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

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| THE APPLE IPOD ITUNES ANTI-TRUST LITIGATION | } | Lead Case No. C-05-00037-JW(HRL) |
| This Document Relates To: | } | <u>CLASS ACTION</u> |
| ALL ACTIONS. | } | PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF MOTION TO COMPEL PRODUCTION OF DATA |
| | | JUDGE: Hon. Howard R. Lloyd |
| | | DATE: May 3, 2011 |
| | | TIME: 10:00 a.m. |
| | | CTRM: 2, 5th Floor |

25 [REDACTED]

1 **I. INTRODUCTION**

2 After months of delay, and only after Plaintiffs' motion to compel was filed, did Apple
3 appear to produce the data that is the subject of Plaintiffs' motion to compel. This data was
4 produced after the deadline for filing Plaintiffs' expert report in support of class certification despite
5 the fact that Apple has known *for years* that this data is important for Plaintiffs' expert to use in his
6 report. Because this data was produced only after Plaintiffs filed a motion to compel and because
7 Apple has no legitimate excuse for its delay, Rule 37 of the Federal Rules of Civil Procedure
8 requires Apple to pay Plaintiffs' costs incurred in writing the motion to compel.

9 On April 1, 2011, just days after Plaintiffs went through the time and expense of filing a
10 motion to compel, Apple suddenly found a source for [REDACTED] that had been
11 the subject of repeated and extensive requests. See Declaration of Alexandra S. Bernay in Support
12 of Plaintiffs' Reply Memorandum in Support of Motion to Compel Production of Data ("Reply
13 Bernay Declaration") filed concurrently, ¶6. In fact, as Apple admits in its opposition, the data
14 produced on April 1, 2011, was still incomplete and corrected data had to be produced
15 April 11, 2011. See Apple's Opposition to Motion to Compel ("Def.'s Mem.") at 3.

16 Though Apple contends Plaintiffs' motion is moot, it is not for two independent
17 reasons: First, Apple still has not answered all the questions necessary to make the data useful for
18 Plaintiffs' experts; and second, Plaintiffs are entitled to costs.

19 Apple's unwarranted delay and needless foot-dragging is precisely the type of conduct Rule
20 37 is meant to deter. Under Rule 37(a)(5)(A):

21 If the motion [to compel] is granted—*or if the disclosure or requested discovery is*
22 *provided after the motion was filed—the court must*, after giving an opportunity to be
23 heard, require the party or deponent whose conduct necessitated the motion, the party
or attorney advising that conduct, or both to *pay the movant's reasonable expenses*
*incurred in making the motion, including attorney's fees.*¹

24
25 ¹ Plaintiffs are not required to detail fees and expenses from their opening motion to compel in
26 that motion. "[B]ecause Rule 37(a)(5)(A) provides for attorneys' fees and expenses 'incurred in
27 making the motion [to compel],' it would be impossible to include the requested amount in the
notice of motion to compel." *ATM Express, Inc. v. ATM Express, Inc.*, No. 07cv1293-L(RBB), 2008
28 U.S. Dist. LEXIS 94924, at *4-*5 (S.D. Cal. Nov. 21, 2008).

1 Fed. R. Civ. P. 37(a)(5)(A) (emphasis added).

2 **II. HISTORY OF DATA ISSUES**

3 As detailed extensively in the Reply Bernay Declaration, Plaintiffs sought [REDACTED]
4 [REDACTED] for years in this case. See Reply Bernay Declaration, ¶¶3, 5. Finally, in mid-
5 December 2010, [REDACTED]. See Dkt. Nos. 557, 590, Declaration
6 of Alexandra S. Bernay in Support of Plaintiffs' Motion to Compel Production of Data ("Bernay
7 Declaration"), ¶4. This data had a number of errors, which were corrected on January 6, 2011. *Id.*
8 Additionally, this data was missing transactions for the period October 2001 through August 2002.
9 *Id.*, ¶6. Apple told Plaintiffs in early January 2011 that this data might reside in archives. *Id.*, ¶4.
10 Since February 2011 Plaintiffs have worked tirelessly to get data for the earlier period. Plaintiffs
11 sent more than ten emails and had numerous meet and confers with Apple regarding the earlier
12 period data. See *id.*, ¶¶5-15. In fact, Plaintiffs specifically held off filing an already-drafted motion
13 to compel based on Apple's indication that perhaps the data requested existed in other, non-archived
14 databases. *Id.*, ¶12. Plaintiffs sought repeatedly to get updates following this indication from Apple
15 that the data might be available from a non-archived source, but heard nothing for more than a week.
16 *Id.*, ¶13. Of course, at the same time, the March 28, 2011 deadline for Plaintiffs' expert report was
17 drawing near. Further emails followed and nothing was heard from Apple until April 1, 2011, *three*
18 *days after* Plaintiffs filed their reply memorandum in support of class certification, the report of
19 Professor Roger G. Noll and the motion to compel. Reply Bernay Declaration, ¶6. This data had, as
20 Apple admits, certain issues that needed to be corrected. See Def.'s Mem. at 3. Corrected data was
21 received April 11, 2011. *Id.* Plaintiffs still have questions regarding certain issues with the data and
22 have followed up with Apple regarding those issues. Reply Bernay Declaration, ¶6.

23 The timing of Apple's production, just days after Plaintiffs' filings were due, coupled with
24 the deliberate and dilatory tactics of Apple, including the repeated failure to respond to multiple
25 emails requesting a status report as well as vague claims of burden, demonstrate Apple has no
26 justifications contemplated under Rule 37 and must pay Plaintiffs' costs, including attorneys' fees
27 related to the motion to compel. Indeed, these facts evince "strong scents of noncompliance and
28 evasive conduct. Plaintiff continually requested information and Defendants did not provide it,

1 forcing Plaintiff to expend time and money filing motions. Only after Plaintiff filed motions did
2 Defendants produce these documents. This is exactly the type of behavior contemplated by Rule 37's
3 fee-shifting provision." *Lorillard Tobacco Co. v. Elston Self Serv. Wholesale Groceries*, 259 F.R.D.
4 323, 328 (N.D. Ill. 2009).

5 **III. RELIEF REQUESTED**

6 Plaintiffs here submit contemporaneous billing and expense records detailing the reasonable
7 time spent drafting and filing the motion to compel. These records demonstrate that attorney
8 Alexandra Bernay spent eight hours drafting the motion to compel and supporting declaration.
9 Reply Bernay Declaration, ¶7, Ex. 1. Ms. Bernay bills at \$550.00 per hour. *Id.*, ¶7. Copy costs and
10 attorney service fees are also detailed in the Bernay Reply Declaration. *Id.*, ¶8, Ex. 2. These figures
11 are reasonable and should be awarded. This is so because "litigation is costly for both sides, and
12 when a party is compelled to waste time seeking to compel disclosures which should have been
13 forthcoming, the law provides that sanctions *shall* be imposed to reimburse the innocent party when
14 the defaulting party has not interposed a justifiable reason for not timely responding." *Villalpando v.*
15 *Citrus Heights Police Dep't*, No. CIV S-08-2130 LKK GGH, 2009 U.S. Dist. LEXIS 130548, at *5-
16 *6 (E.D. Cal. July 6, 2009) (emphasis in original).

17 **IV. CONCLUSION**

18 For the foregoing reasons, Plaintiffs request an order compelling Apple to respond to
19 questions regarding the newly produced data and to pay Plaintiffs' reasonable costs associated with
20 the filing of the motion to compel, including attorneys' fees.

21 DATED: April 19, 2011

Respectfully submitted,

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