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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' NOTICE OF MOTION AND RENEWED MOTION FOR CLASS CERTIFICATION AND APPOINTMENT OF LEAD CLASS COUNSEL
	JUDGE: Hon. James Ware DATE: April 18, 2011 TIME: 9:00 a.m. CTRM: 8, 4th Floor

[REDACTED]

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TO: ALL PARTIES AND THEIR ATTORNEYS OF RECORD

PLEASE TAKE NOTICE that on April 18, 2011, at 9:00 a.m., before the Honorable James Ware, in Courtroom 8, 4th Floor of the above-entitled Court, located at 280 South First Street, San Jose, California, Plaintiffs Melanie Tucker, Mariana Rosen, and Somtai Troy Charoensak (collectively "Plaintiffs"), will move the Court for class certification and the appointment of Robbins Geller Rudman & Dowd LLP ("Robbins Geller") as Lead Class Counsel.

RELIEF SOUGHT

Plaintiffs respectfully seek certification of the following class for purposes of their federal Sherman Act Section 2 claims and their derivative California Unfair Competition Law ("UCL") claim:

> All persons or entities in the United States (excluding federal, state and local governmental entities, Apple, its directors, officers and members of their families) who purchased an iPod directly from Apple between October 1, 2004 and March 31, 2009 ("Class Period").

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiffs request class certification of their claims that Defendant Apple, Inc. ("Apple") unlawfully maintained and/or attempted to maintain its monopolies of the digital audio file market and the portable digital media player market through anticompetitive conduct taken under the false pretext that its actions were required by its contracts with the record labels and benefited consumers. The Court has already ruled that Plaintiffs have adequately alleged viable federal antitrust claims under Section 2 of the Sherman Act and a viable state law claim under the UCL. *See* Dkt. No. 377. Plaintiffs seek damages for the supracompetitive price paid for iPods as a consequence of Apple's alleged anticompetitive conduct.

As the Supreme Court, other courts, and commentators have recognized, few cases are better candidates for class-wide resolution than antitrust actions. *Amchem Prods. v. Windsor*, 521 U.S. 591, 625, 117 S. Ct. 2231, 2250 (1997) ("Predominance is a test readily met in certain cases alleging . . . violations of the antitrust laws."); *In re Playmobil Antitrust Litig.*, 35 F. Supp. 2d 231, 238 (E.D.N.Y. 1998) ("Antitrust claims are well suited for class actions."); *see generally* Joshua P.

Davis & Eric L. Cramer, *Antitrust, Class Certification, and the Politics of Procedure*, 17 Geo. Mason L. Rev. 969, 983-84 (2010) ("*Davis*") ("because the predominant issues in antitrust cases tend to be common to the class, for at least two decades courts have routinely certified classes in antitrust cases in which direct purchasers seek damages – perhaps more regularly than in any other field of substantive law").

And class actions, in turn, "play an important role in the private enforcement of antitrust laws." *In re Online DVD Rental Antitrust Litig.*, No. M 09-2029 PJH, 2010 WL 5396064, at *3 (N.D. Cal. Dec. 23, 2010); *In re Tableware Antitrust Litig.*, 241 F.R.D. 644, 648 (N.D. Cal. 2007); *accord In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, No. M 02-1486 PJH, 2006 WL 1530166, at *3 (N.D. Cal. June 5, 2006) ("*DRAM*"); *see generally* 6 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions*, §18:1 (4th ed. 2002) ("*Newberg*"). In the words of the Supreme Court:[1]

> Every violation of the antitrust laws is a blow to the free-enterprise system envisaged by Congress. This system depends on strong competition for its health and vigor, and strong competition depends, in turn, on compliance with antitrust legislation. In enacting these laws, Congress had many means at its disposal to penalize violators. It could have, for example, required violators to compensate federal, state, and local governments for the estimated damage to their respective economies caused by the violations. But, this remedy was not selected. Instead, Congress chose to permit all persons to sue to recover three times their actual damages every time they were injured in their business or property by an antitrust violation. By offering potential litigants the prospect of a recovery in three times the amount of their damages, Congress encouraged these persons to serve as "private attorneys general."
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> * * *
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> Congress has given private citizens rights of action for injunctive relief and damages for antitrust violations without regard to the amount in controversy. 28 U.S.C. §1337; 15 U.S.C. §15. Rule 23 of the Federal Rules of Civil Procedure provides for class actions that may enhance the efficacy of private actions by permitting citizens to combine their limited resources to achieve a more powerful litigation posture.

Hawaii v. Standard Oil Co. of Cal., 405 U.S. 251, 262-66, 92 S. Ct. 885, 891-93 (1972). Given the salutary role of the class mechanism in private antitrust actions, any doubt under Rule 23 is to be

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

resolved in favor of certification. *Online DVD*, 2010 WL 5396064, at *3; *see also Tableware*, 241 F.R.D. at 648; *In re Rubber Chems. Antitrust Litig.*, 232 F.R.D. 346, 350 (N.D. Cal. 2005).

Plaintiffs' Section 2 claims against Apple Inc. ("Apple") are particularly suited for class treatment because ***every*** element of those claims can and will be established by evidence and expert economic analysis common to all members of the proposed class of iPod purchasers. The predominance of common issues is confirmed in the declaration of esteemed Stanford economist, Professor *Emeritus* Roger G. Noll who, based on his expertise and the data produced by Apple, identifies the established methodologies that can be used to prove the requisite elements on a class-wide basis. *See* Declaration of Roger G. Noll, filed concurrently ("Noll Decl."). As shown below, Professor Noll's expert analysis is already more complete than his earlier declaration upon which the Court previously certified Plaintiffs' monopolization and attempted monopolization claims, and will only be further bolstered as Plaintiffs continue to digest the voluminous materials produced by Apple on the very eve of the discovery deadline.

II. PROCEDURAL BACKGROUND

A. Earlier Class Certification

In their original consolidated complaint, Plaintiffs alleged both tying and monopolization claims against Apple under Sections 1 and 2 of the Sherman Act.[2] Dkt. No. 107. Plaintiffs moved to certify damages and injunctive relief classes in 2008, supported by an initial declaration from Professor Noll. Dkt. Nos. 165, 166-1. On December 22, 2008, the Court certified classes for Plaintiffs' Section 2 claims, holding that common evidence would be used to prove these claims. Dkt. No. 196 (Order Granting Plaintiffs' Motion for Class Certification As To Counts Two, Three, Four, Five, Six and Seven Only And Appointing Class Counsel; *Sua Sponte* Order Reconsidering

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[2] Plaintiff William Slattery filed a complaint against Apple in 2005 (Dkt. No. 1) and was later dismissed as a Plaintiff. Plaintiffs Somtai Troy Charoensak and Mariana Rosen substituted as new lead Plaintiffs and filed a complaint against Apple in 2006. *See* Dkt. Nos. 73, 77. Plaintiff Melanie Tucker filed a complaint in 2006. *See Tucker v. Apple Computer Inc.*, No. 66-cv-04457-JW (N.D. Cal.), *Tucker* Dkt No. 1. On August 23, 2006 the *Tucker* action was related to the instant case (Dkt. No. 76) and an Amended Consolidated Complaint was filed on April 19, 2007. Dkt. No. 107.

Defendant's Motion to Dismiss Count One And Requiring Further Briefing).[3] Specifically addressing the market definition and market power elements of Plaintiffs' Section 2 claims, this Court found:

> Both of these threshold issues [relevant market and market power] are complex factual inquiries that do not depend in any way upon individualized proof. For example, whether an "online music market" exists, and whether Apple has power in that market, are broad questions that exist independently of each individual Plaintiff. If each Plaintiff were forced to proceed individually on their antitrust claims, each would have to prove market and market power as the foundational elements of their cases. As such, questions of market definition, market share, and market power are common to all members of the proposed class.

Id. at 6-7. The Court further held that the other elements of Plaintiffs' monopolization and attempted monopolization claims were likewise subject to common proof:

> Questions surrounding the willfulness of Apple's behavior are undoubtedly common to the class, as are questions of antitrust injury, especially if the injury alleged is that Apple uniformly charged consumers supracompetitive prices based on its purported monopoly position. Similar issues surrounding the intentionality of Apple's actions and antitrust injury will be integral to Plaintiffs' success on their attempted monopolization claim.

Id. at 8.

The Court specifically rejected Apple's argument that certification was inappropriate because individualized proof of injury was required, finding the predominance requirement satisfied by the "numerous common questions of law and fact involving [Apple]'s allegedly anticompetitive conduct." *Id.* at 12.[4] Finally, the Court held that a class action was "the superior method to adjudicate Plaintiffs' claims." *Id.* at 12. In a later order the Court clarified that it had considered but rejected Apple's argument that resellers should be excluded from the certified damages class. Dkt. No. 198 at 2 ("the Court implicitly included resellers in the certified class").

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[3] Because of subsequent rulings and developments in the marketplace, discussed below, Plaintiffs' operative complaint does not include a claim for injunctive relief.

[4] The Court also rejected Apple's argument that individualized proof of injury prevented the named Plaintiffs' claims from being typical of those of the class: "Each of the antitrust causes of action asserted in this case are based on domestic iPod purchases directly from Apple, and relate to the same allegedly anticompetitive conduct associated with the iPod and the ITMS. Given that the named Plaintiffs allege antitrust injury based on exactly this type of iPod purchase, their claims are sufficiently co-extensive with those of absent class members to satisfy the typicality requirement of Rule 23(a)." *Id.* at 8-9.

The Court declined to certify Plaintiffs' tying claims, however, deferring that issue until the parties could brief the question as to whether the market-level coercion alleged by Plaintiffs was sufficient to support their tying claims under Section 1. *Id.* at 7-8. The Court ultimately dismissed Plaintiffs' tying claims, holding that Plaintiffs' allegations of technological interoperability between iPods and music purchased from iTMS (now known as the iTunes Store) did not constitute unlawful tying under Section 1 under either a per se or a rule of reason theory. Dkt. No. 213; Dkt. No. 274.

As a result of its ruling dismissing Plaintiffs' tying claims, the Court *sua sponte* vacated its order certifying the monopolization claims. The Court held that it was unable to provide clear definitions of the affected classes because Plaintiffs' monopoly maintenance claims remained "inextricably interwoven" with allegations supporting the dismissed claims. Dkt. No. 303 at 10. The Court invited Plaintiffs to further amend their complaint to clarify that the monopoly claims are not dependent upon the allegations of tying. *Id.* at 3. Notably, the Court made clear in its decertification order (Dkt. No. 303) that it was ***not*** decertifying the classes on the grounds raised by Apple in its motion to decertify:

> [T]his decertification is not dependent on the grounds raised by Defendant in its Motion to decertify, namely, that Plaintiffs' expert, Dr. Roger G. Noll's, report provides an inadequate method for proving common impact on the class to meet the predominance requirement of Rule 23(b)(3). The Court rejects Defendant's contention and decertifies the Rule 23(b)(3) without prejudice and only in order to ensure that a proper class would be defined in light of this Order.

Id. at 2 n.6.

B. Plaintiffs' Narrowed Section 2 Claims

In accordance with the Court's directive, on January 26, 2010, Plaintiffs filed an Amended Consolidated Complaint ("ACC") alleging violations of Section 2 of the Sherman Act and California's UCL statute that are ***not*** premised on the technological tie between the iPod and digital audio files purchased through the iTunes Store. Dkt. No. 322, ¶¶2-4. The ACC instead focuses on Apple's affirmative and pretextual use of software updates beginning in 2004 to maintain or attempt to maintain its monopolies in the digital audio file and digital media player markets. *Id.*, ¶¶52-67.

The Court, on June 29, 2010, sustained the ACC over Apple's motion to dismiss and alternative motion for summary judgment, rejecting Apple's assertion that the willfulness element of a Section 2 claim was inadequately plead. *See* Dkt. No. 377 at 5-6.[5] The Court wrote:

> The Court finds that Plaintiffs have alleged facts, which if proven true, would suffice to hold Defendant liable under Section 2 of the Sherman Act. Specifically, Plaintiffs allege that Defendant used software updates to maintain its monopolies in both the digital media and portable digital media player markets by preventing competing online music stores from offering customers digital files that could be played on the iPod, and by preventing competing music players from being able to play digital files purchased from the iTS. . . . Thus, Plaintiffs' allegations, if proven true, would satisfy the second element of a claim for monopolization under Section 2 of the Sherman Act.

Id. at 6.[6]

Notably, Apple sought summary dismissal of the Section 2 claims using a declaration in which Apple employee Jeffrey Robbin represented that Apple's conduct was motivated by its obligation to protect the digital rights management ("DRM") interests of the music labels. *Id.* at 7, 9-11 (noting Apple's contention that the updates were aimed at stopping hacks and complying with agreements with the labels). The Court rejected Apple's bid for summary resolution as insufficiently supported and premature, finding that Plaintiffs were entitled to conduct discovery in order to challenge the validity of Apple's business justification defense:

> The Court finds that the Declaration of one of Defendant's own employees is an insufficient basis upon which to find that there is no triable issue of fact as to Defendant's claimed business justification in the face of Plaintiffs' request for further discovery under Federal Rule of Civil Procedure 56(f). The Robbin Declaration provides little detail as to the nature of the hacks and how they worked, or the manner in which Defendant's software updates addressed the threat posed by the hacks. Furthermore, the temporal proximity between RealNetworks' 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.

Id. at 12-13.

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[5] Apple did not challenge the first or third elements of Plaintiffs' Section 2 allegations, namely, that Apple possesses monopoly power in a relevant market and that its conduct has caused antitrust injury, in either its motion to dismiss or alternative motion for summary judgment. *Id.* at 5.

[6] The Court dismissed Plaintiffs' Cartwright Act, California Legal Remedies Act ("CLRA") and Common Law monopoly claims but upheld their UCL claims. *Id.* at 7-9.

In short, the Court has squarely framed the fundamental, common substantive issue to be litigated under the ACC: the validity of Apple's purported "business justification" defense.

C. Factual Background

Formal and informal discovery accomplished to date, despite Apple's significant delays,[7] amply demonstrates that Plaintiffs claims are proper for class treatment. Common issues regarding Apple's anticompetitive conduct swamp any purported issues affecting only individual members of the proposed class.

Plaintiffs allege that Apple obtained monopoly power in the market for digital audio files almost immediately after the launch of the iTunes Store in 2003 because Apple was the first legal download service to offer a comprehensive library of music. Apple was then able to leverage that power into monopoly power in the portable digital media player market because the iPod was the only portable digital media player that could directly play music purchased through the iTunes Store. Dkt. No. 322, ¶¶40-51, 62; *see also* Noll Decl. at 44-45, 48.

Evidence defining the digital audio file market and the portable digital media player market and demonstrating Apple's monopoly power in these markets is susceptible to common proof and will predominate over any individual issues. Noll Decl. at 29-51; *see also* §IIIB.1. [redacted] [8] Ex. 1 at 24:6-9; Noll Decl. at 48. Common evidence also demonstrates [redacted]

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[7] Plaintiffs have been greatly hampered by Apple's "data dump" during the month leading up to the discovery deadline and the two weeks following that deadline, during which time it produced more than a million pages of documents and data that Plaintiffs had requested in 2009. *See* Declaration of Paula M. Roach in support of renewed motion for class certification, filed concurrently ("Roach Decl."), ¶¶8-9. Plaintiffs accordingly reserve the right to supplement their expert report in accordance with Rule 26(e) of the Federal Rules of Civil Procedure.

[8] Unless otherwise noted, all references to "Ex" and "Exs." are to the declaration of Bonny E. Sweeney in support of Plaintiffs' renewed motion for class certification, filed concurrently ("Sweeney Decl.").

[redacted] Noll Decl. at 48; Ex. 1 at 184:15-18; Exs. 2-4. Similarly, Plaintiffs will use common evidence [redacted] Noll Decl. at 46-51; Ex. 5 at 30:21-31:5; *see also* Dkt. No. 196 at 6-7. This evidence is common to all class members.

Plaintiffs will also rely on common evidence to prove that Apple willfully maintained its monopolies in the relevant markets. [redacted]

As a result of Apple's decision to use FairPlay, digital audio files purchased from other internet sites (such as Amazon.com or Walmart.com) could not play directly on an iPod. Dkt. No. 322, ¶¶68-72. Similarly, songs purchased from the iTunes Store could not play directly on any portable digital media player other than the iPod. *Id.* [redacted]

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9 [redacted]

[redacted]

[redacted]

[redacted]

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10 [redacted]

11 [redacted]

[redacted]

Proof that Apple used unnecessary and non-improving iTunes software and iPod firmware updates to exclude RealNetworks and other potential rivals from the market is common to the class

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[redacted]

12

[redacted]

because it will focus on Apple's conduct. Similarly, evidence that Apple's asserted business justification is mere pretext is also common to the class:[13] Plaintiffs will rely on common evidence to prove that the disabling updates provided no benefit to consumers because the recording labels did not, despite Apple's claims to the contrary, threaten to withhold music unless Apple shut down Harmony. [redacted] As a result of Apple's conduct, consumers were further restricted in the choice of music that was compatible with the iPod.[14]

III. THE REQUIREMENTS OF RULE 23 ARE FULLY SATISFIED

"In determining the propriety of a class action, the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178, 94 S. Ct. 2140, 2153 (1974); *see also Online DVD*, 2010 WL 5396064, at *2. Arguments evaluating the weight of evidence or the merits of a case are improper at the class certification stage. *United Steel, Paper &Forestry, Rubber Mfg. Energy v. ConocoPhillips Co.*, 593 F.3d 802, 808 (9th Cir. 2010) (reversing a denial of a claim certification motion the court held that district courts "'may not go so far. . . as to judge the validity of these claims'"). The Court is instead "'bound to take the substantive allegations of the complaint as true.'" *Tableware*, 241 F.R.D. at 648 (quoting *Blackie v. Barrack*, 524 F.2d 891,

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[13] [redacted]

[14] [redacted]

901 n.17 (9th Cir. 1975)). Nor may a court weigh the merits of conflicting expert evidence. *See In re Live Concert Antitrust Litig.*, 247 F.R.D. 98, 135 (C.D. Cal. 2007) (challenges to expert opinions constitute merits determinations not properly resolved at the class certification stage).

As shown below, certification of Plaintiffs' Section 2 claims and UCL claim, as well as Apple's affirmative defenses, is even more clearly warranted now than it was when the Court certified those claims earlier in this litigation.

A. Rule 23(a) Is Satisfied

1. Numerosity

The numerosity requirement is met if "the class is so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). "'A finding of numerosity may be supported by common sense assumptions, and it is especially appropriate in antitrust actions brought under Rule 23(b)(3).'" *Tableware*, 241 F.R.D. at 648 (quoting *Playmobil*, 35 F. Supp. 2d at 239); *see also Online DVD*, 2010 WL 5396064, at *3 ("plaintiffs need not state the 'exact' number of potential class members"); *Rubber Chems.*, 232 F.R.D. at 350. "A potential class of 1,700 members is, *a fortiori*, sufficiently numerous to preclude joinder." *Krehl v. Baskin-Robbins Ice Cream Co.*, 78 F.R.D. 108, 114 (C.D. Cal. 1978). The fact that a class is geographically dispersed supports class certification. *DRAM*, 2006 WL 1530166, at *3.

[redacted] Because the number of putative class members in the United States is unquestionably in the millions, numerosity is easily satisfied. *See Online DVD*, 2010 WL 5396064, at *3; *Live Concert*, 247 F.R.D. at 116 (numerosity satisfied by "thousands" of class members); *Tableware*, 241 F.R.D. at 648-49 (same); *DRAM*, 2006 WL 1530166, at *3 (same).

2. Commonality

Commonality is satisfied where "there are questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). The commonality requirement is permissively construed, such that "[t]he existence of shared legal issues with divergent factual predicates is sufficient, as is a common core of

salient facts coupled with disparate legal remedies within the class." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998). In the antitrust context, "[a]n allegation of . . . monopolization . . . will establish a common question." *Newberg*, §18:5.

To prove their Section 2 monopolization claims, Plaintiffs must show: (1) that Apple possessed monopoly power in the relevant market; (2) that Apple willfully acquired or maintained that power; and (3) that Apple's conduct has caused antitrust injury. *See* Dkt. No. 377 at 5; *see also Cost Mgmt. Servs. v. Wash. Natural Gas Co.*, 99 F.3d 937, 949 (9th Cir. 1996); *Moore v. Jas. H. Matthews & Co.*, 550 F.2d 1207, 1218 (9th Cir. 1977). Similarly, to establish their Section 2 attempted monopolization claim, Plaintiffs must show: (1) a specific intent by Apple to monopolize the relevant market; (2) predatory or anticompetitive conduct by Apple designed to control prices or destroy competition; (3) a dangerous probability of success; and (4) causal antitrust injury. *Rebel Oil Co. v. Atl. Richfield Co.*, 51 F.3d 1421, 1433 (9th Cir. 1995); *Davis v. Pac. Bell*, 204 F. Supp. 2d 1236, 1241 (N.D. Cal. 2002).

Because none of these elements of either Section 2 violation turns on the individual circumstances of any one product purchaser, courts have consistently certified Section 2 monopolization and attempted monopolization claims for class-wide resolution of those claims. *See, e.g., Live Concert*, 247 F.R.D. at 131; *Behrend v. Comcast Corp.*, No. 03-6604, 2007 WL 2972601, at *12-*14 (E.D. Pa. Oct. 10, 2007); *In re Lorazepam & Clorazepate Antitrust Litig.*, 202 F.R.D. 12, 29-30 (D.D.C. 2001).

Here, the legal issues common to all class members likewise include virtually every element of the federal antitrust claims alleged against Apple: What is the proper scope of the relevant markets? What are Apple's respective market shares? Does Apple enjoy market power in these markets? Has Apple used software updates to maintain or attempt to maintain monopoly power in these markets? Are Apple's asserted business justification mere pretext? If Apple is liable, how are damages to be calculated? These and many other common issues focusing on the common conduct of Apple are squarely raised in this action, amply demonstrating commonality. *Compare In re Static Random Access Memory (SRAM) Antitrust Litig.*, 264 F.R.D. 603, 609 (N.D. Cal. 2009) ("*SRAM*") (commonality satisfied based on common issues such as market definition, monopoly power,

anticompetitive conduct and casual antitrust injury); *Live Concert*, 247 F.R.D. at 117 (same); *Tableware*, 241 F.R.D. at 649 (same).

3. Typicality

The third Rule 23(a) requirement, typicality, is met where "the claims . . . of the representative parties are typical of the claims . . . of the class." Fed. R. Civ. P. 23(a)(3). This requirement is "permissive," and to be "liberally construed." *Thomas & Thomas Rodmakers, Inc. v. Newport Adhesives & Composites, Inc.*, 209 F.R.D. 159, 164 (C.D. Cal. 2002). A class representative's "claims are 'typical' if they are reasonably co-extensive with those of absent class members; they need not be substantially identical." *Hanlon*, 150 F.3d at 1020; *SRAM*, 264 F.R.D. at 609. In the antitrust context, typicality "will be established by plaintiffs and all class members alleging the same antitrust violations by the defendants." *Estate of Garrison v. Warner Bros., Inc.*, No. CV 95-8328 RMT, 1996 WL 407849, at *2 (C.D. Cal. June 25, 1996); *accord Newberg*, §18.8.[15] Plaintiffs' claims need not "be identical to the claims of class members." *Online DVD*, 2010 WL 5396064, at *4. "Rather, typicality results if the representative plaintiffs' claims 'arise[] from the same event, practice or course of conduct that gives rise to the claims of the absent class members and if their claims are based on the same legal or remedial theory." *Id.*

Here, Plaintiffs allege precisely the same antitrust claims on behalf of themselves and every other person that purchased an iPod directly from Apple during the Class Period, and seek relief for payment of supracompetitive prices based on the same legal theories. Dkt. No. 322, ¶¶6-8. Typicality is thus satisfied. *Cf. SRAM*, 264 F.R.D. at 609 (typicality requirement met by direct purchaser plaintiffs); *Live Concert*, 247 F.R.D. at 117-18 (same); *Tableware*, 241 F.R.D. at 649 (same).

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[15] The typicality requirement "does not mandate that products purchased, methods of purchase, or even damages of the named plaintiffs must be the same as those of the absent of the class members." *SRAM*, 264 F.R.D. at 609; *see also DRAM*, 2006 WL 1530166, at *4 (typicality satisfied "even though the plaintiff followed different purchasing procedures, purchased in different quantities or at different prices, or purchased a different mix of products than did the members of the class").

4. Adequacy

The fourth requirement of Rule 23(a) is that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). Adequacy under Rule 23(a)(4) turns on two basic questions: (1) whether named plaintiffs and their counsel have any conflicts of interest with class members; and (2) whether named plaintiffs and their counsel will prosecute the action vigorously on behalf of the class. *Id.*; *see also Staton v. Boeing Co.*, 327 F.3d 938, 957 (9th Cir. 2003); *Live Concert*, 247 F.R.D. at 118. To disqualify class representatives or class counsel, perceived conflicts of interest "must go to the heart of the litigation, relating to the subject matter of the suit." *Newberg*, §18:14; *accord Blackie*, 524 F.2d at 909; *see also Cummings v. Connell*, 316 F.3d 886, 896 (9th Cir. 2003) ("[T]his circuit does not favor denial of class certification on the basis of speculative conflicts.").

Here, the interests of Plaintiffs and the rest of the proposed classes are entirely aligned: as direct purchasers of iPods from Apple, all share the same interest in determining whether Apple's use of software updates to exclude competitors violated antitrust law, whether competition was thereby stifled, and whether Plaintiffs and class members consequently paid Apple supracompetitive prices for their iPods. *DRAM*, 2006 WL 1530166, at *6 (adequacy of representation met because "the named plaintiffs allege that all members of the proposed class paid artificially inflated prices as a result of defendants' [antitrust violation] during the relevant class period, that all suffered similar injury as a consequence of the conspiracy, and that all seek the same relief"). There are no conflicts precluding class certification. *Compare SRAM*, 264 F.R.D. at 609-10 (no conflict precluding certification of antitrust claims); *Live Concert*, 247 F.R.D. at 119-20 (same); *Tableware*, 241 F.R.D. at 649 (same).

Nor is there any basis to doubt that Mr. Charoensak, Ms. Rosen, and Ms. Tucker are motivated advocates for the proposed class. They have retained legal counsel with considerable experience in the prosecution of major class and antitrust litigation, including Robbins Geller, the firm which the Court previously designated as co-lead class counsel for this litigation. Ex. 30; *see also* Dkt. No. 106 (Order Consolidating Related Cases; Appointing Co-Lead Counsel); *Online DVD*, 2010 WL 5396064, at *4 ("representation will be found to be adequate when the attorneys

representing the class are qualified and competent"). Furthermore, all three proposed class representatives have already given day-long depositions, have submitted their iPods for a forensic inspection by Apple's counsel, and have produced voluminous (and needlessly intrusive) documentation to Apple as part of the discovery process, including: copies of all music files stored on their personal computers; copies of their iTunes Purchase history; iTunes account names and passwords; copies of receipts documenting their iPod purchases from Apple; and lists of every compact disc they currently own. Sweeney Decl., ¶¶2, 3.

B. Rule 23(b)(3) Is Satisfied

Under Rule 23(b)(3), the Court may certify a class if it determines: (1) that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members; and (2) that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The "predominance" and "superiority" factors are closely related: when common issues predominate, class actions achieve Rule 23's objectives of economy and efficiency by minimizing costs and avoiding the confusion that would result from inconsistent outcomes. *Tableware*, 241 F.R.D. at 651.

1. Predominance

"The Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Prods.*, 521 U.S. at 623. "A straightforward approach to predominance is to focus on what plaintiffs will need to prove at trial and then to ask whether they can attempt to offer that proof through predominantly common evidence." *Davis*, 17 Geo. Mason L. Rev. at 971. In antitrust cases, issues of monopolization and attempted monopolization are central common issues which readily satisfy the predominance requirement. *SRAM*, 264 F.R.D. at 611 ("'[C]ommon liability issues such as . . . monopolization have, almost invariably, been held to predominate over individual issues.'"); *Newberg*, §18:26 (same); *see, e.g., In re Visa Check/MasterMoney Antitrust Litig.*, 192 F.R.D. 68, 88 (E.D.N.Y. 2000), *aff'd*, 280 F.3d 124 (2d Cir. 2001) (each element of an attempt to monopolize claim focuses on conduct of the defendants and its effects in the relevant markets, factors that will not vary from plaintiff to plaintiff).

Here, as shown below and confirmed by Professor Noll, each element of Plaintiffs' Section 2 monopolization claims can and will be proved in this case through evidence common to every member of the proposed classes.[16]

Monopoly Power. Plaintiffs will rely on common evidence to define the relevant markets and to prove that Apple has market power in these markets. In *Rebel Oil*, the Ninth Circuit reiterated that market power in a Section 2 claim may be demonstrated in either of two ways: (1) direct evidence of injurious exercise of market power, such as evidence of restricted output and supracompetitive prices, or (2) circumstantial evidence of dominance in the relevant and significant barriers to entry and competitor expansion of output. *Rebel Oil*, 51 F.3d at 1434. Neither of these alternative approaches turns on proof of the idiosyncratic circumstances of the individual iPod purchaser. Noll Decl. at 19-23; 29-51; *see, e.g.*, *Rebel Oil*, 51 F.3d at 1432-43 (reviewing evidence submitted in support of and in opposition to motion for summary judgment on attempt to monopolize claim).

Plaintiffs here can most easily demonstrate Apple's market power in the relevant markets [redacted], together with proof of barriers to entry. *Eastman Kodak Co. v. Image Tech. Servs.*, 504 U.S. 451, 464, 112 S. Ct. 2072, 2081 (1992) ("The existence of such power ordinarily is inferred from the seller's possession of a predominant share of the market."); [redacted]. As Professor Noll has opined, all of the economic evidence regarding market definition, market share and barriers to entry is common to the class. Noll Decl. at 29-51. Should Apple choose to debate market definition or dispute its market power, Apple will only reinforce the predominance of common issues. *See, e.g.*, *Live Concert*, 247 F.R.D. at 123-31(concluding that whatever the respective merits of the parties' positions, the issue of market definition and market power were predominate common issues supporting class certification).

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[16] Similarly, because Plaintiffs' UCL claim relies on Plaintiffs' proof of its Section 2 claims, this claim will be proven through common proof. *See* Dkt. No. 377 at 8; *see also Chavez v. Whirlpool Corp.*, 93 Cal. App. 4th 363, 375 (2001).

Anticompetitive Conduct. "Anticompetitive conduct is behavior that tends to impair the opportunities of rivals and either does not further competition on the merits or does so in an unnecessarily restrictive way." *Cascade Health Solutions v. PeaceHealth*, 515 F.3d 883, 894 (9th Cir. 2008) (citing *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605 n.32, 105 S. Ct. 2847 (1985)). Where, as here, the alleged anticompetitive conduct focuses "'on the defendants' conduct and not on the conduct of the individual class members,'" predominance is satisfied. *Online DVD*, 2010 WL 5396064, at *6 n.3 (quoting *In re Bulk [Extruded] Graphite Prods. Antitrust Litig.*, No. 02-6030 (WHW), 2006 WL 891362, at *9 (D.N.J. April 4, 2006)); *see also Live Concert*, 247 F.R.D. at 131-32. As summarized above, Plaintiffs' Section 2 claims turn on Apple's own actions in response to RealNetworks' introduction of the Harmony technology that was fully interoperable ***without*** diminishing DRM protections and Apple's software changes to exclude other competitors. *See* §II(C), above. As Professor Noll explains, economic analysis can address whether this conduct "reduced competition in the market for portable digital media players" and whether it "was anticompetitive or an example of superior efficiency." Noll Decl. at 58, 61.

[redacted]

Specific Intent to Monopolize. This element of the attempted monopolization claim can be inferred from "'either specific intent coupled with monopoly power ***or*** from "proof of specific intent to . . . exclude competition . . . accompanied by predatory conduct directed to accomplishing the unlawful purpose.'"'" *Moore*, 550 F.2d at 1219.

[redacted] The burden shifts to Apple to demonstrate

"'valid business reasons'" for its actions. *Eastman Kodak*, 504 U.S. at 483. Plainly, any and all such proof of "business justification" will likewise focus on the conduct of Apple, statements and conduct by the recording labels, a technical analysis of Apple's software updates, and evidence regarding competitors, not the circumstances of any individual consumer. Noll Decl. at 66-68.

Dangerous Probability of Success. In the Ninth Circuit a dangerous probability of success required for an attempted monopolization claim may be inferred from the existence itself of predatory or anticompetitive conduct. *Foremost Pro Color, Inc. v. Eastman Kodak Co.*, 703 F.2d 534, 544 (9th Cir. 1983). Once again, therefore, the evidence presented will concern Apple's own company-wide actions, not the actions of any individual iPod purchaser.

Antitrust Impact. In a direct purchaser antitrust action, the mere payment of artificially high prices is sufficient to establish injury in fact. *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 729, 97 S. Ct. 2061 (1977) ("[T]he overcharged direct purchaser . . . is the party 'injured in his business or property' within the meaning of [the Clayton Act]."). Nevertheless, one tactic in opposing class certification in antitrust cases is to isolate and focus on the question of antitrust impact, in the hopes of persuading the court that such impact can only be proven on an individual basis. *Davis*, 17 Geo. Mason L. Rev. at 985-86. To demonstrate antitrust impact at trial, however, Plaintiffs need only show ***some*** injury suffered as a consequence of the alleged anti-competitive behavior. *See Zenith Radio Corp. v. Hazeltine Research*, 395 U.S. 100, 114 n.9, 89 S. Ct. 1562, 1572 n.9 (1969) (noting the "burden of proving the fact of damage . . . is satisfied by . . . proof of ***some*** damage flowing from the unlawful [conduct]; inquiry beyond this minimum point goes only to the amount and not the fact of damage") (emphasis in original).

Antitrust impact is typically established for class certification purposes through expert testimony confirming that generally accepted economic methodologies are available to demonstrate impact and to reasonably calculate damages on a class-wide basis. *SRAM*, 264 F.R.D. at 612; *Live Concert*, 247 F.R.D. at 136; *DRAM*, 2006 WL 1530166, at *8; *Estate of Garrison*, 1996 WL 407849, at *4. Apple concedes this is the applicable standard. *See, e.g.*, Dkt. No. 240 at 1 (Defendant's Motion for Decertification of Rule 23(B)(3) Class) ("To obtain class treatment, the plaintiff must show a reliable method for proving common impact on the purported class."). At the class

certification stage, then, Plaintiffs "need only advance a plausible methodology to demonstrate that antitrust injury can be proven on a class-wide basis." *DRAM*, 2006 WL 1530166, at *9; *see also Online DVD*, 2010 WL 5396064, at *9-*10; *Live Concert*, 247 F.R.D. at 146-47.

Plaintiffs have done just that. Professor Noll, in his Declaration, explains the different ways Apple's alleged anticompetitive actions have harmed competition in the relevant markets, not only through supracompetitive pricing for iPods (specifically addressed below in the context of ways to calculate antitrust damages), but also: (a) "dead-weight loss" that occurs when prices exceed the incremental cost of production; (b) reduced intensity of competition among other firms in the respective markets; and (c) the adverse effects of "lock-in" due to technological incompatibility, which extends not only to reduced choice for consumers but also to reduced incentive to innovate by competitors. Noll Decl. at 63-66. Professor Noll confirms that the economic evidence to establish these harms, involving product features and market outcomes, is common to all class members. *Id.* at 65. *Cf. Live Concert*, 247 F.R.D. at 144 ("Plaintiffs have demonstrated that several generally accepted methodologies can be used to prove class-wide impact through the use of common evidence.").

Although the Court has already rejected Apple's attack on the sufficiency of Professor Noll's earlier report for purposes of class certification, (Dkt. No. 377 at 2 n.6) Professor Noll has revised his report to the extent possible given Apple's calculated discovery delay. *See* Noll Decl. at 14-19; Roach Decl., ¶¶8-10. Professor Noll has confirmed that class-wide impact can be demonstrated through the use of common evidence. For example, as he explains in his Declaration, each of the three damages methods that he proposes using in this case "produces a formula for damages that is based on data about prices, product characteristics, costs, and conditions in the market. Each method would be based on data and analysis for all iPods sold to all direct purchasers, and so would be predominantly common to class members." Noll Decl. at 28; *see generally* Noll Decl. at 68-84.

Antitrust Damages. Once antitrust injury is established, the overall burden of proving damages is eased significantly under the Sherman Act. *Moore v. Jas. H. Matthews & Co.*, 682 F.2d 830, 836 (9th Cir. 1982); *see also Online DVD*, 2010 WL 5396064, at *11 ("plaintiffs have 'a limited burden with respect to showing that individual damages issues' do not predominate"); *Live*

Concert, 247 F.R.D. at 144-45 (citing *Moore*, 682 F.2d 830, among other authorities); *DRAM*, 2006 WL 1530166, at *10. Furthermore, "the use of an aggregate approach to measure class-wide damage is appropriate." *In re Cardizem CD Antitrust Litig.*, 200 F.R.D. 297, 324 (E.D. Mich. 2001). Individual damages issues are thus generally no bar to certification of antitrust claims. *Online DVD*, 2010 WL 5396064, at *11; *Live Concert*, 247 F.R.D. at 137 (collecting cases); *In re Rubber Chems.*, 232 F.R.D. at 354; *see generally Newberg*, §18:27. "Plaintiffs need not supply a 'precise damage formula,' but must simply offer a proposed method for determining damages that is not 'so insubstantial as to amount to no method at all.'" *Online DVD*, 2010 WL 5396064, at *11 (quoting *In re Potash Antitrust Litig.*, 159 F.R.D. 682, 697 (D. Minn. 1995)).

Here again the quantification of damages only ***reinforces*** predominance because Plaintiffs will calculate those damages on a class-wide basis, based upon one or more of the three best established and most reliable aggregate damages methodologies. *Compare SRAM*, 247 F.R.D. at 144-47; *DRAM*, 2006 WL 1530166, at *10. Specifically, Professor Noll confirms that antitrust damages can be calculated under the "before-and-after" method, the "yardstick" method or the "mark-up" method – all recognized methodologies that are, in Professor Noll's opinion, suitable for use in this case, based upon documents and data produced by Apple and reasonably relied upon by experts in the field. Noll Decl. at 68-84.

Courts have repeatedly acknowledged these methodologies as accepted means of calculating class-wide damages in the antitrust context. *See, e.g.*, *DRAM*, 2006 WL 1530166, at *10.[17] Decisions in this district subsequent to *DRAM* continue to recognize the validity of these methods and have certified classes accordingly. *See, e.g.*, *Tableware*, 241 F.R.D. at 652 (the materials

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[17] *See also In re NASDAQ Market-Makers Antitrust Litig.*, 169 F.R.D 493, 521 (S.D.N.Y. 1996) (holding the "'yardstick'" method for calculating damages, which "'compares profits earned or prices paid by the plaintiff with the corresponding data for a . . . market unaffected by the violation'" is "an accepted means of measuring damages in an antitrust action"); *In re Indus. Silicon Antitrust Litig.*, No. 95-1131, 1998 WL 1031507, at *3 (W.D. Pa. Oct. 13, 1998) (finding expert's before-and-after comparison proper model for showing antitrust damages); *In re Corrugated Container Antitrust Litig.*, No. MDL 310, 1979 WL 1751, at *2 (S.D. Tex. Dec. 21, 1979) (approving, over objection, damages amount in antitrust settlement because expert's damages "estimate was based on a before-and-after model, using the four years within the statute of limitations as 'before' and the years 1977 and 1978, after the grand jury investigation was underway, as 'after'").

supporting the before-and-after method "suffice to show that means exist for proving impact on a class-wide basis"); *SRAM*, 264 F.R.D. at 615 (finding "before and after" and "cost data" methods sufficient for certification of indirect purchase class); *In re Static Random Access (SRAM) Antitrust Litig.*, No. C-07-01819 CW, 2008 WL 4447592, at *6-*7 (N.D. Cal. Sept. 29, 2008) (same methods suffice for certification of direct purchaser class).

Apple may attempt to attack Professor Noll's application of these accepted models for quantifying class-wide damages, but this is neither the time nor place to resolve any such battle of the experts: "'It is not necessary that plaintiffs show that their expert's methods will work with certainty at this time. Rather, plaintiffs' burden is to present the court with a likely method for determining class damages.'" *Tableware*, 241 F.R.D. at 652 (quoting *In re Domestic Air Transp. Antitrust Litig.*, 137 F.R.D. 677, 693 (N.D. Ga. 1991)); *accord Live Concert*, 247 F.R.D. at 110 ("a district court is not permitted to discount the testimony of a plaintiff expert merely because the defendant has challenged some aspect of the expert's opinion"); *Rubber Chems.*, 232 F.R.D. at 353 (same). At this stage, Plaintiffs need to only offer "realistic methodologies." *DRAM*, 2006 WL 1530166, at *10. As Justice Souter recently wrote:

> Plaintiffs have offered affidavits of their expert economist in support of a class-wide methodology for appraising damages depending on severity and duration of contamination. [Defendant's] effort to discredit this approach apparently portends a fight over admissibility and weight that would be identical in at least a high proportion of cases if tried individually.

Gintis v. Bouchard Transp. Co., 596 F.3d 64, 67 (1st Cir. 2010) (vacating denial of class certification).

2. Superiority

Superiority is demonstrated where "classwide litigation of common issues will reduce litigation costs and promote greater efficiency." *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996). Apple cannot seriously question the superiority of the class mechanism in resolving the antitrust claims asserted against it here; the resolution of the monopolization claims of each iPod purchaser on an individual basis is plainly not the preferable alternative. *Live Concert*, 247 F.R.D. at 148 (holding class mechanism clearly superior way to resolve antitrust claims, even if individualized damages analysis were assumed *arguendo* to be required); *DRAM*, 2006 WL

1530166, at *11 ("it would be unnecessarily duplicative, and judicially inefficient, for the court to mandate individual trials as to each class member"); *see generally* 2 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions*, §4:32 (4th ed. 2002) ("It is only when such difficulties make a class action less fair and efficient than some other method, such as individual interventions or consolidation of individual lawsuits, that a class action is improper.").

Indeed, class certification is nothing less than essential if the private antitrust enforcement mechanism is to function at all. As stated in *Tableware*: "The modest amount at stake for individual plaintiffs . . . renders individual prosecution impractical; class treatment not only promotes judicial economy, it represents plaintiffs' ***only*** chance for adjudication." *Tableware*, 241 F.R.D. at 652 (citing *Amchem Prods.*, 521 U.S. at 616).

C. There Exists a Readily Definable Class of Apple Customers

A Rule 23 class must be defined with reasonable specificity. *O'Connor v. Boeing N. Am., Inc.*, 184 F.R.D. 311, 319 (C.D. Cal. 1998). A class definition is "'definite enough'" to satisfy Rule 23 if it "'is administratively feasible for the court to ascertain whether an individual is a member.'" *Tableware*, 241 F.R.D. at 650 (quoting *O'Connor*, 184 F.R.D. at 319). The class definition proposed by Plaintiffs here – all persons who purchased specified products directly from Apple during a specified time period – unquestionably constitute "ascertainable" classes within the meaning of Rule 23. *See, e.g., Live Concert*, 247 F.R.D. at 105 (certifying class of: "'All persons who purchased tickets to any live rock concert in the Chicago Region directly from any of the Defendants or their affiliates or predecessors or agents during the period from June 19, 1998 to the present'"). This Court has certified far less precisely defined classes. *See, e.g., Slaven v. BP Am., Inc.*, 190 F.R.D. 649, 650-51 (C.D. Cal. 2000) (certifying class defined as persons who have suffered or will suffer economic damage as a result of an oil spill and/or the ensuing clean-up effort).

D. Appointment of Class Counsel

Rule 23(g)(1) requires the Court to appoint counsel to represent the interests of the class. *Rubber Chems.*, 232 F.R.D. at 355. For the reasons stated above in connection with the adequacy requirements of Rule 23(a)(4), and as has hopefully been demonstrated thus far in this litigation, the counsel retained by Plaintiffs to prosecute this class action are "well equipped" to vigorously

represent the proposed classes. *See* Ex. 30. Accordingly, the Court should again appoint Robbins Geller as counsel for the class.[18]

IV. CONCLUSION

All of Rule 23's requirements for the certification of Plaintiffs' monopolization, attempted monopolization and UCL claims against Apple have once again been satisfied. Plaintiffs' renewed motion for class certification should be granted: the Court should appoint Melanie Tucker, Mariana Rosen, and Somtai Troy Charoensak as Class Representatives and Robbins Geller as Lead Class Counsel.

DATED: January 18, 2011

Respectfully submitted,

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[18] Although the Court appointed Robbins Geller as interim co-lead class counsel together with The Katriel Law Firm, Robbins Geller now moves separately for Lead Class Counsel and has given notice to The Katriel Law Firm.

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CERTIFICATE OF SERVICE

I hereby certify that on January 18, 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 18, 2011.

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