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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.	REPLY MEMORANDUM IN SUPPORT OF PLAINTIFFS' RENEWED MOTION FOR CLASS CERTIFICATION
	JUDGE: Hon. James Ware DATE: April 18, 2011 TIME: 9:00 a.m. CTRM: 8 – 4th Floor

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I. INTRODUCTION

In its opening paragraph, Apple attempts to spin Plaintiffs' monopoly maintenance claim as "a new theory" asserting that Plaintiffs have "changed their theory of liability."[1] Def's Mem. at 1. While not relevant to the issue of class certification, Plaintiffs are compelled to respond to this outright fabrication. Monopoly maintenance has always been a part of Plaintiffs' claims. *See* Dkt No. 107, ¶¶85-92 (Consolidated Complaint for Violations of Sherman Antitrust Act, Clayton Act, Cartwright Act, California Unfair Competition Law, Consumer Legal Remedies Act and California Common Law of Monopolization). Plaintiffs have also consistently alleged that Apple maintained its monopoly specifically by rendering Harmony incompatible with iPods. *Id.*, ¶¶ 51-55. Monopoly maintenance is neither a new theory, nor is it substantively different than monopoly acquisition.[2] Noll Reply Decl. at 4-5 (citing the *United States v. Microsoft Corp.*, 253 F.3d 34, 56 (D.C. Cir. 2001) and *Northeastern Tel. Co. v. Am. Tel. & Tel. Co.*, 651 F.2d 76, 85 (2d Cir. 1981) cases as examples of legally acquired monopolies that were illegally maintained through anticompetitive means).

Despite Apple's attempts to muddy the issues, the only issue before the Court in this motion is whether Plaintiffs have shown that the class meets the elements of Rule 23 of the Federal Rules of Civil Procedure and should be certified. Apple has conceded numerosity. The elements of Plaintiffs' Section 2 claim for monopoly maintenance all involve common, not individual legal issues. *See* Plaintiffs' Notice of Motion and Renewed Motion for Class Certification and Appointment of Lead Class Counsel ("Pls' Mem.") at 13. Moreover, Plaintiffs have submitted in support of this motion, two declarations of Professor Roger G. Noll in which Professor Noll opines

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[1] Apple also asserts that Plaintiffs "acknowledge" and "admit" that Apple's monopoly was legally obtained and its DRM was "entirely lawful." *See* Apple's Opposition to Renewed Motion for Class Certification ("Def's Mem.") at 1. Plaintiffs did not admit or concede the legality of Apple's monopoly. In fact, that issue was hotly contested and Plaintiffs' amended consolidated complaint specifically preserves the issue for appeal. Dkt. No. 322, ¶130 (Amended Consolidated Complaint for Violations of Sherman Antitrust Act, Clayton Act, Cartwright Act, California Unfair Competition Law, Consumer Legal Remedies Act and California Common Law of Monopolization).

[2] "Noll Reply Decl." refers to the Reply Declaration of Roger G. Noll filed concurrently. "Noll Decl." refers to the Declaration of Roger G. Noll, dated January 18, 2011.

that the economic aspects of Plaintiffs' liability and damages claims can be proven through proof that is common to all class members. In his Reply Declaration, Professor Noll conducts a preliminary regression analysis, which demonstrates that impact and damages can be proven by relying on common proof. As the arguments of both Plaintiffs and Apple demonstrate, these legal and factual issues clearly predominate over individual issues.

Apple's only argument challenging Plaintiffs' typicality and adequacy focuses on whether they can represent reseller direct purchasers. Since all direct purchasers claim injury due to the same actions by Apple, Plaintiffs' claims are typical of the entire class. As Apple admits, [redacted]. Def's Mem. at 22. If, as Plaintiffs allege and Professor Noll's preliminary regression analysis indicates, Apple's actions to prevent competitive interoperability between RealNetworks' Harmony and iPods had the effect of raising iPod prices, all direct purchasers paid more for iPods than they would have otherwise paid. Apple does not challenge Plaintiffs' counsel's adequacy.

Finally, given the size and complexity of the case, and the large percentage of small direct purchasers, including resellers, a class action is clearly the superior method for litigating these common issues.

In summary, this Court was correct in certifying Plaintiffs' claims before, and should re-certify the class now.

II. APPLE IGNORES NINTH CIRCUIT CLASS CERTIFICATION STANDARDS

Apple willfully ignores settled Ninth Circuit authority on the standards for class certification and the weight given to expert opinions at the class-certification stage. Instead, it conducts a nationwide search for the most favorable standards it can find.[3] Def's Mem. at 7-8 (citing *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305 (3d Cir. 2008); *Castano v. Am. Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996); *West v. Prudential Sec. Inc.*, 282 F. 3d 935 (7th Cir. 2002)). This reliance on out-of-district authority runs throughout Apple's opposition brief. However, even a cursory

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

examination of recent case law in the Northern District of California shows that the standards for class certification in this Circuit are exactly as Plaintiffs represent in their opening brief. Moreover, even if the standards were more like the *Hydrogen Peroxide* analysis Apple argues for, Professor Noll's declarations in support of class certification easily meet that test.

A. Standards for Class Certification in the Ninth Circuit

"The Supreme Court has long recognized that class actions play an important role in antitrust enforcement." *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 267 F.R.D. 291, 299 (N.D. Cal. 2010) (Illston, J.) (citing *Reiter v. Sonotone Corp.*, 442 U.S. 330, 344, 99 S. Ct. 2326 (1979) and *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 262, 266, 92 S. Ct. 885 (1972)). "'Accordingly, when courts are in doubt as to whether certification is warranted, courts tend to favor class certification.'" *Id.* (quoting *In re Static Random Access (SRAM) Antitrust Litig.*, No. C 07-01819 CW, 2008 WL 4447592, at *2 (N.D. Cal. Sept. 29, 2008) (Wilken, J.)).

"'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 and 'nothing in either the language or history of Rule 23 . . . gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action.'" *United Steel, Paper & Forestry, Rubber, Mfg. Energy, Allied Indus. & Serv. Workers Int'l Union, AFL-CIO, LLC v. ConocoPhillips Co.*, 593 F.3d 802, 808 (9th Cir. 2010) (quoting *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177-79, 94 S. Ct. 2140 (1974)). "Although certification inquiries such as commonality, typicality, and predominance might properly call for some substantive inquiry, the court may not go so far . . . as to judge the validity of these claims." *Id.* (internal quotation omitted).

B. Professor Noll's Reports are Sufficient to Support Class Certification

Apple relies on *Allied Orthopedic* to argue that Plaintiffs must essentially have a full-blown damages analysis prepared and proved in order to certify a class. Def's Mem. at 20 (citing *Allied Orthopedic Appliances, Inc. v. Tyco Healthcare Group L.P.*, 247 F.R.D. 156, 177 (C.D. Cal. 2007)). *Allied Orthopedic* actually holds only that it would be insufficient to "merely promise to develop in the future some unspecified workable damage formula." *Id.* at 176. Recent cases since *Allied*

Orthopedic have consistently reiterated this standard for an expert damages analysis to support class certification. Most recently, in *In re Online DVD Antitrust Litig.*, No. M 09-2029 PJH, 2010 WL 5396064, at *11 (N. D. Cal. Dec. 23, 2010) (Hamilton, J.), the court described the "limited burden" plaintiffs face at the class certification stage. "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.'" *Id.*; *see also Flat Panel*, 267. F.R.D. at 314 (same); *SRAM*, 2008 WL 4447592, at *6 (applying same "not insubstantial" standard in finding Professor Noll's damages methodology sufficient for class certification); *In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, No. M 02-1486 PJH, 2006 WL 1530166, at *10 (N.D. Cal. June 5, 2006) (Hamilton, J.) (same). Professor Noll's declarations certainly meet this standard.

Professor Noll goes far beyond a "mere[] promise" and instead "describe[s]" a "concrete workable formula." *Allied Orthopedic*, 247 F.R.D. at 176. In addition to Professor Noll's thorough declaration in support of Plaintiffs' motion, Professor Noll's Reply Declaration, contains a preliminary regression analysis of Apple's wholesale prices which could not have been prepared at the time Plaintiffs filed their opening brief because Apple withheld the necessary data. "This analysis shows conclusively that (1) virtually all of the variation in prices of iPods across models and over time can be explained in a linear regression analysis and (2) the before-after method of calculating the effect of Apple's conduct can be implemented." Noll Reply Decl. at 1-2.

Further, *Allied Orthopedic* is easily distinguishable. The expert in *Allied Orthopedic* failed to consider actual pricing data regarding class members, which varied widely. *Allied Orthopedic*, 247 F.R.D. at 176.[4] Here, by contrast, [redacted] Rather, as Apple's expert

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[4] The other out-of-circuit cases Apple cites are similarly distinguishable. *Piggly Wiggly Clarksville v. Interstate Brands Corp.*, 100 Fed. Appx. 296, 298 (5th Cir. 2004) ("individualized determination would be required because many class members negotiated a price rather than being charged strictly on price lists"); *Am. Seed Co., Inc. v. Monsanto Co.*, 238 F.R.D. 394, 400-01 (D. Del. 2006) (genetically modified seed market is "highly individualized," prices "var[y] considerably" and plaintiff's expert did not even conduct "at least a preliminary study of the market"); *Butt v. Allegheny Pepsi-Cola Bottling Co.*, 116 F.R.D 486, 492 (E.D. Va. 1987) (damages calculation possible only "through a detailed and individualized examination of hundreds of thousands of transactions").

concedes, [redacted].[5] Medici Decl., Ex. 1 (Burtis Depo. at 74:21-23). [redacted] *See* Noll Reply Decl. at 28 [redacted] Also, in contrast to *Allied Orthopedic*, Professor Noll is using data of actual prices paid by end-users and resellers available from Apple's own sales records.

III. APPLE'S SUBSTANTIVE ATTACKS ON PROFESSOR NOLL'S METHODOLOGY GO TO THE MERITS AND ARE INSUFFICIENT TO PRECLUDE CLASS CERTIFICATION

As it has consistently, Apple ignores the appropriate legal standard used to assess commonality and predominance. As the Court succinctly summarized in its December 22, 2008 Order:

> Rule 23(a)(2) requires that class certification be predicated on "questions of law or fact common to the class." This requirement "has been construed permissively. All questions of fact and law need not be in common to satisfy the rule. The existence of shared legal issues with divergent factual predicates is sufficient, as is a common core of salient facts coupled with disparate legal remedies with the class." *Hanlon*, 150 F. 3d at 1019.

Dkt. No. 196 at 5-6 (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 Defendant's Motion to Dismiss Count One and Requiring Further Briefing).

> Certification under Rule 23(b)(3) requires that "questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). "When common questions present a significant aspect of the case and they can be resolved for all members of the class in a single adjudication, there is clear justification for handling the dispute on a representative rather than on an individual basis." *Hanlon*, 150 F.3d at 1022.

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[5] *See* Declaration of Carmen A. Medici in Support of Plaintiffs' Reply Memorandum in Support of Plaintiffs' Renewed Motion for Class Certification ("Medici Decl."), filed concurrently.

Id. at 12.

Here, Plaintiffs have alleged a core of common facts and legal issues, and Professor Noll has shown that both antitrust injury and damages can be proven through a common method. In short, Professor Noll's empirical analyses can show, and will show at trial, that Apple's actions to block competition by disabling competing product compatibility caused iPod prices to be higher than they would have been had Apple not acted improperly to maintain its monopoly. This common issue predominates with regard to both antitrust injury and damages. *See id.* at 12 ("[T]he Court has found there are numerous common questions of law and fact involving Defendant's allegedly anticompetitive conduct. Accordingly, the Court finds that Plaintiffs have met the predominance requirement of Rule 23(b)(3).").

Much of Apple's opposition is devoted to trying to win a "battle of the experts" on the *merits* of Plaintiffs' claims; a battle that is inappropriate at class certification (though one Apple has lost). Apple's invitation to the Court to decide Plaintiffs' case on the merits at class certification goes far beyond a rigorous analysis as to whether the requirements of Rule 23 have been met.

Apple, again relying on authority from other circuits, claims that Professor Noll must "prove[] with certainty" that the class suffered actual injury. Def's Mem. at 8-9. In addition to misstating the relevant standard, Apple's out-of-district cases are factually inapposite. In *Alabama v. Blue Bird Body Co., Inc.* 573 F. 2d 309 (5th Cir. 1978), the court determined that the nature of the product (school buses) and the nature of the market in each individual location was so differentiated that impact and damages could only be determined on an individual basis. *Id.* at 328. The court could envision no way to make these determinations without "particularized proof" and by "examining the relevant school bus market where each individual plaintiff is located." *Id.* Similarly, in *Blades v. Monsanto Co.*, 400 F.3d 562 (8th Cir. 2005), the court found that the market for genetically modified seed was too differentiated by product and geographic market to assess impact

based on common proof. *Id.* at 574.[6] Here, by contrast, there is no dispute that the iPod market at issue is a nationwide, nondifferentiated market with prices set by Apple.

Next, Apple launches into a lengthy factual attack on Professor Noll's methodology. Def's Mem. at 9-19. Initially, Apple faults Professor Noll for not examining individual class members' usage of Harmony and iTS. *Id.* at 9-11. However, Apple's focus on lock-in and Harmony usage by individual consumers misses the point. Noll Reply Decl. at 11. Plaintiffs' claims and Professor Noll's analysis center on the overarching market impact of Apple's exclusionary conduct on the price of iPods. Plaintiffs' theory does not require a damages analysis that tracks the lock-in effect at an individual consumer level to determine how each consumer was damaged. Rather, damages flow from the price of an iPod being more expensive than it would have been had Apple not illegally maintained its monopoly. Professor Noll refutes Apple's argument in the strongest possible terms, calling it "economic nonsense," and "a fallacy of composition," and describes in detail why it is an error in both logic and economics. *Id.* at 11-12. As Apple's expert concedes, every direct purchaser who purchased the same model of iPod during the same time period would have paid a higher price for an iPod (be they consumers or resellers) as a result of Apple's anticompetitive conduct, regardless of the extent of that buyer's lock-in. Medici Decl., Ex. 1 (Burtis Depo. at 74:21-23; 77:1-87:6).

The remaining issues Apple raises with regard to Professor Noll's declaration are addressed in his Reply Declaration. Though Professor Noll has already put forth an opinion detailing the information and methodology necessary to conduct a regression analysis (*see* Noll Decl. at 68-84), in his Reply Declaration, he provides new detail discussing the various elements that must be addressed

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[6] *Federal Prescription Serv. Inc. v. Am. Pharm. Ass'n*, 663 F.2d 253 (D.C. Cir. 1981), is completely factually dissimilar. There, the antitrust violation alleged was a "group boycott" of a mail order pharmacy which the court rejected on the facts. In *In re New Motor Vehicles Canadian Export Antitrust Litig.*, 522 F.3d 6 (1st Cir. 2008), to show injury, plaintiffs had to show that prices paid for new cars by individual consumers were higher due to the anticompetitive conduct. In that context "hard bargainers" will presumably always do better than "poor negotiators," and the plaintiffs' expert report, based on impact to MSRP and dealer invoice prices, had not fashioned a method to control for individual bargaining. *Id.* at 29. Here, iPod prices are not individually negotiated. *Bell Atl. Corp. v. AT&T Corp.*, 339 F.3d 294 (5th Cir. 2003), simply parrots *Blue Bird Body*, and in fact does not reach the issue of antitrust injury at all. *Id.* at 303.

in his regression, how exactly a regression analysis properly addresses those elements, and finally, he runs a working regression analysis implementing the before-after method of calculating Apple's overcharge applicable to all class members (which is provisional pending the receipt of the more particularized data Apple has refused to produce to date). Specifically, Professor Noll:

- Demonstrates that Dr. Burtis's Report contains no basis for its conclusions in either facts or economics (Noll Reply Decl. at 3-4);
- Demonstrates, using examples, that Dr. Burtis has an unsteady grasp on antitrust and competition economics and that she made a number of elementary mistakes in her analysis (*Id.* at 3-6);
- Identifies the periods before iTMS, before Apple broke interoperability, after Apple broke interoperability and when Harmony functioned and incorporates those time periods into his analysis, describing the effect the Harmony period had on the price of iPods, a task Apple and Dr. Burtis contend could not be completed (though they did not try) (*Id.* at 6-13);
- Demonstrates the adequacy of the pre-iTMS period as a benchmark (*Id.* at 14-22);
- Defines what harm to competition is in antitrust terms, why Dr. Burtis failed to properly identify it, and establishes that Apple's conduct harmed competition (*Id.* at 22-24); and
- Describes how resellers and direct purchasers have a common interest in Apple charging lower prices (*Id.* at 26-28).

In addition to meeting Apple's objections, Professor Noll has prepared preliminary empirical analyses.

> Two regressions were estimated. The first is a standard hedonic model that explains the price of a transaction on the basis of characteristics of the iPod model that was sold and other aspects of the transaction. The second regression supplements the standard hedonic regression by adding a unit cost variable and indicator variables for various time periods in which the extent of competition in the market for iPods may have differed, including the periods of alleged anticompetitive conduct.

Id. at 34-35; *see also id.* at 28-39 and Exs. 2 and 3 attached thereto (describing the regression analyses and reporting their results).

While these preliminary analyses are not a final damages report – indeed no such report is needed to support class certification – they do add conclusive support to Plaintiffs' position that injury and damages can be proven through common evidence.

Apple's reliance on Dr. Burtis's opinions demonstrates how weak its arguments are against class certification. As is detailed in Plaintiffs' motion to exclude Dr. Burtis's report, filed herewith,

Dr. Burtis conducted no analysis at all, let alone any analysis directed at class issues. The sum total of her opinion is that Professor Noll's proposed methodology for class treatment fails because it "will not work." Burtis Report at 11, 14, 15.[7] She offers no evidence or reasoning in support of this "analysis," which is really just a statement of her conclusion, and simply parrots Apple's counsel's legal argument.

Further, Dr. Burtis's work in the case is pathetically cursory. [redacted] Medici Decl., Ex. 1 (Burtis Depo. at 9:13-10:11). [redacted] *Id.*, Ex. 1 (Burtis Depo. at 32:23-33:16). Unburdened by the facts and data, Dr. Burtis simply makes conclusory statements, sometimes at odds with those facts. For example, Dr. Burtis claimed that Professor Noll [redacted] Burtis Report at 15-17. [redacted] Noll Reply Decl. at 24-26. This relative ignorance of Apple's own internal documents had the real-world effect of skewing Dr. Burtis's analysis. *See* Noll Reply Decl. at 3-4. Further, as Professor Noll points out in his Reply Declaration, Dr. Burtis makes conclusory economic assertions that have no foundation in scholarly publications. *Id.* at 4. So, even if the Court were to accept Apple's invitation to weigh the experts' opinions, Professor Noll would clearly win the "battle."

Apple argues that Plaintiffs and their expert had sufficient data in sufficient time to complete a full-blown damages analysis by the scheduled deadline for the filing of their class certification motion. Def's Mem. at 19-21; Kiernan Decl., ¶16.[8] This contention is disingenuous. As discussed more fully in both Professor Noll's Reply Declaration (Noll Reply Decl. at 28-34) and the

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[7] *See* Expert Report of Dr. Michelle M. Burtis ("Burtis Report"), dated February 28, 2011.

[8] *See* Declaration of David C. Kiernan in Support of Apple Inc.'s Opposition to Renewed Motion for Class Certification ("Kiernan Decl.").

declaration of Alexandra S. Bernay[9] filed herewith, Plaintiffs have diligently sought (and in fact are still diligently seeking) the data necessary to complete Professor Noll's analysis. As described more fully in the Bernay Declaration, Plaintiffs have sought, for years, completed transactional data from Apple. Bernay Decl., ¶¶8, 17-28. It was not until early January 2011 that Plaintiffs were informed data for the period October 2001 through August 2002 was only available in archives. Bernay Decl., ¶19. Then, despite repeated, unheeded requests, Apple refused to provide a detailed explanation of costs and burden to retrieve the data that Apple knows Professor Noll believes is critical to his ability to conduct a complete regression analysis. Bernay Decl., ¶¶17-28.

IV. PLAINTIFFS CAN REPRESENT ALL DIRECT PURCHASERS

Finally, Apple argues that the named Plaintiffs should not be permitted to represent reseller direct purchasers. Def's Mem. at 21-25. Despite Apple's contention to the contrary, this same argument was considered and rejected by the Court in its 2008 class certification order. *Compare* Def's Mem. at 22 (asserting that the Court granted the 2008 motion "without explicitly addressing the resellers") *with* Dkt. No. 198 at 2 (Order Vacating Case Management Conference; Clarifying and Correcting Class Certification Order; Setting Briefing Schedule) ("[T]he Court considered Defendant's contentions that resellers should be excluded from the class definition" and "included resellers in the certified class"). None of the grounds Apple asserts this time are valid either.

Initially, Apple argues that by not specifically using the word "resellers" in their class certification motion, Plaintiffs somehow waived their right to represent the class of direct purchasers as defined. Def's Mem. at 21-22. Apple cites no real authority for this proposition, and the facts do not support waiver. Plaintiffs' motion defines the class as including "[a]ll persons or entities in the United States . . . who purchased an iPod directly from Apple." Pls' Mem. at 1. This would clearly include resellers. This is also the same as the class defined in the amended consolidated complaint. Dkt. No. 322, ¶31. Professor Noll's declaration also addresses in detail both kinds of direct purchasers. *See e.g.*, Noll Decl. at 14-17 (discussing data issues with regard to resellers); *id.* at 69-70

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[9] *See* Declaration of Alexandra S. Bernay in Support of Reply Memorandum in Support of Plaintiffs' Renewed Motion for Class Certification ("Bernay Decl."), filed concurrently.

(addressing damages methodology for resellers). Plaintiffs have diligently sought discovery as to resellers. Bernay Decl., ¶¶8, 17-28. Apple's expert testified [redacted] Burtis Report at 2-3; Medici Decl., Ex. 1 (Burtis Depo. at 46:18-25). Thus, there is simply no support for Apple's waiver argument, and Apple can claim no prejudice.

Second, Apple argues that resellers are not "similarly situated" to end-users. Def's Mem. at 21-23. [redacted] *Id.* at 22 [redacted] *See also* Noll Reply Decl. at 27 [redacted]

Apple also argues that resellers could actually have benefited from higher retail prices. Def's Mem. at 22. Besides making no economic sense, this argument is completely irrelevant.[10] Under settled federal antitrust law, a "pass-on" or "otherwise benefited" defense is barred. *See Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481, 489, 88 S. Ct. 2224 (1968) (disallowing "pass on" defense; "[a]s long as the seller continues to charge the illegal price, he takes from the buyer more than the law allows"); *see, e.g., Teva Pharms. USA, Inc. v. Abbott Labs.*, 252 F.R.D. 213, 226-227 (D. Del. 2008) (Rejecting as "irrelevant" adequacy challenge premised on variation in resellers' size and pricing strategies: "Direct purchasers may recover the amount of their overcharges irrespective of what happens after the overcharge is paid.") (citing *Hanover Shoe*, 392 U.S. at 489); *In re Relafen Antitrust Litig.*, 360 F. Supp. 2d 166, 187-89 (D. Mass. 2005) (*Hanover Shoe* precludes contention that class certification should be denied because allegedly overcharged direct purchasers "otherwise benefitted" from the challenged misconduct). "[T]he true import of the *Hanover Shoe* rule [is] that a direct purchaser may recover the full amount of the overcharge, even if he is

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[10] *See* Noll Reply Decl. at 27 ("The argument in the *Apple Opposition* does not make sense economically, and tellingly the *Burtis Report* contains no support for it.").

otherwise benefitted, because the antitrust 'injury occurs and is complete when the defendant sells at the illegally high price.'" *Meijer, Inc. v. Abbott Labs.*, 251 F.R.D. 431, 435 (N.D. Cal. 2008). In addition to being contrary to *Hanover Shoe*, the "otherwise benefited" argument "does not make sense economically, and tellingly the Burtis Report contains no support for it." Noll Reply Decl. at 27; *see id.* at 26-28 (describing why higher retail prices do not benefit resellers).

Neither is class certification precluded because Professor Noll's damages analysis must account for resellers' discounts. Professor Noll's declarations address the issue head on and concludes that "[i]n both cases, damages still are calculated from a common formula that takes into account the magnitude of price discrimination among buyers." Noll Decl. at 69-70; *see also* Noll Reply Decl. at 28 ("[T]he interests of distributors, resellers and consumers are fully aligned in seeking to eliminate anticompetitive overcharges by Apple."). The theory of the harm is exactly the same for both. *Id.* at 26-28. Both end-users and resellers paid more than they otherwise would have for iPods. *Id.*

Dr. Burtis's testimony also supports Plaintiffs' ability to represent all direct purchasers. Retail purchasers of iPods are ideally suited for class treatment because, as Dr. Burtis testified, [redacted] Medici Decl., Ex. 1 (Burtis Depo. at 74:21-23) [redacted] *See generally id.*, Ex. 1 (Burtis Depo. at 77:1-87:6) [redacted]

Apple also argues that the Plaintiffs are not typical of or adequate to represent resellers. Def's Mem. at 21-24. The focus of the typicality analysis, however, is on the defendant's conduct. As the Court previously noted,

> Like the commonality requirement, the typicality requirement is permissive: "representative 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. The test is whether "other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and