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 APPLE INC.

8
 9 UNITED STATES DISTRICT COURT
 10 NORTHERN DISTRICT OF CALIFORNIA
 11 OAKLAND DIVISION

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

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

**APPLE'S RESPONSE TO
 ORDER TO SHOW CAUSE**

16 **This Document Relates To:**

17 **ALL ACTIONS**

Date: February 7, 2014
 Time: 3:30 p.m.
 Courtroom: 5
 Judge: Hon. Yvonne Gonzalez Rogers

23 Apple and its counsel understand that, under this Court's Standing Order in Civil Cases,
 24 an order setting deadlines for a summary judgment motion does not excuse compliance with the
 25 pre-filing conference requirements. Unfortunately, Apple and its counsel mistakenly thought that
 26 a pre-filing conference for its current summary judgment motion was not required given previous
 27 proceedings in this action. Judge Ware had previously authorized a motion for summary
 28 judgment to be filed after the close of expert discovery; Apple had disclosed the general nature of

1 its motion; and the Court had approved briefing and hearing schedules for the specific motion. In
2 these circumstances, neither party nor their counsel thought further leave of the Court was
3 necessary. It is clear, however, from this Court’s January 29 Order that this understanding was
4 incorrect. We apologize to the Court for not complying with the pre-filing requirements.

5 We provide a brief discussion of the events leading up to the filing of the summary
6 judgment motion to show that our understanding, although mistaken, was in good faith. When
7 the action was pending before Judge Ware, Apple moved for summary judgment on the threshold
8 ground that its software updates, as a matter of law, were not exclusionary acts under Section 2 of
9 the Sherman Act. *See* Dkt. No. 473. With the Court’s approval, Apple filed this motion in
10 advance of expert discovery in an effort to efficiently resolve the case. *See* Dkt. Nos. 381, p. 5;
11 392. Judge Ware granted summary judgment as to iTunes 4.7 and denied it as to iTunes 7.0. *See*
12 Dkt. No. 627.

13 Subsequently, over plaintiffs’ objection, Judge Ware ruled that Apple could file another
14 motion for summary judgment “addressing issues which have not yet been raised before the
15 Court” including issues such as impact and damages for which plaintiffs intended to rely on
16 experts. *See* Dkt. No. 713 (“nothing in the Federal Rules of Civil Procedure or the Civil Local
17 Rules would prevent Defendant from filing a motion for summary judgment addressing issues
18 which have not yet been raised before the Court. . . . [T]he Court finds no reason to deny
19 Defendant the ability to challenge [the expert report to be filed in the future] once it becomes
20 available, and to file any appropriate motion for summary judgment resulting from the disclosures
21 made in that expert report.”)

22 After this action was reassigned in September 2012, the parties’ plan as outlined in joint
23 CMC statements was to complete expert discovery and proceed to the summary judgment motion
24 authorized by Judge Ware. Accordingly, the parties jointly submitted several case management
25 statements and proposed orders setting out a full briefing and hearing schedule specifically for
26 that motion. *See* Dkt. Nos. 719, 721, 727, 729. On May 31, 2013, the parties filed a stipulation
27 to continue certain expert deadlines and proposing that the summary judgment motion be heard in
28 February, noting again Judge Ware’s statement that Apple would be permitted to move for

1 summary judgment on issues not previously raised. Dkt. No. 729. The Court adopted the
2 proposed briefing schedule for the summary judgment motion, adding that the hearing date was
3 “to be set once Court has availability to consider motions.” Dkt. No. 730. In October 2013, the
4 parties proposed changing the briefing schedule in light of delays in expert discovery, noting that
5 “the sufficiency of plaintiffs’ expert testimony will be the focus of Apple’s motion for summary
6 judgment motion . . .” Dkt. No. 734-1, at 4. On November 1, 2013, the Court adopted the
7 proposed revised briefing schedule and set the hearing on Apple’s motion for February 18, 2014.
8 Dkt. No. 735.

9 In these circumstances, Apple and its counsel believed that further leave of the Court was
10 not required. Plaintiffs and their counsel voiced no disagreement. As noted, however, it is clear
11 from the Court’s order that this mutual understanding was mistaken. Apple respectfully submits
12 that no sanctions are required because its failure to comply with the Standing Rule was an
13 unintentional, good faith mistake as outlined above, and the parties have now complied with the
14 requirements of this Court’s Standing Order. If any sanctions are awarded, they should be
15 directed to counsel because this was counsel’s mistake. Apple and its counsel will be prepared at
16 the February 7th hearing to discuss the grounds for its summary judgment motion which are
17 summarized in its three-page letter to the Court and a new hearing date, and again apologizes for
18 not complying with this Court’s Standing Order.

19 Dated: February 3, 2014

JONES DAY

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

23 Counsel for Defendant APPLE INC.

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