

1 HAEGGQUIST LAW GROUP  
 2 ALREEN HAEGGQUIST (221858)  
 3 501 West Broadway, Suite A-276  
 4 San Diego, CA 92101  
 5 Telephone: 619/955-8218  
 6 Facsimile: 619/342-7878  
 7 alreen@haeggquistlaw.com

8 LAW OFFICE OF HELEN ZELDES  
 9 HELEN I. ZELDES (220051)  
 10 249 S. Highway 101, #370  
 11 Solana Beach, CA 92075  
 12 Telephone: 858/523-1713  
 13 Facsimile: 858/523-1783  
 14 helenz@zeldeslaw.com

MEHRI & SKALET, PLLC  
 STEVEN A. SKALET  
 CRAIG L. BRISKIN  
 1250 Connecticut Ave. NW, Suite 300  
 Washington, DC 20036  
 Telephone: 202/822-5100  
 Facsimile: 202/822-4997  
 sskalet@findjustice.com  
 cbriskin@findjustice.com

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT  
 NORTHERN DISTRICT OF CALIFORNIA  
 SAN JOSE DIVISION

16 STACIE SOMERS, On Behalf of Herself and )  
 17 All Others Similarly Situated, )  
 18 Plaintiff, )  
 19 vs. )  
 20 APPLE, INC., a California Corporation, )  
 21 Defendant. )

Case No. 5:07-cv-06507-JW  
CLASS ACTION  
 INDIRECT PURCHASER PLAINTIFF'S  
 RESPONSE TO COURT'S ORDER  
 REGARDING CONSOLIDATION  
 JUDGE: Hon. James Ware  
 DATE: May 12, 2008  
 TIME: 10:00 a.m.  
 CTRM: 8-4TH FLOOR

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1 Plaintiff Stacie Somers, on behalf of herself and the putative class she represents in *Somers v.*  
2 *Apple, Inc., et. al.*, No. C-07-06507-JW (“Somers”), respectfully submits the following response to  
3 this Court’s April 22, 2008, Order Directing All Parties to Submit Briefing re: Consolidation.  
4 While Plaintiff supports consolidation of the *Somers* action with the *Apple iPod iTunes Anti-Trust*  
5 *Litigation*, No. C-05-00037-JW, for the limited purposes of pretrial discovery and scheduling,  
6 Plaintiff *Somers* opposes consolidation for the purposes class certification, summary judgment and  
7 trial.  
8

9 **I. CONSOLIDATION IS NOT PRACTICABLE FOR ALL PURPOSES HERE**

10 **A. The Direct and Indirect Purchaser Actions are at Different Stages in their**  
11 **Development and Each Would be Prejudiced by Consolidation for All Purposes**

12 While the direct purchaser class cases were filed more than two years ago, the indirect  
13 purchaser action, the *Somers* case, was filed only five months ago. The direct purchaser class has  
14 already engaged in extensive discovery and is prepared to file its class certification brief this month.  
15 The parties in *Somers*, the indirect purchaser action, have only just held their Rule 26(f) conference  
16 and agreed to a schedule in which Plaintiff’s motion for class certification would be filed on or  
17 before November 3, 2008. Plaintiff *Somers* believes that a November class certification deadline is  
18 necessary in the indirect purchaser action to allow Plaintiff sufficient time to obtain necessary  
19 discovery, including discovery specific to her indirect purchaser claims that was not requested or  
20 produced in the direct purchaser action, to allow sufficient time to prepare her expert report and to  
21 adequately prepare her motion for class certification.  
22

23 There is no reason to delay the filing of class certification in the *Apple iPod iTunes Anti-*  
24 *Trust Litigation*, the direct purchaser action, nor is there any benefit to the Court in doing so. To the  
25 contrary, it is likely that the class certification issues decided in the *Apple iPod iTunes Anti-Trust*  
26 *Litigation* would in fact aid the Court in deciding certification issues in the *Somers* action.  
27

1           **B.       There are Potential Conflicts Between the Direct and Indirect Purchaser Classes**

2           While the two actions pending before this Court allege similar issues of fact and law -- both  
3 claiming Apple engaged in illegal tying conduct, monopolization and unfair competition related to  
4 its iPod and iTunes products -- the *Somers* action is an indirect purchaser action while the *Apple iPod*  
5 *iTunes Anti-Trust Litigation* is a direct purchaser action. As such, the two proposed classes stand in  
6 potential conflict to each other as they are required to prove different sets of facts and meet different  
7 tests under the law.  
8

9           **II.       CONSOLIDATION FOR THE LIMITED PURPOSES OF SCHEDULING AND**  
10           **PRETRIAL DISCOVERY WOULD PROMOTE EFFICIENCY**

11           Plaintiff Somers agrees with the direct purchaser plaintiffs that limited consolidation of the  
12 direct and indirect purchaser actions is appropriate for scheduling and pretrial discovery.  
13 Coordination of scheduling and discovery will promote efficiency and reduce expenses for all.

14           **III.       CONCLUSION**

15           For the foregoing reasons, the indirect purchaser Plaintiff respectfully requests that this Court  
16 only consolidate these cases, if at all, for the limited purposes of scheduling and pretrial discovery.

17 DATED: May 2, 2008

LAW OFFICE OF HELEN I. ZELDES

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\_\_\_\_\_  
/s/ Helen I. Zeldes  
HELEN I. ZELDES

21

249 S. Highway 101, #370  
Solana Beach, CA 92075  
Telephone: 858/523-1713  
858/523-1783 (fax)

22

23

24

HAEGGQUIST LAW GROUP  
ALREEN HAEGGQUIST  
501 West Broadway, Suite A-276  
San Diego, CA 92101  
Telephone: 619/955-8218  
619/342-7878 (fax)

25

26

27

28

1 MEHRI & SKALET, PLLC  
2 STEVEN A. SKALET  
3 CRAIG L. BRISKIN  
4 1250 Connecticut Ave. NW, Suite 300  
5 Washington, DC 20036  
6 Telephone: 202/ 822-5100  
7 202/822-4997 (fax)

8 Attorneys for Plaintiff

9 CERTIFICATE OF SERVICE

10 I hereby certify that on May 2, 2008, I electronically filed the following documents with the  
11 Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail  
12 addresses denoted on the attached Electronic Mail Notice List, and I hereby certify that I have  
13 caused the foregoing document or paper to be mailed via the United States Postal Service to the non-  
14 CM/ECF participants indicated on the attached Manual Notice List and Service List:

- 15 • Indirect Purchaser Plaintiff's Response to Court's Order Regarding Consolidation

16  
17 s/ HELEN I. ZELDES  
18 HELEN I. ZELDES

19 LAW OFFICES OF HELEN I. ZELDES  
20 HELEN I. ZELDES (220051)  
21 249 S. Highway 101, #370  
22 Solana Beach, CA 92075  
23 Telephone: 858/523-1713  
24 858/523-1783 (fax)  
25 E-mail: helenz@zeldeslaw.com

1 **Mailing Information for a Case 5:05-cv-00037-JW**

2 **Electronic Mail Notice List**

3 The following are those who are currently on the list to receive e-mail notices for this case.

- 4
- 5 • **Francis Joseph Balint , Jr**  
fbalint@bffb.com
  - 6 • **Michael David Braun**  
service@braunlawgroup.com
  - 7
  - 8 • **Andrew S. Friedman**  
rcreech@bffb.com,afriedman@bffb.com
  - 9
  - 10 • **Roy A. Katriel**  
rak@katriellaw.com,rk618@aol.com
  - 11 • **Thomas J. Kennedy**  
tkennedy@murrayfrank.com
  - 12
  - 13 • **Caroline Nason Mitchell**  
cnmitchell@jonesday.com,mlandsborough@jonesday.com,ewallace@jonesday.com
  - 14 • **Robert Allan Mittelstaedt**  
ramittelstaedt@jonesday.com,ybennett@jonesday.com
  - 15
  - 16 • **Brian P Murray**  
bmurray@rabinlaw.com
  - 17
  - 18 • **Jacqueline Sailer**  
jsailer@murrayfrank.com
  - 19 • **Adam Richard Sand , Esq**  
invalidaddress@invalidaddress.com
  - 20
  - 21 • **John J. Stoia , Jr**  
jstoia@csgrr.com
  - 22
  - 23 • **Tracy Strong**  
tstrong@jonesday.com,dharmon@jonesday.com
  - 24 • **Bonny E. Sweeney**  
bonnys@csgrr.com,tturner@csgrr.com,E\_file\_sd@csgrr.com
  - 25

26 **Manual Notice List**

1 The following is the list of attorneys who are **not** on the list to receive e-mail notices for this case  
2 (who therefore require manual noticing). You may wish to use your mouse to select and copy  
3 this list into your word processing program in order to create notices or labels for these  
4 recipients.

5 **Todd David Carpenter**  
6 Bonnett, Fairbourn, Friedman, & Balint  
7 2901 N. Central Avenue  
8 Suite 1000  
9 Phoenix, AZ 85012

## 10 **Mailing Information for a Case 5:07-cv-060507-HRL**

### 11 **Electronic Mail Notice List**

12 The following are those who are currently on the list to receive e-mail notices for this case.

- 13 • **Craig L. Briskin**  
14 cbriskin@findjustice.com
- 15 • **Alreen Haeggquist**  
16 alreen@haeggquistlaw.com
- 17 • **Steven A. Skalet**  
18 sskalet@findjustice.com
- 19 • **Helen I. Zeldes**  
20 helenz@zeldeslaw.com

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25 recipients.

- 26 • No manual recipients