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10 [Additional counsel appear on signature page.]

11 UNITED STATES DISTRICT COURT
 12 NORTHERN DISTRICT OF CALIFORNIA
 13 SAN FRANCISCO DIVISION

14 THE APPLE IPOD ITUNES ANTI-TRUST)	Lead Case No. C-05-00037-JW
15 LITIGATION)	
16 _____)	<u>CLASS ACTION</u>
17 This Document Relates To:)	RENOTICED JOINT PROPOSAL
18 ALL ACTIONS.)	REGARDING NOTICE PLAN
19 _____)	Judge: Hon. Chief Judge James Ware
	Date: April 30, 2012
	Time: 9:00 a.m.
	CTRM: 9, 19th Floor

1 **I. INTRODUCTION**

2 On November 22, 2011, the Court granted Plaintiffs’ motion for class certification and
3 directed that the parties file a proposed form of class notice and joint proposal for dissemination of
4 the notice for approval by the Court. On January 9, 2012, the parties filed a Joint Proposal. The
5 Court ordered that the parties renounce the Joint Proposal within ten days of the Ninth Circuit’s ruling
6 denying Apple’s Fed. R. Civ. P. 23(f) petition.

7 The parties hereby renounce their joint proposal for dissemination of the class notice.

8 **II. ADMINISTRATOR**

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

12 **III. FORM OF NOTICE**

13 The parties jointly submit:¹ (1) a proposed summary notice for publication (“Summary
14 Notice”), attached as Exhibit 1; (2) a proposed Notice of Pendency of Class Action to be emailed to
15 those prospective Class Members for whom the parties have email addresses (“Notice”), attached as
16 Exhibit 2; and (3) a proposed long-form notice to be published on a website (“Long-Form Notice”),
17 attached as Exhibit 3.² The notices define the Class and describe the nature of the action and the
18 binding effect of a later Class judgment on Class Members. In addition, the notices inform the Class
19 Members that, if they do not want to be a Class Member and wish to retain their right to pursue their
20 own independent action at their own expense and appear through their own counsel, they can request
21 to be excluded from the Class. They can do so by mailing a letter to the Administrator setting forth
22 their name and address and requesting exclusion. Any requests for exclusion from Class Members

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25 ¹ All references to “Exhibit” are to the exhibits attached to the Declaration of Alexandra S.
26 Bernay in Support of Renoticed Joint Proposal Regarding Notice Plan, filed concurrently.

27 ² The parties have agreed to use the domain name www.ipodlawsuit.com as the website where
28 the Long-Form Notice and other case-related materials will be located.

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 The parties submit that the Notice be disseminated within 30 days of the Court's approval of
5 the notice form and plan.

6 **V. PROPOSED NOTICE PROCESS**

7 The parties propose that individual notice be disseminated to potential Class Members via
8 direct notice and publication.

9 Apple maintains email addresses for customers who provided them when they purchased
10 iPods directly from Apple through its online and retail stores and when they registered their iPods
11 with Apple. Apple also maintains contact information for resellers (physical mailing addresses, and
12 for most, email addresses of the contact at each Reseller) who purchased iPods directly from Apple
13 during the Class Period. If the Court approves the Notice Plan, Apple will provide approximately
14 4.2 million email addresses, plus additional contact information for the resellers, for customers who
15 purchased iPods directly from Apple during the Class Period. The email addresses and other contact
16 information will be designated as Confidential under the Protective Order previously entered into in
17 this case. Class Counsel will provide the email addresses and contact information to the third-party
18 Administrator, which it will use solely for the purposes of disseminating the Notice. The
19 Administrator has signed Attachment A to the Protective Order and given its assurance that it will
20 comply with the provisions of the Protective Order. Notice will be disseminated to the Class within
21 30 days after the Court approves the notice form and plan.

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

26 The Administrator shall establish a website, www.ipodlawsuit.com, to make available to
27 Class Members the following information: (1) the Order granting class certification; (2) Plaintiffs'

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1 Complaint; (3) Defendant’s Answer; and (4) the Notice and Long-Form Notice and other such
2 documents as the parties may agree or the Court shall require.

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

7 **VI. THE PROPOSED NOTICE PLAN AND FORM OF NOTICE MEETS THE**
8 **REQUIREMENTS OF RULE 23**

9 **A. The Proposed Class Notice Provides for the Best Notice Practicable**
10 **Under the Circumstances**

11 Rule 23 requires the “best notice that is practicable under the circumstances.” Fed. R. Civ. P.
12 23(c)(2)(B). The notice should be “reasonably calculated, under all the circumstances, to apprise
13 interested parties of the pendency of the action and afford them an opportunity to present their
14 objections.” *Silber v. Mabon*, 18 F.3d 1449, 1454 (9th Cir. 1994) (quoting *Mullane v. Central*
15 *Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S. Ct. 652 (1950)). “There is no one ‘right way’
16 to provide notice as contemplated under Rule 23(e).” *In re Wireless Tel. Fed. Cost Recovery Fees*
17 *Litig.*, No. 4:03-MD-015, 2004 WL 3671053, at *8-*9 (W.D. Mo. Apr. 20, 2004) (citations omitted).
18 Notice plans are not expected to reach every class member; Rule 23 requires the best notice
19 ‘practicable,’ not perfect notice. Fed. R. Civ. P. 23(c)(2)(B). “Due process does not require actual
20 notice, but rather a good faith effort to provide actual notice.” *In re Prudential Ins. Co. of Am. Sales*
21 *Practices Litig.*, 177 F.R.D. 216, 231 (D.N.J. 1997). As described in detail above, the proposed
22 notice plan comprised of direct Notice supplemented by publication notice will reach a wide number
23 of Class Members.

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

26 The notice program provides that Apple will work with Class Counsel and the notice
27 Administrator to cause the Notice to be sent by email to each identifiable Class Member by sending
28 the Notice to the Class Member’s last known email address in the customer databases of Apple. The
Notice will consist of a summary of the Long-Form Notice and a link to an official website, where

1 the entire Long-Form Notice and other documents related to the case may be viewed and printed by
2 Class Members as detailed, below, in § VI.E. The Notice has been designed to minimize the chances
3 that it could be blocked by spam filters. For example, the Notice will not include an attachment of
4 the Long-Form Notice because such notices are known to sometimes trigger spam filters. Instead,
5 the Notice will direct the recipient to the official website for complete information. The notice
6 program provides that in the event a Notice is returned to the sender because it could not be
7 delivered (“bounced back”), the parties may, if it is deemed useful, resend the Notice.

8 Similar programs for notice by email rather than regular first-class mail have been accepted
9 in other cases by courts throughout the country. *See, e.g., In re Classmates.com Consol. Litig.*, No.
10 C 09-45 RAJ, slip. op. (W.D. Wash. Apr. 19, 2010) (Order attached hereto as Exhibit 4); *Cho v.*
11 *Seagate Tech. (US) Holdings, Inc.*, No. CGC 06-453195, slip. op. (San Francisco Super. Ct. Mar. 1,
12 2010) (attached hereto as Exhibit 5); and *Barker v. Skype, Inc.*, No. 2:09-cv-01364-RSM, slip. op.
13 (W.D. Wash. Nov. 17, 2009) (attached hereto as Exhibit 6).³ In the specific circumstances of this
14 case, because iPod users are likely heavy technology users, email is likely to be a more efficient
15 means of communicating with Class Members than regular first-class mail. As to Resellers, the
16 notice plan calls for email and mail notice to these Members of the Class.

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

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

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25 ³ *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 **D. Notice Will Also Be Provided Through Print Media**

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

12 *Wired* is a monthly magazine and online periodical that covers “how ideas and innovation are
13 changing the world” and “the future of business, culture, innovation and science.” See
14 www.wired.com/services/press/center/about. “AdWeek named WIRED to its 2011 Hot List and
15 made WIRED its first-ever ‘Magazine of the Decade’ in 2010. It was named to Advertising Age’s
16 A-List in 2010, received three National Magazine Awards for general excellence in 2005, 2007, and
17 2009, and was nominated for a National Magazine Award for Magazine of the Year in 2011.” It was
18 also “named 2009’s Best Magazine Website by AdWeek, Best News, Business & Finance Website
19 in 2009 by MPA Digital, and was a 2011 National Magazine Award for Digital Media ‘General
20 Excellence’ finalist.” *Id.*

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

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

25 An official website, www.ipodlawsuit.com, will feature copies of important case documents
26 including the Long-Form Notice, the Notice, the Court’s Order granting class certification and other
27 documents the parties agree to post or that the Court requires be posted. The documents will be
28 available for Class Members to review and print. The website will be available until at least one-

1 year after settlement or conclusion of trial in this action. No material may be posted to the website
2 without Apple and Plaintiffs' joint agreement. The website will also feature a toll-free number Class
3 Members may call if they have questions.

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

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

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

14 DATED: March 23, 2012

Respectfully submitted,

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ECF CERTIFICATION

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

Dated: March 23, 2012

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

1 CERTIFICATE OF SERVICE

2 I hereby certify that on March 23, 2012, I authorized the electronic filing of the foregoing
3 with the Clerk of the Court using the CM/ECF system which will send notification of such filing to
4 the e-mail addresses denoted on the attached Electronic Mail Notice List, and I hereby certify that I
5 caused to be mailed the foregoing document or paper via the United States Postal Service to the non-
6 CM/ECF participants indicated on the attached Manual Notice List.

7 I certify under penalty of perjury under the laws of the United States of America that the
8 foregoing is true and correct. Executed on March 23, 2012.

9 s/ Alexandra S. Bernay
10 ALEXANDRA S. BERNAY

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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)