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10   UNITED STATES DISTRICT COURT

11   NORTHERN DISTRICT OF CALIFORNIA

12   SAN JOSE DIVISION

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14
    THE APPLE iPOD iTUNES   Lead Case No. C 05-00037-JW (HRL)
15 **ANTITRUST LITIGATION**
                                        [CLASS ACTION]
16
                                        DECLARATION OF DAVID C. KIERNAN
17   **IN SUPPORT OF APPLE INC.'S:**

18   **(1) MOTION FOR LEAVE TO FILE**
                                        RESPONSE TO PLAINTIFFS'
19   **SUPPLEMENTAL MEMORANDUM**
                                        REGARDING APPLE INC.'S MOTION
20 This Document Related To: **FOR PROTECTIVE ORDER**

21 ALL ACTIONS   **(2) RESPONSE TO PLAINTIFFS'**
                                        SUPPLEMENTAL MEMORANDUM
22   **REGARDING APPLE INC.'S MOTION**
                                        FOR PROTECTIVE ORDER
23
                                        Date: January 18, 2011
24   Time: 10:00 a.m.
                                        Place: Courtroom 2, 5th Floor
25   **Honorable Howard Lloyd**

26   **[FILED UNDER SEAL]**

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I, David C. Kiernan, under penalty of perjury, declare as follows:

1.   I am an attorney with the law firm of Jones Day, counsel of record for Defendant Apple Inc. I am an active, licensed member of the State Bar of California. I submit this declaration based on personal knowledge.

2.   The close of fact discovery in this case was set for December 20, 2010. I, on behalf of Apple, communicated to Plaintiffs' counsel, Paula Roach, on December 18, 2010, that Apple would be producing additional documents to Plaintiffs on December 20, 2010. In order to ensure that Plaintiffs received Apple's production on December 20, I arranged for Apple's production to be sent to Plaintiffs by courier for delivery on December 20. According to Plaintiffs, Apple's production of the documents that are the subject of Plaintiffs' Motion for Leave to File Supplemental Memorandum, Docket No. 426, were delivered to Plaintiffs at 7:30 P.M. on December 20, 2010. According to when we received service via ECF, Plaintiffs filed their Opposition to Apple's Motion for Protective Order at approximately 11:00 P.M. on December 20, 2010—several hours after receiving Apple's production of documents that are the subject of Plaintiffs' Supplemental Memorandum.

3.   I have reviewed the documents attached as Exhibits 1-12 to the Declaration of Paula M. Roach in Support of Plaintiffs' Supplemental Memorandum in Further Support of Their Opposition to Apple Inc.'s Motion for Protective Order Preventing the Deposition of Steve Jobs ("Roach Declaration"). I am also familiar with Apple's production of documents in this case and have reviewed certain documents produced by Apple that are identical to, or substantially similar to, exhibits to the Roach Declaration.

4.   Half of the exhibits Plaintiffs identify were produced by Apple, in either identical or substantially similar form, well before Plaintiffs filed their opposition.

5.   Exhibit 1 to the Roach Declaration was twice produced to Plaintiffs in identical form in November 2010.

6.   Exhibit 2 to the Roach Declaration was produced to Plaintiffs in its entirety in November 2010 as part of a separate email chain.

7.   Exhibit 3 to the Roach Declaration is a draft of Mr. Jobs's essay, *Thoughts on*

1   *Music*. That essay has been previously produced to Plaintiffs in substantially similar form as

2   Exhibit 3 to the Roach Declaration. Moreover, that essay has been publicly available on Apple's

3   website since February 2007. *See* http://www.apple.com/hotnews/thoughtsonmusic/.

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23   I declare under penalty of perjury that, to the best of my knowledge, the foregoing is true

24   and correct. This declaration was executed on January 12, 2011, in San Francisco, California.

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27   David C. Kiernan

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EXHIBIT 1
[FILED UNDER SEAL]

EXHIBIT 2
[FILED UNDER SEAL]

EXHIBIT 3
[FILED UNDER SEAL]

EXHIBIT 4
[FILED UNDER SEAL]