

1 Robert A. Mittelstaedt #60359  
ramittelstaedt@jonesday.com  
2 Craig E. Stewart #129530  
cestewart@jonesday.com  
3 David C. Kiernan #215335  
dkiernan@jonesday.com  
4 Michael Scott #255282  
michaelscott@jonesday.com  
5 JONES DAY  
555 California Street, 26th Floor  
6 San Francisco, CA 94104  
Telephone: (415) 626-3939  
7 Facsimile: (415) 875-5700

8 Attorneys for Defendant  
APPLE INC.

10 UNITED STATES DISTRICT COURT  
11 NORTHERN DISTRICT OF CALIFORNIA  
12 SAN JOSE DIVISION

14 **THE APPLE iPod tunes ANTI-TRUST  
15 LITIGATION**

**Case No. C 05-00037 JW (HRL)  
C 06-04457 JW (HRL)**

**DECLARATION OF DAVID C. KIERNAN  
IN SUPPORT OF APPLE'S OPPOSITION  
TO PLAINTIFFS' MOTION TO COMPEL**

Magistrate Judge Howard R. Lloyd

Date: May 3, 2011  
Time: 9:00 a.m.  
Courtroom 2, 5th Floor

23 I, David C. Kiernan, declare as follows:

24 1. I am a partner of Jones Day, counsel of record for Defendant Apple Inc. I am an  
25 active, licensed member of the State Bar of California. I make this declaration in support of  
26 Apple's Opposition to Plaintiffs' Motion to Compel. Part of my responsibilities for the defense  
27 of this case includes supervising the document review and production process. The following is  
28 based on my personal knowledge.

1           2.       On December 29, 2009, Plaintiffs requested “transaction data between Apple and  
2 wholesalers and resellers of iPods, including the quantity of iPods sold, the date the iPods were  
3 sold, the model number of iPods, and the price from October 2001 to the present.”<sup>1</sup> See Exhibit  
4 1. Apple objected to the scope of the request and to the extent that complying with the request  
5 would impose an undue burden on Apple. *Id.* After meeting and conferring over scope, the  
6 parties agreed in the fall of 2010 that Apple would produce, to the extent available, “dollar and  
7 unit sales, and price, by transaction, for each iPod model SKU, to each wholesale/reseller  
8 customer, from 2001 to 2010.” See Exhibit 2.

9           3.       Before the close of discovery, on behalf of Apple, I sent Plaintiffs’ counsel reseller  
10 transaction data for the period August 14, 2002 – December 2010 [REDACTED]

11 [REDACTED]  
12 [REDACTED]<sup>2</sup> I advised Plaintiffs’ counsel that Apple believed that the data for the October 2001 –  
13 August 2002 period existed only in archives—that is, it did not reside in Apple’s active systems.  
14 See also Bernay Decl. at ¶ 4. Nevertheless, I worked with Apple to search for a less burdensome  
15 means to obtain the data and to determine if other data existed that would satisfy the purported  
16 needs of Plaintiffs’ expert. *Id.*

17 \_\_\_\_\_  
18 <sup>1</sup> Contrary to Plaintiffs’ assertion (p. 2), the request at issue on this motion has not  
19 previously been the subject of a motion to compel. The “primary document request” seeking  
20 reseller transaction is Request No. 55 of Plaintiffs’ Second Set of Requests For Production. That  
21 request was served in December 2009. The document request Plaintiffs reference—Request No.  
22 19 of Tucker’s First Set of Requests for Production of Documents—was served in 2007 and  
23 sought quarterly data, not transactional data. *Id.* After the underlying cases were consolidated,  
24 Plaintiffs reserved Request No. 19 along with Request No. 55. Notably, Apple produced the  
25 document responsive to Request No. 19 (the document that showed, on a quarterly basis, for each  
26 iPod model sold, the number of units sold, the total revenue from the sales, and the cost of  
27 manufacturing) in October 2009 and produced an updated document with updated numbers in  
28 December 2010.

24 <sup>2</sup> [REDACTED]  
25 [REDACTED]  
26 [REDACTED]  
27 [REDACTED]  
28 [REDACTED]

1           4.       In early March 2011, Plaintiffs threatened to move to compel production of data  
2 for the October 2001 – August 2002 period. I explained to Plaintiffs’ counsel that such a motion  
3 was premature given that Apple was continuing to look for alternative sources of data and that it  
4 was working cooperatively with Plaintiffs in analyzing other solutions. I also reiterated Apple’s  
5 position that restoring the data from archives was not justified in light of the enormous costs of  
6 restoration, which could exceed several hundreds of thousands of dollars, and in light of all of the  
7 other data Apple had produced regarding sales to resellers. Exhibit 3, pp. 1-3. On March 25,  
8 2011, in response to yet another threat to move to compel, I sent an email explaining that Apple  
9 was still “examining another possible source of the data” that is “not in archives.” In addition, I  
10 expressed that, “In light of the estimated costs to restore the data, which would exceed several  
11 hundreds of thousands of dollars, the parties should continue to examine whether the data is truly  
12 necessary and to explore alternatives especially given the data that has been produced.”

13           5.       After continuing to look for a solution, on March 31, 2010, Apple was able to  
14 extract the reseller transaction data with the same 15 fields from a source without having to resort  
15 to archives. On April 1, 2011, on behalf of Apple, I sent Plaintiffs’ counsel the reseller  
16 transaction data with the same 15 fields as the previously produced data. On the same day, in an  
17 effort to save the parties the costs of additional briefing, I asked Plaintiffs to withdraw their  
18 motion as moot. Plaintiffs’ counsel responded that Plaintiffs’ experts were reviewing the data and  
19 that Plaintiffs’ counsel could not agree to take the motion off calendar. She provided no further  
20 explanation.

21           6.       However, it turned out that the dataset produced on April 1, 2011 included some  
22 duplicate records and some of the transactions were missing certain fields. Apple immediately  
23 addressed these issues. And on April 11, 2011, I sent a new dataset that eliminated the duplicate  
24 records and provided all the data requested by Plaintiffs’ motion to compel; *i.e.*, reseller  
25 transaction data for the period October 2001 – August 2002 with the same 15 fields that were  
26 previously produced for the August 14, 2002 – December 2010 period. On the same day, I left a  
27 voicemail for Plaintiffs’ counsel asking that Plaintiffs agree to withdraw the motion to compel as  
28 moot. Plaintiffs’ counsel has not returned my call.

1           7.       Contrary to Plaintiffs' assertions (p. 5), I gave specific details about the cost of  
2 restoring data from archives.

3 [REDACTED]  
4 [REDACTED]  
5 [REDACTED]  
6 [REDACTED]  
7 [REDACTED]  
8 [REDACTED]  
9 [REDACTED]  
10 [REDACTED]  
11 [REDACTED]  
12 [REDACTED]  
13 [REDACTED]  
14 [REDACTED]  
15 [REDACTED]  
16 [REDACTED]  
17 [REDACTED]  
18 [REDACTED]  
19 [REDACTED]  
20 [REDACTED]  
21 [REDACTED]

23           8.       Exhibit 1 is a true and correct copy of Plaintiffs' second set of request for  
24 production of documents.

25           9.       Exhibit 2 is a true and correct copy of a letter dated September 20, 2010 from  
26 Paula Roach to David C. Kiernan.

27           10.      Exhibit 3 is a true and correct copy of an email string dated March 11, 2011  
28 between David Kiernan and Plaintiffs' counsel.

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I declare under penalty of perjury that, to the best of my knowledge, the foregoing is true and correct. Executed on the 12th day of April, 2011 at San Francisco, California.

/s/ David C. Kiernan  
David C. Kiernan

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