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UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

ZACK WARD and THOMAS BUCHAR, on behalf of themselves and all others similarly situated, Plaintiffs, v. APPLE INC., Defendant.	)	CASE NO. 4:12-cv-05404-YGR **[REDACTED VERSION OF DOCUMENT SOUGHT TO BE SEALED]** **PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF PLAINTIFFS' RULE 56(d) MOTION** DATE: March 29, 2016 TIME: 2:00 p.m. DEPT: Courtroom 1, 4th Floor JUDGE: Hon. Yvonne Gonzalez Rogers

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I. INTRODUCTION

When the Court denied Defendant Apple Inc.'s motion to dismiss on December 15, 2015, the Court permitted Apple to move for summary judgment solely on the narrow question whether Plaintiffs have alleged a relevant aftermarket. *See* ECF No. 72. In *Newcal Indus. v. Ikon Office Solution*, 513 F.3d 1038 (9th Cir. 2008), the Ninth Circuit identified the factors which the market definition must satisfy. Apple's motion – which again misstates controlling law and improperly addresses issues unrelated to the relevant market (such as antitrust damages) – concedes many of these factors and fails to demonstrate the absence of a genuine issue of material fact on any of them. Following the clear roadmap set forth in *Newcal*, as the Court must, Apple's summary judgment motion must be denied.

Plaintiffs allege a secondary market of iPhone voice and data service. That market meets the *Newcal* standards exactly. Relying upon detailed expert analyses from ***two*** highly qualified economists, Plaintiffs will be able to prove at trial that the market is a "product market" (as that term is used in antitrust cases) and encompasses all reasonably interchangeable economic substitutes. *See* Declaration of Rachele R. Rickert in Support of Plaintiffs' Opposition to Defendant's Motion for Summary Judgment and in Support of Plaintiffs' Rule 56(d) Motion ("Rickert Decl."), Ex. A [Affidavit of Frederick R. Warren-Boulton], ¶¶ 6, 16-18. Apple does not dispute the first factor, and it misstates the record to dispute the second factor. The iPhone voice and data market easily meets these *Newcal* criteria. *Newcal*, 513 F.3d at 1045.

Undoubtedly, Plaintiffs will be able to prove at trial that the secondary market for iPhone voice and data service is a distinct market that is derived from and dependent upon the primary market for iPhones. *See* Rickert Decl., Ex. A, ¶ 16. No supplier participates in both markets (*see* Rickert Decl., Ex. B, ¶ 10), and no consumer would buy voice and data service for iPhones before there were iPhones. Apple tries in vain to dispute these self-evident facts by distorting the factual record and by urging the Court to adopt a wholly unprecedented legal standard not found in *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451 (1992), or *Newcal*. The iPhone voice and data market also easily meets these *Newcal* criteria. *Id.*, 513 F.3d at 1045.

Likewise, Plaintiffs will be able to prove at trial that Apple's secondary market power did

not derive from any contractual rights consumers knowingly and voluntarily gave to it when they bought iPhones in the primary market. *See* Rickert Decl., Ex. A at ¶¶ 16-18. Apple has not identified any contractual provision giving it those rights. Because of myriad imperfections in that market, Plaintiffs also will be able to prove at trial that the consumers' purchase of an iPhone is ***not*** the functional equivalent of a contractual commitment giving Apple an agreed-upon right to monopolize consumers in the aftermarket. *Id*. The iPhone voice and data market thus satisfies these *Newcal* criteria as well. *Newcal*, 513 F.3d at 1048-49. Apple, which has not submitted ***any*** expert analysis to dispute the detailed analyses of Plaintiffs' two economists, cannot meet its heavy burden to show no genuine issue of material fact on these highly technical questions.

At a minimum, Apple's summary judgment motion prematurely raises many disputed factual questions that cannot be resolved on the basis of this incomplete record. *See* Rickert Decl., Ex. A at ¶¶ 21-22 & 24-26. The plaintiffs had only limited discovery in the prior litigation, *In re Apple and AT&TM Antitrust Litig.*, 596 F. Supp. 2d 1288 (N.D. Cal. 2008) ("*Apple I*"), and Plaintiffs have been permitted no discovery in this case. *See* Rickert Decl., ¶¶ 39-60. Because Plaintiffs have not been permitted an opportunity to conduct sufficient discovery on the complex, highly technical factual questions raised by Apple's summary judgment motion, under Federal Rule of Civil Procedure 56(d), the Court cannot grant Apple's motion without allowing Plaintiffs to complete that discovery.

For all these reasons, explained more fully below, under the Ninth Circuit's controlling decision in *Newcal*, Apple's motion for summary judgment must be denied.

II. STATEMENT OF ISSUES TO BE DECIDED

The only issue properly raised by Apple's summary judgment motion is "whether the complaint alleges a relevant market." ECF No. 72. Plaintiffs also ask the Court to determine whether Apple's motion should be denied or to defer consideration of the motion because they have not had sufficient discovery to oppose it. Fed. R. Civ. P. 56(d).

III. RELEVANT PROCEDURAL HISTORY

The Court denied Apple's motion to dismiss and set a briefing schedule for the narrow motion for summary judgment on December 15, 2015. ECF No. 72. On December 18 and 23,

2015, Plaintiffs served their First and Second Set of Document Requests to Apple, respectively, in anticipation of factual issues Apple might raise. Apple moved for summary judgment on February 2, 2016. ECF No. 78. On February 5, 2016, after reviewing the motion, Plaintiffs served their Third Set of Document Requests to Apple and noticed the depositions of Michael Fenger and Sandy Green. Apple responded to each of the discovery requests in due course by refusing to provide ***any*** discovery to Plaintiffs and Apple refused to allow Plaintiffs to take the noticed depositions.

IV. COUNTERSTATEMENT OF DISPUTED AND UNDISPUTED FACTS

A. The Cellphone Industry

The cellphone (or "wireless") service industry is dominated by four major domestic carriers – AT&T, T-Mobile, Sprint, and Verizon – which control the industry in a way that "severely limits consumer choice, stifles innovation, crushes entrepreneurship, and has made the U.S. the laughingstock of the mobile-technology world." Compl. ¶¶ 30-31. Apple and AT&T exploited imperfections in the cellphone market to "lock-in" iPhone customers and extract supra-competitive profits from them in the secondary market.

B. Apple's Unprecedented Exclusive 5-Year iPhone Deal Stifled Competition and Extracted Supra-Competitive Profits in the iPhone Voice and Data Services Aftermarket

In the spring of 2007, Apple began a massive marketing campaign for its revolutionary new wireless communication device, the iPhone. *Id*., ¶ 16. Apple advertised the iPhone as "***revolutionary***" and a "***breakthrough***" Internet communications device. *See* Rickert Decl., Ex. B at ¶ 18, n.18. Apple began selling iPhones on June 29, 2007. Despite their hefty price tag of $499 to $599 and heavy competition in the cellphone market, consumers waited in line to buy them. Compl., ¶ 16.

Prior to release of the iPhone, Apple entered into an unprecedented, secret, five-year deal with AT&T whereby AT&T would be the exclusive provider of cellphone voice and data services for the iPhone through 2012, in exchange for which Apple would receive a percentage of AT&T's revenues and profits with respect to the first generation of iPhones, known as the iPhone 2G. The arrangement was unprecedented in the cellphone industry. Compl., ¶¶ 2, 19, 45; Rickert Decl., Ex. B, ¶ 27. To enforce AT&T's exclusivity and maximize its own revenue share, Apple installed

Program Locks on all iPhones and agreed to never give consumers the unlock codes to iPhone, either for international travel or to lawfully switch to another carrier, even after they fulfilled their original service commitments with AT&T or paid to terminate their service contracts. Compl., ¶¶ 3, 47. Apple also agreed [redacted]. Rickert Decl., Ex. B at 16, ¶ 25; Fenger Decl., Ex. C, § 3.1.

Apple and AT&T agreed to prevent Plaintiffs and other consumers from unlocking their iPhones in part to suppress competition from T-Mobile, which at that time also used the "GSM" technology. Compl., ¶¶ 28, 30. Apple sought to enhance its revenues and competitive position by preventing iPhone users from switching to T-Mobile. *Id*., ¶¶ 46-47. Apple and AT&T also agreed as part of their five-year exclusive contract that Apple [redacted] *Id*., ¶ 52; Fenger Decl., Ex. C., ¶ 3.1; Rickert Decl., Ex. B at 16, ¶ 25. After the introduction of the iPhone 3G, iPhone 3GS, iPhone 4, iPhone 4S, and iPhone 5, Apple and AT&T continued to abide by and enforce certain anticompetitive terms of their exclusivity agreement, such as the Program Locks and their refusal to give consumers the unlock codes for their iPhones, in order to continue to suppress competition in the voice and data service aftermarket and continue to enjoy supra-competitive profits from their secret deal. *Id*., ¶ 54.[1]

Consumers purchased iPhones and then purchased iPhone voice and data service from AT&T,[2] but they did ***not*** agree to use AT&T for five years. Compl., ¶¶ 2, 20, 46, 58. The terms of Apple's deal with AT&T were kept secret. Apple never publicly disclosed its five-year deal with

[1] Apple makes much of the fact that after *Apple I* was filed, Apple and AT&T shortened their deal to 3-1/2 years and ended their revenue-sharing arrangement and switched to a more traditional agreement whereby AT&T compensated Apple by subsidizing iPhone purchases. However, even after those changes were made, iPhone users still paid billions of dollars in supra-competitive prices for AT&T's service. *See* Rickert Decl., Ex. B at ¶ 64.

[2] Plaintiffs bought their iPhones before buying iPhone voice and data service from AT&T. *See* Yates Decl., Ex. B, ¶ 5; and Ex. A, ¶ 5; Rickert Decl., Ex. B, ¶ 8.

AT&T, or that the deal effectively locked Plaintiffs and other iPhone consumers into using AT&T as their voice and data service provider for five years. *Id*., ¶ 21. In fact, [redacted]. Rickert Decl., Ex. C. Apple also never disclosed to Plaintiffs, much less obtained their contractual consent to, the fact that their iPhones were made to work only on AT&T's network or that unlock codes would not be provided to them upon request, departures from industry custom and practice. Compl., ¶ 22; Yates Decl., Exs. A & B; Rickert Decl., Ex. B, ¶ 11.[3]

iPhone consumers, all of whom then accepted AT&T service plans for two year terms that were terminable at will, did not know their contractual right to terminate and switch to a different carrier was illusory and did not know they would have to renew with AT&T after their initial two-year contracts expired to continue using the expensive iPhones, even if they were dissatisfied with AT&T's service or if AT&T's prices skyrocketed (which is exactly what happened). Compl., ¶¶ 46, 50, 69. Plaintiffs did not "knowingly contract" to permit Apple and AT&T to monopolize the iPhone voice and data services aftermarket or "knowingly contract" to permit them to charge supra-competitive prices for those services. *Id.*, ¶¶ 6, 53, 71; Yates Decl., Ex A, ¶¶ 14-15 and Ex. B, ¶¶ 15-16; Rickert Decl., Ex. D, ¶ 8. Instead, they were unknowingly "locked in" to AT&T's wireless service for five years, without knowing what those services would cost them over the life of their iPhones. Compl., ¶¶ 46 & 69.

Apple falsely claims that the iPhone box disclosed the five-year exclusive deal. Def. Br. at 6, 19. Aside from being insufficiently informative and insufficiently visible to inform consumers, the alleged "disclosure" was made too late to give consumers adequate notice they were locked in: Plaintiffs and all other iPhone consumers received the box only ***after*** they bought the iPhone and, usually, after they signed their initial AT&T service plan. Yates Decl., Exs. A, ¶ 6 & B, ¶ 6.

V. LEGAL STANDARD

Summary judgment is a drastic remedy and, therefore, a court must act with caution before

[3] As with all ***other*** cellphones on the market, AT&T provides unlock codes for all ***other*** cellphones whenever requested to do so by a customer. Compl., ¶ 23.

granting it. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). Summary judgment is appropriate only "when no genuine dispute as to any material fact exists and the moving party is entitled to judgment as a matter of law. *Tucker v Wright Med. Tech., Inc.*, No. 11-cv-03086-YGR, 2013 U.S. Dist. LEXIS 38354, at *6 (N.D. Cal. Mar. 19, 2013) (citing Fed. R. Civ. P. 56(a)). Material facts are those that ***might*** affect the outcome of the case. *Anderson*, 477 U.S. at 248. A dispute is "genuine" if there is sufficient evidence for a reasonable jury to return a verdict for the non-moving party. *Id*. at 247-48. The moving party has the burden of demonstrating the absence of a genuine issue of fact for trial. *See Anderson*, 477 U.S. at 256.[4] Importantly, however, the responding party need not resolve the issue of material fact "conclusively." *Id*. at 249. Instead, "all that is required is that sufficient evidence supporting the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial." *Id*.

[4] Much of the material submitted by Apple in support of its motion is inadmissible and should be stricken. The unsworn Declaration of Michael Fenger ("Fenger") (ECF No. 80), an Apple employee, does not purport to be based only upon his personal knowledge and includes many statements for which he obviously lacks personal knowledge, and therefore lacks foundation. *See, e.g., id.*, ¶ 2 ("carriers have always competed with each other based on network quality, and particularly since the 2007 introduction of the original iPhone they have competed based on the handsets available on each network as well"); ¶ 3 ("before and after the launch of the original iPhone, carriers have acquired exclusive rights to a new cellular device for a period of time in order to differentiate its network. . . . [A]fter Apple introduced the iPhone exclusively on AT&T, Verizon's advertising stressed that the 'only' reason to select a carrier was the quality of its network"); ¶ 7 ("***My understanding*** is that significant engineering work, including work by chipset manufacturers, would have been required to make the iPhone 3G/3GS fully compatible with T-Mobile's U.S. network.") (emphasis added); ¶ 10 ("original exclusivity period was indeterminate, as it depended on whether Apple or AT&T exercised its right to terminate for convenience. For that reason, the press release announcing the original iPhone explained that the parties' agreement was a multi-year exclusive arrangement."); ¶ 11 ("In the vast majority of cases the two transactions occur simultaneously or within a day or two of one another."); ¶ 16 ("***I am unaware*** of any iPhone customers in the 2007-2010 time period who paid AT&T an early termination fee and thereafter used their iPhone on the T-Mobile network or any other U.S. network.") (emphasis added). Fenger also fails to authenticate or demonstrate any personal knowledge of the documents he attaches to his declaration. Likewise, the unsworn Declaration of Sandy Green ("Green") (ECF No. 79), another Apple employee, also does not purport to be based only upon her personal knowledge and includes many statements for which she obviously lacks personal knowledge; therefore it, too, lacks foundation. Nor does Green claim to have first-hand knowledge to authenticate the documents attached to her declaration. Finally, Exhibit A to the unsworn "affidavit" from Christopher Butler (Ex. M to the Yates Declaration), should be stricken as inadmissible hearsay.

When deciding a summary judgment motion, the Court must view the evidence in a light most favorable to the non-moving party and must draw all reasonable inferences in its favor. *Anderson*, 477 U.S. at 255; *Hunt v. City of Los Angeles*, 638 F.3d 703, 709 (9th Cir. 2011). The "judge's function is not . . . to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson*, 477 U.S. at 249. "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions." *Id.* at 255.

Summary judgment is generally disfavored in antitrust cases, *see Christofferson Dairy, Inc. v. MMM Sales, Inc.*, 849 F.2d 1168, 1171 (9th Cir. 1988), particularly in complex antitrust cases such as this, which raise myriad technical questions and are often based on evidence exclusively in the defendant's possession. The Ninth Circuit has referred to the market definition as a "highly technical economic question." *Morgan, Strand, Wheeler & Biggs v. Radiology, Ltd.*, 924 F.2d 1484, 1490 (9th Cir. 1991)). "Establishing market definition . . . ***likely requires expert testimony***." *Hynix Semiconductor Inc. v. Rambus Inc.*, No. CV-00-20905 RMW, 2008 U.S. Dist. LEXIS 123822, at *42 n.13 (N.D. Cal. Jan. 5, 2008) (quoting *Morgan*) (emphasis added). Thus, as the Supreme Court explained in *Kodak*, the market definition "can be determined only ***after a factual inquiry into the commercial realities faced by consumers***." *Kodak*, 504 U.S. at 482 (internal quotations omitted) (emphasis added).

Apple's summary judgment motion seeks to bypass that highly technical factual inquiry.

VI. ARGUMENT

In *Kodak*, the Supreme Court held that an aftermarket antitrust claim may be based on a ***single product aftermarket*** (in that case, it was an aftermarket for service and replacement parts for Kodak-brand copiers). *Id.*, 504 U.S. at 481-82. The Supreme Court also held that a viable aftermarket could stand ***even where the defendant did not have monopoly power in the primary product market*** (in that case, it was the market for copiers). *Id.* at 465-69. Consistent with the holding in *Kodak*, Plaintiffs have alleged that Apple conspired to monopolize the aftermarket for iPhone voice and data service: a single product aftermarket that is functionally the same as the aftermarket for Kodak copier services and replacement parts. That Apple did not possess monopoly

power in the primary market for smartphones is no defense to Plaintiffs' claim here, any more than Kodak's lack of market power in the primary market for copiers barred the plaintiffs' claim in that case.

Newcal sets forth the roadmap the Court must follow in deciding whether "the complaint alleges a relevant market." ECF No. 72. By following that roadmap – instead of taking the legal and factual detours Apple urges – the Court will conclude that Plaintiffs do allege a viable relevant market, and will deny Apple's motion for summary judgment accordingly.

A. The Court Should Defer Ruling on Apple's Summary Judgment Motion

The Court may deny or continue a motion for summary judgment to allow time to take discovery "[i]f a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition." Fed. R. Civ. P. 56(d). The accompanying Rickert Declaration lists Plaintiffs' diligent efforts to obtain discovery necessary to oppose the motion and Apple's refusal to provide the discovery, identifies the specific facts Plaintiffs hope to obtain from further discovery, states that the facts sought exist, and explains how the sought-after facts are essential to oppose summary judgment. *See Family Home & Fin. Ctr., Inc. v. Fed. Home Loan Mortgage Corp.*, 525 F.3d 822, 827 (9th Cir. 2008).[5] As Plaintiffs have met the requirements of Rule 56(d), the Court should deny Apple's motion or continue the motion for at least 90 days.

B. The Market Is a Product Market

First, *Newcal* directs the Court to determine whether the market in question is a "product market." *Id.*, 513 F.3d at 1045. As Plaintiffs' economist, Dr. Warren-Boulton, explains, for antitrust purposes, a "product market" unquestionably includes services. Rickert Decl., Ex. A at ¶¶ 10, 16. For example, Kodak monopolized the derivative markets for copier service and replacement parts; the Supreme Court upheld ***both*** of those aftermarkets. *Kodak*, 504 U.S. at 455-57 & 463. Likewise, the Ninth Circuit upheld the derivative market for photocopier service contract buyouts

[5] Courts liberally grant Rule 56(d) requests unless the plaintiff (1) fails to exercise due diligence in conducting discovery; (2) files an untimely request; or (3) fails to explain how additional facts would help oppose summary judgment. *See Freeman v. ABC Legal Servs., Inc.*, 827 F. Supp. 2d 1065, 1071 (N.D. Cal. 2011); *see also Burlington Northern Santa Fe R. Co. v. Assiniboine and Sioux Tribes of Fort Peck Reservation*, 323 F.3d 767, 773 (9th Cir. 2003).

and lease-end services in *Newcal*. *Id.*, 513 F.3d at 1043. Apple does not deny that the market for voice and data service is a ***product*** market. The first *Newcal* factor is unquestionably met.

C. The Market Includes All Reasonably Interchangeable Substitutes

Undoubtedly, the product market must include all economic substitutes. *Newcal*, 513 F.3d at 1045 (citing *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962)). However, *Newcal* also holds that the relevant market need include only ***reasonably interchangeable*** economic substitutes. *Id*. Therefore, the relevant market need only include "sellers or producers who have actual or potential ability to deprive each other of significant levels of business." *Id*. (quoting *Thurman Industries, Inc. v. Pay 'N Pak Stores, Inc*., 875 F.2d 1369, 1374 (9th Cir. 1989)). Because of technological features that Apple built into iPhones and the iPhone operating system, no competitor had any ability – actual or potential – to deprive AT&T of ***any*** business. Rickert Decl., Ex. A, ¶ 17.

Moreover, the Ninth Circuit also held in *Newcal* that "the law permits an antitrust claimant to ***restrict the relevant market to a single brand of the product at issue***." *Id.* at 1048 (emphasis added); *see also Apple I*, 596 F. Supp. 2d at 1303 (recognizing "legally cognizable aftermarket in a single brand's products") (citing *Newcal*). This is precisely what Plaintiffs have done, but Apple chides them for doing so.

These settled, black-letter legal principles are not open for dispute. Apple's argument that the relevant market in this case ***must*** be the entire market for cellular service disregards the most important parts of the Ninth Circuit's binding decision in *Newcal*, and in so doing, it invites the Court to commit reversible error. The Court should simply follow *Newcal*, not Apple's superficial, erroneous argument that the relevant market must include all cellular service providers.

In *Newcal*, the Ninth Circuit also held, "although the general market must include all economic substitutes, it is legally permissible to premise antitrust allegations on a submarket." *Id*., 513 F.3d at 1045. Whether a submarket (rather than the general market) is the relevant market for a particular product is highly technical and intensely fact-sensitive. As the Ninth Circuit noted in *Newcal*, the Supreme Court identified in *Brown Shoe* several "'practical indicia' of an economically distinct submarket: 'industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities,

distinct customers, distinct prices, sensitivity to price changes, and specialized vendors.'" *Newcal*, 513 F.3d at 1045 (quoting *Brown Shoe*, 370 U.S. at 325).

Two important practical indicia point to the iPhone voice and data service submarket as the relevant market in this case. *First*, the iPhone's peculiar characteristics and uses identify it as a distinct market. Pursuant to its secret agreement with AT&T, Apple designed and manufactured the iPhone so it could only be used on AT&T's cellular network. Unlike every other cellphone sold before it (as well as every other cellphone sold since the iPhone), the iPhone worked on only one network: AT&T's. Unlike all other cellphones, Apple also agreed not to provide the unlock codes for iPhones, depriving consumers of their contractual right to terminate their AT&T service plan and switch to another carrier. In addition, unlike every other cellphone ever sold, Apple took affirmative steps to "brick," or break, any iPhone that a consumer tried to use on another cellular network. These factors made iPhone voice and data service not merely distinct, but unique.

Second, iPhone voice and data service was highly unresponsive to price changes. As Prof. Wilkie has explained, AT&T used the iPhone to retain customers who were otherwise leaving it for other service providers. Before the iPhone was introduced in 2007, AT&T had [redacted] Rickert Decl., Ex. B, ¶ 15. After the iPhone was introduced, AT&T continued to rank last or next-to last in customer satisfaction among the four major carriers. *Id*., ¶ 38. However, its "churn" rate – the rate at which customers terminated their service with AT&T to move to another carrier – improved. *Id*., ¶¶ 57-58. Prof. Wilkie attributed these results to the "lock-in," which forced consumers to stay with AT&T no matter how dissatisfied they were with AT&T's service. *Id*., ¶ 59. Prof. Wilkie also explained that exclusivity also allowed AT&T to maintain its prices for cellular service even after other major providers reduced their service prices, reaping huge antitrust profits it shares with Apple. *Id*., ¶¶ 38, 64. Because iPhone consumers were "locked in" to AT&T, iPhone voice and data service was highly price inelastic.

Apart from its legal infirmities, Apple's argument that the relevant market must include all cellular service providers because AT&T's actively competed with the three other major domestic carriers in the wireless industry is also factually infirm. Whether theoretically competing products

are reasonable substitutes depends upon the "commercial realities" faced by consumers in the market. *Kodak*, 504 U.S. at 482. *See also* Rickert Decl, Ex. B, ¶¶ 30-41. These are intensely fact-specific, highly technical issues that cannot be decided as pure questions of law without the benefit of expert testimony (as Apple blithely attempts to do here). *See Hynix Semiconductor*, 2008 U.S. Dist. LEXIS 123822, at *42 n.13 (defining relevant market "likely requires expert testimony").

The Supreme Court made clear in *Kodak* that: (i) competitors' services are not reasonable substitutes for an aftermarket monopolist's services ***if consumers have no realistic option*** to choose a competitor's service, and (ii) the relevant market is composed only of those service providers who ***actually have realistic access*** to the market:

> The relevant market for antitrust purposes is determined by the choices available to Kodak equipment owners. . . . Because service and parts for Kodak equipment are not interchangeable with other manufacturers' service and parts, the relevant market from the Kodak equipment owner's perspective is composed of ***only those companies that service Kodak machines***.

Kodak, 504 U.S. at 481-82 (emphasis added and citation omitted). Because Kodak's anticompetitive policy prohibited other copier service and parts suppliers from competing with Kodak in the aftermarket for servicing Kodak-brand copiers, the Supreme Court held that "evidence that Kodak controls nearly 100% of the parts market and 80% to 95% of the service market, with no readily available substitutes . . . [was] sufficient" to define a relevant single-brand aftermarket under the "stringent monopoly standard of § 2." *Id.* at 481. *See Datel Holdings v. Microsoft Corp.*, 712 F. Supp. 2d 974, 986 (N.D. Cal. 2010) (permitting single brand aftermarket "where aftermarket restrictions are not disclosed or agreed to by the customers at the time of purchase of a product or service from the primary market") (citing *Kodak*, 504 U.S. 451).

The record is exactly the same in this case, and the outcome should be the same as well: summary judgment should be denied. Because of the technological features Apple designed and built into iPhones – and because it agreed not to make iPhones that worked on the competing CDMA cellular network – there were ***no reasonable interchangeable substitutes*** for AT&T's cellular service available to iPhone consumers. Apple concedes that AT&T controlled virtually 100% of the market for iPhone voice and data service during the relevant time period. *See* Def. Br. at 11 ("All of these iPhones were locked to the AT&T network and AT&T did not release unlock

codes for any of them.")[6]

Indeed, pursuant to its secret agreement with AT&T, Apple structured the market so there was no reasonably available substitute voice and data service for the iPhone.[7] Just as in *Kodak*, under these facts, the single-brand iPhone voice and data service aftermarket is appropriate. *See Kodak*, 504 U.S. at 481.[8]

Under *Kodak* and *Kodak II*, that is sufficient to make the sub-market of iPhone voice and data service a viable aftermarket. The relevant market does not include the entire cellular service market because Sprint, Verizon, or T-Mobile had no "actual or potential ability" to deprive AT&T of market share in the iPhone voice and data services market.

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[6] Apple claims that "because of T-Mobile's unusual spectrum, there were technological limitations that impeded the use of the iPhone on T-Mobile's network." Def. Br. at 6. Apple attempts to support this claim with even more cryptic hearsay from its own employee, Fenger: "Even though T-Mobile operated a GSM network and ultimately a 3G network, neither the original iPhone nor the iPhone 3G/3GS was fully compatible with T-Mobile's network." Fenger Decl., ¶ 7. It is unclear how iPhones were "impeded," what Mr. Fenger meant by "fully compatible," or why any of this is relevant to the summary judgment notion since Apple prevented iPhones from working on T-Mobile's network. Apple has made contrary statements in the past, making this a quintessential disputed fact. *See* Rickert Decl., Exs. D, ¶ 34 & E at 4.

[7] In *Newcal*, the Ninth Circuit held that monopolists, not the plaintiffs, define the relevant market. *Id.*, 513 F.3d at 1045 ("consumers do not define the boundaries of the market; the products or producers do") (citing *Brown Shoe*, 370 U.S. at 325).

[8] After affirming the reversal of summary judgment in Kodak's favor, the Supreme Court remanded *Kodak* for trial. On remand, the jury found "that Kodak used its monopoly over Kodak photocopier and micrographic parts to attempt to create and actually create a second monopoly over the service markets." *Image Tech. Servs., Inc. v. Eastman Kodak Co.*, 125 F.3d 1195, 1202 (9th Cir. 1997), *cert. denied*, 523 U.S. 1094 (1998) ("*Kodak II*"). Later affirming that verdict, the Ninth Circuit elaborated on the market definition principles applicable to single-brand aftermarket monopolization cases such as this. The Ninth Circuit defined the market "as the group of sellers or producers who have the '***actual or potential ability to deprive each other of significant levels of business***.'" *Id.* at 1203 (internal citation omitted) (emphasis added). The Ninth Circuit rejected Kodak's proposed market definition because it "ignore[ed] the 'commercial realities' faced by ISOs and end users," and reiterated that "the relevant market for service 'from the Kodak equipment owner's perspective is composed of ***only those companies that service Kodak machines***.'" *Id.* (quoting *Kodak*, 504 U.S. at 482) (emphasis added). The Ninth Circuit also repeated the Supreme Court's conclusion that whether Kodak had monopoly power in the service market was "'easily resolved,'" given that Kodak controlled "'80% to 95% of the service market, with no readily available substitutes." *Id.* at 1206 (quoting *Kodak*, 504 U.S. at 481). Following both *Kodak* and *Kodak II*, there is no principled basis to reach a contrary conclusion here.

Other *Kodak*-type aftermarket cases involving servicing of single-brand primary market products confirm the principle that only those competitors that could realistically service the aftermarket at issue are to be included within the market definition. Competitors foreclosed from that market – like Sprint, Verizon, and T-Mobile – are not within the market, contrary to Apple's assertion. *See Black Box Corp. v. Avaya, Inc.*, Civ. No. 07-6161 (GEB) (JJH), 2008 U.S. Dist. LEXIS 72821, at *31 (D.N.J. Aug. 29, 2008) (defendant did not even identify reasonably interchangeable substitutes to proposed aftermarket); *Xerox Corp. v. Media Scis. Int'l, Inc.*, 511 F. Supp. 2d 372, 384-86 (S.D.N.Y. 2007) (defining aftermarket for "sale of replacement solid ink sticks for use in Xerox phase change color printers" as limited to Xerox, excluding competitors Xerox foreclosed from the market); *cf. Jensen Enters. v. AT&T Inc.*, No. C 06-247 SI, 2007 U.S. Dist. LEXIS 52064, at *8-14 (N.D. Cal. July 6, 2007) (in primary market monopolization case, jury could limit relevant market to "one true purchaser of the AT&T vaults – AT&T").

Kodak and *Newcal* firmly support the single brand sub-market here, and none of the cases Apple cites supports its argument that Sprint, Verizon, and T-Mobile must be included in the relevant market.[9] None of those cases involved an aftermarket at all. Consequently, they did not concern, much less decide, whether a derivative aftermarket could be confined to a single brand of the primary product. Apple's irrelevant citations have no bearing on whether Plaintiffs have properly defined the aftermarket here.

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[9] Apple cites *SmithKline Corp. v. Eli Lilly & Co.*, 575 F.2d 1056, 1063 (3d Cir. 1978), for the unremarkable principle that "defining a relevant product market is a process of describing those groups of producers which, because of the similarity of their products, have the ability – actual or potential – to take significant amounts of business away from each other." Def. Br. at 14. Here, by virtue of the secret agreement between Apple and its co-conspirator, no competitor in the cellular service market could take ***any*** iPhone business away from AT&T. AT&T was the ***only*** provider – "actual or potential" – of voice and data service for the iPhone. Nor does this case concern the type of "exclusive distribution contract" presented in *Paddock Publ'ns v. Chi. Tribune Co.*, 103 F.3d 42, 46-47 (7th Cir. 1996), where the court noted that "vendors can and do sell news and features to multiple customers, and customers can and do buy news and features from multiple vendors." In *Paddock*, despite the contract, "someone with a better offer can get or sell news on short notice." *Id.* at 47. There was no "foreclosure" from the market in that case as there is in this case. Similarly, *Omega Envtl. v. Gilbarco, Inc.*, 127 F.3d 1157, 1162 (9th Cir. 1997), cited by Apple, was an exclusive dealing case brought under section 3 of the Clayton Act, so the principles concerning exclusive distribution agreements discussed in it are inapplicable here.

D. Apple's Market Power Did ***Not*** Arise Solely From Any Contractual Rights that Consumers Knowingly Gave to It

In *Newcal*, the Ninth Circuit held that an antitrust claimant may not rely upon "market ***power*** that arises solely from contractual rights that consumers knowingly and voluntarily gave" to the monopolist. *Id*., 513 F.3d at 1048 (emphasis original). This factor permits "an inquiry into whether a consumer's selection of a particular brand in the competitive market is the functional equivalent of a contractual commitment." *Id*. at 1049. Under this standard, at trial the jury will be asked to determine whether consumers bought their iPhones in the competitive cellular device market knowing they were giving Apple "an agreed-upon right to monopolize" them in the monopolized aftermarket for iPhone voice and data service. *Id*.

The crux of Apple's argument is that Plaintiffs consented to Apple's monopoly in the aftermarket for iPhone voice and data service when they bought their iPhones. Apple is wrong, both factually and legally.

1. Apple Has No Express Contractual Right to Monopolize the Aftermarket

Nothing in any agreement between Apple and its customers or between AT&T and those customers gave Apple or its co-conspirator the right to monopolize consumers' choice of iPhone voice and data service providers in the aftermarket. Apple has not even submitted any of its own agreements with its customers. Instead, Apple relies upon AT&T's Wireless Service Agreement ("WSA"), which it concedes "all iPhone purchasers who activated their iPhones for use in the United States entered into." *See* Apple's Separate Statement, Issue 2 Fact 3; Apple RJN, Ex. C. They did so ***after*** they bought their iPhones and became "locked in" to AT&T. *See* Yates Decl., Exs. A, ¶ 5 & B, ¶ 5.

AT&T's WSA says ***nothing*** about the secret exclusivity agreement or any restraints on a consumer's ability to buy service in the aftermarket. No provision in the WSA gives Apple or AT&T the power to bind consumers in the aftermarket. Apple has not pointed to any provision in any agreement (other than the secret agreement between Apple and AT&T) even arguably doing so. In *Newcal*, IKON's market power was derived from its "relationship with" and "special access" to its consumers. *Newcal*, 513 F.3d at 1050. As in this case, "no provision of IKON's initial contract [gave] it the power . . . to extend the contract beyond 60 months . . . or to prevent

competition in lease-end services." *Id*. Under *Newcal*, Apple's market power did not arise from any contractual rights that Plaintiffs or the other iPhone consumers gave to it.

2. Consumers Did *Not* Knowingly Agree to Use AT&T in the Aftermarket

Despite Apple's and AT&T's choice ***not*** to obtain any express contractual right to monopolize the iPhone voice and data aftermarket from their customers, Apple insists it was entitled to do so, arguing that the purchase of an iPhone in the primary market was "the functional equivalent of a contractual commitment" to be bound and constrained in the secondary sub-market for iPhone voice and data service. Absent an express contractual right to monopolize, no court ever has accepted Apple's "reasonably discoverable" standard as a proxy or substitute for the Ninth Circuit's "knowing and voluntary" standard of *Newcal*.[10] And no court ever has dismissed an antitrust claim after finding the "functional equivalent of a contractual commitment" to use the monopolized product and pay supra-competitive prices in the aftermarket from "reasonably discoverable" information. In the only case Apple has cited on this point, *Universal Avionics Sys. Corp. v. Rockwell Int'l Corp*., 184 F. Supp. 2d 947, 958 (D. Ariz. 2001), the defendant's standard contract expressly ***permitted*** its customers to buy competing products in the aftermarket and obligated the defendant to ***facilitate*** such aftermarket purchases at a customer's request.

a) The Fully Integrated WSA Is Not the Functional Equivalent of a Contractual Commitment to Use AT&T or Pay Supra-Competitive Prices in the Aftermarket

There are two insurmountable problems with Apple's argument. *First*, AT&T's WSA was fully integrated.[11] Such clauses bar contract terms that are not included in the agreement itself,

[10] Apple and AT&T ***never*** told iPhone consumers that: (i) they would have to use AT&T's service for five-years; (ii) their contractual right to terminate their AT&T plan at any time was illusory; or (iii) they were waiving their right to switch service to other carriers. *See Red Lion Med. Safety, Inc. v. Ohmeda, Inc.*, 63 F. Supp. 2d 1218, 1232 (E.D. Cal. 1999) (summary judgment denied where defendant "did not inform its equipment customers of its restrictive parts policy prior to sales of equipment"). Under *Newcal*, whether consumers could have "reasonably discovered" Apple's monopoly and pay supra-competitive prices to AT&T is ***irrelevant***. *Newcal* did not establish a "reasonable discoverability" standard, it established a "knowing consent" standard, and Apple's interpretation is pure wishful thinking.

[11] The WSA includes a merger clause providing as follows: "This Agreement, the signature or rate summary sheet, the terms included in the rate brochure(s) describing your plan and services,

including any prior agreed-upon terms.[12] Any "functional equivalent of a contractual commitment" that may have been implied by a consumer's decision to buy an iPhone was rescinded when she later accepted the WSA, which included a merger clause and imposed no aftermarket restraints.

Indeed, Section 4 of the WSA, which gave iPhone consumers the right to terminate their iPhone voice and data service before the end of the two-year term by paying an early termination fee (*see* Apple RJN, Ex. C at 9), implied exactly the opposite: that they could switch to a different carrier, just as they could for every cellular handset except for the iPhone. Prof. Wilkie explained that the "information" supposedly available in the public was inconsistent with the early termination provision and was, from an economic perspective, meaningless. *See* Rickert Decl., Ex. D, ¶ 18. Whether Plaintiffs or other iPhone consumers functionally contractually committed themselves to using AT&T and waived their early termination rights simply by purchasing an iPhone is a vigorously disputed question that cannot be decided on summary judgment.

b) Market Imperfections Prevented Consumers from Functionally Committing to Use AT&T or Pay Supra-Competitive Rates in the Aftermarket

Second, market imperfections prevented consumers from discovering, as they were shopping for cellphones, that buying an iPhone would include a *de facto* commitment to use only supra-competitively voice and data service from AT&T until Apple and its co-conspirator decided otherwise. *See Kodak*, 504 U.S. at 473-78; *Newcal*, 513 F.3d at 1048-49. In *Kodak*, the Supreme Court discussed several market imperfections: (a) high switching costs; (b) the relatively high price of equipment in the primary market; (c) high information costs; (d) some consumers' decision not

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terms of service for products and services not otherwise described herein that are posted on applicable AT&T websites, and any documents expressly referred to herein or therein, ***make up the complete agreement between you and AT&T and supersede any and all prior agreements and understandings relating to the subject matter of this Agreement***." Apple's RJN, Ex. C (ECF No. 82-3) at 14 (emphasis added).

[12] *See, e.g.*, Restatement of Contracts (Second) § 213 ("A binding integrated agreement discharges prior agreements to the extent that it is inconsistent with them.") "Ordinarily, a merger clause provision indicates that the subject agreement is completely integrated." *Tempo Shain Corp. v. Bertek, Inc.*, 120 F.3d 16, 21 (2d Cir. 1997). "The presence of an integration clause strongly supports a conclusion that the parties' agreement was fully integrated." *M.A. Mortenson Co. v. Timberline Software Corp.*, 140 Wn. 2d 568, 579-80 (2000) (internal quotation omitted).

to acquire and process that information; and (e) some consumers are more concerned about equipment capability than service costs. *Id.*, 504 U.S. at 474-77.[13] The market imperfections created a triable question of fact whether competition in the primary market constrained Kodak's anticompetitive behavior in the secondary market, and for that reason the Supreme Court affirmed the denial of summary judgment for Kodak. *Id*. at 477. *See also Newcal*, 513 F.3d at 1048-49.

Such market imperfections are equally present in this case, if not more so. As in *Kodak*, those market imperfections likewise create a triable question of fact whether competition in the primary market (*i.e.*, the cellphone market) constrains anticompetitive behavior in the secondary sub-market (*i.e.*, the iPhone voice and data service market).

Before addressing the specific "disclosures" at issue, it is important to note that Apple's argument that iPhone consumers "knowingly and voluntarily" agreed to monopolistic restraints in the aftermarket solely because of "reasonably discoverable" public information, without having to consider whether any one of them actually saw, understood, or consented to the information, is an abrupt reversal of their own prior argument. In *Apple I*, Apple vehemently opposed class certification, insisting that what each iPhone consumer knew about the aftermarket restraint ***was a necessary individual inquiry***:

> Plaintiffs claim that disclosures of a "multi-year" exclusive deal failed to convey that AT&T would be the only choice for iPhone service after the first two years. ***Whether any given consumer failed to understand that is an individualized issue***. Plaintiffs claim that consumers "expect" to be able to get unlock codes so they can move their cellphones to new carriers. Whether any given consumer shares that mindset ***is an individual issue***.

Rickert Decl., Ex. F at 4-5 (emphasis added).[14]

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[13] Acquiring information about "the total cost of the 'package' – equipment, service and parts – at the time of purchase . . . is expensive. If the costs of service are small relative to the equipment price, or if consumers are more concerned about equipment capabilities than service costs, they may not find it cost efficient to compile the information." *Kodak*, 504 U.S. at 473-76 (footnotes and citations omitted). "If the cost of switching is high, consumers who already have purchased the equipment, and are thus "locked in," will tolerate some level of service-price increases before changing equipment brands." *Id.*; *see also id.* at 480-86.

[14] "[T]he *Kodak* court did not examine individual consumers' knowledge in finding that they 'did not knowingly enter a contract that gave Kodak the exclusive right to provide parts and services for the life of the equipment.'" *In re Apple & AT&T Antitrust Litig.*, No. C 07-05152 JW,

If, as Apple now argues, iPhone consumers knowingly and voluntarily accept whatever information may be in the public domain – whether in FAQs or a press release from Apple or in a speculative media report – then what they "knew" about the exclusive deal would not have raised any individual questions. Apple's new argument implies that consumers know everything. Plaintiffs do not agree with Apple's former argument that what consumers knew or intended is an individual inquiry, but its former argument demonstrates the flaw in Apple's current argument. The two arguments are logically inconsistent.

Apple's "reasonably discoverable" argument assumes that iPhone consumers knew there was reason to seek information about AT&T's exclusivity before buying iPhones, assumes they cared enough to search for the information, assumes iPhone consumers knew where and how to look for the information – much of which was obscured or buried in pages of fine print and much of which was third-party speculation rather than factual disclosures – before buying iPhones, assumes they were willing to take the time to search for the information, and assumes it would have influenced consumers who were conditioned to buy iPhones based on the "revolutionary" and "breakthrough" technology that Apple marketed heavily. Apple's "reasonably discoverable" argument also assumes that iPhone consumers could or would have done something with the information given the high prices they paid for iPhones and given the high cost of terminating their AT&T contracts – essentially, giving up the expensive iPhones. All those assumptions fly in the face of economic reality (*i.e.*, market imperfections).

These are the market imperfections in this case:

(a) Relatively high price of an iPhone. Although consumers were compelled to accept a standard two-year service plan from AT&T, iPhones were sold at full retail prices of $499 or $599

2010 U.S. Dist. LEXIS 98270, at *36 (N.D. Cal. July 8, 2010) (quoting *Newcal*, 513 F.3d at 1048). "[T]he *Newcal* court explained that this conclusion was based on, not an individual inquiry, but the fact that 'the simple purchase of Kodak-brand equipment . . . did not constitute a binding contractual agreement to consume Kodak parts and services in the aftermarket.'" *Id.* at *35 (quoting *Newcal* at 1048). The question here is "whether the purchase of an iPhone constitutes a binding contractual agreement to [use] . . . AT&T's voice and data services in the aftermarket" for five years. *Id.* at *35-36. The answer, of course, is "no."

each. Every other cellphone was sold at a discounted price. Even after iPhones were subsidized, like every other cellphone, their cost was still relatively high. This high initial equipment cost helped to lock consumers in to AT&T.

(b) High switching costs. Because Apple built technological locks into each iPhone, consumers could not switch to another carrier, either by satisfying their initial two-year service commitment or by paying the early termination fee. The switching cost included the full iPhone purchase price (without the unlock codes, it was inoperable on any other cellular network) plus either the full two-year service charge or the early termination fee. Even if consumers wished to revoke their service plans and return the iPhones, they faced a 10% "restocking" fee (*see* Rickert Decl., Exs. H & I), which was also high given the initial price of the equipment.

(c) High information costs. As discussed below, the information Apple has cited had high acquisition costs. For any consumers who knew enough to look for it, real information was not readily available. In fact, Apple points to just one single "disclosure" of the fact that it would not provide unlock codes to iPhone consumers – a stunning departure from normal practice in the cellphone industry – in its Frequently Asked Questions supposedly "available" during the iPhone activation process (which took place ***after*** the purchase of an iPhone) and on its website. Def. Br. at 9. Finding that information would have been no easy matter.

(d) Many consumers decided not to acquire and process the information. Empirical evidence suggests that many consumers did not know about or understand the "information" that Apple cites. Plaintiffs, for example, were unaware of it. *See* Yates Decl., Ex. A, ¶ 10 & Ex. B, ¶ 10. There were not unique in that regard. Apple has not provided any information substantiating that the information was widely acquired or widely understood.[15]

(e) Many consumers were more concerned about the iPhone's capability than AT&T's service costs. Based on market information collected and reviewed by Prof. Wilkie, this was the most significant market imperfection. As discussed above, AT&T [redacted]

[15] As discussed above and more fully in the accompanying Rule 56(d) motion for additional discovery, Plaintiffs sought discovery related to consumers' actual awareness and understanding of the purported disclosures. Apple refused to produce any such discovery.

[redacted] Rickert Decl., Ex. B, ¶ 64.

iPhone purchasers could not assess their total lifecycle costs because they were not told they would have to use AT&T for five years and, more importantly, they had no ability to know when they bought their iPhones that they would have to pay monopoly prices for iPhone voice and data plans when they were forced (due to Apple and AT&T's secret exclusivity agreement) to renew their service contracts with AT&T. Thus, Apple and AT&T were able to exploit those consumers because they were "locked in" to their expensive iPhones and had little choice but to pay AT&T's supra-competitive prices, and switching to another smartphone would have cost them even more.[16] *Kodak*, 504 U.S. at 476. In other words, "[c]ompetition in the initial market [did not] suffice to discipline anticompetitive practices in the aftermarket." *Newcal*, 513 F.3d at 1050. This is the precise factual context in which *Kodak* and *Newcal* held that a Section 2 aftermarket is viable and adequately pleaded. *See also Red Lion*, 63 F. Supp. 2d at 1232 ("The disparity in cost between anesthesia machines and service on those machines also increases the likelihood of lock-in.")

Finally turning to the substance of Apple's so-called "disclosures" about the exclusivity agreement, particularly the vague public statement about its secret "multi-year" agreement with AT&T, Apple argues that "[i]nformation about exclusivity was accessible to consumers . . .

[16] Apple suggests that if Plaintiffs had uncovered, after their purchase of the iPhone, the unusual terms of its exclusive deal with AT&T and its refusal to follow industry practice and unlock their phones (despite Apple's and AT&T's agreement to keep this information highly confidential, *see* § IV.B., *supra*), they simply could have "returned their iPhones and terminated their AT&T service contract." Def. Br. at 11 n.2. Apple merely hints at the lock-in costs that could be applied, including the $175 early termination fee if Plaintiffs failed to uncover these secrets within 30 days, and the $36 activation fee for each new line and $26 for each new Family Talk line if consumers did not learn of the secret deal within three days. *See id.*; Apple RJN, Ex. C at 9-10. And Apple ignores the restocking fees that were charged when the iPhone was returned, assuming the consumer returned it within 14 days. *See* Rickert Decl., Exs. H & I. For an iPhone which cost as much as $500 or $600, those switching costs created a significant lock-in.

beginning early in 2007 and throughout the alleged class period." *See* Def. Br. at 21. There is no legitimate reason why Apple did not disclose the duration and terms of AT&T's exclusivity before the start of the Class Period on October 19, 2008. By that date, as Apple concedes, the secret exclusivity agreement had been amended (in June 2008) and it would end on December 31, 2010. *See* Def. Br. at 7; Fenger Decl., Ex. D at 5. Whether AT&T's exclusivity in fact ended on that date is a vigorously disputed question of fact (*see* Rickert Decl., Ex. J) and Apple kept this term secret throughout most of the pendency of this case.

Apple also argues that some consumers, ***after*** buying an iPhone, may have seen the vague, tiny print on the bottom of the box stating that a "service plan with AT&T" was "required for cellular network capabilities on expiration of initial two-year agreement." Def. Br. at 9, Fenger Decl., Ex. B. The virtually unreadable, post-point of purchase statement, micro-printed on the bottom of the iPhone box (*see* Rickert Decl., Ex. K), is nothing more than a tacit admission that its five-year deal had to be disclosed and reflects, at best, Apple's half-hearted – and inadequate – attempt to feign disclosure. *See Datel Holdings*, 712 F. Supp. 2d at 989 (denying motion to dismiss where scope of restrictions in aftermarket for "X-Box" video game accessories and add-ons was ambiguous: "[a]t the very least, Plaintiff has shown an ambiguity in the relevant contract language which counsels against granting a motion to dismiss premised on Defendant's contested interpretation of the provision, ***which customers may not have understood***") (emphasis added); Cal. Civ. Code § 1654 (contract ambiguities are interpreted against the drafter). Similarly, the activation process for the iPhone, which Apple claims informed iPhone purchasers that their iPhone could not be unlocked for use on other networks, *see* Def. Br. at 9, also took place ***after their purchase*** and therefore could not have formed the basis of a contractual commitment to use AT&T for five years, especially since it did not disclose the five-year term or the fact that iPhone consumers would not get unlock codes even if they paid their early termination fees.

Apple's and AT&T's own press releases also used vague language such as the above-mentioned claim that AT&T would be the exclusive carrier of the iPhone for a "multi-year" period. *See supra*. But the existence of these press releases, which did not inform iPhone purchasers that they would have to use AT&T's service for five years and that, therefore, their contractual right to

terminate their AT&T plan at any time was illusory, is not the "functional equivalent" of a binding contract, certainly not as a matter of law. *Newcal*, 513 F.3d at 1049. AT&T's "market power in [iPhone voice and data] services, therefore, did not arise from a knowing contractual (or quasi-contractual) arrangement." *Id.* at 1048.

Apple's contention that a handful of speculative and vaguely worded newspaper articles regarding the exclusivity agreement and unlocking of the phone demonstrate the functional equivalent of a contractual agreement is baseless under *Newcal* and *Kodak*, but as importantly, is easily rebutted on summary judgment by providing articles to the contrary, of which there are many. *See* Rickert Decl., Ex. B at 6, ¶ 8 n.3; *id*., Ex. L.

Apple finally argues that the mere filing and public availability of the complaint in *Apple I*, at least for those with access to Pacer, "surely establishes that this aftermarket restriction was reasonably discoverable to consumers in this later, third case's alleged class period." Def. Br. at 22.[17] But even putting aside that this is an exquisitely fact-specific question for which Apple has both provided no evidence or expert testimony ***and*** refused to provide any discovery, *see* §VI.A., *supra*, as late as May 12, 2010, nearly *three years* after the *iPhone I* complaint was filed, an antitrust expert reached exactly the ***opposite*** conclusion. *See* Rickert Decl., Ex. L.[18]

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[17] For legal support on this point Apple cites only to inapposite, out-of-Circuit cases that discuss the standard for "inquiry notice" in the context of a statute of limitations defense, which is not at issue here. *See Staehr v. The Hartford Fin. Servs*., 547 F.3d 406, 435 (2d Cir. 2008) (in securities fraud case, the filing of previous lawsuit containing similar key allegations did not trigger inquiry notice for statute of limitations defense); *LC Capital Partners, LP v. Frontier Ins. Group, Inc*., 318 F.3d 148, 155 (2d Cir. 2003) (in securities fraud case, inquiry notice for statute of limitations defense was triggered by multiple reserve charges taken by company); *Landow v. Wachovia Secs., LLC*, 966 F. Supp. 2d 106, 119 (E.D.N.Y. 2013) (court took judicial notice of media reports and court filings to determine that plaintiff had been placed on inquiry notice and that claims were barred by the statute of limitations).

[18] "Ever since Apple Inc. unveiled the iPhone in 2007, ***users have wondered*** how long the company and its U.S. partner, AT&T Inc., would be locked in an exclusive relationship. Despite reports this week claiming that conclusive evidence of a five-year pact is contained in court documents, ***they're still wondering***. According to an expert who has reviewed documents from an ongoing class-action antitrust lawsuit against both companies, it's not clear how long Apple's iPhone is married to AT&T's network. . . . One thing is clear, said Sterling: ***Court documents in a nearly three-year-old lawsuit do not prove that Apple and AT&T have a deal that lasts until 2012***." (Emphasis added).

Apple's assertion that the purported "disclosures" establish as a matter of law that Plaintiffs "***knowingly contracted***" to use AT&T for five years is unsupported by any authority and borders on frivolous. At the very least, there is a genuine dispute of material fact whether iPhone consumers "knowingly contracted" to use AT&T as their exclusive voice and data service provider, both domestically and abroad, for five years when the WSA itself did not include such a constraint. *See Datel Holdings*, 712 F. Supp. 2d at 990 (denying motion to dismiss because "shopping for competing products in the Aftermarket is not clearly precluded by any contractual provision into which customers knowingly and voluntarily entered"). Plaintiffs already clearly stated that they did not do so. *See* Yates Decl., Exs. A & B.

Apple's argument is not based on Ninth Circuit law. The cases from other circuits on which Apple relies are inapposite because they adopt a restrictive view of *Kodak* that has been rejected in the Ninth Circuit. *See PSI Repair Services v. Honeywell, Inc.*, 104 F.3d 811, 820-21 (6th Cir. 1997); *SMS Sys. Maintenance Servs v. Digital Equip. Corp.*, 188 F.3d 11, 19 (1st Cir. 1999).[19] While other jurisdictions may require proof that a defendant "changed a generally known policy" towards its already "locked in" customers to establish a *Kodak* claim, the Ninth Circuit requires only that consumers had not "knowingly contracted" to buy exclusively from the defendant in the aftermarket. *Newcal*, 513 F.3d at 1049. *See Red Lion*, 63 F. Supp. 2d at 1230-31 ("to the extent that the Ninth Circuit has considered the *Honeywell* aftermarket theory, it appears to have rejected it"). *Kodak* itself "does not hold that an aftermarket claim is contingent on a change in a manufacturer's parts or service policy; it simply acknowledges that Kodak's ability to make a policy change without suffering losses in the equipment market was evidence that the service market was not disciplined by competition in the equipment market." *Id*.

[19] *Metzler v. Bear Auto. Serv. Equip. Co.*, 19 F. Supp. 2d 1345, 1359 (S.D. Fla. 1998), is distinguishable because in that case, "the evidence, in substance, establishe[d] that customers knew or could readily obtain information about the defendants' parts and service policies. Customers unhappy with those policies could purchase equipment from other manufacturers. And customers were free to purchase their external parts and some internal parts from sources other than the defendants." Here, the terms of the deal between Apple and AT&T were not "readily" available, and consumers could not purchase iPhone voice and data service except from AT&T.

Even if the Court were to disregard *Newcal* and apply another circuit's "change in policy" requirement, Plaintiffs still would prevail because the secret five-year deal ***was*** a change in policy that affected only the "locked in" iPhone customers. Except for iPhone consumers, AT&T (and all other cellular service providers) allowed all its other customers to switch carriers at the end of their two-year service period or by paying an early termination fee.[20] Only iPhone customers were singled out for "special" treatment under the terms of Apple's secret deal with AT&T: they alone could not get unlock codes and switch carriers.[21] This change to the generally-known – and otherwise universal – policy permitting cellphone consumers to switch carriers after two years or after paying an early termination fee – was never disclosed to iPhone consumers. If Apple now argues that purchasers could have uncovered vague statements to this effect had they thought to dig through Apple's website or ask an AT&T store employee to confirm whether the *status quo* still held, they would have had no reason to think this was the case and would not likely have been told that such a sea change had occurred. In any event, this raises a genuine issue of material fact requiring discovery that Apple has refused to provide.

And if Apple convinces the Court that *Newcal's* "functional equivalent of a contractual commitment" standard is met by any "reasonably discoverable" non-contractual "disclosures," Apple certainly has not shown there is no genuine dispute of material fact as to whether the particular "disclosures" in this case were the "functional equivalent of a contractual commitment."

E. Whether iPhone Purchasers Actually Paid Monopoly Prices is Not a Market Definition Issue

Apple incorrectly argues that an aftermarket antitrust claim fails where there is no "post-lock-in price increase." Def. Br. at 25. Whether iPhone consumers actually paid monopoly prices is a question of damages, ***not*** a market definition issue. Apple's argument goes beyond the narrow

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[20] The WSA gave all consumers the right to terminate their service before the end of the two-year term. Apple RJN, Ex. C at 9.

[21] The widely known policy that was applicable to all other cellphone consumers – [redacted] *See, e.g.,* Rickert Decl., Ex. B, ¶ 53 [redacted].

scope of this Court's Order and should be stricken. *See* ECF No. 72 (permitting motion "solely on the issue of whether the complaint alleges a relevant market"); *see also ABC Rail Prods. Corp. v. Progress Rail Servs. Corp.*, No. 98 C 3663, 1998 U.S. Dist. LEXIS 14510, at *8 (N.D. Ill. Sept. 10, 1998) (evidence required for issues of market definition, market share, and market power each "distinct"). In any event, Apple deliberately tries to mislead the Court, knowing that Plaintiffs do not contend that AT&T earned supra-competitive profits by charging more for iPhone voice and data service than it charged for other cellular service. Rather, Apple's secret exclusive agreement with AT&T enabled AT&T to maintain supra-competitive prices ***across the board for all its customers*** as other carriers cut their rates. As Plaintiffs' expert Prof. Wilkie explained in *Apple I*, by locking in iPhone consumers, AT&T was able to [redacted] *See* Rickert Decl., Ex. B, ¶¶ 14-17, 29, 37-39, 57-59; *id.*, Ex. D, ¶¶ 24, 28-33. [redacted] *Id.* Apple does not address Plaintiffs' proof of damages resulting from AT&T's supra-competitive pricing. Apple's damages argument is a pure red herring that should be disregarded.

VII. CONCLUSION

For these reasons, following the roadmap from *Newcal* rather than Apple's convoluted legal analysis or fanciful factual arguments, Apple's summary judgment motion must be denied.

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