

1 Robert A. Mittelstaedt #60359  
 ramittelstaedt@jonesday.com  
 2 Craig E. Stewart #129530  
 cestewart@jonesday.com  
 3 Michael Scott #255282  
 michaelscott@jonesday.com  
 4 JONES DAY  
 555 California Street, 26th Floor  
 5 San Francisco, CA 94104  
 Telephone: (415) 626-3939  
 6 Facsimile: (415) 875-5700

7 Attorneys for Defendant  
 APPLE INC.

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

12  
 13 THE APPLE IPOD iTUNES ANTI-TRUST  
 LITIGATION.

**Case No. C 05-00037 JW**  
**C 06-04457 JW**

**DEFENDANT'S MOTION FOR  
 DECERTIFICATION OF RULE  
 23(B)(3) CLASS**

**Date:** October 5, 2009  
**Time:** 9:00 A.M.  
**Place:** Courtroom 8, 4th floor

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1 **NOTICE OF MOTION AND MOTION**

2 PLEASE TAKE NOTICE that on October 5, 2009, at 9 A.M., or as soon thereafter as the  
3 matter may be heard, defendant Apple Inc. will bring on for hearing this motion for  
4 decertification of the Rule 23(b)(3) damages class. Alternatively, pursuant to L.R. 7-9, Apple  
5 requests leave to move for reconsideration of the decision certifying that class.

6 **RELIEF SOUGHT**

7 Decertification of the Rule 23 (b)(3) damages class or leave to move to reconsider that  
8 decision.

9 **MEMORANDUM OF POINTS AND AUTHORITIES**

10 **INTRODUCTION**

11 To obtain class treatment, the plaintiff must show a reliable method for proving common  
12 impact on the purported class. In the *Somers* indirect purchaser action, this Court held that  
13 plaintiff failed to meet that burden. The Court found that “Plaintiff has done nothing more than  
14 make a vague five-paragraph long collection of proposals for accomplishing what the Court sees  
15 as a daunting task.” Dkt. 80 (*Somers*), p. 12. Plaintiff’s expert, Dr. French, made only “unspeci-  
16 fied proposals as to how he might be able to prove damages” while “conced[ing] that he has not  
17 yet developed a model or worked with any data in the context of this case.” *Id.* at 11-12. Among  
18 other deficiencies, he offered no proof that he could take prices for the original iPod and use them  
19 to determine “but for” prices for the wide array of iPod models sold throughout the alleged six-  
20 year class period, including iPods that are so different from the original that he could not even  
21 identify them as music players, let alone as iPods. *See infra*, pp. 5, 8. By contrast, Apple’s  
22 expert, Dr. Burtis, “gave specific testimony about how regression models work, and testified  
23 about the difficulties of constructing such a model to deal with the complex multi-variable  
24 situation underlying iPod pricing.” Dkt. 80 (*Somers*), p. 11. Because plaintiff had not shown  
25 how she could overcome the “significant challenges” Dr. Burtis identified, the Court ruled that  
26 her requested damages class under Rule 23(b)(3) could not be certified. *Id.* at 12.

27 The Court’s analysis and its findings apply with equal force to the direct purchaser  
28 plaintiffs. Just like *Somers*, they relied solely on an economist, Dr. Noll, to carry their burden of

1 showing common impact and damages. Dr. Noll offers the same three possible models: before-  
2 after, competitive yardstick, and margin analysis. And just like Dr. French, Dr. Noll has not gone  
3 past the proposal stage, providing instead only the most generic description of these methods. He  
4 has not gathered any data, identified the necessary variables, or actually run any models. He  
5 admits that he has doubts that at least one of his models will work, in part because it requires data  
6 that he says he is not sure exists. And, like Dr. French, he too proposes to divine the prices of the  
7 iPod touch, shuffle and nano (among others) from the original 2001-2002 white iPod. As  
8 discussed in the accompanying report of Dr. Burtis (“Burtis Report”), his approach faces the same  
9 challenges as the same methods proposed by Dr. French and fails for the same reasons. This  
10 Court accordingly should decertify the Rule 23(b)(3) class in this case just as it denied  
11 certification in the indirect purchaser case.

## 12 **PROCEDURAL BACKGROUND**

### 13 **A. The Direct Purchasers’ Motion for Class Certification.**

14 When the direct purchasers moved for class certification in November 2008, the thrust of  
15 their claim was that the iPod’s enhanced utility for playing music from the iTunes Store was an  
16 unlawful tying arrangement under section 1 of the Sherman Act. Accordingly, the parties’ class  
17 certification briefing focused largely on that claim. *See* Dkt. 165, pp. 11-18; Dkt. 181, pp. 3-22;  
18 Dkt. 188, pp. 1-11. In particular, Apple showed that the tying claim required proof of individual  
19 coercion that would predominate over any common issues.

20 Plaintiffs also claimed that the same alleged tying arrangement was a willful exclusionary  
21 act under section 2 of the Sherman Act. Apple argued that, because the gravamen of the section 2  
22 claim was the same alleged tie, a class for the section 2 claim should be denied for the same  
23 reasons that a class for the section 1 claim should be denied—*i.e.*, the claim depended on an  
24 individualized showing of coercion. Dkt. 181, p. 24.

25 Of significance to the present motion, Apple also asserted, albeit briefly, that the  
26 regression analysis proposed by plaintiffs’ economist to prove class-wide anticompetitive impact  
27 was impermissibly speculative. As Apple pointed out, plaintiffs’ economist admitted that he did  
28 not know whether his proposed methodology for establishing whether iPods were overpriced

1 would work. And he had not offered any proposal on how to prove a net overcharge taking music  
2 prices into account. *Id.* at 21-22.

3 In ruling on the motion, the Court denied certification of the tying claim without prejudice  
4 pending the Court's reconsideration of the legal basis of that claim, including whether  
5 individualized proof of coercion was required. Dkt. 196, p. 7. Finding that coercion would not  
6 be a required element of the section 2 claim, however, the Court certified a Rule 23(b)(3) class for  
7 that claim. *Id.* at 13. In doing so, the Court did not address the sufficiency of plaintiffs'  
8 economist's proposed methodology.<sup>1</sup>

9 **B. The Court's Rejection of the *Per Se* Tying Claim.**

10 On May 15, 2009, the Court granted Apple's motion for judgment on the pleadings,  
11 finding that plaintiffs had failed to state a cognizable tying claim under the *per se* theory because  
12 the two products at issue are separately available. Dkt. 213. The Court invited further briefing on  
13 the rule of reason claim that plaintiffs intend to pursue. Apple's motion on that claim was filed  
14 on August 3 (Dkt. 229) and is set for hearing on October 5.

15 **C. Denial of the Indirect Purchasers' Motion for Class Certification.**

16 The indirect purchasers filed their motion for class certification in February 2009. Their  
17 economist, Dr. French, submitted a report positing three "possible" methods to determine whether  
18 iPods were overpriced: a temporal benchmark, or before-after, method; a competitive yardstick  
19 method; and a margin analysis. He proposed to use these methods to calculate in two alternative  
20 ways the overcharge allegedly paid by indirect purchasers. Under the first alternative, he would  
21 use regression analyses to estimate the overcharge paid by the *direct* purchasers such as Wal-  
22 mart, Amazon, or Target, and then determine how much of that overcharge was passed along in  
23 the retail price those entities charged to *indirect* purchasers. Under the second alternative, which  
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25 <sup>1</sup> Defendants further argued that resellers such as Wal-Mart, Best Buy and Target were  
26 "obviously not in the same position as individual end-user purchasers" like plaintiffs; that their  
27 interests diverged from plaintiffs' and that given their differing circumstances and interests, the  
28 named plaintiffs could not adequately represent the resellers. Dkt. 181, pp. 22-24. The Court's  
opinion did not expressly address this argument. Dkt. 196. The Court later noted that it had  
implicitly rejected that argument. Dkt. 198, p. 2.

1 he called a “more direct approach,” he would apply his regression analyses directly to the retail  
2 prices charged to indirect purchasers to estimate the amount those prices were supposedly inflated  
3 without trying to separately determine what the overcharge was at the wholesale level and how  
4 much was passed on. For both of these alternatives, the principal method he proposed was a  
5 before-after regression, in which he would use the prices of the original iPods sold in 2001 and  
6 2002 to determine what the prices should have been for all of the more than forty different iPods  
7 introduced over the ensuing six-year class period.

8 To evaluate the sufficiency of these proposed methodologies, the Court held a hearing at  
9 which economists for both sides testified. Testifying for Apple, Dr. Burtis described the  
10 significant obstacles to Dr. French’s proposals. She noted the paucity of data from the alleged  
11 “before” period, in which Apple sold only its earliest generations of the original iPod (and only  
12 one generation of the iPod mini)—and none of the later, significantly more advanced iPods, such  
13 as the touch-screen, wi-fi iPod touch or the tiny iPod shuffle. Dkt. 74 (*Somers*), ¶¶ 32-37; June  
14 30 Tr. (*Somers*), pp. 43-49.<sup>2</sup> She likewise pointed to the numerous complex factors that have  
15 affected iPod pricing over the more than six-year-long class period (and that would have to be  
16 controlled for in any regression), including the unique and changing features of the numerous  
17 different iPod models introduced over those six years, the impact on the demand for iPods from  
18 such unquantifiable factors as consumers’ perception that they are “cool,” and the nascent,  
19 dynamic nature of the industry. Dkt. 74 (*Somers*), ¶¶ 21-24; 33-34; June 30 Tr. (*Somers*), pp. 50-  
20 51.<sup>3</sup> She contrasted this circumstance from others in which regressions have been successfully  
21 employed, such as the regression she performed to estimate, based on five years of stable data  
22 from a “before” period, what crude oil prices would have been absent Hurricane Katrina. June 30

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23  
24 <sup>2</sup> The transcript of the June 30 evidentiary hearing is Exhibit B to the accompanying Expert Report of Dr. Michelle M. Burtis.

25 <sup>3</sup> Dr. Burtis illustrated these points at the hearing with charts showing the very limited price  
26 data available in the alleged before period, as compared to the prices charged for the wide array  
27 of numerous different models sold during the alleged class period. Those charts are attached as  
28 Exhibits E and F to the accompanying Burtis Report. Exhibit D to the Burtis Report is a graphic illustration of some of the many factors affecting demand that differed over time and varied among the iPod models.

1 Tr. (*Somers*), pp. 38-51. Dr. Burtis also pointed out that Dr. French addressed only iPod prices  
2 and did not offer any method for showing that customers suffered a net overcharge on the alleged  
3 tying and tied products as a package, as the Ninth Circuit requires. Dkt. 74 (*Somers*), ¶ 40.

4 In contrast to this specific testimony from Dr. Burtis, Dr. French testified only “generally  
5 about his history of using regression models” and offered only broad assertions that he could  
6 “create a model that was sufficient to calculate individual damages.” Dkt. 80 (*Somers*), p. 11. He  
7 admitted that he had not created or run any actual models, asserting that that would be “for the  
8 merit stage.” June 30 Tr. (*Somers*), p. 28 (“I have only proposed doing it. I haven’t done them  
9 yet.”). Nor had he gathered or examined the data that would be necessary for his regression  
10 models. Dkt. 80 (*Somers*), p. 12. And he confirmed the dramatic differences among the various  
11 iPod models (and thus the difficulty of divining what the price of one should have been in 2008  
12 based on what original iPods cost in 2002) when he was unable to recognize that an iPod shuffle  
13 was even an iPod and mistook an iPod mini as “an attachment to the part of the iPod.” June 30  
14 Tr. (*Somers*), pp. 26-27.

15 After considering this evidence, the Court concluded 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 product throughout the chain of distribution.’” Dkt. 80 (*Somers*), p. 12 (citation  
18 omitted). Importantly, although the Court noted the additional hurdle typically faced by indirect  
19 purchaser plaintiffs of showing that the overcharge was passed along to them, the Court’s ruling  
20 ultimately did not turn on that issue here. Instead, the Court found that Dr. French faltered on the  
21 initial step of “demonstrate[ing] supracompetitive pricing for iPods,” without even getting to the  
22 question of showing that any such purported overcharges were passed along to consumers. *Id.*<sup>4</sup>

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23  
24 <sup>4</sup> To use Dr. French’s terminology, his study failed at the “overcharge” step of both of his  
25 two approaches. As to the first, he offered no method for showing an overcharge at the wholesale  
26 level, without ever getting to the question of whether it was passed through. Likewise, as to his  
27 second approach, he did not show that his methods could “directly” estimate an overcharge at the  
28 retail level. Dr. Noll’s proposal is the same as the first step of Dr. French’s first wholesale/pass-  
through approach, and entirely the same as Dr. French’s second “direct” approach. The only  
difference in the direct approach is that Dr. Noll would use retail prices at Apple’s store and Dr.  
French would use retail prices at Best Buy and other resellers.



1 In other words, Dr. French failed to show how he could take the \$399 price of the first iPod in  
2 2001 and use it to determine if, but for the iPod's enhanced ability to play iTS content, the price  
3 of an iPod shuffle in 2009 would have been even lower than its \$79 price. As we show below,  
4 the Court's basis for finding Dr. French's approach insufficient applies with equal force to Dr.  
5 Noll's testimony offered by the direct purchasers.

## 6 ARGUMENT

### 7 **I. THE COURT HAS THE AUTHORITY TO DECERTIFY THE DAMAGES** 8 **CLASS OR ALTERNATIVELY TO RECONSIDER ITS PRIOR RULING.**

9 "An order that grants or denies class certification may be altered or amended before final  
10 judgment." Fed. R. Civ. P. 23(c)(1)(C). As the Ninth Circuit has recognized, "Federal Rule of  
11 Civil Procedure 23 provides district courts with broad discretion to determine whether a class  
12 should be certified, and to revisit that certification throughout the legal proceedings before the  
13 court." *Armstrong v. Davis*, 275 F.3d 849, 872 n.28 (9th Cir. 2001). "[B]efore entry of a final  
14 judgment on the merits, a district court's order respecting class status is not final or irrevocable,  
15 but rather, it is inherently tentative." *Officers For Justice v. Civil Serv. Comm'n*, 688 F.2d 615,  
16 633 (9th Cir. 1982); *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 n.11 (1978) (describing a  
17 court's class certification order as "inherently tentative"). In evaluating whether to decertify the  
18 class, the court applies the same standard used in deciding whether to certify the class in the first  
19 place. *O'Connor v. Boeing N. Am., Inc.*, 197 F.R.D. 404, 410 (C.D. Cal. 2000).

20 A motion to decertify a class is not governed by the standards that apply to motions for  
21 reconsideration and does not depend on a showing of new law, facts or procedural developments.  
22 *Ballard v. Equifax Check Serv., Inc.*, 186 F.R.D. 589, 593 n.6 (E.D. Cal. 1999) ("Because the  
23 court has the power to alter or amend the previous class certification order under Rule 23(c)(1),  
24 the court need not consider whether 'reconsideration' is also warranted under Fed.R.Civ.P. 60(b)  
25 or [local rules governing reconsideration]."); *Slaven v. BP Am., Inc.*, 190 F.R.D. 649, 652 (C.D.  
26 Cal. 2000) ("Because Defendants' motion assists the Court in performing its role as gatekeeper,  
27 or manager, of the class action, the motion should not be denied on the ground that it  
28 impermissibly recounts old facts and law under Local Rule 7.16.").

1 But if the reconsideration standard were governing here, it is met. This Court's ruling in  
2 the indirect purchasers' case finding that their economist's testimony was insufficient provides  
3 ample basis for evaluating more closely that same issue in this case involving the same  
4 underlying factual allegations and, as relevant here, the same required proof.

5 **II. THE DIRECT PLAINTIFFS SUFFER FROM THE SAME**  
6 **FUNDAMENTAL DEFECTS AS THE INDIRECT PLAINTIFF.**

7 The Court's analysis finding insufficient Dr. French's proposed methods applies equally  
8 to Dr. Noll's proposals. This Court should reject them for the same reasons and decertify the  
9 Rule 23(b)(3) damages class in this case just as it denied certification of the damages class in the  
10 indirect purchaser case.

11 The accompanying report of Dr. Burtis reviews Dr. Noll's report and demonstrates that it  
12 fails in the same material respects as Dr. French's approach. To summarize:

- 13 • Like Dr. French, Dr. Noll has not done the work necessary to determine whether his  
14 proposals will work. Neither economist has "developed any actual model or provided  
15 sufficient information about his proposed models to demonstrate or even suggest that  
16 they would work." Dkt. 80 (*Somers*), p. 10; Scott Decl., Ex. 2 (Noll Dep., pp. 96:24-  
17 97:9); Noll Report, pp. 52-59; Burtis Report, ¶ 8. They both have "collected little if  
18 any data." Dkt. 80 (*Somers*), p. 10; Scott Decl., Ex. 2 (Noll Dep., pp. 96:24-97:9); Noll  
19 Report, pp. 52-59; Burtis Report, ¶ 13. Both have "no written equations." Dkt. 80  
20 (*Somers*), p. 10; Scott Decl., Ex. 2 (Noll Dep., pp. 96:24-97:9); Noll Report, pp. 52-  
21 59; Burtis Report, ¶ 8.
- 22 • Though admittedly critical to their proposed models, neither economist has "identified  
23 or quantified any specific variables" that would have to be accounted for. Dkt. 80  
24 (*Somers*), p. 10; Scott Decl., Ex. 2 (Noll Dep., pp. 96:24-97:9); Noll Report, pp. 52-  
25 59; Burtis Report, ¶ 8.
- 26 • Similarly, neither economist has determined that the relevant variables can be  
27 adequately quantified at all. Dkt. 80 (*Somers*), pp. 11-12; Noll Report, pp. 52-59;  
28 Burtis Report, ¶ 8. This includes such factors affecting the demand for iPods as their

1 award-winning design, the widespread consumer perception that they are “cool,” their  
2 ability to display video or photos, their software capabilities and other similar product  
3 characteristics and market factors. Indeed, both economists conceded that the  
4 perception that the iPod is “cool” affects demand, but neither could identify any  
5 specific method. Scott Decl., Ex. 1 (French Dep., p. 125:1 – 125:7); Ex. 2 (Noll Dep.,  
6 p. 86:6-86:16).

- 7 • Both economists seek to “evaluate pricing for a host of evolving iPod models that  
8 emerged during the proposed class period” based on the original iPod models to which  
9 the later models bear virtually no resemblance. Dkt. 80 (*Somers*), p. 10; Noll Report,  
10 p. 55 ; Burtis Report, ¶¶ 18-20. Both economists thus propose to divine from the \$399  
11 price of the original iPod in 2001 what the price should have been seven years later for  
12 the current iPod shuffle, which costs only \$79, has no screen, is controlled with  
13 buttons on the earphone cord, weighs only 1/3 of an ounce and is roughly the size of a  
14 Post-It tag. It is one-twentieth the size of the original iPod but has nearly the same  
15 capacity. It is so dramatically different from the original iPod that Dr. French thought  
16 it might be a device for “connecting earphones to something.” June 30 Tr. (*Somers*),  
17 pp. 26-27. Both economists likewise propose to use the original iPod prices to come  
18 up with the “but for” price of the iPod touch, which was not introduced until  
19 September 2007, and has a 3.5 inch widescreen display, a “multi-touch interface” that  
20 allows users to “pinch” the screen to make images larger or smaller, and an  
21 accelerometer that automatically senses when its position changes and rotates the  
22 image to a landscape position. Far more than simply a device to store and play music,  
23 the iPod touch allows users to download and play video games, watch videos and full-  
24 length feature movies, send and receive e-mail, store and view photographs, and  
25 access the internet with wi-fi capability. Users can download from over 65,000  
26 applications available from the Apple App Store. The original iPod had none of these  
27 features. Despite all of these features, the touch is eight millimeters thick, less than  
28 half the thickness of the original.

- 1           • They both propose yardstick and margin approaches, but neither has done the  
2           economic analysis necessary to identify any products or markets that would be a  
3           proper benchmark for either analysis. Dr. French essentially abandoned these  
4           approaches, after devoting only a single sentence in his report to each. *See* Dkt. 74  
5           (*Somers*), p. 15 n.14. Dr. Noll admitted that he had “doubts” about his yardstick  
6           approach, and admitted that it “requires data that I’m not sure exists.” Scott Decl.  
7           Ex. 2 (Noll Dep., pp. 72:2-73:9).
- 8           • Neither of them “deal[s] with whether any iPod overcharge may have been offset by  
9           lower iTMS pricing.” Dkt. 80 (*Somers*), p. 11; Scott Decl., Ex. 2 (Noll Dep., p. 141:3-  
10          19); Noll Report, pp. 52-59; Burtis Report, ¶ 36. Instead, they both focus solely on  
11          iPod pricing, disregarding that, under the Ninth Circuit’s “net overcharge” rule, a  
12          plaintiff cannot establish impact or damages in a tying case unless the plaintiff shows  
13          that the alleged overcharge on the tied product exceeded the amount of any savings  
14          from a reduced price of the tying product. *See Siegel v. Chicken Delight, Inc.*, 448  
15          F.2d 43, 52 (9th Cir. 1971). Indeed, the very consumers that plaintiffs contend are  
16          locked in—those with large iTS libraries—are the very consumers least likely to have  
17          suffered an overcharge. The price reductions on the iTS music implied by their tying  
18          theory would outweigh any alleged overpricing of the iPod.

19           In short, Dr. Burtis’ “extensive explanation of how the types of regression models  
20          proposed by Dr. French cannot be reliably applied to the complex product and pricing dynamic  
21          underlying the claims in this case” applies with full force to the similar regression models  
22          proposed by Dr. Noll. Dkt. 80 (*Somers*), p. 11.

23           It is of no consequence that Dr. French was addressing overcharges to indirect purchasers,  
24          rather than direct purchaser overcharges. The inadequacies this Court found in Dr. French’s  
25          proposals did not relate to the difficulty of showing pass-through. Nor did it relate to any  
26          circumstances unique to evaluating retail prices charged by resellers. Rather, as noted, this Court  
27          found that Dr. French failed more fundamentally by not being able to show the existence of any  
28          supracompetitive pricing at all, at any level. The inability to estimate prices for vastly different

1 iPod models based on earlier models, the lack of adequate price data for sales within the before  
2 period, the inability to determine when the impact period supposedly began, the failure to identify  
3 any specific variables or determine whether they can be quantified—these are all defects that apply  
4 equally to determining overcharges, if any, at either the retail or the wholesale level.

5 Moreover, the direct purchasers face an additional complication of their own in this case.  
6 They must show not only an overcharge at Apple’s online and retail stores but also an overcharge  
7 to an entirely different line of purchasers—the more than 1,000 resellers who were also “direct”  
8 purchasers from Apple. To do this, plaintiffs would need to prove the wholesale price the  
9 resellers paid, demonstrate that that price did not vary among resellers (or that any variations can  
10 be handled through a common methodology), and then show the competitive price that each  
11 reseller would have paid absent the alleged unlawful conduct. Dr. Noll admitted, however, that  
12 he had not looked into these issues; just as with sales to consumers, he has not gathered any data,  
13 identified the relevant variables or constructed any models. Scott Decl., Ex. 2 (Noll Dep.,  
14 pp. 239:9-240:18). This complication, not present in the indirect case, makes plaintiffs’ burden  
15 here even more daunting. It adds to the reasons why the damages class should be decertified.

### 16 CONCLUSION

17 For the foregoing reasons, the Rule 23(b)(3) damages class should be decertified.

18 Dated: August 31, 2009.

Respectfully submitted,

19 Jones Day

20 By: /s/ Robert A. Mittelstaedt

21 Robert A. Mittelstaedt

22 Counsel for Defendant  
APPLE INC.

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