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13 UNITED STATES DISTRICT COURT  
 14 NORTHERN DISTRICT OF CALIFORNIA  
 15 SAN FRANCISCO DIVISION

16 **THE APPLE IPOD iTUNES ANTI-  
 17 TRUST LITIGATION**

Lead Case No. C 05-00037 JW (HRL)

[CLASS ACTION]

18 \_\_\_\_\_  
 19 This Document Relates To:  
 20 ALL ACTIONS

**APPLE'S REQUEST FOR LEAVE AND  
 SUPPLEMENTAL BRIEF RE *WAL-  
 MART STORES INC. V. DUKES***

Date: June 27, 2011  
 Time: 9:00 a.m.  
 Place: Courtroom 5, 17th Floor

1 Apple respectfully requests leave of Court to submit this supplemental brief addressing  
2 the Supreme Court’s decision in *Wal-Mart Stores, Inc. v. Dukes*, No. 10-277 (June 20, 2011) as it  
3 relates to Plaintiffs’ pending motion for class certification. Because *Wal-Mart* is the latest  
4 Supreme Court pronouncement on the standards for class certification, Apple believes the Court  
5 will benefit from this short brief outlining its effect on the issues raised by Plaintiffs’ motion.

6 *Wal-Mart* buttresses Apple’s opposition to class certification in several critical respects:

7 First, the Supreme Court made clear that, contrary to Plaintiffs’ assertions here (Doc. 550,  
8 p. 3), no presumption exists in favor of class certification. The Court reiterated that a “class  
9 action is an exception to the usual rule that litigation is conducted by and on behalf of the  
10 individual named parties only.” *Op.* at 8. Thus, a “party seeking class certification must affirma-  
11 tively demonstrate his compliance with” Rule 23 with “convincing proof.” *Id.* at 10, 19.  
12 “[A]ctual, not presumed, conformance with Rule 23(a) remains . . . indispensable.” *Id.* (internal  
13 quotation marks omitted).

14 Second, district courts must inquire into the merits of the plaintiff’s claim when necessary  
15 to determine whether the requirements of Rule 23 are met. The “rigorous analysis” that courts are  
16 required to conduct under Rule 23 “frequently will entail some overlap with the merits of the  
17 plaintiff’s underlying claim. That cannot be helped.” *Id.* Thus, where a securities fraud plaintiff  
18 relies on the “fraud-on-the-market” presumption to avoid individual reliance issues, the plaintiff  
19 must prove at the class certification stage that the shares were traded on an efficient market, even  
20 though that is a merits issue that the plaintiff would have to prove at trial. *Id.* at 11 n.6. Similarly,  
21 in this case, because Plaintiffs rely on purported econometric models to prove that class-wide  
22 injury exists, they must prove at the class certification stage that those models are valid and will  
23 work in the circumstances here, even though that is a matter they will also have to prove on the  
24 merits at trial.

25 Third, a plaintiff cannot discharge its burden to justify class treatment by relying on expert  
26 testimony that is inconclusive or does not bear on the relevant issues. *Id.* at 13-14. Thus, the  
27 Supreme Court “disregard[ed]” the testimony of the plaintiffs’ sociology expert, who had  
28 conducted a “social framework analysis” and opined that Wal-Mart has a corporate culture that

1 made it “vulnerable” to gender bias. *Id.* at 13-14. The Court found that this testimony was  
2 insufficient because the expert admitted that he “could not determine with any specificity” the  
3 degree to which bias played a role in Wal-Mart’s employment decisions. *Id.* The expert  
4 conceded that “he could not calculate whether 0.5 percent or 95 percent of the employment  
5 decisions at Wal-Mart might be determined by stereotyped thinking.” *Id.* at 13. The Supreme  
6 Court concluded that testimony did “nothing to advance respondents’ case” because it failed to  
7 answer the essential question on which class certification depended—*i.e.*, whether discrimination  
8 could be shown on a common basis.

9 Similarly, the Court rejected the plaintiffs’ reliance on statistical regression analyses  
10 because the analyses addressed pay and promotion disparities only at the national and regional  
11 levels, and thus did not show whether disparities existed at individual stores, let alone that they  
12 were the product of unlawful discrimination. *Id.* at 16-17. These rulings effectively rejected  
13 lower court holdings, relied on by plaintiffs here (*e.g.*, Doc. 550, p. 4), that plaintiffs at class  
14 certification have only a “limited burden,” that district courts are not permitted to resolve a “battle  
15 of experts,” and that a plaintiffs’ expert’s proposed methods must be accepted unless they are “so  
16 insubstantial as to amount to no method at all.”

17 Based on these rulings, the Supreme Court reversed the Ninth Circuit and held that  
18 plaintiffs failed to discharge their burden of providing “convincing proof of a companywide  
19 discriminatory pay and promotion policy” and thus failed to establish the “existence of any  
20 common question” as required by Rule 23(a)(2). *Op.* at 19. The dissent criticized the majority  
21 for conducting that inquiry under the (a)(2) commonality requirement rather than under the (b)(3)  
22 predominance standard. But whether analyzed under (a)(2) or (b)(3), the Court made clear that  
23 “convincing proof” rather than an expert’s inconclusive say-so is required.

24 The Supreme Court’s ruling applies to Plaintiffs’ expert testimony here. Neither  
25 Plaintiffs nor their expert Roger Noll have offered any evidence, let alone “convincing proof,”  
26 that the only alleged exclusionary act left in this case, iTunes 7.0, had any impact on iPod prices.  
27 The only regression Dr. Noll has attempted to run was with respect to the alleged effect of iTunes  
28 4.7, which the Court has since ruled was lawful. Dr. Noll has performed no analysis of the

1 alleged impact, if any, of iTunes 7.0 on iPod prices. And even as to the regression he previously  
2 ran, Dr. Noll admitted that it is not a workable, valid damages model: “I do not regard this as a  
3 damage model.” Doc. 595, Ex. 1 (Noll Dep. at 90). “I am not here to defend as the final damages  
4 equation that which I have done because it’s obviously incomplete.” *Id.* at 110. He does not  
5 know whether his model contains specification errors and admits that it may reflect a “spurious  
6 correlation.” *Id.* at 87-89, 91-92. He thus cannot draw any “causal inferences from that  
7 regression” (*id.* at 90), including any inference on the pivotal question for which Plaintiffs offer  
8 his testimony—*i.e.*, whether Apple’s software updates caused any change in the price of iPods.  
9 As he summarized, “I cannot rule out anything based on the regression I have because I’m not  
10 relying on it for anything.” *Id.* at 130-131. In short, Plaintiffs have presented nothing to show  
11 whether or the degree to which iTunes 4.7 impacted iPod prices. And they have not even tried to  
12 do so with respect to iTunes 7.0.

13 In *Wal-Mart*, the Court found that because the expert could not say whether a high or low  
14 percent of employment decisions might be discriminatory, “we can safely disregard what he has  
15 to say. It is worlds apart from ‘significant proof’ that Wal-mart ‘operated under a general policy  
16 of discrimination.’” *Id.* at 14. Even more so here, Dr. Noll’s testimony that he is “not relying” on  
17 his regression analysis “for anything” fails to carry Plaintiffs’ burden of showing that a workable  
18 classwide method exists to determine the key elements of impact and damages. Indeed, as shown  
19 in Apple’s June 6 brief (Doc. 633), Plaintiffs have failed to make any showing of when the  
20 alleged impact or damages began or ended.

21 Given Plaintiffs’ failure of proof, their motion for class certification should be denied.  
22 Alternatively, this matter should be set for an evidentiary hearing, as conducted in the *Somers*  
23 case (*Somers* Docs. 61, 73), to determine whether Plaintiffs have demonstrated “in fact” by  
24 “convincing proof” (*Wal-Mart*, Op. at 10, 19) that the requirements of Rule 23 are met.

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Dated: June 22, 2011

JONES DAY

By: /s/ Robert A. Mittelstaedt  
Robert A. Mittelstaedt

Counsel for Defendant APPLE INC.

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