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**\*\* E-filed May 6, 2011 \*\***

NOT FOR CITATION  
IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

THE APPLE IPOD ITUNES ANTITRUST  
LITIGATION,

No. C05-00037 JW (HRL)

**ORDER DENYING AS MOOT  
PLAINTIFFS' MOTION TO COMPEL  
PRODUCTION OF DATA AND  
DENYING PLAINTIFFS' REQUEST  
FOR FEES AND COSTS**

**[Re: Docket No. 556]**

\_\_\_\_\_ /  
Plaintiffs in this class action are purchasers of Apple, Inc.'s ("Apple") iPods and of digital music files from Apple's iTunes Store who allege that Apple unlawfully maintained dual monopolies in the markets for portable digital media players and digital audio downloads by using pretextual updates to its FairPlay DRM and other software that were intended to, and had the effect of, excluding competitors from these markets. See Docket No. 322.

On March 29, 2011, Plaintiffs filed a motion to compel the production of certain reseller data. Docket No. 556. The parties had been negotiating over the production of this data for some time. See id. at 4-5. On April 1, 2011, Apple produced the requested data. Docket No. 585 at 3. It produced corrected data on April 11, 2011. Id.

At oral argument, the parties agreed that Apple has produced the data at issue in Plaintiffs' motion to compel. Apple also represented that Plaintiffs' questions about that data, to the extent they have any, will be answered promptly, and the Court expects as much. Thus, Plaintiffs' motion to compel the production of data is DENIED as moot.

**United States District Court**  
For the Northern District of California

1 In their reply brief, though, Plaintiffs' say that, under Federal Rule of Civil Procedure 37,  
2 they are entitled to their reasonable expenses incurred in making their motion. Docket No. 613 at 1-  
3 2. Rule 37 states:

4 If [a] motion is granted — or if the disclosure or requested discovery is provided after  
5 the motion was filed — the court must, after giving an opportunity to be heard,  
6 require the party or deponent whose conduct necessitated the motion, the party or  
7 attorney advising that conduct, or both to pay the movant's reasonable expenses  
8 incurred in making the motion, including attorney's fees. But the court must not order  
9 this payment if:

- 10 (i) the movant filed the motion before attempting in good faith to obtain the  
11 disclosure or discovery without court action;
- 12 (ii) the opposing party's nondisclosure, response, or objection was substantially  
13 justified; or
- 14 (iii) other circumstances make an award of expenses unjust.

15 FED. R. CIV. P. 37(a)(5)(A).

16 In addition to the fact that Plaintiffs' request for fees and costs was raised for the first time in  
17 their reply brief,<sup>1</sup> Plaintiffs' request will not be granted because Apple's failure to produce the data  
18 sooner appears to be substantially justified. At the motion hearing, Apple plausibly explained that it  
19 believed that the data sought by Plaintiffs only existed in a location from which it would have been  
20 extremely costly to extract. In order to avoid unnecessary expense, Apple looked for the data in  
21 other locations from which extraction would be cheaper. After Plaintiffs' filed their motion to  
22 compel, Apple located the data in such a location, and produced it forthwith. Plaintiffs suggest that  
23 Apple purposefully delayed its search for improper reasons, but this suggestion is unpersuasively  
24 conclusory. Plaintiffs' request for attorney's fees and costs is DENIED.

25 **IT IS SO ORDERED.**

26 Dated: May 6, 2011

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28 \_\_\_\_\_  
HOWARD R. LLOYD  
UNITED STATES MAGISTRATE JUDGE

29 <sup>1</sup> This District's civil local rules require that when, in connection with a dispute about disclosure or  
30 discovery, a party moves for an award of attorney fees or other form of sanction under Rule 37, the  
31 motion must be separately filed and noticed for hearing in accordance with Civil Local Rule 7-2.  
32 See Civ. L.R. 7-8, 37-4. Plaintiffs did not adhere to these rules, which deprived Apple of an  
33 opportunity to present its side of the story until the motion hearing.

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