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14
 15 UNITED STATES DISTRICT COURT
 16 NORTHERN DISTRICT OF CALIFORNIA
 17 SAN JOSE DIVISION

18	THE APPLE IPOD ITUNES ANTI-TRUST)	Lead Case No. C-05-00037-JW(HRL)
19	LITIGATION)	
20	_____)		<u>CLASS ACTION</u>
21	This Document Relates To:)	DECLARATION OF ALEXANDRA S.
22	ALL ACTIONS.)	BERNAY IN SUPPORT OF PLAINTIFFS'
	_____)		MOTION TO COMPEL PRODUCTION OF
)	DATA

23 JUDGE: Hon. Howard R. Lloyd
 24 DATE: May 3, 2011
 TIME: 10:00 a.m.
 25 CTRM: 2, 5th Floor

26 **REDACTED**

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I, ALEXANDRA S. BERNAY, hereby declare as follows:

1. I am an attorney duly licensed to practice before all of the courts of the State of California. I am an associate at the law firm Robbins Geller Rudman & Dowd LLP, Co-Lead Class Counsel of record for Plaintiffs Melanie Tucker, Mariana Rosen and Somtai Troy Charoensak (collectively "Plaintiffs") in this action. I have personal knowledge of the matters stated herein, and, if called upon, I could and would competently testify thereto.

2. During the final two months of the fact-discovery period in this action, defendant [REDACTED]. Part of that production [REDACTED], part of the data necessary for Plaintiffs' experts to be able to conduct their analysis regarding damages and antitrust impact in this action.

3. Because a great deal of the materials received by Apple were produced just before and after the discovery cut-off, the parties agreed that Apple would work with Plaintiffs to resolve questions and issues regarding the data as they came up.

4. Apple first produced [REDACTED]
[REDACTED]
[REDACTED] From the end of December 2010 to the present, Plaintiffs have regularly contacted Apple with questions regarding the meaning of certain items in the various data sets produced and made requests concerning the absence of needed material in the data, as well as other matters as they have come up. During that time, Apple provided some written responses and also produced some corrected data. I have found no record of Apple telling Plaintiffs the material was in archives until January 4, 2011.

5. In early February 2010, Plaintiffs sought to wrap up the remaining issues surrounding the data and, on February 10, 2011, sent Apple's counsel a list of the critical items that remained to be either produced or explained. The items on the list had been raised in previous correspondence.

6. One item on the list was a [REDACTED]
[REDACTED]
[REDACTED]

1 7. Plaintiffs followed up several times with Apple's counsel regarding the outstanding
2 data issues between February 10, 2011 and March 3, 2011, including a phone call on February 14,
3 2011. Apple's counsel committed to providing an estimate of costs and explanation of the burden of
4 producing the requested [REDACTED] during the phone call between the parties.

5 8. Between February 17, 2011 and March 3, 2011, Plaintiffs' counsel repeatedly sent
6 emails seeking an update on the data. On March 7, 2011, Plaintiffs' counsel sent another email to
7 Apple's counsel again following up on the data issues which stated if Apple could not "provide full
8 responses by Thursday [March 10, 2011], plaintiffs will file a motion to compel responses on Friday
9 [March 11, 2011]."

10 9. On March 10, 2011, Apple's counsel provided answers to a number of the
11 outstanding questions and produced some requested data. [REDACTED]

12 [REDACTED] Instead, counsel suggested setting up
13 another call to discuss the issue. Apple's counsel further stated that he [REDACTED]

14 [REDACTED]

15 [REDACTED] Despite Plaintiffs'
16 explanation that the data was necessary for their experts, Apple suggested Plaintiffs use previously-
17 produced data, saying it was "sufficient." Plaintiffs again explained that in order to perform an
18 econometric analysis, their experts needed the data.

19 10. On March 10, 2011, Apple's counsel sent an email containing answers to a number of
20 the outstanding data questions. I replied and again asked whether Apple intended to produce the
21 requested [REDACTED] by March 11, 2011.

22 11. On March 11, 2011, I again wrote to Apple's counsel. I stated that Plaintiffs were
23 still planning to file a motion to compel because Plaintiffs had not received the production nor any
24 detail concerning the burden of producing [REDACTED]. I asked counsel for Apple to let me know by
25 noon whether the [REDACTED] would be produced.

26 Apple asked to have until 2:00 p.m. to respond and I agreed. At 2:06 p.m., Apple's counsel wrote a
27 lengthy email again claiming burden, but again failing to provide details of the costs of producing

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1 the data other than claiming “based on prior experience, the costs could run into the several hundreds
2 of thousands of dollars and perhaps much higher.”

3 12. The parties had further back-and-forth communications and Apple counsel indicated
4 [REDACTED]. Based in large
5 part on this statement, Plaintiffs held off filing their motion to compel on March 11, 2011. On
6 March 15, 2011, Plaintiffs again provided additional detail to Apple which further explained why
7 data previously produced by Apple was not sufficient for Plaintiffs’ expert and why the earlier
8 period data was important.

9 13. I wrote again to follow up with Apple’s counsel on March 16, 2011, March 18, 2011,
10 March 21, 2011 and March 22, 2011. On March 22, 2011, Apple finally responded and agreed to set
11 up a call March 23, 2011 to discuss [REDACTED]. During the call Apple’s counsel
12 [REDACTED]
13 [REDACTED]

14 14. On Thursday, March 24, 2011, I again wrote to Apple’s counsel reminding him that
15 he committed to getting back to Plaintiffs regarding [REDACTED]
16 [REDACTED]. On Friday, March 25, 2011, Apple responded that it was
17 [REDACTED] and asked a number of
18 questions regarding the data. I responded to Apple’s questions within a half hour. I explained that
19 Plaintiffs had been working with Apple for many months in an effort to get the data from Apple. I
20 further explained Plaintiffs’ position that many of the issues regarding data would have been
21 resolved much sooner if Apple had not waited until on and after the close of discovery to provide
22 relevant data to Plaintiffs. Plaintiffs again told Apple that motion practice may be necessary. In
23 addition to [REDACTED] that had been previously requested, counsel
24 for Apple stated that [REDACTED]
25 He further stated that he would “have an answer Monday whether data exists.”
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15. As of 11:30 p.m., on March 28, 2011, Apple's counsel has neither responded to the March 24-25 series of emails referred to in ¶14, above, nor produced [REDACTED]

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed this 28th day of March, 2011, at San Diego, California.

s/ Alexandra S Bernay

ALEXANDRA S. BERNAY

1 CERTIFICATE OF SERVICE

2 I hereby certify that on March 28, 2011, I authorized the electronic filing of the foregoing
3 with the Clerk of the Court using the CM/ECF system which will send notification of such filing to
4 the e-mail addresses denoted on the attached Electronic Mail Notice List, and I hereby certify that I
5 caused to be mailed the foregoing document or paper via the United States Postal Service to the non-
6 CM/ECF participants indicated on the attached Manual Notice List.

7 I certify under penalty of perjury under the laws of the United States of America that the
8 foregoing is true and correct. Executed on March 28, 2011.

9 s/ Alexandra S. Bernay
ALEXANDRA S. BERNAY

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Manual Notice List

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- (No manual recipients)