certification expert report.

The parties had been working cooperatively toward a joint agreement regarding class certification deadlines and had been meeting and conferring extensively. A series of emails and letters were exchanged and telephone conferences took place. *Id.*, ¶3. Additionally, drafts of a proposed stipulation were passed between the parties over the course of several days. *Id.* Agreement between the parties only broke down because, at the last minute, Apple sought to include for the first time an extension for summary judgment briefing in the proposed joint stipulation. *Id.*, ¶6. At 12:30 in the afternoon on the date the parties intended on filing the stipulation, Apple's counsel proposed new language that would add a month to the schedule for summary judgment. Plaintiffs did not agree with this reasoning and explained that such an extension was not warranted. *Id.*

Critically, and contrary to Apple's representation in its opposition regarding scheduling and cross-motion to renew their Rule 56 motion, Plaintiffs have never represented that their experts needed until March 2011 to "prepare and run a regression analysis to test the adequacy of their proposed methodology of showing whether or not any increase in iPod prices could be attributed to the alleged wrongdoing." *See* Dkt. No. 437 at 3. Apple takes quotes out of context from correspondence they fail to attach for the Court's review and use ellipses in an improper attempt to mold Plaintiffs' words into a version that fits Apple's story.[1] In fact, as demonstrated by the correspondence, Plaintiffs have been completely consistent in what they believe is their burden at class certification. That is, that "plaintiffs are not required, in order to meet their burden under Rule 23, to conduct any regression analysis or prepare any damages study at this stage in the litigation."

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[1] In Apple's brief and in the Declaration of Robert Mittelstaedt, Apple purports to cite to correspondence dated January 5, 2011. No such correspondence exists on that date. Rather, Apple has confirmed they are referring to a letter dated December 30, 2010, attached hereto as Exhibit 1 to the Sweeney Declaration.

Sweeney Decl., Ex. 1 at 1. "Rather, plaintiffs are only required to 'put forth a methodology that "there is a way to prove a class-wide measure of [impact] through generalized proof.'" *Id.* (citing case law).

There has never been a commitment by Plaintiffs to conduct a regression analysis as part of their class certification motion because no such regression analysis is required under Rule 23. Apple's cobbling together of words from meet and confer letters does not make this so. As Plaintiffs put forth in their motion to seek an extension of the schedule, Plaintiffs intend, if given more time, to sufficiently analyze the data produced by Apple to formulate and estimate a regression equation to test the feasibility of the before-and-after methodology. *Id.*, Ex. 1 at 2. As explained, the late data production does not allow Plaintiffs' experts to fully conduct this analysis in time for the current January 17, 2011 due date of Plaintiffs' class certification motion. Thus, Plaintiffs' motion for an extension is warranted.

1. Plaintiffs Demonstrate Good Cause Exists to Extend the Deposition Schedule

On December 17, 2010, the parties filed a joint stipulation with the Court regarding depositions. *See* Dkt. No. 401. On December 4, 2011, the court denied the motion without prejudice based on the lack of a time line for the end of discovery. *See* Dkt. No. 416. Accordingly, on January 6, 2011, Plaintiffs proposed to Apple a new joint stipulation that included a set date for all depositions to be concluded. Sweeney Decl., ¶7. Instead of proposing alternative dates or responding otherwise, Apple sought to make this stipulation similarly contingent on an extension for Apple's renewed motion for summary judgment. *Id.*, ¶8. Apple objects to the reasonable extension sought by Plaintiffs to re-open depositions of witnesses: Jeffrey Robbin in his personal capacity and as a 30(b)(6) witness on December 3, 2010; Augustin Farrugia in his personal capacity and as a 30(b)(6) witness on December 8, 2010; David Heller in his personal capacity and as a 30(b)(6) witness on December 15, 2010; Art Rangel in his personal capacity and as a 30(b)(6) witness on December 17, 2010; and Eddy Cue in his personal capacity and as a 30(b)(6) witness on December 17, 2010.

As to each of these deponents, Apple produced documents from the custodial file, or documents from or to the witness, or from both sources after the deposition was concluded. *Id.* While Apple now claims Plaintiffs have had sufficient time to review the documents produced by Apple, this plainly does not account for the thousands of documents produced after the depositions, listed above, which Plaintiffs could not have questioned the witnesses about as they did not have the documents. Plaintiffs took those depositions in a good faith effort to complete fact discovery by December 20, 2010 and were prejudiced by Apple's late document production.

Additionally, Plaintiffs took the deposition of Apple's Rule 30(b)(6) witness, Mark Donnelly, on cost and pricing of iPods, on December 20, 2010, despite having received relevant cost and price information only days before and with some cost information produced as late as last week.

While Apple has been providing some answers to various questions Plaintiffs have posed regarding recently produced documents and data, this is no substitute for live witness testimony given under oath. Apple admits that it is "informally answering" Plaintiffs' questions, thus making clear that Apple may not necessarily view its answers as binding. *See* Dkt. No. 437 at 5.

Additionally, Apple supplemented its initial disclosures by adding the names of several witnesses that the parties previously agreed from whom documents would be obtained with the areas of knowledge about the matters at issue in Plaintiffs' complaint on December 13, 2010. Contrary to Apple's suggestion, Plaintiffs should not be penalized by Apple's late supplementation.

2. Apple Fails to Demonstrate Prejudice in Filing Its Motion For Summary Judgment on January 17, 2011 and thus Its Cross-Motion Should be Denied

In support of its position and without explanation, Apple only claims that it must have Plaintiffs' responses to its contention interrogatories before it can submit its Rule 56 motion. *See* Dkt. No. 437 at 7. This however completely ignores the fact that the information Plaintiffs require to answer those premature and sweeping requests has been in Apple's control, 90% of which was only produced to Plaintiffs in the final weeks of discovery. In fact, Apple produced data as recently as January 8, 2011. Sweeney Decl., ¶2. Plaintiffs and their experts have been unable to analyze the documents and data sufficiently to provide answers that Apple demands now. Apple's motion to compel these responses on an earlier schedule than what Plaintiffs' have proposed is currently

pending before Judge Lloyd and Plaintiffs expect that motion will be denied as they have agreed to provide responses in time for Apple's reply in support of its motion for summary judgment.

Because Apple has failed to show any good cause for extending the deadline for its summary judgment motion to be filed, its cross-motion should be denied.

DATED: January 11, 2011

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 11, 2011, 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 January 11, 2011.

s/ Bonny E. Sweeney
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