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18 UNITED STATES DISTRICT COURT
 19 NORTHERN DISTRICT OF CALIFORNIA
 20 SAN JOSE DIVISION

21 THE APPLE IPOD ITUNES ANTI-TRUST)	Lead Case No. C-05-00037-JW(RS)
22 LITIGATION)	
23 _____)	<u>CLASS ACTION</u>
24 This Document Relates To:)	DIRECT PURCHASER PLAINTIFFS'
25 ALL ACTIONS.)	RESPONSE TO THE COURT'S ORDER
26 _____)	REGARDING CONSOLIDATION

27 JUDGE: Hon. James Ware
 28 DATE: May 12, 2008
 TIME: 10:00 a.m.
 CTRM: 8-4th Floor

1 Plaintiffs Melanie Tucker, Somtai Troy Charoensak, and Mariana Rosen (collectively,
2 “Direct Purchaser Plaintiffs”), as plaintiffs and proposed class representatives in *The Apple iPod*
3 *iTunes Anti-Trust Litig.*, No. C-05-00037-JW (N. D. Cal.) (“*Apple Anti-Trust*”), hereby respectfully
4 respond to the Court’s April 22, 2008, Order Directing All Parties to Submit Briefing re:
5 Consolidation of the Present Action with C 05-00037 (“Order”). Direct Purchaser Plaintiffs agree
6 that consolidation of *Apple Anti-Trust* with *Somers v. Apple, Inc.*, No. C-07-06507-JW (N. D. Cal.)
7 (“*Somers*”), is proper for purposes of pretrial discovery and scheduling, but oppose consolidation for
8 purposes of pleading, class certification, summary judgment and (at least at this early stage) trial.

9 **I. Complete Consolidation Is Not Warranted Under Rule 42(a)**

10 Rule 42(a) authorizes consolidation of “actions . . . involv[ing] a common question of law or
11 fact.” Fed. R. Civ. P. 42(a); *see also Paxonet Commc’ns, Inc. v. Transwitch Corp.*, 303 F. Supp. 2d
12 1027, 1028 (N.D. Cal. 2003); *Enterprise Bank v. Saettele*, 21 F.3d 233, 235 (8th Cir. 1994). A
13 district court “has broad discretion under this rule to consolidate cases pending in the same district.”
14 *Investors Research Co v. U.S. District Court*, 877 F.2d 777 (9th Cir. 1989). However, the court
15 “must examine ‘the special underlying facts’ with ‘close attention’ before ordering a consolidation.”
16 *In re Repetitive Stress Injury Litig.*, 11 F.3d 368, 373 (2d Cir. 1993) (citation omitted). This
17 involves weighing “the interest in judicial convenience against the potential for delay, confusion, and
18 prejudice caused by consolidation.” *Southwest Marine, Inc. v. Triple A Mach. Shop, Inc.*, 720 F.
19 Supp. 805, 807 (N.D. Cal. 1989).

20 Here, the two actions previously consolidated as *Apple Anti-Trust* were brought on behalf of
21 a class of direct purchasers: individuals and companies that purchased iPod portable digital music
22 players and iTunes online digital music directly from Apple. By contrast, *Somers* seeks to represent
23 a class of indirect purchasers, consumers who purchased iPod portable digital music players
24 downstream. While there is no question the related actions share some “common questions of law or
25 fact” as to Apple’s alleged anticompetitive practices, there remain potential conflicts of law and fact
26 between the classes of direct and indirect purchaser plaintiffs such that complete consolidation
27 would cause delay, confusion and prejudice.

1 For example, indirect purchasers uniquely face the “pass-on” defense. *Illinois Brick Co. v.*
2 *Illinois*, 431 U.S. 720, 730-31 (1977); *see also Campos v. Ticketmaster Corp.*, 140 F.3d 1166, 1171
3 (8th Cir. 1998) (applying direct purchaser rule to monopoly claims by indirect purchasers). This
4 typically requires proof by indirect purchasers that supracompetitive prices paid by direct purchaser
5 plaintiffs were passed-on in whole or in part to indirect purchasers. *See Sports Racing Servs. v.*
6 *Sport Car Club of Am.*, 131 F.3d 874, 890 (10th Cir. 1997) (noting conflict in recovery between
7 indirect and direct plaintiffs). Thus, the burdens and interests of indirect and direct purchasers
8 remain distinct, eliminating any possible benefit a consolidated complaint may provide to the parties
9 or the Court.

10 Accordingly, separate complaints for direct and indirect purchaser claims are the norm in
11 consolidated federal antitrust actions. *See, e.g., In re Static Random Access Memory (SRAM)*
12 *Antitrust Litig.*, MDL No. 1819, 2008 WL 426522, at *1 (N.D. Cal. Feb. 14, 2008) (separate
13 consolidated amended complaints filed for direct and indirect purchasers); *In re Flash Memory*
14 *Antitrust Litig.*, No. C 07-0086 SBA, 2008 WL 62278, at *1 (N.D. Cal. Jan. 4, 2008) (same); *In re*
15 *Graphics Processing Units Antitrust Litig.*, _____ F. Supp. 2d _____, No. C 06-7417 WHA, 2007
16 WL 3342602, at *2 (N.D. Cal. Nov. 7, 2007) (same); *see also In re Hydrogen Peroxide Antitrust*
17 *Litig.*, MDL No. 1682, 2006 WL 999955 (E.D. Pa. Apr. 11, 2006) (all antitrust actions were
18 consolidated into multidistrict litigation, but then divided into two actions, one for direct purchasers
19 and one for indirect purchasers).

20 Additionally, as a practical matter, Direct Purchaser Plaintiffs previously defeated motions to
21 dismiss in *Tucker v. Apple Computer, Inc.*, 493 F. Supp. 2d 1090 (N. D. Cal. 2006), and in *Slattery v.*
22 *Apple Computer, Inc.*, No. C 05-00037 JW, 2005 WL 2204981 (N. D. Cal. Sept. 9, 2005).¹ Direct
23 Purchaser Plaintiffs would be prejudiced if forced to face the motion to dismiss stage again through
24 the filing of an amended complaint consolidating direct and indirect purchaser claims.

25
26
27 ¹ Plaintiff Slattery withdrew his claims and was replaced as a class representative by Somtai
28 Troy Charoensak and Mariana Rosen.

1 For similar reasons, Direct Purchaser Plaintiffs also contend consolidation is improper at the
2 class certification stage. Issues of injury and damages for direct and indirect purchasers remain
3 unique and require separate briefing. Direct and indirect purchaser classes may also confront unique
4 defenses.

5 Furthermore, Direct Purchaser Plaintiffs do not want to further delay class certification.
6 Direct Purchaser Plaintiffs are set to file their class certification brief in May 2008, whereas the
7 *Somers* action has a current class certification date of November 3, 2008. There is no reason to
8 delay Direct Purchaser class certification. Nor is there any benefit to the Court in doing so; to the
9 contrary, it is more likely that class certification issues decided in *Apple Anti-Trust* would actually
10 aid the Court in deciding issues in the *Somers* action.

11 Similarly, while the issue may be premature at this stage, Direct Purchaser Plaintiffs at this
12 point also believe a consolidated trial would be improper and unwarranted. “Although,
13 consolidation may enhance judicial efficiency, ‘considerations of convenience and economy must
14 yield to a paramount concern for a fair and impartial trial.’” *Repetitive Stress Injury Litig.*, 11 F.3d
15 at 373. Where major conflicts exist, the court should avoid consolidation of the actions. *See Fed. R.*
16 *Civ. P. 42(b); see also Manual Complex Litigation (Fourth) §11.631 (2004) (“MCL 4th”)*. Indeed,
17 presentation of direct and indirect purchasers’ injury and damages before one jury may create the
18 suggestion that Direct Purchaser Plaintiffs suffered no actual harm because they were able to pass-on
19 any illegal overcharge to indirect purchasers. *See Illinois Brick*, 431 U.S. at 735.

20 Still, to avoid prejudice the Court may consolidate only common issues for trial and sever
21 non-common issues, such as causation and damages, for separate resolution. *MCL 4th §11.631*.
22 Perhaps as the parties move closer to trial in the respective actions, some benefit from limited
23 consolidation on certain common issues may become apparent. But for now, in order to avoid
24 confusion with the jury and prejudice to both direct and indirect purchaser classes, the unique factual
25 and legal issues raised in the separate actions should not be consolidated for trial.

1 **II. Consolidation Is Warranted Under Rule 42(a) For Purposes of Scheduling**
2 **and Pretrial Discovery**

3 On the other hand, Direct Purchaser Plaintiffs agree that consolidation is appropriate for
4 scheduling and pretrial discovery. Doing so would advance the ultimate purpose of consolidation
5 under Rule 42 – avoiding unnecessary duplication in discovery or procedure without prejudicing the
6 parties. *In re Prudential Sec. Inc. Ltd. P'ships Litig.*, 158 F.R.D 562, 571 (S.D.N.Y. 1994) (purpose
7 of consolidation is to streamline and economize pretrial proceedings as to avoid duplication and
8 effort). As discussed above, the focus of both actions will be the common conduct of Apple giving
9 rise to the antitrust tying and monopoly claims. Much of the discovery already served in *Apple Anti-*
10 *Trust* would be equally applicable to the *Somers* action. Continued coordination of pretrial
11 discovery should save time and expense for all parties.

12 **III. Conclusion**

13 Direct Purchaser Plaintiffs therefore respectfully request that any consolidation of *Apple*
14 *Anti-Trust* and *Somers* be limited at this time to pretrial discovery and scheduling. The *Apple Anti-*
15 *Trust* action should otherwise continue separately with respect to class certification, summary
16 judgment, and (for now) trial.

17 DATED: May 2, 2008

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1 CERTIFICATE OF SERVICE

2 I hereby certify that on May 2, 2008, I electronically filed the foregoing with the Clerk of the
3 Court using the CM/ECF system which will send notification of such filing to the e-mail addresses
4 denoted on the attached Electronic Mail Notice List, and I hereby certify that I have mailed the
5 foregoing document or paper via the United States Postal Service to the non-CM/ECF participants
6 indicated on the attached Manual Notice List.

7 I certify under penalty of perjury under the laws of the United States of America that the
8 foregoing is true and correct. Executed on May 2, 2008.

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