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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

The Apple iPod iTunes Antitrust Litigation / NO. C 05-00037 JW  
NO. C 07-06507 JW

Stacie Somers,  
Plaintiff,  
v.  
Apple, Inc.,  
Defendant.

**ORDER DECERTIFYING CLASSES  
WITHOUT PREJUDICE TO BEING  
RENEWED; INVITING FURTHER  
MOTIONS**

**I. INTRODUCTION**

Plaintiffs<sup>1</sup> bring this class action against Defendant Apple Computer, Inc. (“Apple”), alleging violations of the Sherman Act, 15 U.S.C. §§ 1, *et seq.*, and related state law claims. Plaintiffs allege that Apple has committed unlawful acts in the sale of its iPod portable digital music player and online digital music files sold through its iTunes Store (“iTS”), in violation of federal and state antitrust laws.

Presently before the Court are: (1) the Direct Purchaser Action Plaintiffs’ Motion to Modify Injunctive Relief Class Definition to Include iTS Purchasers,<sup>2</sup> (2) the Indirect Purchaser Action Plaintiff’s Motion for Class Certification of a Rule 23(b)(2) Class and Appointment of Class

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<sup>1</sup> Named Plaintiffs are Melanie Tucker, Mariana Rosen, and Somtai Troy Charoensak.

<sup>2</sup> (hereafter, “Direct Purchaser Motion to Modify,” No. C 05-00037 JW, Docket Item No. 236.) For ease of identification, this Order will use the term “Direct Purchaser Action” to refer to the lead case in The Apple iPod iTunes Antitrust Litigation, No. C 05-00037 JW.

1 Counsel,<sup>3</sup> (3) Defendant's Motion for Reconsideration of Rule 23(b)(2) Class in the Direct Purchaser  
 2 Action,<sup>4</sup> and (4) Defendant's Motion for Decertification of the Rule 23(b)(3) Class in the Direct  
 3 Purchaser Action.<sup>5</sup>

4 The Court conducted a hearing on November 23, 2009. Prior to the hearing, the Court found  
 5 that the technological interoperability between iPods and media sold through Apple's iTunes did not  
 6 constitute tying made unlawful under the Sherman Act. Accordingly, the Court ordered the tying  
 7 claim dismissed from the Consolidated Complaint. Since the monopoly claims require that Plaintiffs  
 8 allege anticompetitive conduct, at the hearing on the present Motions, the parties disputed whether  
 9 Plaintiffs could continue to rely on allegations of technological interoperability as a basis for their  
 10 monopoly claims and consequently on the definitions of certifiable classes. As it presently stands,  
 11 the monopoly claims interweave allegations that there were technological ties between Apple  
 12 products when they were first introduced to the market (which, without more, is not anticompetitive  
 13 conduct) and allegations that Apple made technological modifications to its products for the express  
 14 purpose of maintaining monopoly power (which could support a monopoly claim). Thus, the Court  
 15 finds that further orders with respect to the definition of the classes are premature until Plaintiffs  
 16 clarify what actions they allege Apple took to maintain monopoly power beyond initial  
 17 technological relationships between its products. For the reasons set forth below, the Court, *sua*  
 18 *sponte*, decertifies the Rule 23(b)(2) and 23(b)(3) classes<sup>6</sup> in the Direct Purchaser Action and

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19  
 20 <sup>3</sup> (hereafter, "Indirect Purchaser Motion for Class Certification," No. C 07-06507 JW,  
 21 Docket Item No. 83.) For ease of identification, this Order will use the term "Indirect Purchaser  
 22 Action" to refer to Stacie Somers v. Apple, Inc., No. C 07-06507 JW.

22 <sup>4</sup> (hereafter, "Motion for Reconsideration," Docket Item No. 244.)

23 <sup>5</sup> (hereafter, "Motion for Decertification," Docket Item No. 240.)

24 <sup>6</sup> As the Court will explain *supra*, this decertification is not dependent on the grounds raised  
 25 by Defendant in its Motion to decertify, namely, that Plaintiffs' expert, Dr. Roger G. Noll's, report  
 26 provides an inadequate method for proving common impact on the class to meet the predominance  
 27 requirement of Rule 23(b)(3). The Court rejects Defendant's contention and decertifies the Rule  
 28 23(b)(3) without prejudice and only in order to ensure that a proper class would be defined in light  
 of this Order.

1 DENIES all other Motions as premature, without prejudice to being renewed after further  
 2 proceedings pursuant to this Order. Plaintiffs are invited to submit an Amended Consolidated  
 3 Complaint that does not depend upon allegations of tying as the anticompetitive conduct upon which  
 4 they base their monopoly claims. If Plaintiffs decline to do so, Defendant is invited to move for  
 5 judgment on the pleadings as to the monopoly claims on the ground that they cannot survive the  
 6 dismissal of the tying claims.

## 7 **II. BACKGROUND**

8 A detailed outline of the factual allegations and procedural history in this case may be found  
 9 in the Court's December 20, 2006 Order Denying Defendant's Motion to Dismiss (Docket Item No.  
 10 27)<sup>7</sup> and in the Court's December 22, 2008 Order Granting Plaintiffs' Motion for Class Certification  
 11 as to Counts Two, Three, Four, Five, Six, and Seven Only and Appointing Class Counsel; *Sua*  
 12 *Sponte* Order Reconsidering Defendant's Motion to Dismiss Count One and Requiring Further  
 13 Briefing. (hereafter, "December 22 Order," Docket Item No. 196.) The Court reviews the relevant  
 14 alleged facts and procedural history to the extent they implicate the present Motions.

### 15 **A. Factual Allegations**

16 In a Consolidated Complaint, Plaintiffs allege<sup>8</sup> as follows:

17 In order to prevent consumers from making illegal unauthorized copies of digital  
 18 files, online music stores use protected digital file formats.<sup>9</sup> While most online music stores  
 19 use a protected digital file format called WMA, Apple uses a format called AAC. (*Id.* ¶¶ 40-  
 20 41.) Apple encodes its AAC format files with DRM restrictions that Apple calls "FairPlay."

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21 <sup>7</sup> This Order may be found in the docket for *Tucker v. Apple Computer, Inc.*, 493 F. Supp.  
 22 2d 1090 (N.D. Cal. 2006), Case No. C 06-04457 JW, which was one of the original cases now  
 23 included in this consolidated action.

24 <sup>8</sup> During the course of pretrial proceedings, the Court has been made aware of changes in  
 25 Apple's practices that have taken place while this action has been pending. Since Plaintiffs have not  
 filed a supplemental complaint, the Court describes the events as alleged by Plaintiffs as of the date  
 of the Consolidated Complaint.

26 <sup>9</sup> (Consolidated Complaint for Violations of Sherman Antitrust Act, Clayton Act, Cartwright  
 27 Act, California Unfair Competition Law, Consumer Legal Remedies Act, and California Common  
 Law of Monopolization ¶ 39, hereafter, "CC," Docket Item No. 107.)

1 (Id. ¶ 41.) Apple has not licensed or given access to its FairPlay-DRM format to any other  
2 manufacturer of digital music players. (Id. ¶ 50.) Apple has an approximately 85% share of  
3 the online digital music market and a 90% share of the online video market. (Id. ¶¶ 5, 7.)

4 Apple also manufactures and sells digital music players variously called “iPods.”  
5 (CC ¶ 9.) Apple deliberately designed the iPod software so that iPods would only play files  
6 encoded in a single protected digital format, the Fairplay-modified AAC format. (Id. ¶ 46.)  
7 As a result of Apple’s actions, consumers who purchase media files from the iTS can only  
8 play those files directly<sup>10</sup> on an iPod. (Id. ¶ 22.) Conversely, Apple deliberately makes  
9 iPods unable to play music directly sold at rival online music stores, which means that iPod  
10 owners can only buy online music from the iTS to play on their iPods. (Id. ¶ 23.) Apple has  
11 an approximately 80% share of the digital music player market. (Id. ¶ 10.)

12 On July 26, 2004, RealNetworks, an Apple competitor in the online digital music  
13 market, publicly announced that music files sold through its online store would be playable  
14 on the iPod. (CC ¶ 52.) In December 2004, Apple updated its iPod software to prevent  
15 songs downloaded from RealNetworks music store (or any other online music store) from  
16 being played on iPods. (Id. ¶ 54.) In at least two additional instances, Apple changed iPod  
17 and iTunes software to add new restrictions to music that customers previously purchased  
18 from Apple. (Id. ¶ 55.)

19 On the basis of the allegations outlined above, Plaintiffs allege six causes of action. Their  
20 first two causes of action are for violation of the Sherman Act, 15 U.S.C. § 2: (1) the unlawful  
21 acquisition or maintenance of monopoly power in the digital music player, online music, and online  
22 video markets; and (2) attempted monopolization of the digital music player, online music, and  
23 online video markets. Their remaining state law causes of action are: (1) violation of the Cartwright  
24 Act, Cal. Bus. & Prof. Code §§ 16270, *et seq.*; (2) violation of California Unfair Competition Law,

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26 <sup>10</sup> The Court has been led to understand that Plaintiffs used the word “directly” to  
27 acknowledge that consumers could “indirectly” play music purchased from the iTS on other music  
28 devices. Similarly, iPods could “indirectly” play music purchased online from other vendors.

1 Cal. Bus. & Prof. Code §§ 17200, *et seq.*; (3) violation of the Consumer Legal Remedies Act, Cal.  
2 Civ. Code §§ 1750, *et seq.*; and (4) common law monopolization business practices.

3 **B. Direct Purchaser Action**

4 On January 3, 2005, the original Complaint in this litigation was filed, which stated:  
5 “Plaintiff brings this action on behalf of himself and on behalf of all other similarly situated  
6 consumers who, during the period April 28, 2003 to the present (“the Class Period”) purchased an  
7 iPod device directly from Apple, and online digital music files from Apple’s iTunes store.”  
8 (Complaint ¶ 56, Docket Item No. 1.) On July 21, 2008, Plaintiffs in the Direct Purchaser Action  
9 filed a Motion for Class Certification and Appointment of Class Counsel. (See Docket Item No.  
10 165.) On December 22, 2008, the Court certified an injunctive relief class in the Direct Purchaser  
11 Action defined as follows: “All persons or entities in the United States . . . who: (a) purchased an  
12 iPod from Apple or (b) purchased audio or video files from the iTMS since April 28, 2003.”

13 Subsequent to the Court’s December 22 Order, Defendant sought clarification of the  
14 definition of the class, pointing out to the Court that the Motion for Class Certification had not  
15 included purchasers of audio or video files from the ITS in its definition of the class. (See Docket  
16 Item No. 197.) In response to Defendant’s request for clarification, on January 14, 2009, the Court  
17 issued an Order Clarifying and Correcting Class Certification Order which modified the definition of  
18 the injunctive relief class to include only direct purchasers of iPods. (See Docket Item No. 198.)

19 Now, Plaintiffs in the Direct Purchaser Action seek to modify the class once again to include  
20 purchasers of audio or video files from the ITS. Concurrently, Defendant moves the Court to  
21 reconsider its certification of the injunctive relief class.

22 **C. Indirect Purchaser Class**

23 On February 23, 2009, Plaintiff in the Indirect Purchaser Class filed a Motion for Class  
24 Certification and Appointment of Co-Lead Class Counsel. (hereafter, “Indirect Purchaser Motion  
25 for Class Certification,” Docket Item No. 39.) The Indirect Purchaser Plaintiff sought to certify a  
26 class with the following definition: “All persons and entities in the United States . . . that from  
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1 December 31, 2003 to the present (“Class Period”) purchased an Apple iPod indirectly from Apple  
2 for their own use and not for resale.” (Indirect Purchaser Motion for Class Certification at 3.)

3 On July 17, 2009, the Court issued an Order Denying in Part Plaintiff’s Motion for Class  
4 Certification. (hereafter, “July 17 Order,” Docket Item No. 80.) In its July 17 Order, the Court  
5 denied certification of a damages class under Rule 23(b)(3), but declined to rule on an injunctive  
6 relief class under Rule 23(b)(2) until the parties provided further briefing on the operative theories  
7 of liability, the class definition, and the form of relief sought. (July 17 Order at 12-13.)

8 Now, the Indirect Purchaser Action Plaintiff again moves the Court to certify an injunctive  
9 relief class, this time seeking to add to the definition of the class provided in its original Motion “all  
10 purchasers of audio or video files from the iTunes since December 31, 2003.” (Indirect Purchaser  
11 Motion for Class Certification at 1.)

12 **D. Tying Claims**

13 Subsequent to class certification, the Court granted Judgment on the Pleadings in favor of  
14 Apple dismissing Plaintiffs’ tying claims on the ground that the allegations of technological  
15 interoperability between iPods and music and videos purchased from iTunes did not state a violation of  
16 Section 1 of the Sherman Act under either a *per se*<sup>11</sup> theory or under the rule of reason.<sup>12</sup>

17 **III. DISCUSSION**

18 Apple opposes modification of the injunctive relief class and moves for decertification of the  
19 damages class on a number of grounds. A principal ground for Apple’s opposition to expanding the  
20 class is its contention that Plaintiffs’ Section 2 monopoly claims are no longer viable because in  
21 dismissing the tying claims, the Court has rejected Plaintiffs’ only basis for their monopoly and  
22 attempted monopoly claims. Although more appropriately raised by a formal motion for judgment  
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25 <sup>11</sup> (See Order Granting in Part Defendant’s Motion for Judgment on the Pleadings; Ordering  
Supplemental Briefing, Docket Item No. 213.)

26 <sup>12</sup> (See Order Granting Defendant’s Motion for Judgment on the Pleadings as to the First  
27 Cause of Action for Violations of Section 1 of the Sherman Act and the Fifth Cause of Action for  
Violations of the Cartwright Act, Docket Item No. 274.)

1 on the pleadings, the Court considers, *sua sponte*, whether Plaintiffs state a basis for a monopoly  
2 claim independent from the tying claims.

3 To state a claim for monopolization, a plaintiff must allege that (1) the defendant possesses  
4 monopoly power in the relevant market, (2) the defendant has willfully acquired or maintained that  
5 power, and (3) the defendant's conduct has caused antitrust injury. Cost Mgmt. Servs. v.  
6 Washington Natural Gas, 99 F.3d 937, 949 (9th Cir. 1996); Foremost Pro Color, Inc. v. Eastman  
7 Kodak Co., 703 F.2d 534, 543 (9th Cir. 1983).

8 Here, to satisfy the requirement for alleged willful conduct, Plaintiffs must allege facts  
9 showing that Apple engaged in anticompetitive conduct, with the specific intent to control prices or  
10 destroy competition, beyond the technological interoperability of iPods and media sold through the  
11 iTunes. See Foremost Pro, 703 F.2d 534. The Court proceeds to examine the Consolidated Complaint  
12 to explore, in light of the Court's dismissal of Plaintiffs' tying claims, whether there are other factual  
13 allegations to support Plaintiffs' monopolization claims.<sup>13</sup>

14 **A. Apple's Alleged Anticompetitive Conduct**

15 In 2006, when the Court first examined the merits of Plaintiffs' monopoly and attempted  
16 monopoly claims in light of Defendant's Rule 12(b)(6) challenge, the Court identified several  
17 actions alleged by Plaintiffs to be Apple's anticompetitive conduct. In its December 20, 2006 Order,  
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22 <sup>13</sup> It is well established that a preliminary inquiry into the merits of the plaintiffs' claims at  
23 the class certification stage is inappropriate. See Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177  
24 (1974). The court may only scrutinize the plaintiffs' legal causes of action to determine whether  
25 they are suitable for resolution on a class-wide basis. See, e.g., Moore v. Hughes Helicopters, Inc.,  
26 708 F.2d 475, 480 (9th Cir. 1983). This inquiry requires the court to accept the substantive  
27 allegations contained in the plaintiffs' complaint as true and analyze only whether the asserted  
28 claims or defenses are susceptible to resolution on a class-wide basis. See McCarthy v. Kleindienst,  
741 F.2d 1406, 1419 n.8 (D.C. Cir. 1984).

Accordingly, in reexamining Plaintiffs' monopoly claims in light of these Motions, the Court  
is not, *sua sponte*, challenging their merits, but rather setting forth what factual allegations are  
susceptible to resolution on a class-wide basis.



1 the Court recited the six different actions Plaintiffs alleged that Apple took to maintain its  
2 monopoly. These allegations have been carried forward to the Consolidated Complaint.<sup>14</sup>

3 **1. Actively modifying the iPod’s “core processor,” the Portal Player  
4 System-On-A-Chip, not to support WMA**

5 Plaintiffs allege that Apple outsources most of the production of the iPod to third party  
6 manufacturers in Asia. One third party part used in the iPod is its “core processor,” the Portal Player  
7 System-On-A-Chip. The System-On-A-Chip by default supports the WMA format. Apple,  
8 however, deliberately designed the iPod’s software so that it would only play a single protected  
9 digital format, Apple’s FairPlay-modified AAC format. (CC ¶ 46.)

10 **2. Actively modifying the iPod Shuffle’s SigmaTel chip not to support WMA**

11 Plaintiffs allege that in place of the Portal Player System-On-A-Chip, Apple uses the  
12 SigmaTel STMP3550 in its low end iPod shuffles. Like the Portal Player System-On-A-Chip, the  
13 SigmaTel STMP3550 was designed to decode and play WMA files and does indeed play them on  
14 every Digital Music Player that contains the STMP3550 chip except the iPod. As in its higher end  
15 models, Apple’s crippleware operating system software prevents the iPod shuffle from playing  
16 WMA files. (CC ¶ 48.)

17 **3. Refusing to pay a nominal licensing fee for WMA**

18 Plaintiffs allege that Apple could license its FairPlay-DRM format to other manufacturers of  
19 Digital Music Players, so that music purchased from the Music Store could be transferred directly to  
20 Digital Music Players other than the iPod. (CC ¶ 45.) The cost to Apple of licensing the WMA  
21 format would likely not exceed \$800,000 per year or less than two cents per iPod sold in 2006. (Id.  
22 ¶ 49.) Apple has not licensed or given access to its FairPlay-DRM format to any other Digital  
23 Music Player manufacturer, thereby ensuring two results—both of which are anticompetitive. First,  
24 through the foregoing, Apple has ensured that the iPod is the only Digital Music Player that can  
25 directly play songs purchased from the Music Store. Second, through the foregoing, Apple has

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26 <sup>14</sup> (December 20, 2006 Order at 10.) The anticompetitive acts that the Court cited were  
27 alleged in Plaintiffs’ original Complaint. (See Class Action Complaint ¶¶ 16, 35-41, Docket Item  
28 No. 1.)



1 managed to ensure that owners of iPods wishing to purchase music files online to be directly played  
2 on their iPod can only do so by purchasing these files at the Music Store. (*Id.* ¶ 50.)

3 **4. Using technological restrictions to prevent consumers who purchased**  
4 **music from rival stores from playing their music on their iPods**

5 Plaintiffs allege that Apple gains access to the iPods of consumers when the consumers  
6 download music and videos from the iTunes and when consumers login to download updates to  
7 software residing in their iPods. (CC ¶¶ 51-55.) Plaintiffs allege that in December 2004, Apple  
8 used that access for an anticompetitive purpose, namely to install codes in the iPods that prevented  
9 the owners from being capable of directly downloading music into their iPods that was being sold by  
10 an Apple competitor, RealNetworks.<sup>15</sup> Plaintiffs further allege that Apple used this online access to  
11 impose “restrictions to music that customers previously purchased from Apple.”<sup>16</sup> (*Id.* ¶ 55.)

12 **5. Selling music only using Apple’s FairPlay DRM, which is incompatible**  
13 **with any digital music players other than iPod**

14 Plaintiffs allege digital music purchased from the iTunes is technologically tied to the iPod.  
15 (CC ¶¶ 39-44.)

16 The Sherman act does not outlaw monopoly power gained from the popularity of  
17 interoperable products even if incompatible with the products of competitors. See *Foremost Pro*  
18 *Color*, 703 F.2d at 543.

19 However, as the Court has previously held, Plaintiffs must allege willful conduct beyond  
20 interoperability and incompatibility. Accordingly, the Court invites Plaintiffs to show cause why  
21 these allegations should not be stricken.

22 **6. Using technological restrictions to prevent users from playing video files**  
23 **purchased from Apple on rival video-enabled music players**

24 This appears to duplicate the conduct criticized in paragraph (5).

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25 <sup>15</sup> It is not clear to the Court whether the allegation that “Apple updated its iPod software,”  
26 (CC ¶ 54), alleges that Apple made a “software change,” (*id.* ¶ 55), to iPods as they were being  
27 updated or to those sold after December 2004. This is a matter left to pretrial discovery.

28 <sup>16</sup> Plaintiffs do not describe what other actions Apple took after December 2004 to further  
restrict consumers’ rights to listen to the music they purchased from the iTunes.

1 **B. Distinction Between the Above Alleged Conduct and the Dismissed Tying Claims**

2 At issue is whether additional clarification of the distinction between the six alleged  
3 anticompetitive acts and the dismissed tying claims is necessary before any further orders with  
4 respect to the definition of the class can be issued.

5 A Section 2 claim can be based on willful conduct undertaken to acquire monopoly power or,  
6 if monopoly power is lawfully acquired, a Section 2 claim can be based on willful conduct  
7 undertaken to maintain monopoly power. See Verizon Commc'ns, Inc. v. Law Offices of Curtis V.  
8 Trinko, 540 U.S. 398, 407 (2004) (a monopolization or attempt to monopolize claim requires “in  
9 addition to the possession of monopoly power in the relevant market, ‘the willful acquisition or  
10 maintenance of that power as distinguished from growth or development as a consequence of a  
11 superior product, business acumen, or historic accident’”).

12 Here, Plaintiffs allege that Apple has monopoly power and acted to “maintain” its monopoly.  
13 However, on the face of the Consolidated Complaint, Plaintiffs mix their allegations that Apple  
14 introduced products to the market with technological restrictions with allegations that Apple  
15 changed its products to thwart competition. For purposes of certifying a class, the class definition  
16 will depend upon what anticompetitive acts are alleged and when they allegedly took place. The  
17 Court is not able to discern whether Plaintiffs are basing their monopoly claims solely on  
18 technological decisions made as products were introduced to the market or whether Plaintiffs are  
19 alleging that Apple gained monopoly power and afterward made anticompetitive technological  
20 decisions to maintain its monopoly.

21 **C. Summary**

22 In sum, the Court finds that Plaintiffs’ allegations of technology changes alleged to have  
23 been made to maintain a monopoly are so inextricably interwoven with allegations about technology  
24 decisions that are alleged to have been made before the products were first introduced to the market,  
25 that the Court is not able to give clear definitions of the affected classes. Indeed, Plaintiffs’ earlier  
26 motion to remove from the class a group that it now seeks to add demonstrated their own  
27 ambivalence on the proper class definition.

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1           Accordingly, to give consideration to class definitions based on clearly stated monopoly  
2 claims delineating what anticompetitive conduct Apple is alleged to have engaged in and when it  
3 allegedly took place, the Court vacates its Order certifying Rule 23(b)(2) and 23(b)(3) classes.<sup>17</sup>

4           **1.       The Direct Purchaser Action**

5           In light of the discussion above, Plaintiffs are invited to submit an Amended Consolidated  
6 Complaint that does not depend upon allegations of tying as the anticompetitive conduct upon which  
7 they base their monopoly claims. If Plaintiffs decline to do so, Defendant is invited to move for  
8 judgment on the pleadings as to the monopoly claims on the ground that they cannot survive the  
9 dismissal of the tying claims. The Court also invites Plaintiffs in the Direct Purchaser Action to, in  
10 their amendment, combine their injunctive remedies with that of the Indirect Purchaser Action since  
11 it appears to the Court that those remedies, to the extent they are viable, should be merged because  
12 they derive from the same alleged anticompetitive conduct by Apple.

13           **2.       The Indirect Purchaser Action**

14           Nothing in this Order is intended to allow the Indirect Purchaser Plaintiff to renew her  
15 Motion to certify a Rule 23(b)(3) class since the Court has found that Plaintiff has failed to meet her  
16 burden of establishing “a reliable method for proving common impact on all purchasers of  
17 [D]efendant’s products throughout the chain of distribution.” In re Graphics Processing Units  
18 Antitrust Litig., 253 F.R.D. 478, 507 (N.D. Cal. 2008).

19           Moreover, it is undisputed that there is no “indirect purchaser” of iTunes digital music or video  
20 files. Accordingly, the Court orders the Indirect Purchaser Plaintiff to show cause, if any, why her  
21 case should not be dismissed since the basis for a separate action, namely, indirect purchasers of  
22 iPods, is no longer viable in light of the Court’s denial of certification of the damages class. Thus,

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24           <sup>17</sup> Federal Rule of Civil Procedure 23 provides district courts with broad discretion to  
25 determine whether a class should be certified, and to revisit that certification throughout the legal  
26 proceedings. Dukes v. Wal-Mart, Inc., 509 F.3d 1168, 1176 (9th Cir. 2007). If later evidence  
27 disproves the plaintiffs’ contentions, the court can modify or decertify the class. See Gen. Tel. Co.  
28 of S.W. v. Falcon, 457 U.S. 147, 160 (1982) (“Even after a certification order is entered, the judge  
remains free to modify it in light of subsequent developments in the litigation.”). A district court’s  
decision to decertify a class is committed to its sound discretion. See Knight v. Kenai Peninsula  
Borough Sch. Dist., 131 F.3d 807, 816 (9th Cir. 1997).

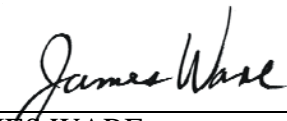
1 once the Direct Purchaser Plaintiffs amend their pleadings to add remedies also sought by the  
2 Indirect Purchaser Plaintiff, it appears to the Court that the Indirect Purchaser Action is no longer  
3 necessary.

4 **IV. CONCLUSION**

5 The Court decertifies the Rule 23(b)(2) and 23(b)(3) classes and DENIES all other Motions  
6 as premature. On or before **January 25, 2010**, Plaintiffs in the Direct Purchaser Action shall file  
7 their Amended Consolidated Complaint consistent with the terms of this Order. If no amended  
8 pleading is filed, on or before **February 1, 2010**, Defendant shall file a motion for judgment on the  
9 pleadings as to Plaintiffs' monopoly claims. Defendant shall file its motion in accordance with the  
10 Civil Local Rule of Court. In addition, on or before **February 1, 2010**, the Indirect Purchaser  
11 Plaintiff shall file her Response to the Court's Order to Show Cause re: Dismissal of her remaining  
12 claims as duplicative of the Direct Purchaser Action.

13 In any event, the parties shall appear for a Case Management Conference on **February 22,**  
14 **2010 at 10 a.m.** On or before **February 12, 2010**, the parties shall file a Joint Case Management  
15 Statement. The Statement shall include, among other things, the parties' proposed schedule for any  
16 further discovery in light of this Order and any further dispositive motions.

17  
18  
19 Dated: December 21, 2009

  
\_\_\_\_\_  
JAMES WARE  
United States District Judge

1 **THIS IS TO CERTIFY THAT COPIES OF THIS ORDER HAVE BEEN DELIVERED TO:**

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15 **Dated: December 21, 2009**

**Richard W. Wieking, Clerk**

16  
17 **By:           /s/ JW Chambers**  
18 **Elizabeth Garcia**  
19 **Courtroom Deputy**

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