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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

THE APPLE IPOD ITUNES ANTITRUST
LITIGATION

) Lead Case No. C-05-00037-YGR

) CLASS ACTION

) This Document Relates To:

) ALL ACTIONS.

) PLAINTIFFS' NOTICE OF MOTION AND
) MOTION TO ADD CLASS
) REPRESENTATIVE

) Date: November 18, 2014
) Time: 1:00 p.m.
) Courtroom: 1, 4th Floor
) Judge: Hon. Yvonne Gonzalez Rogers

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1 TO: ALL PARTIES AND THEIR ATTORNEYS OF RECORD

2 PLEASE TAKE NOTICE that on November 18, 2014 at 1:00 p.m., in Courtroom 1, 4th
3 Floor, before the Honorable Yvonne Gonzalez Rogers, of the above-entitled Court, located at 1301
4 Clay Street, Oakland, California 94612, Movant Kenneth Riegel owner of K&N Enterprises, Inc.
5 f/d/b/a Delaware Computer Exchange, Plaintiffs Melanie Wilson (formerly Tucker) and Mariana
6 Rosen (collectively, "Plaintiffs") will and hereby do, through undersigned counsel, move the Court
7 for an Order granting relief sought in their Motion to Add Class Representative.

8 Plaintiffs seek to add Delaware Computer Exchange as a class representative.

9 **I. INTRODUCTION**

10 A motion to add a class representative should be granted where the proposed new plaintiff is
11 a member of the class and seeks the same relief for all of the reasons offered by the original
12 plaintiffs. *Rogers v. Paul*, 382 U.S. 198, 198-99 (1965). Courts within the Ninth Circuit often allow
13 either substitution or addition of new class representatives. *See, e.g., In re TFT-LCD Antitrust Litig.*,
14 No. M 07-1827 SI, MDL No. 1827, 2009 U.S. Dist. LEXIS 17792, at *10 (N.D. Cal. Mar. 3, 2009);
15 *Morgan v. Laborers Pension Trust Fund*, 81 F.R.D. 669, 673-75 (N.D. Cal. 1979) (permitting
16 plaintiffs to add new class representatives).

17 Here, out of an abundance of caution, where the Court has raised a question about the current
18 consumer class representatives' representation of the reseller portion of the class, allowing a reseller
19 class member to be added as a proposed additional class representative is an appropriate and salutary
20 outcome which provides the broadest possible representation of the entire class. Delaware Computer
21 Exchange,¹ an Apple-authorized reseller during the Class Period and a member of the certified Class,
22 is an ideal representative whose addition as a named class representative will "significantly
23 contribute to full development of the underlying factual issues in the suit and to the just and
24 equitable adjudication of the legal questions presented."² *Lovely H. v. Eggleston*, No. 05 Civ. 6920

25 _____
26 ¹ Delaware Computer Exchange was 100% owned by K & N Enterprises, Inc., a company solely
27 owned by Kenneth Riegel since 1992. K & N Enterprises is no longer in existence and Mr. Riegel
sold Delaware Computer Exchange in 2008.

28 ² Here, and throughout, citations are omitted and emphasis is added unless otherwise noted.

(LTS) (AJP), 2006 U.S. Dist. LEXIS 83424, at *8 (S.D.N.Y. Nov. 15, 2006) (granting leave to intervene and add three named plaintiffs after class certification).

Plaintiffs dispute Apple's assertion that the consumer representatives cannot adequately represent the resellers. Well-established precedent, previous holdings of the Court addressing this issue, as well as the 9th Circuit's declination to consider Apple's 23(f) appeal that had as a focal point the argument that the proposed consumer representatives were inappropriate representatives of resellers, all support adequacy of the current class representatives. However, the addition of Delaware Computer Exchange will ensure "efficient and fair resolution of common questions of fact and law in a single proceeding." Manual for Complex Litigation (Fourth) ("Manual") §21.222 (2004). Defendant suffers no prejudice by the addition of this representative as it is conducting extensive discovery, including taking the deposition of Mr. Riegel, the former owner of Delaware Computer Exchange, and will have the opportunity, for at least the fifth time, to make argument opposing certification of the reseller portion of the class.

II. PROCEDURAL HISTORY

This motion comes after years of litigating class issues and, in particular, whether consumer direct purchasers can properly represent the interests of reseller direct purchasers. On October 17, 2008, Apple opposed Plaintiffs' motion for class certification and argued that resellers were "obviously not in the same position as individual end-user purchasers." ECF 185 at 22-23. In their reply brief filed on November 17, 2008, Plaintiffs responded that "Professor Noll's analysis, based upon the exemplar data supplied by Apple, amply satisfies the need to demonstrate plausible economic methodologies with which to calculate antitrust impact and damages on a common basis." ECF 188 at 19-21. The issue was addressed at oral argument in front of Chief Judge Ware at the hearing on class certification. *See* ECF 199, Dec. 16, 2008 Hrg. Tr. at 4:22-5:9; 43:17-44:17; 52:22-53:6. On December 22, 2008, the Court certified a class including both resellers and consumers, finding that "there is no evidence that either the named Plaintiffs or their counsel have any conflicts of interest with absent class members." ECF 196 at 9. After Apple inquired whether the Court meant to include resellers in the class, on January 14, 2009 the Court clarified, stating "[i]n declining

1 to address this issue in the December 22 Order, the Court implicitly included resellers in the certified
2 class.” ECF 198 at 2.

3 On August 31, 2009, Apple moved to decertify the class. ECF 240. That motion did not
4 include any argument related to the consumer class representatives’ ability to represent absent
5 reseller class members. On December 21, 2009, the Court decertified the classes without prejudice
6 to being renewed stating “the Court finds that further orders with respect to the definition of the
7 classes are premature until Plaintiffs clarify what actions they allege Apple took to maintain
8 monopoly power beyond initial technological relationships between its products.” ECF 303 at 2.
9 The Court did not decertify the class because of a finding that resellers could not properly be
10 represented by consumers.

11 On January 18, 2011, Plaintiffs filed a renewed motion for class certification. ECF 532. In
12 its opposition, Apple again argued that “resellers like Best Buy and Target are situated so differently
13 that they should not be included in the class.” ECF 529 at 2-3; *see also id.* at 21-25. Plaintiffs met
14 this argument once more in their March 28, 2011 reply memorandum. ECF 566 at 11 (“Apple
15 admits that the wholesale price resellers pay is based largely on retail prices. . . . Therefore, if the
16 retail price was impacted by Apple’s monopoly maintenance, the resellers also automatically paid
17 more for their wholesale price”); *see generally id.* at 10-15. On June 27, 2011, the Court heard
18 argument on the renewed motion, and the reseller issue was argued again. ECF 657, June 27, 2011
19 Hrg. Tr. at 5-6, 38-39.

20 On November 22, 2011, then Chief Judge Ware ordered the class recertified, specifically
21 considering the reseller argument:

22 Defendant contends that the class should be limited to end-user consumers
23 and should exclude resellers, on the ground that resellers are not situated similarly to
24 end-users insofar as resellers benefit from higher retail prices.¹ (Opp’n at 21-24.)
Plaintiffs respond that: (1) the Court has already considered and rejected this
argument; and (2) they can represent all direct purchasers, including resellers.²

25 In its January 15, 2009 Order, the Court stated that “in ruling on class
26 certification, the Court considered Defendant’s contentions that resellers should be
27 excluded from the class definition.”³ The Court expressly stated that by “declining to
28 address this issue in [its Class Certification Order],” it had “implicitly included
resellers in the certified class.” (*Id.*) Thus, the Court has already found that resellers
are properly included in the certified class.

1 Further, the Court finds that Defendant's contention that resellers are
 2 differently situated from end-users insofar as they "benefit from higher retail prices"
 3 is misguided. (Opp'n at 22.) As a matter of antitrust law, "when a seller overcharges
 4 a buyer . . . the fact that the buyer raises the price for its own product, thereby
 5 passing on the overcharge to its customers and avoiding a loss in profit, has no
 6 bearing on the issue of whether the buyer has suffered an injury and thus has the right
 7 to recover damages from the seller." *Meijer, Inc. v. Abbott Labs.*, 251 F.R.D. 431,
 433 (N.D. Cal. 2008) (citing *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392
 U.S. 481, 489-92 (1968)). Thus, because "all class members have the right to pursue
 overcharge damages, they have the same incentive to do so, and there is no conflict
 among class members allegedly harmed by the same antitrust violation." *Id.* at 435
 (citation omitted).

8 Accordingly, the Court finds that Plaintiffs can represent all direct purchasers,
 including resellers.

9
 10 ¹ Defendant defines the term "reseller" to include a variety of vendors,
 including "large electronic stores" such as Best Buy and Circuit City, "retail stores"
 11 such as Target, "Discount warehouses" such as Costco, and other stores and on-line
 retailers. (Opp'n at 22).

12 ² (Reply Memorandum in Support of Plaintiffs' Renewed Motion for Class
 Certification at 10-14, Docket Item No. 550 (filed under seal).)

13 ³ (*See* Order Vacating Case Management Conference; Clarifying and
 14 Correcting Class Certification Order; Setting Briefing Schedule at 2, Docket Item No.
 15 198.)

ECF 694 at 7-8.

16 On December 6, 2011, Apple filed a 23(f) petition with the Ninth Circuit, once more arguing
 17 "[b]ecause the resellers paid different prices from the end-users in separate transactions, litigating
 18 their claims will necessarily involve separate proof from the end-users." Ex. 1, Apple's Petition for
 19 Permission to Appeal Order Granting Class Certification at 18; *see also id.* at 3, 18-19; Ex. 2,
 20 Apple's Reply Brief in Support of 23(f) Petition at 11-12. Plaintiffs again refuted this argument,
 21 stating that Plaintiffs' expert Professor Noll "concluded that an economic regression could be
 22 implemented which would apply equally to all direct purchasers." Ex. 3, Plaintiffs' Answer to
 23 Apple's 23(f) Petition at 18; *see also id.* at 3-4; 13-14, 17-20, 23-26. On March 13, 2012, the Ninth
 24 Circuit declined to hear Apple's appeal.

25 On October 29, 2014, the Court discussed the idea that of having a reseller as an additional
 26 class representative. *See* Ex. 4, Oct. 29, 2014 Hrg. Tr. at 7:4-20:23; 187:20-199:3. On October 31,
 27

2014, an Order issued requiring Plaintiffs to move to add an additional class representative. ECF 866 at 3.

III. THE COURT HAS THE AUTHORITY TO ADD A NEW REPRESENTATIVE

The addition of Delaware Computer Exchange as a class representative can be accomplished in a number of ways, all of which are procedurally proper. “The court may permit intervention by a new representative or may simply designate that person as a representative in the order granting class certification.” Manual at §21.26 (citing *In re Telectronics Pacing Sys., Inc.*, 172 F.R.D. 271, 283 (S.D. Ohio 1997) (court named substitute new class representative without formal intervention or joinder)).³ Many Courts decide the issue under Federal Rules of Civil Procedure (“Rule”) 15(a)(2) and 16 or, alternatively Rule 24.

A. The Addition of Delaware Computer Exchange Is Proper Under Fed. R. Civ. P. 15

Rule 15(a)(2) states that “[t]he court should freely give leave [to amend] when justice so requires.” In deciding whether to grant leave to amend, a court considers the following factors: “(1) bad faith; (2) undue delay; (3) prejudice to the opposing party; (4) futility of amendment; and (5) whether the plaintiff has previously amended his complaint.” *Nunes v. Ashcroft*, 375 F.3d 805, 808 (9th Cir. 2003). Of these factors, prejudice to the opposing party “carries the greatest weight.” *Eminence Capital L.L.C. v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003). All inferences should be drawn “in favor of granting the motion,” *Griggs v. Pace Am. Group, Inc.*, 170 F.3d 877, 880 (9th Cir. 1999), and “the nonmoving party bears the burden of demonstrating why leave to amend should not be granted,” *Genentech, Inc. v. Abbott Labs.*, 127 F.R.D. 529, 530-31 (N.D. Cal. 1989). *Davis v. Brown Group Retail, Inc.*, No. 1:13-cv-01211-LJO-BAM, 2014 U.S. Dist. LEXIS 106024, at *4-*5

³ This is a vastly different case from *Corns v. Laborers Int’l Union of N. Am.*, No. 09-cv-4403 YGR, 2014 U.S. Dist. LEXIS 44997 (N.D. Cal. Mar. 31, 2014), where the Court denied the plaintiff’s motion to amend a complaint to add class claims, add two additional plaintiffs/class representatives and to add state law claims. In *Corns*, the litigation was not brought as a class action in the first place and thus the proposal to add class allegations now, and to seek “damages” on behalf of the proposed class members, was prejudicial to the defendants and disruptive to the orderly management of the case. *Id.* at *16. Here by contrast, the addition of a reseller class member can serve only to strengthen the already certified class.

(E.D. Cal. July 31, 2014) (allowing new plaintiff to be added as a class representative; changes to complaint did not add or otherwise broaden the scope of case other than addition of a named plaintiff); *True Health Chiropractic Inc. v. McKesson Corp.*, No. 13-cv-02219-JST, 2014 U.S. Dist. LEXIS 85961 (N.D. Cal. June 23, 2014) (allowing addition of class representative under Fed. R. Civ. P. 15); *Amparan v. Plaza Home Mortg., Inc.*, No. C 07-4498 JF(RS), 2009 U.S. Dist. LEXIS 83110 (N.D. Cal. Aug. 28, 2009) (addition of class representatives granted); *McConnell v. Red Robin Int'l, Inc.*, No. C 11-03026 WHA, 2012 U.S. Dist. LEXIS 53942, at *9 (N.D. Cal. Apr. 17, 2012) (allowing addition of a plaintiff where previously plaintiff had “no reason not to rely on [a single plaintiff as the] class representative”).⁴ “Where there is a lack of prejudice to the opposing party and the amended complaint is obviously not frivolous, or made as a dilatory maneuver in bad faith, it is an abuse of discretion’ to deny leave to amend.” *United States v. Pend Oreille Pub. Util. Dist. No. 1*, 926 F.2d 1502, 1511-12 (9th Cir. 1991) (citing *Howey v. United States*, 481 F.2d 1187, 1190-91 (9th Cir. 1973)).

1. The Addition of a Reseller Representative Was Not Done in Bad Faith

No bad faith has been alleged by Apple, nor could it be. Plaintiffs have relied on the Court’s prior orders regarding the propriety of the class’ current representation. Just after the hearing on summary judgment on August 13, 2014, when the Court first proposed a trial date, Plaintiffs began contacting resellers as potential witnesses. In late September Plaintiffs first made contact with Mr. Riegel and first met with him October 8, 2014.⁵ Less than two weeks later, Plaintiffs put him on the witness list exchanged by the parties.

⁴ See also *Nat’l Fed’n of the Blind v. Target Corp.*, 582 F. Supp. 2d 1185, 1201 (N.D. Cal. 2007) (ordering plaintiffs to substitute class representatives); *Wiener v. Dannon Co.*, 255 F.R.D. 658, 673 (C.D. Cal. 2009) (granting leave to substitute in an appropriate representative); *Tait v. BSH Home Appliances Corp.*, 289 F.R.D. 466, 476 (C.D. Cal. 2012) (permitting substitution of class representatives); *Hernandez v. Balakian*, 251 F.R.D. 488 (E.D. Cal. 2008) (permitting additional time for class counsel to find new class representative).

⁵ See Declaration of Alexandra S. Bernay in Support of Motion to Add Class Representative, filed concurrently (“Bernay Decl.”), ¶4. All references to “Ex.” are to the exhibits attached to the Bernay Decl.

1 **2. There Was No Undue Delay**

2 As noted above, Plaintiffs relied on the prior class certification orders and did not seek to add
3 plaintiffs on the reasonable assumption that the certified class was proper. Plaintiffs made contact
4 with Mr. Riegel just weeks after the Court set a trial date. *See Ashby v. Farmers Ins. Co.*, No. 01-cv-
5 1446-BR, 2007 U.S. Dist. LEXIS 97502, at *9 (D. Or. Sept. 26, 2007) (No undue delay in seeking to
6 add representatives six years after complaint filed and three years after class certified where “critical
7 aspects of the developing law” only recently arose.)

8 **3. Any Prejudice Is Ameliorated by Apple Being Given a**
9 **Deposition, Receiving Discovery and Having the Ability to**
10 **Oppose the Addition of Delaware Computer Exchange and**
11 **Rebrief Certification of the Reseller Class Prior to Trial**

12 Apple’s only argument regarding prejudice is that it will need to conduct additional
13 discovery. However, “additional discovery is not prohibitively prejudicial under Rule 15(a).”
14 *Davis*, 2014 U.S. Dist. LEXIS 106024, at *8; *see also PNY Techs. Inc. v. Sandisk Corp.*, No. 11-cv-
15 04689-WHO, 2014 U.S. Dist. LEXIS 9858, at *15-*16 (N.D. Cal. 2014) (“the prospect of
16 additional discovery needed by the non-moving party in itself [does not] constitute a sufficient
17 showing of prejudice”)⁶ In *Ashby*, the court found no undue prejudice where discovery would have
18 to be reopened and, according to defendants, a new notice would need to issue. *Ashby*, 2007 U.S.
19 Dist. LEXIS 97502, at *7-*8. The Court held that the additional discovery could be timely
20 completed. *Id.* Here, the parties have agreed on an expedited schedule to ensure that trial is moved
21 only a few days and provides Apple an opportunity to take discovery and conduct a deposition. Any
22 prejudice has been dispelled.⁷

23 ⁶ Apple served in the late afternoon of October 31, 2014 extremely broad and burdensome
24 discovery requests, including 20 interrogatories, many of which call for “all facts” as well as detailed
25 and multipart requests for documents. *See* Ex. 5. Plaintiffs were extremely surprised to receive such
26 lengthy and burdensome requests considering that Plaintiffs are required to respond to these wide
27 ranging requests by November 4, 2014. Many of the discovery requests do not go to issues related
28 to class certification, but instead are aimed at Mr. Riegel’s potential trial testimony, according to
Apple’s counsel. Apple is thus trying to kill two birds with one stone – by pre-trying its planned
cross examination and getting class related discovery as well. Apple is thus seeking to take full
advantage of the Court’s interest in the reseller issue.

⁷ “‘Undue prejudice’ means substantial prejudice or substantial negative effect; the Ninth Circuit
has found such substantial prejudice where the claims sought to be added ‘would have greatly altered

1 The addition of another representative is not futile and amendment should be granted.
 2 Because Delaware Computer Exchange has the identical claims as the other class representatives, his
 3 addition is plainly not futile. “A proposed amended pleading is futile ‘only if no set of facts can be
 4 proved under the amendment to the pleadings that would constitute a valid and sufficient claim or
 5 defense.’” *Rieve v. Coventry Health Care, Inc.*, No. SACV 11-1032 DOC (RNBx), 2012 U.S. Dist.
 6 LEXIS 36814, at *7 (C.D. Cal. Mar. 19, 2012) (quoting *Miller v. Rykoff-Sexton, Inc.*, 845 F.2d 209,
 7 214 (9th Cir. 1988)).

8 **B. The Addition of a Reseller Representative Is Also Appropriate Under**
 9 **Fed. R. Civ. P. 24(b)**

10 Alternatively, the proposed reseller representative should be allowed to intervene under Rule
 11 24(b). Pursuant to 24(b), the Court may permit a person who has a claim with a common question of
 12 law or fact to intervene in the action. *See* Fed. R. Civ. P. 24(b)(1). The only proper countervailing
 13 considerations are undue delay or prejudice to the existing parties’ rights. *See* Fed. R. Civ. P.
 14 24(b)(3).

15 Here, as explained above, Delaware Computer Exchange’s claims are identical in all respects
 16 to those currently alleged by the members of the certified class. 1 Newberg on Class Actions §2:17
 17 (5th ed. 2011) (noting that “intervention by absentee members is freely allowed in order to substitute
 18 them as class representatives”). The only change would be the addition of Delaware Computer
 19 Exchange to the case. Apple should welcome the addition of a reseller class member as they have
 20 argued for more than five years that such a representative is necessary for a class to be certified and
 21 that the current representatives were inappropriate representatives of the reseller members of the
 22 class. *See* discussion above at §II.⁸

23
 24
 25 the nature of the litigation and would have required defendants to have undertaken, at a late hour, an
 26 entirely new course of defense.” *Saes Getters S.p.A v. Aeronex, Inc.*, 219 F. Supp. 2d 1081, 1086
 (S.D. Cal. 2002).

27 ⁸ The Court can also add Delaware Computer Exchange as a class representative under Fed. R.
 28 Civ. P. 21. “On motion or on its own, the court may at any time, on just terms, add or drop a party.”
Id.

IV. ADDING DELAWARE COMPUTER EXCHANGE AS A CLASS REPRESENTATIVE DOES NOT REQUIRE ADDITIONAL NOTICE TO THE CLASS OR OTHERWISE TARNISH THE ORIGINAL CLASS NOTICE

During the October 29 and 31, 2014 pre-trial conferences, Apple's counsel suggested that the addition of a reseller representative might present "notice issues" because the class has not been notified of an additional representative's appointment. Ex. 6, Oct. 31, 2014 Pre-Trial Conference Hrg. Tr. at 13. However, Apple has provided no authority supporting its suggestion that the Court must provide notice in this situation, especially when the Class has already received notice of the certified claims and an opportunity to opt-out. Indeed, Plaintiffs are aware of none. Defendant's claimed concern on behalf of the class beggars' belief. Apple's "fox guarding-the-henhouse" arguments are not well taken.

Under Fed. R. Civ. P. 23, which governs notice in class actions, only two notices to the class are necessary: when a class is certified, and when a case is settled. Here, the court has already certified a class and notice has already been provided. At most, appointing an *additional* representative here would simply amend the Court's already existing current class certification order – an act which would not trigger the mandatory notice provision of Rule 23(c)(2) because it does not redefine the class.

Even then, it would not be necessary to inform the class of the appointment of Delaware Computer Exchange as a class representative. Notice "is not required to provide a complete source of information." *DeBoer v. Mellon Mortg. Co.*, 64 F.3d 1171, 1176 (8th Cir. 1995) (quoting *Maier v. Zapata Corp.*, 714 F.2d 436, 452 (5th Cir. 1983)). A class notice need only explain in simple, concise language:

(i) the nature of the action; (ii) the definition of the class certified; (iii) the class claims, issues, or defenses; (iv) that a class member may enter an appearance through an attorney if the member so desires; (v) that the court will exclude from the class any member who requests exclusion; (vi) the time and manner for requesting exclusion; and (vii) the binding effect of a class judgment on members under Rule 23(c)(3).

Fed. R. Civ. P. 23(c)(2)(B). In fact, the litigation notice previously disseminated to the class – which Apple assisted in drafting cooperatively with Plaintiffs – did not identify the class representatives by

1 name or otherwise distinguish between class representatives who were consumers and resellers, as
 2 Apple now suggests is necessary. Ex. 7, Long Form Notice at 1-2.⁹

3 Moreover, by adding Delaware Computer Exchange as a class representative, plaintiffs are
 4 **improving** the adequacy of the representation of the reseller class members. Plaintiffs seek to
 5 appoint Delaware Computer Exchange as a class representative so that its former owner can provide
 6 at trial a retailer's perspective of Apple's iPod sales and address Apple's and the Court's concern
 7 that the consumer plaintiff representatives may not be adequate to represent all parts of the class. As
 8 such, Mr. Riegel's testimony will help build on the testimony provided by the consumer plaintiffs
 9 and further contribute to Plaintiffs' efforts to establish that Apple violated Section 2 of the Sherman
 10 Act.

11 As the Eleventh Circuit acknowledged in addressing similar efforts in *Birmingham Steel*
 12 *Corp. v. TVA*, 353 F.3d 1331 (11th Cir. 2003), such action is consistent with a fair representation of
 13 class members and serves the interests of the class. *Id.* at 1342 (substitution of a class representative
 14 advances the efficient administration of justice and **serves the interests of the class even after**
 15 **discovery was completed and case was ready for trial**); *see also Lavenhall v. General Dynamics*
 16 *Corp.*, 91 F.R.D. 208, 210 (E.D. Mo. 1981) (refusing to direct notice under Rule 23(d)(2) because
 17 lack of notice would not "unduly prejudice the ability of absent purported class members to bring
 18 independent actions"), *aff'd*, 704 F.2d 407 (1983).

19 In addition, notice has already been provided to the class. In the notice, class members were
 20 advised that the class includes iPods sold by Apple directly to customers through its online and retail
 21 stores and directly to Apple authorized resellers. Ex. 7, Long Form Notice of Class Action at 1; *id.*
 22 at 2 (the class includes "[a]ll persons or entities in the United States . . . who purchased one of the
 23 iPod models listed below directly from Apple"); *see also* Ex. 8, Notice of Pendency. The notice

24 ⁹ Nor does the addition of Delaware Computer Exchange as a class representative qualify as one of
 25 the "limited circumstances" in which courts have found additional notice to be warranted under the
 26 Rule 23(d)(2). *Pate v. United States*, 328 F. Supp. 2d 62, 73 n.14 (D.D.C. 2004) (citing *Larionoff v.*
 27 *United States*, 533 F.2d 1167, 1184 (D.C. Cir. 1976) *aff'd sub nom, United States v. Larionoff*, 431
 28 U.S. 86 (1977)). Plaintiffs are not taking any steps which threaten to substantially prejudice or
 impair the rights of the class. Nor are they seeking to alter the legal or factual claims of the certified
 class. Nor are they seeking to dismiss any of the certified claims. Nor are they seeking to redefine
 or limit the class in a way that would exclude former class members.

1 advised class members that they are represented by plaintiffs who were seeking to recover for
 2 themselves and other people who bought iPods. Ex. 8, Notice of Pendency at 1-2. Thus, class
 3 members, including the reseller class members, understand that the court has appointed plaintiffs to
 4 represent their interests with respect to the purchase of iPods between 2006 and 2009, and their
 5 claims have not changed. Notifying the class of the appointment of an additional class
 6 representative who is pursuing the same claims as the existing class representatives is simply
 7 unnecessary.

8 Notably, of the 789 opt-out requests submitted¹⁰ in response to the class notice, only one
 9 company opted-out, and it is not even clear that that company was a reseller.¹¹ Moreover, despite
 10 being advised in the notice that “you may enter an appearance through your own counsel,” not a
 11 single class member, reseller or consumer, has chosen to do so. Ex. 8, Notice of Pendency at 2. If
 12 the reseller class members were concerned that they would not be adequately represented, they
 13 certainly have not expressed any such concern in the two years since notice was disseminated. The
 14 reaction of class to the notice thus weighs heavily against the need for additional notice and also
 15 tends to support the notion that the class, as currently certified, is proper.

16 As to Apple’s vague suggestion that Mr. Riegel’s deposition testimony might necessitate
 17 additional notice to the class, *see* Ex. 6, Oct. 31, 2014 Pre-Trial Conference Hrg. Tr. at 13, it is
 18 incorrect. As noted above, the class has already been presented with “a fair recital of the subject
 19 matter of the suit and [been] inform[ed] of their opportunity to be heard.” *In re Gypsum Antitrust*
 20 *Cases*, 565 F.2d 1123, 1125 (9th Cir. 1977) (“The purpose of the notice requirement . . . is to present
 21 a fair recital of the subject matter of the suit and to inform all class members of their opportunity to
 22 be heard.”). Nothing more is required. Fed. R. Civ. P. 23(c)(2)(B)(i)-(vii).

25 ¹⁰ In total, 8,590,040 notices were sent via email or regular mail. Identified resellers received
 26 mailed notice (967 mailed notices) and the majority (900) resellers also received email notice, where
 email addresses were available. *See* Bernay Decl., ¶7.

27 ¹¹ The one request for exclusion received by a company, is a company that does not appear on the
 28 list of resellers provided by Apple. Bernay Decl., ¶¶9-10.

V. CONCLUSION

The addition of Delaware Computer Exchange as a class representative, strengthens the class; provides a retailer's perspective on issues central to the litigation and resolves any concerns that the current class representatives are unable to properly represent the reseller portion of the class. For all of these reasons, the Court should grant Plaintiffs' motion to add Delaware Computer Exchange as a class representative.

DATED: November 3, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 3, 2014, I authorized the electronic filing of the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses denoted on the attached Electronic Mail Notice List, and I hereby certify that I caused to be mailed the foregoing document or paper via the United States Postal Service to the non-CM/ECF participants indicated on the attached Manual Notice List.

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on November 3, 2014.

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Mailing Information for a Case 4:05-cv-00037-YGR The Apple iPod iTunes Anti-Trust Litigation

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- (No manual recipients)