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8 APPLE INC.

9 UNITED STATES DISTRICT COURT
 10 NORTHERN DISTRICT OF CALIFORNIA
 11 SAN FRANCISCO DIVISION

13 **THE APPLE IPOD iTUNES ANTI-TRUST
LITIGATION**

**Lead Case No. C 05-00037 JW
[CLASS ACTION]**

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 16 **This Document Relates To:
ALL ACTIONS**

**ADMINISTRATIVE MOTION
PURSUANT TO CIVIL LOCAL
RULE 7-11 REGARDING SEVEN
MOTIONS RENOTICED BY
PLAINTIFFS**

DATE: No hearing

DEPT. 9

21 Pursuant to Civil Local Rule 7-11, Apple files this motion to simplify this Court’s
22 consideration of the class certification motion. The specific relief sought is set forth on page 3.

23 On October 13, pursuant to this Court’s “Order Requiring Parties to Renotice Pending
 24 Motions” (Doc. 680), Plaintiffs moved to renotice their January 18, 2011 motion for class
 25 certification and six related motions, and to set them all for hearing on November 28, 2011.
 26 Plaintiffs also listed 32 other pleadings (including motions to strike, declarations, objections and
 27 oppositions to objections) relevant to their renoticed motions.

28 The seven renoticed motions, and most of the 32 other pleadings, are out-of-date given

1 this Court's subsequent rulings. The January class certification motion predates this Court's June
2 ruling on summary judgment which dismissed all but one claim. *See* Doc. 627. For that reason,
3 the January class certification motion was based principally on the claim that iTunes 4.7 was
4 anticompetitive and sought a class that Plaintiffs no longer seek to represent. *See* Doc. 477, pp. 1
5 (definition of class), 8-10 (discussion of 4.7). Plaintiffs' opening and reply expert declarations
6 also focused on iTunes 4.7. *See* Docs. 488, 551. Neither the motion nor the expert declarations
7 mentioned the September 2006 iTunes 7.0 update, which is the subject of the only claim
8 remaining in the case. Nor do the six other renoticed motions pertain to iTunes 7.0. Instead, they
9 object to or seek to exclude expert declarations that deal with iTunes 4.7 and that are superseded
10 by the expert reports filed by Plaintiffs since the May summary judgment ruling and the expert
11 report that Apple will file on November 14, as ordered by the Court. *See* Doc. 672.

12 Thus, all seven motions that Plaintiffs now seek to renotece pertain to claims no longer in
13 this case. The same is true of most of the 32 other pleadings referenced by Plaintiffs. They do
14 not mention, much less focus on, whether a class can be certified for the remaining iTunes 7.0
15 claim.

16 In short, the record that Plaintiffs have "renoticed" is both over- and under-inclusive.
17 **Over-inclusive**, because it focuses on claims that have been dismissed, a class that Plaintiffs no
18 longer seek to represent, and superseded expert reports. **Under-inclusive**, because none of the
19 briefing addresses whether Plaintiffs' expert report filed last month is a sufficient basis for
20 certifying any part of the class requested by Plaintiffs. And, of course, none of the briefing
21 addresses Apple's upcoming supplemental expert report.

22 For these reasons, it is inefficient for Plaintiffs to ask the Court to sift through all of those
23 largely outdated pleadings, extracting whatever arguments might still be relevant from the
24 inoperative ones and determining which motions have been mooted. Instead of renoticing this
25 record in bulk, Apple suggests two options that will simplify and expedite resolution of the
26 certification motion:

- 27 1) Plaintiffs should promptly file a revised motion to certify the class they now seek to
28 represent, based on their expert's new declaration. Apple will file an opposition brief on

1 November 14, the same date that its expert's supplemental report is due. Plaintiffs will
2 reply on November 21. The motion will then be ready for hearing on December 5 – only
3 a week later than the renoticed date picked by Plaintiffs – or as soon thereafter as the
4 Court's calendar permit.

- 5 2) Or, on November 21, one week after Apple's new expert report is due, the parties can file
6 simultaneous briefs, limited to 10-15 pages, addressing how the new expert reports
7 ordered by the Court affect the class certification motion. Plaintiffs should also be
8 required to show why the six other motions they ask to renote are not moot.

9 In Apple's view, the first option is preferable. It will avoid the need for the parties and the
10 Court to wade through the 39 pleadings to determine what, if anything, is still operative and still
11 needs to be decided. In this important respect, the first option will expedite the Court's
12 consideration of class certification. The second option will also help to some extent focus on the
13 matters that are truly in dispute but still will require consideration of the under- and over-
14 inclusive pleadings that Plaintiffs seek to renote. That is why Apple believes that the first
15 option is most efficient.

16 Finally, Apple requests that the Court hold an evidentiary hearing and hear first-hand the
17 experts offered by both sides, as it did in the companion *Somers* case. *See Somers* Doc. 80
18 (finding after evidentiary hearing that Dr. Burtis' testimony was "far more persuasive" than
19 Plaintiff's expert and "highlight[ed] the Court's reservations about the adequacy of Plaintiffs'
20 proposed method of determining class damages"). Given the serious defects in Professor Noll's
21 previous declaration (as outlined in Apple's supplemental briefs, Docs. 633 and 663) and in his
22 September supplemental report (which has not been the subject of briefing), Apple submits that
23 an evidentiary hearing will be useful in demonstrating the inadequacy of Plaintiffs' proposed
24 methodology. An evidentiary hearing will enable the Court to conduct the "rigorous analysis" of
25 whether Plaintiffs have met their burden under Rule 23, including expert testimony and
26 regression analyses. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011).

27 A proposed form of order is submitted herewith.
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Dated: October 14, 2011

Respectfully submitted,

Jones Day

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

Counsel for Defendant