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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

| | | |
|--|---|---|
| THE APPLE IPOD ITUNES ANTI-TRUST LITIGATION |) | Lead Case No. C-05-00037-JW |
| |) | |
| |) | <u>CLASS ACTION</u> |
| This Document Relates To: |) | |
| ALL ACTIONS. |) | JOINT PROPOSAL REGARDING NOTICE PLAN |
| |) | |

1 **I. INTRODUCTION**

2 On November 22, 2011, the Court granted Plaintiffs' motion for class certification and
3 directed that, on or before December 9, 2011, the parties file a proposed form of class notice and
4 joint proposal for dissemination of the notice for approval by the Court.¹

5 Accordingly, the parties jointly propose the following process for dissemination of the class
6 notice.

7 **II. ADMINISTRATOR**

8 To facilitate the notice process, Plaintiffs have retained Rust Consulting, Inc.
9 ("Administrator"), an experienced and highly qualified notice administrator, to assist and provide
10 professional guidance in the implementation of the notice program.

11 **III. FORM OF NOTICE**

12 The parties jointly submit:² (1) a proposed summary notice for publication ("Summary
13 Notice"), attached as Exhibit 1; (2) a proposed Notice of Pendency of Class Action to be emailed to
14 those prospective Class Members for whom the parties have email addresses ("Notice"), attached as
15 Exhibit 2; and (3) a proposed long-form notice to be published on a website ("Long-Form Notice"),
16 attached as Exhibit 3.³ The notices define the Class and describe the nature of the action and the
17 binding effect of a later Class judgment on Class Members. In addition, the notices inform the Class
18 Members that, if they do not want to be a Class Member and wish to retain their right to pursue their
19 own independent action at their own expense and appear through their own counsel, they can request
20 to be excluded from the Class. They can do so by mailing a letter to the Administrator setting forth
21 their name and address and requesting exclusion. Any requests for exclusion from Class Members

22 _____
23 ¹ The Court subsequently changed the due date to January 9, 2012, following the parties'
24 request for an extension. Dkt. No. 696.

25 ² All references to "Exhibit" are to the exhibits attached to the Declaration of Alexandra S.
Bernay in Support of Joint Proposal Regarding Notice Plan, filed concurrently.

26 ³ The parties are working on securing a domain name, but have not yet reached an agreement
27 on a website name. The parties expect to come to agreement shortly and will inform the Court of the
28 agreed-upon domain name.

1 shall be postmarked via U.S. mail, no later than 75 days after the last day on which the Notice is to
2 be disseminated.

3 **IV. TIMING OF DISSEMINATION OF NOTICE**

4 Apple has proposed that dissemination of Notice be deferred until after the Ninth Circuit
5 rules on Apple's Rule 23(f) petition for interlocutory review of this Court's November 22, 2011
6 class-certification decision. Because the Ninth Circuit could reverse or modify the certification
7 decision, Apple believes that deferring the dissemination of notices "will avoid the possibility of the
8 Class receiving two conflicting Notices," thereby serving the public interest by avoiding "the risk of
9 significantly confusing the class consumers." *In re Apple & ATTM Antitrust Litig.*, No. 5:07-cv-
10 05152-JW, slip. op. at 6 (N.D. Cal. Sept. 15, 2010), attached as Exhibit 4. As in *ATTM*, "neither
11 Plaintiffs nor the class will be significantly harmed by a short delay." *Id.* Indeed, Class Members
12 may benefit by avoiding the confusion that conflicting notices would cause.

13 Plaintiffs do not object to the deferral.

14 **V. PROPOSED NOTICE PROCESS**

15 The parties propose that individual notice be disseminated to potential Class Members via
16 email and publication.

17 Apple maintains email addresses for customers who provided them when they purchased
18 iPods directly from Apple through its online and retail stores and when they registered their iPods
19 with Apple. Apple also maintains contact information for resellers who purchased iPods directly
20 from Apple during the Class Period. If the Court approves the Notice Plan, Apple will provide
21 approximately 4.9 million email addresses, plus additional contact information for the resellers, for
22 customers who purchased iPods directly from Apple during the Class Period. The email addresses
23 and other contact information will be designated as Confidential under the Protective Order
24 previously entered into in this case. Class Counsel will provide the email addresses and contact
25 information to the third-party Administrator, which it will use solely for the purposes of
26 disseminating the Notice. The Administrator has signed Attachment A to the Protective Order and
27 given its assurance that it will comply with the provisions of the Protective Order. Notice will be
28 disseminated to the Class within 30 days after the Court of Appeals' denial of Apple's 23(f) petition

1 or affirmance of this Court’s November 22, 2011 class certification Order becomes final or after this
2 Court approves the notice form and plan, whichever is later.

3 In addition to the direct Notice detailed above, notice will also be disseminated through
4 publication. The Administrator shall cause to be published the Summary Notice in *Entertainment*
5 *Weekly* and *Wired* as a means of reaching prospective Class Members not receiving individual
6 Notice.

7 The Administrator shall establish a website, to make available to Class Members the
8 following information: (1) the Order granting class certification; (2) Plaintiffs’ Complaint; (3)
9 Defendant’s Answer; and (4) the Notice and Long-Form Notice and other such documents as the
10 parties may agree or the Court shall require.

11 The Administrator shall also establish a toll-free telephone number for Class Members to call
12 if they have questions or to request copies of the Class notices or other documents. The
13 Administrator shall provide staff to answer the telephone, respond to ministerial matters such as
14 requests for copies of the notices and direct any substantive questions to Class Counsel.

15 **VI. THE PROPOSED NOTICE PLAN AND FORM OF NOTICE MEETS THE**
16 **REQUIREMENTS OF RULE 23**

17 **A. The Proposed Class Notice Provides for the Best Notice Practicable**
18 **Under the Circumstances**

19 Rule 23 requires the “best notice that is practicable under the circumstances.” Fed. R. Civ. P.
20 23(c)(2)(B). The notice should be “reasonably calculated, under all the circumstances, to apprise
21 interested parties of the pendency of the action and afford them an opportunity to present their
22 objections.” *Silber v. Mabon*, 18 F.3d 1449, 1454 (9th Cir. 1994) (quoting *Mullane v. Central*
23 *Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S. Ct. 652 (1950)). “There is no one ‘right way’
24 to provide notice as contemplated under Rule 23(e).” *In re Wireless Tel. Fed. Cost Recovery Fees*
25 *Litig.*, No. 4:03-MD-015, 2004 WL 3671053, at *8-*9 (W.D. Mo. Apr. 20, 2004) (citations omitted).
26 Notice plans are not expected to reach every class member; Rule 23 requires the best notice
27 ‘practicable,’ not perfect notice. Fed. R. Civ. P. 23(c)(2)(B). “Due process does not require actual
28 notice, but rather a good faith effort to provide actual notice.” *In re Prudential Ins. Co. of Am. Sales*
Practices Litig., 177 F.R.D. 216, 231 (D.N.J. 1997). As described in detail above, the proposed

1 notice plan comprised of direct Notice supplemented by publication notice will reach a wide number
2 of Class Members.

3 **B. Each Identified Class Member For Whom the Parties Have an Email**
4 **Address Will be Sent Notice**

5 The notice program provides that Apple will work with Class Counsel and the notice
6 Administrator to cause the Notice to be sent by email to each identifiable Class Member by sending
7 the Notice to the Class Member's last known email address in the customer databases of Apple. The
8 Notice will consist of a summary of the Long-Form Notice and a link to an official website, where
9 the entire Long-Form Notice and other documents related to the case may be viewed and printed by
10 Class Members as detailed, above, in §A. The Notice has been designed to minimize the chances
11 that it could be blocked by spam filters. For example, the Notice will not include an attachment of
12 the Long-Form Notice because such notices are known to sometimes trigger spam filters. Instead,
13 the Notice will direct the recipient to the official website for complete information. The notice
14 program provides that in the event a Notice is returned to the sender because it could not be
15 delivered ("bounced back"), the parties may, if it is deemed useful, resend the Notice.

16 Similar programs for notice by email rather than regular first-class mail have been accepted
17 in other cases by courts throughout the country. *See, e.g., In re Classmates.com Consol. Litig.*, No.
18 C 09-45 RAJ, slip. op. (W.D. Wash. Apr. 19, 2010) (Order attached hereto as Exhibit 5); *Cho v.*
19 *Seagate Tech. (US) Holdings, Inc.*, No. CGC 06-453195, slip. op. (San Francisco Super. Ct. Mar. 1,
20 2010) (attached hereto as Exhibit 6); and *Barker v. Skype, Inc.*, No. 2:09-cv-01364-RSM, slip. op.
21 (W.D. Wash. Nov. 17, 2009) (attached hereto as Exhibit 7).⁴ In the specific circumstances of this
22 case, because iPod users are likely heavy technology users, email is likely to be a more efficient
23

24
25 ⁴ *See also Browning v. Yahoo! Inc.*, No. C04-01463-HRL, 2007 WL 4105971, at *4 (N.D. Cal.
26 Nov. 16, 2007) (citing *Lundell v. Dell, Inc.*, No. C05-3970, 2006 WL 3507938, at *1 (N.D. Cal. Dec.
27 5, 2006) (approving notice by e-mail); *Browning v. Yahoo! Inc.*, No. C04-01463-HRL, 2006 WL
28 3826714, at *8-*9 (N.D. Cal. Dec. 27, 2006); *see also Chavez v. Netflix, Inc.*, 162 Cal. App. 4th 43,
58 (2008); *Farinella v. PayPal, Inc.*, 611 F. Supp. 2d 250, 256 (E.D.N.Y. 2009) (e-mail notice sent
to more than 2.2 million PayPal users).

1 means of communicating with Class Members than regular first-class mail. As to Resellers, the
2 notice plan calls for email and mail notice to these Members of the Class.

3 **C. Resellers Will Receive Notice Via U.S. Mail and Email**

4 Apple has provided the contact information it has maintained for the resellers who purchased
5 iPods directly from Apple during the Class Period. This information includes physical mailing
6 addresses, and for most, email addresses of the contact at each Reseller. In order to ensure the best
7 practicable notice of the Reseller Members of the Class, notice to these entities will be via U.S. mail
8 and email.

9 **D. Notice Will Also Be Provided Through Print Media**

10 As noted, the Administrator will cause the Summary Notice to published in *Entertainment*
11 *Weekly* and *Wired* as a means of reaching prospective Class Members not receiving Notice.
12 *Entertainment Weekly* is a weekly magazine and online periodical that covers all aspects of pop
13 culture and entertainment including movies, television, music, books and new media. The magazine
14 is “the leading consumer brand for entertainment and pop culture.” See
15 http://www.ew.com/ew/static/advertising/pdfs/EW_2011MedaiKit.pdf. It has won more than 100
16 photography, design and editorial awards, including the 2010 Ad Age Media Vanguard Award for
17 Best Magazine App with a Purpose as well the 2010 MIN Best of the Web Awards, the 2010 MIN
18 Integrated Marketing Awards, Multiple Magazine Title Program and the 2009 Folio Magazine
19 Awards for Consumer, Entertainment, Full Issue (6/27/2008). *Id.*

20 *Wired* is a monthly magazine and online periodical that covers “how ideas and innovation are
21 changing the world” and “the future of business, culture, innovation and science.” See
22 www.wired.com/services/press/center/about. “AdWeek named WIRED to its 2011 Hot List and
23 made WIRED its first-ever “Magazine of the Decade” in 2010. It was named to Advertising Age’s
24 A-List in 2010, received three National Magazine Awards for general excellence in 2005, 2007, and
25 2009, and was nominated for a National Magazine Award for Magazine of the Year in 2011.” It was
26 also “named 2009’s Best Magazine Website by AdWeek, Best News, Business & Finance Website
27 in 2009 by MPA Digital, and was a 2011 National Magazine Award for Digital Media ‘General
28 Excellence’ finalist.” *Id.*

1 The Summary Notice will be published in *Entertainment Weekly* and *Wired* within 10 days
2 after completion of the emailing program described above. The Administrator will oversee
3 publication of the Summary Notice and will certify to the Court that publication occurred.

4 **E. Notice Will Be Posted on a Designated Website**

5 An official website will feature copies of important case documents including the Long-Form
6 Notice, the Notice, the Court's Order granting class certification and other documents the parties
7 agree to post or that the Court requires be posted. The documents will be available for Class
8 Members to review and print. The website will be available until at least one-year after settlement or
9 conclusion of trial in this action. No material may be posted to the website without Apple and
10 Plaintiffs' joint agreement. The website will also feature a toll-free number Class Members may call
11 if they have questions.

12 **F. The Proposed Form of Class Notice Adequately Informs Class**
13 **Members of Their Rights in This Litigation**

14 Class notice must "clearly and concisely state in plain, easily understood language" the
15 nature of the action; the class definition; the class claims, issues, or defenses; that the class member
16 may appear through counsel; that the court will exclude from the class any member who requests
17 exclusion; the time and manner for requesting exclusion or for raising objections; and the binding
18 effect of a later class judgment on class members. *See* Fed. R. Civ. P. 23(c)(2)(B). As detailed
19 above, the email and Long-Form Notices proposed here comply with each of these requirements.

20 The parties respectfully request that the Court approve the proposed forms of notice, and
21 direct that Notice be disseminated as proposed.

22 DATED: January 9, 2012

Respectfully submitted,

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11 Attorneys for Defendant Apple Inc.

12 **ECF CERTIFICATION**

13 The filing attorney attests that she has obtained concurrence regarding the filing of this
14 document from the signatories to this document.

15 Dated: January 9, 2012

16 By: s/ Alexandra S. Bernay
17 ALEXANDRA S. BERNAY

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I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on January 9, 2012.

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Mailing Information for a Case 5:05-cv-00037-JW

Electronic Mail Notice List

The following are those who are currently on the list to receive e-mail notices for this case.

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Manual Notice List

The following is the list of attorneys who are **not** on the list to receive e-mail notices for this case (who therefore require manual noticing). You may wish to use your mouse to select and copy this list into your word processing program in order to create notices or labels for these recipients.

- (No manual recipients)