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

|                                       |                                   |
|---------------------------------------|-----------------------------------|
| 18 THE APPLE IPOD ITUNES ANTI-TRUST ) | Lead Case No. C-05-00037-JW       |
| 19 LITIGATION )                       |                                   |
| 20 _____ )                            | <u>CLASS ACTION</u>               |
| 21 This Document Relates To: )        | PLAINTIFFS' OPPOSITION TO APPLE'S |
| 22 ALL ACTIONS. )                     | ADMINISTRATIVE MOTION PURSUANT    |
| _____ )                               | TO CIVIL LOCAL RULE 7-11          |
|                                       | REGARDING SEVEN MOTIONS           |
|                                       | RENOTICED BY PLAINTIFFS           |

23 JUDGE: Hon. Chief Judge James Ware  
 24 DATE: N/A  
 25 TIME: N/A  
 26 CTRM: 9, 19th Floor

1 Apple's October 14, 2011 Motion must be denied.

2 Far from "simplify[ing]" the Court's consideration of the class certification motion, as Apple  
3 claims, the proposed "relief" adds another round of needless briefing as well as a proposed  
4 evidentiary hearing, neither of which are necessary to the Court's consideration of class certification  
5 in this matter. Dkt. No. 687 (Administrative Motion Pursuant to Civil Local Rule 7-11 Regarding  
6 Seven Motions Renoticed by Plaintiffs) at 1. Because the Court has an ample, indeed voluminous,  
7 record upon which to base its class-certification decision, Plaintiffs respectfully request the Court  
8 deny Apple's motion and instead grant Plaintiffs' October 13, 2011 motion re-noticing class  
9 certification-related motions as was called for by the Court's September 27, 2011 Order. Dkt. No.  
10 680 (Order Requiring Parties to Renotice Pending Motions).

11 Apple's arguments for burdening the Court and the parties with yet another round of briefing  
12 and an evidentiary hearing are unpersuasive and serve only to advance Apple's agenda which is to  
13 delay a decision on class certification for as long as possible. Neither the Court nor the parties will  
14 benefit from this wasteful exercise.

15 As the Court is aware, the parties have submitted numerous briefs and expert reports related  
16 to class certification.<sup>1</sup> And despite Apple's contentions that nothing related to iTunes 7.0 is before  
17 the Court, the Court has before it substantial and detailed declarations as well as extensive briefing  
18 from both sides specifically addressing Plaintiffs' remaining claims related to iTunes 7.0. In fact, in  
19 response to the Court's June 27, 2011 Order, Plaintiffs filed a Supplemental Declaration by  
20 Plaintiffs' Expert, Roger Noll, stating that Professor Noll can show antitrust impact and a  
21 methodology for measuring damages in accordance with the Court's May 19, 2011 Order limiting  
22 Plaintiffs' claims to iTunes 7.0.<sup>2</sup> Apple then filed a detailed, substantive response to this Declaration  
23 on July 22, 2011. Dkt No. 663 (Apple's Response to Professor Noll's July 18 Declaration). In

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24  
25 <sup>1</sup> On October 13, 2011, Plaintiffs filed a Notice re-noticing motions related to class  
26 certification based on the Court's September 27, 2011 Order. In that Notice, Plaintiffs re-noticed  
27 seven motions and then listed, for the Court's convenience, all pending filings related to class  
28 certification.

<sup>2</sup> See Dkt. No. 660 (Supplemental Declaration of Roger G. Noll (Redacted)).

1 addition to Apple’s response to Professor Noll’s iTunes 7.0 declaration, Apple also filed a  
2 Supplemental Report from its expert, Dr. Michelle M. Burtis, dated July 22, 2011, which also  
3 addresses iTunes 7.0. Dkt. No. 665 (Supplemental Report of Dr. Michelle M. Burtis).

4 Both parties then submitted yet more supplemental briefing – at Apple’s urging – regarding  
5 the impact, if any, on the proposed class following the United States Supreme Court’s decision in  
6 *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541, 180 L. Ed 2d 374 (2011). Those briefs too dealt  
7 exclusively with issues related to the propriety of certification of a class limited to claims related to  
8 iTunes. 7.0.<sup>3</sup>

9 Additionally, the Court has before it Professor Noll’s Second Supplemental Declaration on  
10 Class Certification, filed on September 23, 2011. Dkt No. 679. This latest declaration further details  
11 Plaintiffs’ ability to show impact and damages on a class-wide basis as to both resellers and those  
12 who purchased from Apple stores or online portals. And, like the July 18, 2011 Declaration, the  
13 Second Supplemental Declaration deals *only* with the remaining claims in this case, *i.e.*, iTunes 7.0.  
14 Apple is scheduled to file a response on November 14, 2011 and Plaintiffs assume that Apple will  
15 make arguments similar to those it has in the past, namely, that in its view, no class can ever be  
16 certified in this matter. The last thing this case needs is yet another round of briefing.

17 Apple’s claim that the pleadings are stale or “largely outdated” is untrue. Dkt. No. 687 at 2.  
18 The basic legal framework supporting certification in this class remains the same.<sup>4</sup> When the  
19 contours of the case changed following the Court’s summary judgment ruling, the parties were both  
20 afforded ample opportunities to discuss the impact of those changes both via expert reports and  
21 briefing. Plaintiffs have demonstrated, repeatedly, that certification is proper here and have provided  
22 detailed and extensive materials to back up that assertion. Apple’s latest tactic serves only to delay.

23 \_\_\_\_\_  
24 <sup>3</sup> Dkt. No. 644 (Plaintiffs’ Response to the Court’s June 22, 2011 Order Requiring Further  
25 Supplemental Briefing); Dkt. No. 646 (Apple’s Further Supplemental Brief Re Class Certification).

26 <sup>4</sup> In fact, the basic legal framework supporting class certification has not changed since the  
27 Court originally granted class certification in this matter. The same legal principles apply to the case  
28 now as it did on December 22, 2008, when the Court originally certified classes for Plaintiffs’  
Section 2 claims. Then, the Court held common evidence would be used to prove Plaintiffs’ claims.  
*See* Dkt. No. 196 (Order Granting Plaintiffs’ Motion for Class Certification). The Court specifically

1 Adding to the problems with Apple's motion, the proposed schedule is unreasonable and  
2 extremely biased. Under Apple's "first option" Apple proposes Plaintiffs file an entirely new  
3 certification motion by October 24, 2011. Dkt. No. 687 at 2-3. That is a mere four days after the  
4 instant brief is due. Should the Court agree to Apple's wasteful and unnecessary additional briefing  
5 and evidentiary hearing, Plaintiffs request the parties meet and confer to come up with a workable  
6 schedule.<sup>5</sup>

7 DATED: October 20, 2011

Respectfully submitted,

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s/ Alexandra S. Bernay  
ALEXANDRA S. BERNAY

15 found Plaintiffs' claims were subject to common proof (*id.* at 8) and found the predominance  
16 requirement satisfied by the "numerous common questions of law and fact involving [Apple]'s  
17 allegedly anticompetitive conduct." *Id.* at 12. Finally, the Court held that a class action was "the  
18 superior method to adjudicate Plaintiffs' claims." *Id.* After the Court dismissed Plaintiffs' tying  
19 claims, it decertified the class. The Court made clear, however, in its decertification order (Dkt. No.  
20 303) that it was not decertifying the classes on the grounds raised by Apple in its motion to decertify:

18 [T]his decertification is not dependent on the grounds raised by Defendant in its  
19 Motion to decertify, namely, that Plaintiffs' expert, Dr. Roger G. Noll's, report  
20 provides an inadequate method for proving common impact on the class to meet the  
21 predominance requirement of Rule 23(b)(3). The Court rejects Defendant's  
22 contention and decertifies the Rule 23(b)(3) without prejudice and only in order to  
23 ensure that a proper class would be defined in light of this Order.

22 Dkt. No. 303 at 2 n.6.

23 <sup>5</sup> Apple's proposed Order also seeks to have Plaintiffs file, by October 20, 2011, a brief  
24 demonstrating why the motions they re-noticed following the Court's September 27, 2011 Order  
25 "are not moot and why they should be re-noticed." Dkt. No. 687-1 ((Proposed) Order Regarding  
26 Plaintiffs' Request to Re-notice Class Certification and Other Motions). This proposed brief,  
27 referenced nowhere in Apple's motion, is nonsensical and, as demonstrated by the declaration filed  
28 by Apple's counsel, was not proposed to Plaintiffs in advance of Apple's filing. *See* Dkt. No. 688  
(Declaration of David Kiernan in Support of Apple's Administrative Motion Regarding Seven  
Motions Renoticed by Plaintiffs). Plaintiffs' response to the instant motion is due October 20, 2011.  
By this proposal Apple seeks to force Plaintiffs to file another brief on the same day as the response  
to the instant brief is due. This is insupportable and patently unfair.

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CERTIFICATE OF SERVICE

I hereby certify that on October 20, 2011, I authorized the electronic filing of the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses denoted on the attached Electronic Mail Notice List, and I hereby certify that I caused to be mailed the foregoing document or paper via the United States Postal Service to the non-CM/ECF participants indicated on the attached Manual Notice List.

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on October 20, 2011.

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