BETSY C. MANIFOLD (182450)
manifold@whafh.com
RACHELE R. BYRD (190634)
byrd@whafh.com
MARISA C. LIVESAY (223247)
livesay@whafh.com
WOLF HALDENSTEIN ADLER FREEMAN & HERZ LLP
750 B Street, Suite 1820
San Diego, CA 92101
Telephone: 619/239-4599
Facsimile: 619/234-4599

MARK C. RIFKIN (*pro hac vice*)
rifkin@whafh.com
MATTHEW M. GUINEY (*pro hac vice*)
guiney@whafh.com
WOLF HALDENSTEIN ADLER FREEMAN & HERZ LLP
270 Madison Avenue
New York, NY 10016
Telephone: 212/545-4600
Facsimile: 212/545-4653

Plaintiffs' Interim Class Counsel

[Additional Counsel Appear on Signature Page]

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

In re Apple iPhone Antitrust Litigation	Case No. CV 11-06714-YGR **NOTICE OF MOTION AND MOTION FOR LEAVE TO FILE FOURTH AMENDED COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES** DATE: November 16, 2021 TIME: 2:00 p.m. JUDGE: Hon. Yvonne Gonzalez Rogers ROOM: 1, Fourth Floor

TO THE COURT, ALL PARTIES, AND THEIR RESPECTIVE ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on November 16, 2021, at 2:00 p.m., or as soon thereafter as this matter may be heard before the Honorable Yvonne Gonzalez Rogers, in Courtroom 1, 4th Floor, at the Oakland Courthouse, 1301 Clay Street, Oakland, California, 94612, plaintiffs Stephen H. Schwartz, Edward W. Hayter, Robert Pepper and Edward Lawrence ("Plaintiffs"), will, and hereby do, move this Court pursuant to Federal Rules of Civil Procedure, rule ("FRCP") 15(a)(2) for an order granting leave to file a Fourth Amended Consolidated Class Action Complaint ("FAC"). (A true and correct copy of the proposed FAC is submitted herewith as Exhibit A to the contemporaneously filed Declaration of Rachele R. Byrd in Support of Motion for Leave to File a Fourth Amended Complaint ("Byrd Declaration" or "Byrd Decl.").)

The Third Amended Consolidated Class Action Complaint ("TAC") currently includes allegations against Defendant Apple Inc. ("Apple") for violations of Section 2 of the Sherman Antitrust Act. The proposed amendments, which would only add a claim for violation of California's Unfair Competition Law, Cal. Bus. & Prof. Code § 17200, *et seq*. (the "UCL"), are not unfairly prejudicial to Apple because both the theory of the case and the operative facts remain the same. Therefore, no new discovery is required to support the UCL claim. The proposed amendments are also made in good faith, are not a result of undue delay, and are not an attempt to cure deficiencies that have been left uncured by prior amendments. No delay will be caused by the amendment.

This Motion is based upon this Notice of Motion, the Byrd Declaration, the proposed FAC, attached as required under Civil Local Rule 10-1, the accompanying Memorandum of Points and Authorities and any Reply Memorandum subsequently submitted in support of the Motion, any argument entertained by the Court on the motion, and any other matters the Court deems proper.

DATED: October 8, 2021

WOLF HALDENSTEIN ADLER FREEMAN & HERZ LLP

By: */s/ Rachele R. Byrd*
RACHELE R. BYRD

BETSY C. MANIFOLD
RACHELE R. BYRD
MARISA C. LIVESAY
750 B Street, Suite 1820
San Diego, CA 92101
Telephone: (619) 239-4599
Facsimile: (619) 234-4599
manifold@whafh.com
byrd@whafh.com
livesay@whafh.com

MARK C. RIFKIN
MATTHEW M. GUINEY
WOLF HALDENSTEIN ADLER FREEMAN & HERZ LLP
270 Madison Ave
New York, NY 10016
Telephone: (212) 545-4600
Facsimile: (212) 686-0114
rifkin@whafh.com
guiney@whafh.com

Interim Class Counsel and Proposed Co-Class Counsel

DAVID C. FREDERICK (*pro hac vice*)
AARON M. PANNER
KELLOGG, HANSEN, TODD, FIGEL & FREDERICK, P.L.L.C.
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
Telephone: (202) 326-7900
Facsimile: (202) 326-7999
dfrederick@kellogghansen.com
apanner@kellogghansen.com

Counsel for Plaintiffs and Proposed Co-Class Counsel

CALCATERRA POLLACK LLP
MICHAEL LISKOW
mliskow@calcaterrapollack.com
1140 Avenue of the Americas, 9th Floor
New York, NY 10036-5803
Telephone: (212) 899-1761
Facsimile: (332) 206-2073

Counsel for Plaintiff Robert Pepper

MEMORANDUM OF POINTS AND AUTHORITIES

I. STATEMENT OF THE ISSUE TO BE DECIDED

Should the Court grant Plaintiffs leave to file a Fourth Amended Consolidated Class Action Complaint?

II. INTRODUCTION

Plaintiffs Stephen H. Schwartz, Edward W. Hayter, Robert Pepper and Edward Lawrence ("Plaintiffs") respectfully request leave to file a Fourth Amended Consolidated Class Action Complaint ("FAC") to add a claim for violation of California's Unfair Competition Law, Cal. Bus. & Prof. Code § 17200, *et seq.* (the "UCL").[1] Plaintiffs' TAC currently brings claims against Defendant Apple Inc. ("Apple"), for monopolization of the iOS applications aftermarket and attempted monopolization of that market in violation of Section 2 of the Sherman Antitrust Act of 1890, 15 U.S.C. § 2 (the "Sherman Act"). Plaintiffs now seek to amend their allegations to add a claim for violation of the UCL, a statute that this Court recently found—after a bench trial in a related case—Apple had violated. *See Epic Games, Inc. v Apple Inc*. Case No. 4:20-cv-05640-YGR ("*Epic*").

The Court should grant Plaintiffs' motion for leave to amend because Plaintiffs' proposed amendments will not be unfairly prejudicial to Apple, as they do not change the theory of the case. The UCL claim is based on the same allegations as the Sherman Act claims, therefore no new discovery will be required due to the addition of the UCL claim. Furthermore, the amendment would not be futile since Apple already litigated (and lost) a UCL claim in the related *Epic* action, which alleged the same antitrust conduct.[2] Moreover, the amendments are not the result of undue delay

---

[1] Both a clean and a redlined version of Plaintiffs' [Proposed] FAC are attached to the Declaration of Rachele R. Byrd in Support of Motion for Leave to File a Fourth Amended Complaint ("Byrd Declaration" or "Byrd Decl.") as Exhibits ("Exs.") A and B, respectively, pursuant to Civil Local Rule 10-1 and so that the Court can easily view the limited amendments Plaintiffs seek to make to the Third Amended Consolidated Class Action Complaint ("TAC").

[2] Epic did not seek restitution but only injunctive relief. Plaintiffs here will seek restitution in addition to the remedies it currently seeks if the Court grants this motion.

because, despite the many years this case has been pending, it was on appeal for more than five-and-a-half years. Plaintiffs bring this motion now because of the Court's recent issuance of its decision in *Epic*, wherein it ruled in favor of Epic on the UCL claim and against it on all other claims, including its Sherman Act claims. Plaintiffs are confident that the Sherman Act clams at issue in *Epic* are distinguishable from this case and that they are therefore likely to prevail on their Sherman Act claims; nevertheless, the Court's ruling underscores the additional legal breadth of the UCL in this context. The proposed amendments are not the result of repeated failures to cure deficiencies by amendment and will not cause any delay going forward. Plaintiffs' reply brief in support of their motion for class certification is due October 19, 2021, and no other discovery will be required for the Court to also consider certification of the UCL claim. The same evidence Plaintiffs submitted in support of certification of the Sherman Act claims also supports certification of the UCL claim. Therefore, Plaintiffs propose they be given leave to file a supplemental brief to address certification of the UCL claim, and that Apple then be permitted to file an opposition. These two additional briefs will not delay the Court-ordered schedule in this case. The Court should therefore grant Plaintiffs' motion and permit the requested amendment.

III. RELEVANT FACTS AND PROCEDURAL HISTORY

This action was filed on December 29, 2011, on behalf of all persons who purchased apps from Apple's "iTunes" site or "App Store" for use on an Apple iPhone. ECF No. 1. Plaintiffs alleged, *inter alia*, that Apple has violated Section 2 of the Sherman Act by monopolizing the aftermarket for iPhone apps and preventing the sale of any such apps outside the App Store, a closed market Apple created, and thereby forcing consumers to pay supracompetitive prices. On February 9, 2012, the Court related the first-filed *Pepper* action to two other cases (ECF No. 12), and on March 21, 2012, Plaintiffs filed their Consolidated Class Action Complaint. ECF No. 26.

On July 7, 2012, this Court denied in part and granted in part Apple's motion to dismiss that complaint, holding that AT&T Mobile LLC ("ATTM") was a necessary party, not to the iPhone apps aftermarket claim but to voice-and-data services aftermarket claims which are no longer part of this case. ECF No. 75. On September 28, 2012, Plaintiffs filed their Amended Consolidated Class Action

DOCKET ALARM

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts

Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research

With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips

Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS
Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS
Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS
Sync your system to PACER to automate legal marketing.