

1 ZELDES & HAEGGQUIST, LLP
HELEN I. ZELDES (220051)
2 ALREEN HAEGGQUIST (221858)
655 West Broadway, Suite 1410
3 San Diego, CA 92101
Telephone: 619/955-8218
4 Fax: 619/342-7878
helenz@zhlaw.com
5 alreenh@zhlaw.com

6 MEHRI & SKALET, PLLC
STEVEN A. SKALET (admitted *pro hac vice*)
7 CRAIG L. BRISKIN (admitted *pro hac vice*)
1250 Connecticut Ave NW, Suite 300
8 Washington, DC 20036
Telephone: 202/822-5100
9 Fax: 202/822-4997
sskalet@findjustice.com
10 cbriskin@findjustice.com

11 Attorneys for Plaintiff Stacie Somers

12 UNITED STATES DISTRICT COURT
13 NORTHERN DISTRICT OF CALIFORNIA
14 SAN JOSE DIVISION
15

16 THE APPLE IPOD ITUNES ANTI-TRUST) Case No. C 07-6507 JW
LITIGATION,)
17) NOTICE OF MOTION AND MOTION FOR
This Document Relates To:) CLASS CERTIFICATION AND
18) APPOINTMENT OF CO-LEAD CLASS
Somers v. Apple, Inc., Case No. C 07-6507 JW,) COUNSEL; MEMORANDUM OF POINTS
19) AND AUTHORITIES IN SUPPORT OF
20) MOTION

JUDGE: The Honorable James Ware
DATE: June 1, 2009
TIME: 9:00 a.m.
CTRM: 8, 4th Floor

21
22
23
24
25
26
27
28

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

	Page
I. INTRODUCTION	1
II. PLAINTIFF’S CLAIMS	3
III. PLAINTIFF READILY MEETS THE STANDARDS FOR CERTIFICATION	4
A. Rule 23(a) Is Satisfied.....	5
1. Numerosity.....	5
2. Commonality.....	5
3. Typicality	6
4. Adequacy of Representation	6
B. Plaintiff Satisfies the Requirements of Rule 23(b)(2).....	6
C. Plaintiff Satisfies the Requirements of Rule 23(b)(3).....	8
1. Common Questions of Law and Fact Predominate Over Individual Issues	8
a. Plaintiff’s Tying Claim	8
(1) Coercion May Be Proven at the Market Level	10
(2) Coercion Can Be Found Where Two Products Are Not Purchased Simultaneously	13
b. Plaintiff’s Monopolization and Attempted Monopolization Claims	15
c. Plaintiff’s California State Law Claims	16
(1) California Business and Professions Code §17200	16
(2) The Consumer Legal Remedies Act	17
d. Antitrust Damages Can Be Proven on a Class-Wide Basis	17
2. A Class Action Is the Superior Method to Resolve Plaintiff’s Claims	19
D. Choice of Law Issues Do Not Defeat Predominance of the Cartwright Act Damages Claim.....	20
1. California’s Laws Do Not Conflict with Those of Other States	20
2. No Other State Has an Interest in Applying Its Own Law	21

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Page

3. Other State Laws Will Not Be Impaired If California’s Laws Were Applied to All Class Members.....22

IV. THE COURT SHOULD APPOINT ZELDES & HAEGGQUIST, LLP AND MEHRI & SKALET, PLLC AS CLASS COUNSEL23

V. CONCLUSION.....25

1 **TABLE OF AUTHORITIES**

	Page
2	
3 CASES	
4 <i>Abed v. A. H. Robins Co.</i> ,	
5 693 F.2d 847 (9th Cir. 1982)	8
6 <i>Advance Bus. Sys. & Supply Co. v. SCM Corp.</i> ,	
7 415 F.2d 55 (4th Cir. 1969)	14
8 <i>Am. Ad Mgmt., Inc. v. Gen. Tel. Co.</i> ,	
9 190 F.3d 1051 (9th Cir. 1999)	15
10 <i>Amchem Products, Inc. v. Windsor.</i>	
11 521 U.S. 591 (1997).....	3, 8
12 <i>Amerinet, Inc. v. Xerox Corp.</i> ,	
13 972 F.2d 1483 (8th Cir. 1992)	13
14 <i>Anderson Foreign Motors, Inc. v. New England Toyota Distrib., Inc.</i> ,	
15 475 F. Supp. 973 (D. Mass. 1979)	12
16 <i>Apple Inc. v. Psystar Corp.</i> ,	
17 586 F. Supp. 2d 1190 (N.D. Cal. 2008)	9
18 <i>Austin v. McNamara.</i>	
19 979 F.2d 728 (9th Cir. 1992)	15
20 <i>B.W.I. Custom Kitchen v. Owens-Illinois.</i>	
21 191 Cal. App. 3d 1341 (1987)	16, 18
22 <i>Bafus v. Aspen Realty.</i>	
23 236 F.R.D. 652 (D. Idaho 2006)	11, 15
24 <i>Bernhard v. Harrah's Club.</i>	
25 16 Cal. 3d 313 (1976)	22
26 <i>Blackie v Barrack.</i>	
27 524 F.2d 891 (9th Cir 1975)	4
28 <i>Bogosian v. Gulf Oil Corp.</i> ,	
561 F. 2d 434 (3d Cir. 1977).....	12
<i>Bruno v. Superior Court.</i>	
127 Cal. App. 3d 120 (1981)	17
<i>Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co.</i> ,	
20 Cal. 4th 163 (1999)	16
<i>Chun-Hoon v. McKee Foods Corp.</i> ,	
No. C-05-620-VRW, 2006 WL 3093764 (N.D. Cal. Oct. 31, 2006).....	4

1		
2		Page
3	<i>Clothesrigger, Inc. v. GTE Corp.</i> ,	
4	191 Cal. App. 3d 605 (1987)	20, 21, 22
5	<i>Collins v. Int’l Dairy Queen, Inc.</i> ,	
6	168 F.R.D. 668 (M.D. Ga. 1996)	11, 13, 15
7	<i>Confederated Tribes of Siletz Indians of Or. v. Weyerhaeuser Co.</i> ,	
8	411 F.3d 1030 (9th Cir. 2005)	15
9	<i>Datagate Inc. v. Hewlitt Packard Co.</i> ,	
10	60 F.3d 1421 (9th Cir. 1995)	8
11	<i>Digidyne Corp. v. Data General Corp.</i> ,	
12	734 F.2d 1336 (9th Cir. 1984)	9
13	<i>Dukes v. Wal-Mart, Inc.</i> ,	
14	474 F.3d 1214 (9th Cir. 2007)	5
15	<i>Dunleavy v. Nadle.</i>	
16	213 F.3d 454 (9th Cir. 2000)	4
17	<i>Eastman Kodak Co. v. Image Tech. Servs., Inc.</i> ,	
18	504 U.S. 451 (1992).....	8
19	<i>Falk v. Gen. Motors Corp.</i> ,	
20	496 F. Supp. 2d 1088 (N.D. Cal. 2007)	17
21	<i>Fortner Enterprises v. U.S. Steel Corp.</i> ,	
22	394 U.S. 495	9
23	<i>Gregory v. Albertson’s, Inc.</i> ,	
24	104 Cal. App. 4th 845 (2002)	16
25	<i>Hanlon v. Chrysler Corp.</i> ,	
26	150 F.3d 1011 (9th Cir. 1998)	5, 6, 8, 20
27	<i>Hanon v. Dataproducts Corp.</i> ,	
28	976 F.2d 497 (9th Cir. 1992)	6
	<i>Hardy v. City Optical, Inc.</i> ,	
	39 F.3d 765 (7th Cir. 1994)	12
	<i>Harmsen v. Smith.</i>	
	693 F.2d 932 (9th Cir. 1982)	20
	<i>Havlicek v. Coast-To-Coast Analytical Servs. Inc.</i> ,	
	39 Cal. App. 4th 1844 (1995)	22
	<i>Hawaii v. Standard Oil Co. of California.</i>	
	405 U.S. 251 (1972).....	4

1		
2		Page
3	<i>Hurtado v. Superior Court,</i>	
4	11 Cal. 3d 574 (1974)	20
5	<i>Image Tech Servs., Inc. v. Eastman Kodak Co.,</i>	
6	Nos. C 07-1686, 94-0524, 94-1070, 1994 WL 508735	
7	(N.D. Cal. Sept. 2, 1994)	11, 15
8	<i>In re Abbott Labs. Norvir Anti-Trust Litig.,</i>	
9	No. Civ. 04-1511 CW, 2007 U.S. Dist. LEXIS 44459	
10	(N.D. Cal. June 11, 2007)	7
11	<i>In re Citric Acid Antitrust Litig.,</i>	
12	No. 95-1092, 1996 WL 655791 (N.D. Cal. Oct. 2, 1996)	18
13	<i>In re Dynamic Random Access Memory (DRAM) Antitrust Litig.,</i>	
14	No. M 02-1486 PJH, 2006 WL 1530166 (N.D. Cal. June 5, 2006).....	3, 18
15	<i>In re General Data Corp. Antitrust Litig.,</i>	
16	490 F. Supp. 1089 (N.D. Cal. 1980)	13
17	<i>In re Lorazepam & Clorazepate Antitrust Litig.,</i>	
18	202 F.R.D 12 (D.D.C. 2001).....	4
19	<i>In re MDC Holdings Sec Litig.,</i>	
20	754 F. Supp. 785 (S.D. Cal. 1990).....	20
21	<i>In re OSB Antitrust Litig.,</i>	
22	No. 06-826, 2007 U.S. Dist. LEXIS 56584 (E.D. Pa. Aug. 3, 2007)	7
23	<i>In re Pizza Time Theatre Sec. Litig.,</i>	
24	112 F.R.D. 15 (N.D. Cal. 1986).....	21, 22
25	<i>In re Playmobil Antitrust Litig.,</i>	
26	35 F. Supp. 2d 231 (E.D.N.Y. 1998)	3
27	<i>In re Polypropylene Carpet Antitrust Litig.,</i>	
28	178 F.R.D. 603 (N.D. Ga. 1997).....	4
	<i>In re Rubber Chemicals Antitrust Litig.,</i>	
	232 F.R.D. 346 (N.D. Cal. 2005).....	4, 18
	<i>In re S. Cent. States Bakery Prods. Antitrust Litig.,</i>	
	86 F.R.D. 407 (M.D. La. 1980)	19
	<i>In re Seagate Techs. Sec. Litig.,</i>	
	115 F.R.D. 264 (N.D. Cal. 1987).....	22
	<i>In re Tableware Antitrust Litig.,</i>	
	241 F.R.D. 644 (N.D. Cal. 2007).....	3

1		
2		Page
3	<i>In re Visa Check/Mastermoney Antitrust Litig.</i> ,	
4	192 F.R.D. 68 (E.D.N.Y. 2000), <i>aff'd</i> , 280 F.3d 124 (2d Cir. 2001)	15, 19
5	<i>In re Warfarin Sodium Antitrust Litig.</i> ,	
6	214 F.3d 395 (3d Cir. 2000).....	7
7	<i>Jefferson Parish Hosp. Dist. No. 2 v. Hyde</i> ,	
8	466 U.S. 2 (1984).....	9, 13
9	<i>Jefferson v. Ingersoll Int'l Inc.</i> ,	
10	195 F.3d 894 (7th Cir. 1999)	7
11	<i>Knevelbaard Dairies v. Kraft Foods, Inc.</i> ,	
12	232 F.3d 979 (9th Cir. 2000)	15
13	<i>Lerwill v. Inflight Motion Pictures, Inc.</i> ,	
14	582 F.2d 507 (9th Cir.1978)	6
15	<i>Little Caesar Enters., Inc. v. Smith</i> ,	
16	172 F.R.D. 236 (E.D. Mich.1997)	15
17	<i>Macmanus v. A.E. Realty Partners</i> ,	
18	195 Cal. App. 3d 1106 (1988)	8
19	<i>Molski v. Gleich</i> ,	
20	318 F.3d 937 (9th Cir. 2003)	7
21	<i>Moore v. Jas. H. Matthews & Co.</i> ,	
22	550 F.2d 1207 (9th Cir. 1977)	9, 11, 12
23	<i>Murphy v. Business Cards Tomorrow, Inc.</i> ,	
24	854 F.2d 1202 (9th Cir. 1988)	13
25	<i>N. Pac. R.R. v. United States</i> ,	
26	356 U.S. 1 (1958).....	14
27	<i>Paladin Assocs., Inc. v. Montana Power Co.</i> ,	
28	328 F.3d 1145 (9th Cir. 2003)	12
	<i>People ex rel. Lockyer v. Fremont Life Ins. Co.</i> ,	
	104 Cal. App. 4th 508 (2002)	16
	<i>Probe v. State Teachers' Retirement Sys.</i> ,	
	780 F.2d 776 (9th Cir. 1986)	7
	<i>Quelimane Co. v. Stewart Title Guar. Co.</i> ,	
	19 Cal. App. 4th 26 (1998)	16
	<i>Reiter v. Sonotone Corp.</i> ,	
	442 U.S. 330 (1979).....	4

1		
2		Page
3	<i>Santa Cruz Med. Clinic v. Dominican Santa Cruz Hosp.</i> ,	
4	No. C93 20613 RMW, 1995 WL 853037 (N.D. Cal. Sept. 7, 1995).....	14
5	<i>SC Manufactured Homes, Inc. v. Liebert</i> ,	
6	162 Cal. App. 4th 68 (2008)	8, 9
7	<i>Slattery v. Apple Comp., Inc.</i> ,	
8	No. C 05-00037 JW, 2005 WL 2204981 (N.D. Cal. Sept. 9, 2005).....	11
9	<i>Spectrum Sports v. McOuillan</i> ,	
10	506 U.S. 447 (1993).....	15
11	<i>Sullivan v. Chase Inv. Servs., Inc.</i>	
12	79 F.R.D. 246 (N.D. Cal. 1978).....	5
13	<i>Tucker v. Apple Comp., Inc.</i> ,	
14	493 F. Supp. 2d 1090 (N.D. Cal. 2006)	1, 11
15	<i>Union Carbide Corp. v. Superior Court</i> ,	
16	36 Cal. 3d 13 (1984)	17
17	<i>United States v. Microsoft Corp.</i> ,	
18	253 F.3d 34 (D.C. Cir. 2001).....	3, 13, 17
19	<i>Valentino v. Carter-Wallace</i> ,	
20	97 F.3d 1227 (9th Cir. 1997)	19
21	<i>Washington Mut. Bank v. Superior Court</i> ,	
22	24 Cal. 4th 906 (2001)	20, 21, 22
23	<i>Ways & Means v. IVAC Corp.</i> ,	
24	506 F. Supp 697 (N.D. Cal. 1979), <i>aff'd</i> , 638 F.2d 143 (9th Cir. 1981)	13
25	<i>Wershba v. Apple Computer, Inc.</i> ,	
26	91 Cal. App. 4th 224 (2001)	21
27	<i>Wong v. Tenneco, Inc.</i> ,	
28	39 Cal. 3d 126 (1985)	22
	STATUTES, RULES AND REGULATIONS	
	15 United States Code	
	§26.....	2, 7
	California Business and Professions Code	
	§16720.....	2
	§17200.....	3, 5, 8, 16, 17
	§17200.....	16
	§1770(a)(19)	17

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

	Page
California Civil Code	
§1770.....	3, 5, 8, 16, 17
Federal Rules of Civil Procedure	
Rule 23(a).....	4, 5, 6
Rule 23(a)(1).....	5
Rule 23(a)(2).....	5
Rule 23(a)(3).....	6
Rule 23(b).....	4
Rule 23(b)(2).....	5, 6, 7
Rule 23(b)(3).....	<i>passim</i>
Rule 23(g).....	23

SECONDARY AUTHORITIES

6 Herbert B. Newberg & Alba Conte, <i>Newberg on Class Actions</i> (4th ed. 2002)	
§3:10	5
§18:1	3
<i>Manual for Complex Litigation</i> (1977)	
§1.43.....	19

1 TO: ALL PARTIES AND THEIR ATTORNEYS OF RECORD

2 PLEASE TAKE NOTICE that on June 1, 2009, at 9:00 a.m., in Courtroom 8, 4th Floor of the
3 above-entitled Court, located at 280 South 1st Street, San Jose, California, plaintiff Stacie Somers on
4 (“plaintiff”) behalf of herself and all others similarly situated will, and hereby does, respectfully
5 move the Court for class certification, and the appointment of the law firms of Mehri & Skalet,
6 PLLC and Zeldes & Haeggquist, LLP as Co-Lead Counsel for the Class.

7 **I. INTRODUCTION**

8 The Court is well-aware of the facts of this case. They are virtually identical to those of the
9 related *Tucker* action, in which this Court has already certified an injunctive relief and damages class
10 of direct purchasers of the iPod. Here, plaintiff Stacie Somers seeks to represent the corresponding
11 class of indirect purchasers of Apple’s iPods; that is, class members who purchased Apple’s iPod
12 from any retailer other than Apple. Plaintiff alleges that Apple violated federal and state antitrust
13 laws by encoding iTunes files so they could only be played on the iPod, and not any competing
14 portable digital media player. As the Court concluded in the direct purchaser case, these claims are
15 well-suited for class certification.¹ Indeed, this Court held that the direct purchaser plaintiffs
16 satisfied all of the requirements for class certification, and requested additional briefing on just one
17 element of one claim (tying).² The sole remaining issue left to be decided by this Court is whether
18 coercion can be proved on a class-wide (or market-level) basis under §1 of the Sherman Act. As this
19 Court has already decided on two occasions, coercion can indeed be shown at the market level.

20 The elements of Apple’s coercive tie are evident in Apple’s public statements, and in the
21 products themselves. Apple’s market share is so high in the tying market that Apple’s CEO Steve
22
23

24
25 ¹ Plaintiff Somers concurs with the briefing by the direct purchaser plaintiffs in the related case
and incorporates their arguments for class certification by reference as if set forth herein.

26 ² See Order Granting Plaintiffs’ Motion for Class Certification as to Counts Two, Three, Four,
27 Five, Six and Seven Only and Appointing Class Counsel; *Sua Sponte* Order Reconsidering
28 Defendant’s Motion to Dismiss Count One and Requiring Further Briefing (“12/22 Order”), Docket
No. 196 (filed Dec. 22, 2008).

1 Jobs proudly calls Apple's Online Music Store "the Microsoft of music stores."³ Jobs states that the
2 "only option to play music from Apple's Music Store is the iPod."⁴ Not surprisingly, Apple's
3 attorneys now try to distance Apple from such claims urging that consumers can *circumvent* Apple's
4 deliberate efforts to lock its files through a process called "ripping and burning," – a possibly illegal
5 activity that Apple itself apparently has never made known to its customers. Notwithstanding
6 counsel's valiant efforts, it remains clear that Apple designed the iTunes store and downloads for
7 direct use on the iPod, and nothing else. Direct use is an *essential* characteristic of the iPod.
8 Hypothetical "ripping and burning" does not cure the anticompetitive conduct alleged herein but
9 rather proves the point: consumers are locked-in to the iPod and have no option but the iPod to
10 directly play their iTunes digital media files. This is not mere "inconvenience" or "enhanced utility"
11 rather the inability to use the product as it was intended.

12 If Apple required iTunes purchasers to burn and rip every download before they could upload
13 them to the iPod, with reduced sound quality, it is fair to say that Apple would be at a competitive
14 disadvantage to music stores that allowed seamless transfer. Plaintiff here has set forth a
15 methodology that will show that Apple's efforts to lock in its customers worked as it was intended:
16 consumers bought iPods, and paid more for them, because of the DRM lock-in. As a result, class
17 members are tied to the iPod, which they are forced to purchase at supracompetitive prices. Even
18 those iPod purchasers who had not previously purchased iTunes music paid supracompetitive prices
19 as a result of Apple's monopolistic activities.

20 In order to remedy Apple's behavior, plaintiff Somers seeks certification of the following
21 class, pursuant to the Clayton Act (15 U.S.C. §26), the Cartwright Act (Cal. Bus. & Prof. Code

22

23

24 ³ Complaint for Violations of Sherman Antitrust Act, Cartwright Act, California Unfair
25 Competition Law, Consumer Legal Remedies Act and Monopolization of Business Practices, ¶12
26 ("Complaint"), filed Dec. 31, 2007. All paragraph citations are to the Complaint, unless otherwise
noted.

27 ⁴ See, e.g., Steve Jobs, "Thoughts on Music," February 6, 2007, attached to the Declaration of
28 Alreen Haeggquist in Support of Plaintiff's Motion for Class Certification and Appointment of Class
Counsel ("Haeggquist Decl.") as Ex. 5.

1 §16720 *et seq.*), California’s Unfair Competition Law (Cal. Bus. & Prof. Code §17200 *et seq.*
2 (“UCL”)), and the Consumer Legal Remedies Act (Cal. Civ. Code §1770 *et seq.* (“CLRA”)):

3 All persons and entities in the United States (excluding federal, state
4 and local governmental entities, Apple, its directors, officers and
5 members of their families) that from December 31, 2003 to the
6 present (“Class Period”) purchased an Apple iPod indirectly from
7 Apple for their own use and not for resale.

8 The Supreme Court and numerous other courts have recognized that few cases are better
9 candidates for class-wide resolution than antitrust actions.⁵ As this Court held in the related direct
10 purchaser action, Plaintiff’s claims should similarly be certified here.

11 **II. PLAINTIFF’S CLAIMS**

12 Plaintiff alleges that Apple has established an illegal tie between its Online Videos and
13 Online Music, and the iPod. Apple enjoys monopoly power in the download markets, it deliberately
14 abuses that power. *See United States v. Microsoft Corp.*, 253 F.3d 34, 58 (D.C. Cir. 2001). A
15 consumer who purchases music and video files from Apple’s Online Music Store is forced to
16 purchase Apple’s iPod in order to play the music or videos on a portable digital music player. ¶¶14.
17 Purchasers of Online Videos from Apple also are precluded from using rival video-enabled portable
18 digital music players. ¶¶16, 67-72. This conduct causes substantial antitrust injury to consumers,
19 because it allows Apple to charge supracompetitive prices for its iPod and reduces innovation by
20 foreclosing competition. ¶¶54-58.

21 Plaintiff also alleges that Apple willfully acquired and exploits its monopoly power in the
22 market for portable music players, by placing technological restrictions on its products that serve
23 _____

24 ⁵ *See Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 625 (1997) (“Predominance is a test
25 readily met in certain cases alleging . . . violations of the antitrust laws.”); *In re Playmobil Antitrust*
26 *Litig.*, 35 F. Supp. 2d 231, 238 (E.D.N.Y. 1998) (“Antitrust claims are well suited for class
27 actions.”). And, in turn, class actions “play a particularly vital role in the private enforcement of
28 antitrust [laws].” *In re Tableware Antitrust Litig.*, 241 F.R.D. 644, 648 (N.D. Cal. 2007); *accord In*
re Dynamic Random Access Memory (DRAM) Antitrust Litig., No. M 02-1486 PJH, 2006 WL
1530166, at *3 (N.D. Cal. June 5, 2006) (“DRAM”) (same); *see generally* 6 Herbert B. Newberg &
Alba Conte, *Newberg on Class Actions*, §18:1, at 3-6 (4th ed. 2002) (“Newberg”).

1 only to exclude potential competitors. ¶¶13-16. Apple does this by “crippling” third-party supplied
2 components in its iPod that otherwise would enable the iPod to play music and videos downloaded
3 from Online Music stores that compete with Apple. ¶¶38-40. Apple further protects its monopolies
4 by placing unneeded technological restrictions on the music and video files it sells at its Online
5 Music Store, iTMS, making the files incompatible with rival portable digital music players. ¶41.

6 **III. PLAINTIFF READILY MEETS THE STANDARDS FOR 7 CERTIFICATION**

8 The Supreme Court has long recognized that antitrust class actions play an important role in
9 the enforcement of the antitrust laws. *See Reiter v. Sonotone Corp.*, 442 U.S. 330, 344 (1979);
10 *Hawaii v. Standard Oil Co. of California*, 405 U.S. 251, 266 (1972). Because of this critical
11 enforcement role, “courts resolve doubts in these actions in favor of certifying the class.” *In re*
12 *Rubber Chemicals Antitrust Litig.*, 232 F.R.D. 346, 350 (N.D. Cal. 2005).

13 In addition, “[o]n a motion for class certification, the court ‘is bound to take the substantive
14 allegations of the complaint as true.’” *Chun-Hoon v. McKee Foods Corp.*, No. C-05-620-VRW,
15 2006 WL 3093764, at *1 (N.D. Cal. Oct. 31, 2006) (quoting *Blackie v Barrack*, 524 F.2d 891, 901
16 n.17 (9th Cir 1975)). The certification inquiry is not a merits inquisition. Neither the plaintiff nor
17 the plaintiff’s expert must prove or show that defendant’s conduct violated the law. “[R]ather, they
18 must demonstrate that their attempt to evidence impact will involve common issues that
19 predominate.” *In re Lorazepam & Clorazepate Antitrust Litig.*, 202 F.R.D 12, 29 (D.D.C. 2001).
20 *See also In re Polypropylene Carpet Antitrust Litig.*, 178 F.R.D. 603, 618 (N.D. Ga. 1997)
21 (explaining that “at the class certification stage, plaintiffs must show that antitrust impact *can be*
22 *proven* with common evidence on a class wide basis; plaintiffs need not show antitrust impact *in*
23 *fact occurred* on a class-wide basis.”) (emphasis in original).

24 To certify a class action, plaintiff must set forth prima facie facts that support the four
25 requirements of Rule 23(a): (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy of
26 representation. *Dunleavy v. Nadle*, 213 F.3d 454, 462 (9th Cir. 2000). The court must then consider
27 whether the class is maintainable under one or more of the three alternatives set forth in Rule 23(b).
28

1 Plaintiff seeks certification of an injunctive relief class under Rule 23(b)(2) and a damages class
2 under Rule 23(b)(3).

3 **A. Rule 23(a) Is Satisfied**

4 The Court has already held that Rule 23(a)'s requirements of numerosity, commonality,
5 typicality and fair and adequate representation were met by the Direct Purchasers. *See* 12/22 Order
6 at 3-6. The same reasoning is applicable here, and little additional analysis is required.

7 **1. Numerosity**

8 The numerosity requirement is satisfied if the class "is so numerous that joinder of all
9 members is impracticable." Rule 23(a)(1). As this Court already held, "[a] class of one thousand
10 members 'clearly satisfies the numerosity requirement.'" 12/22 Order at 3 (quoting *Sullivan v.*
11 *Chase Inv. Servs., Inc.* 79 F.R.D. 246, 257 (N.D. Cal. 1978)). The numerosity of Apple's iPod sales
12 is not a point in serious dispute. Apple has sold millions of iPods to indirect purchasers during the
13 class period. *See* Affidavit of Gary L. French, Ph.D. ¶27 ("French Aff.") (citing Apple's
14 interrogatory response), attached to the Haeggquist Declaration as Ex. 1. As this Court held in
15 certifying the direct purchaser classes, "Given that the volume of relevant purchasers during the
16 Class Period is undisputedly in the millions, the Court finds that plaintiffs have satisfied the
17 numerosity requirement of Rule 23(a)." 12/22 Order at 5. The numerosity requirement is easily
18 satisfied here as well.

19 **2. Commonality**

20 Commonality requires "questions of law or fact common to the class." Rule 23(a)(2). The
21 commonality requirement is generally construed liberally; the existence of only a few common legal
22 and factual issues may satisfy the requirement. *Dukes v. Wal-Mart, Inc.*, 474 F.3d 1214, 1225 (9th
23 Cir. 2007) (citing *Newberg* §3:10 at 271; *Hanlon v. Chrysler Corp.*, 150 F.3d 1011 (9th Cir. 1998)).
24 As this court has already concluded, "there are numerous common questions of law and fact
25 involving Defendant's allegedly anti-competitive conduct." 12/22 Order at 8. Plaintiff's tying,
26 monopolization, attempted monopolization, UCL and CLRA claims are essentially identical to the
27 claims that the Court has already certified with regard to the direct purchasers. The only issues that
28

1 differ are those specific to the certification of a class of indirect purchasers. These issues, too, are
2 common. Thus, this requirement is satisfied.

3 **3. Typicality**

4 The typicality requirement requires that “the claims or defenses of the representative parties
5 are typical of the claims or defenses of the class[.]” Rule 23(a)(3). “[R]epresentative claims are
6 ‘typical’ if they are reasonably co-extensive with those of absent class members; they need not be
7 substantially identical.” *Hanlon*, 150 F.3d at 1020. The typicality requirement is satisfied when
8 “other members have the same or similar injury, whether the action is based on conduct which is not
9 unique to the named plaintiffs, and whether other class members have been injured by the same
10 course of conduct.” *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992). In this case,
11 plaintiff’s and the proposed class members’ claims all arise from Apple’s alleged tying of iTunes
12 music with the iPod and its monopolization of the market for portable media players. Plaintiff’s
13 claim is identical to that of absent class members, which is far more than Rule 23(a) requires.

14 **4. Adequacy of Representation**

15 To satisfy the requirement of adequacy of representation, “First, the named representatives
16 must appear able to prosecute the action vigorously through qualified counsel, and second, the
17 representatives must not have antagonistic or conflicting interests with the unnamed members of the
18 class.” *Lerwill v. Inflight Motion Pictures, Inc.*, 582 F.2d 507, 512 (9th Cir.1978).

19 Plaintiff’s counsel has invested considerable time since the initiation of the litigation
20 gathering evidence, formulating legal theories, reviewing documents, and working with an economic
21 expert. Haeggquist Decl. ¶3. Plaintiff’s counsel is experienced in antitrust and consumer law, and
22 class action litigation, as set forth in the declaration and firm resumes submitted herewith. *See*
23 *Haeggquist Decl. Exs. 3-4 and §IV below.* As an iPod purchaser, plaintiff has interests that are
24 aligned with and are in no way antagonistic to those of absent class members. Plaintiff has served
25 well as a representative for the proposed class. Thus, this requirement is satisfied.

26 **B. Plaintiff Satisfies the Requirements of Rule 23(b)(2)**

27 Plaintiff also satisfies the requirements of Rule 23(b)(2), which is that “the party opposing
28 the class has acted or refused to act on grounds that apply generally to the class, so that final

1 injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole[.]”
2 As the Court did with respect to direct purchasers, it also should certify the proposed nationwide
3 indirect purchaser class for injunctive relief under federal law.

4 Defendant has acted on grounds generally applicable to the class. Its alleged anticompetitive
5 conduct is and has been market-wide, and it does not require reference to the actions of individual
6 consumers. Injunctive relief is available to these consumers pursuant to §16 of the Clayton Act (15
7 U.S.C. §26). 12/22 Order at 10; *see also In re Warfarin Sodium Antitrust Litig.*, 214 F.3d 395, 400
8 (3d Cir. 2000). Defendant’s anticompetitive conduct has enabled it to overcharge for iPods. While
9 Apple has announced its intention to remove DRM from future iTunes downloads, it still will charge
10 a fee to remove DRM from existing purchases, which is roughly equivalent to one third of the
11 purchase price. Haeggquist Decl. Ex. 1, French Aff. ¶34. An injunction would force Apple to stop
12 charging consumers for removal of DRM from iTunes downloads, which would remove the lock-in
13 that DRM represents. This will result in lower prices for iPods, and allow purchasers of iTunes
14 music to choose freely among products in the market for portable media players.

15 Therefore, the Court should certify a Rule 23(b)(2) class in addition to the Rule 23(b)(3)
16 class as set forth below. *See Jefferson v. Ingersoll Int’l Inc.*, 195 F.3d 894, 898 (7th Cir. 1999) (“It is
17 possible to certify the injunctive aspects of the suit under Rule 23(b)(2) and the damages aspects
18 under Rule 23(b)(3), achieving both consistent treatment of class-wide equitable relief and an
19 opportunity for each affected person to exercise control over the damages aspects.”); *Probe v. State*
20 *Teachers’ Retirement Sys.*, 780 F.2d 776, 780 n.3 (9th Cir. 1986). *See also In re Abbott Labs. Norvir*
21 *Anti-Trust Litig.*, No. Civ. 04-1511 CW, 2007 U.S. Dist. LEXIS 44459, at *22-*23 (N.D. Cal.
22 June 11, 2007) (same). Moreover, plaintiff’s injunctive relief is based on a federal law, while her
23 claim for damages is based only on state law. Thus, the federal antitrust claim is not one that
24 “relates exclusively or predominantly to money damages.” *See In re OSB Antitrust Litig.*, No. 06-
25 826, 2007 U.S. Dist. LEXIS 56584, at *47-*48 (E.D. Pa. Aug. 3, 2007) (agreeing with plaintiffs
26 “that I need not even consider this issue because the claims for damages and injunctive relief are
27 entirely separate” noting that the claims “arise under different statutes (Clayton Act versus state
28 statutes)”); *see also Molski v. Gleich*, 318 F.3d 937, 949-50 (9th Cir. 2003).

1 **C. Plaintiff Satisfies the Requirements of Rule 23(b)(3)**

2 The court may certify a class under Rule 23(b)(3), which requires “that the questions of law
3 or fact common to the members of the class predominate over any questions affecting only
4 individual members, and that a class action is superior to other available methods for the fair and
5 efficient adjudication of the controversy” Certification under Rule 23(b)(3) is proper
6 “whenever the actual interests of the parties can be served best by settling their differences in a
7 single action.” *Hanlon*, 150 F.3d at 1022 (internal quotations omitted). The Court must balance
8 concerns regarding the litigation of issues common to the class a whole with questions affecting
9 individual class members. *Abed v. A. H. Robins Co.*, 693 F.2d 847, 856 (9th Cir. 1982).

10 **1. Common Questions of Law and Fact Predominate Over
11 Individual Issues**

12 The “predominance inquiry tests whether proposed classes are sufficiently cohesive to
13 warrant adjudication by representation.” *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997).
14 As the Supreme Court has stated, “predominance is a test readily met in certain cases alleging . . .
15 violations of the antitrust laws.” *Id.* at 625. Here, plaintiff alleges antitrust claims for tying,
16 monopolization, attempted monopolization, and violation of the UCL and CLRA. As shown above
17 and as demonstrated by Dr. French, each element of plaintiff’s claims can and will be proved
18 through common evidence applicable to every member of the proposed classes.

19 **a. Plaintiff’s Tying Claim**

20 The practice of tying has long been forbidden as a *per se* illegal practice under Section 1 of
21 the Sherman Act. *See Datagate Inc. v. Hewlett Packard Co.*, 60 F.3d 1421, 1423 (9th Cir. 1995); *see*
22 *also Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 461-62 (1992) (affirming rule of
23 *per se* liability). The *per se* analysis also applies to tying claims under the Cartwright Act. *See SC*
24 *Manufactured Homes, Inc. v. Liebert*, 162 Cal. App. 4th 68, 86 (2008) (stating that a tie exists if “the
25 buyer can[not] simply walk away and turn to another seller”); *Macmanus v. A.E. Realty Partners*,
26 195 Cal. App. 3d 1106, 1110 (1988). The Supreme Court notes that “the essential characteristic of
27 an invalid tying arrangement lies in the seller’s exploitation of its control over the tying product to
28 force the buyer into the purchase of a tied product that the buyer either did not want at all, or might

1 have preferred to purchase elsewhere on different terms.” *Jefferson Parish Hosp. Dist. No. 2 v.*
 2 *Hyde*, 466 U.S. 2, 12 (1984).

3 The prerequisites of a *per se* tying arrangement under the Cartwright Act are
 4 [the existence] of a tying agreement, arrangement or condition []
 5 whereby the sale of the tying product was linked to the sale of the tied
 6 product or service; (2) the party had sufficient economic power in the
 7 tying market to coerce the purchase of the tied product; (3) a
 8 substantial amount of sale was affected in the tied product; and (4)
 9 the complaining party sustained pecuniary loss as a consequence of
 10 the unlawful act.

11 *SC Manufactured Homes*, 162 Cal. App. 4th at 86 (internal citations and quotations omitted). The
 12 requirements for a *per se* tying claim under the §1 of the Sherman Act are virtually identical.⁶ Most
 13 notably, none of the elements of plaintiff’s tying claim turn on individual class members’
 14 circumstances but rather on common class-wide evidence.

15 Here, plaintiff alleges that Apple tied its iTunes Music Store (the tying product) to sales of
 16 the iPod (the tied product). ¶¶12, 55, 67-72. These products belong to separate product markets –
 17 the Online Music and Online Video markets, and the Digital Music Player market. ¶68. Thus, as
 18 Apple proudly admits, the consumer’s only option to play music from Apple’s Music Store is the
 19 iPod.⁷ As a result, Apple can and does sell the iPod at prices far above those that would prevail in a
 20 competitive market. ¶¶14, 71. In addition, Apple made affirmative efforts to ensure that iTunes
 21 music was not interoperable with other portable music players, by disabling its operating chip
 22 through software commonly known as “crippleware.” ¶38. Limiting consumer choices for music

23

24 ⁶ *Digidyne Corp. v. Data General Corp.*, 734 F.2d 1336 (9th Cir. 1984), overruled on other
 25 grounds by *Illinois Tool Works v. Independent Ink, Inc.*, 547 U.S. 28 (2006), as recognized in *Apple*
 26 *Inc. v. Psystar Corp.*, 586 F. Supp. 2d 1190 (N.D. Cal. 2008) (citing *Fortner Enterprises v. U.S.*
Steel Corp., 394 U.S. 495, 499, *Moore v. Jas. H. Matthews & Co.*, 550 F.2d 1207, 1212 (9th Cir.
 1977)).

27 ⁷ See, e.g., Steve Jobs, *Thoughts on Music*, February 6, 2007, [http://www.apple.com/hotnews/](http://www.apple.com/hotnews/thoughtsonmusic/)
 28 [thoughtsonmusic/](http://www.apple.com/hotnews/thoughtsonmusic/) (Haeggquist Decl. Ex. 5).

1 and video downloads has further strengthened Apple's anticompetitive tie. Proof of this claim
 2 clearly goes to Apple's anticompetitive behavior at the market level, and does not reference any
 3 inquiry into the circumstances of individual purchasers. For this reason, the claim is amenable to
 4 resolution on a class-wide basis.

5 This Court rightfully held that all but one of the elements of the direct purchasers' tying
 6 claim were satisfied by class-wide or market level proof. Specifically, in its Class Certification
 7 Order, this Court held that establishing the relevant markets set forth in plaintiff's complaint and
 8 determining whether Apple possessed market power in each of those markets "do not depend in any
 9 way upon individualized proof." 12/22 Order at 6. This Court also held that "Apple's use of
 10 technological restrictions and the amount of commerce affected by these restrictions are both
 11 questions that do not require individual proof." *Id.* at 7. For the same reasons, the Court should so
 12 hold here.

13 The only remaining element of plaintiff's tying claim to be determined by this Court is
 14 whether the sale of the tying product (iTMS) was linked to the sale of the tied product (iPod). As to
 15 whether such a tie exists, this Court sought additional briefing on the issues of (1) whether market-
 16 level coercion is a sufficient basis to bring plaintiffs' allegations within the ambit of a §1 tying
 17 claim, and (2) "whether, as a matter of law, coercion can be found where there is no requirement that
 18 the tying and tied products be purchased together."⁸

19 **(1) Coercion May Be Proven at the Market Level**

20 Market-level proof of coercion is sufficient and appropriate, because it is at the market level
 21 that tying operates. Indeed, while many or most consumers in a tied market may have been coerced,
 22 even those that are not are injured by the tie in the form of higher prices and reduced consumer
 23 choice and quality. In addition, while there may be some conceivable way in which a consumer
 24 could circumvent a market tie, it is the actual behavior of buyers and sellers in the marketplace that
 25

26 ⁸ 12/22 Order at 4. While certifying Counts Two through Seven of the direct purchasers'
 27 claims, the Court invited the parties to provide additional briefing on Count One, the tying claim, as
 28 to these two points. On February 13, 2009, Apple filed its Motion for Judgment on the Pleadings as
 to Plaintiffs' Tying Claim ("MJP"), arguing that plaintiffs' tying claim is invalid.

1 is the concern of antitrust law, which is why econometric, market-level analysis is the appropriate
2 way of discerning whether an illegal tie has been established to the detriment of competition.

3 As this Court has already held on two occasions, coercion may be alleged and proven at the
4 market, rather than the individual, level:

5 [T]here is no requirement that individual purchaser plaintiffs must
6 allege coercion at the individual level, rather than at the market level,
7 to state a Section 1 tying claim. In the Ninth Circuit, “[t]he essence of
8 an antitrust tying violation is not the seller’s unilateral refusal to deal
9 with a buyer who refuses to buy the tied product, but the use by the
10 seller of its ‘leverage’ to force a purchaser to do something that he
11 would not do in a competitive market.”

12 *Tucker v. Apple Comp., Inc.*, 493 F. Supp. 2d 1090, 1097 (N.D. Cal. 2006); *see also Slattery v.*
13 *Apple Comp., Inc.*, No. C 05-00037 JW, 2005 WL 2204981, at *3 (N.D. Cal. Sept. 9, 2005). These
14 rulings are correct: it is well-settled that the Ninth Circuit “does not require any showing of [] actual
15 coercion in tying claims.” *Bafus v. Aspen Realty*, 236 F.R.D. 652, 657 (D. Idaho 2006); *see also*
16 *Moore*, 550 F. 2d at 1217 (“Although some cases in other circuits have required a showing of actual
17 coercion . . . our reading of the Supreme Court’s opinions supports the view that coercion may be
18 implied from a showing that an appreciable number of buyers have accepted burdensome terms, such
19 as a tie-in, and there exists sufficient economic power in the tying product market . . .”).

20 Thus, to the extent coercion need be shown at all, plaintiff only needs to show that “an
21 appreciable number of buyers” have been coerced, which is a market-level showing made on a class-
22 wide basis. *See, e.g., Bafus*, 236 F.R.D. at 657 (following *Moore*, 550 F.2d 1207); *Image Tech*
23 *Servs., Inc. v. Eastman Kodak Co.*, Nos. C 07-1686, 94-0524, 94-1070, 1994 WL 508735, at *3
24 (N.D. Cal. Sept. 2, 1994) (same); *see also Collins v. Int’l Dairy Queen, Inc.*, 168 F.R.D. 668, 675-76
25 (M.D. Ga. 1996) (rejecting argument that coercion must be proved individually, so as to preclude
26 class certification). Therefore, proof of market coercion – i.e., that “an appreciable number of
27 buyers have accepted” the tie-in, and that Apple holds “sufficient economic power in the tying
28

1 product market” does not require individual “state-of-mind” testimony from every class member so
2 as to preclude class certification.⁹

3 While such a showing need not be proven on the merits at the class certification stage,
4 Apple’s own testimony confirms that Apple coerces and locks buyers of iTunes products into
5 purchasing its iPods by restricting their choice of portable digital music players to the iPod. Indeed,
6 Apple has proudly announced that “music purchased from Apple’s iTunes store will only play on
7 iPods.” *See, e.g.,* Haeggquist Decl. Ex. 5 (*see supra, Jobs, Thoughts on Music*) (“[Apple] envelopes
8 each song purchased from the iTunes store in special and secret software so that it cannot be played
9 on unauthorized devices.”). “Today, Apple’s own iPod compressed audio players are the **only**
10 devices on the market capable of playing iTunes music, though the company has licensed FairPlay to
11 Motorola, which plans to launch an iTunes compatible handset this year. ***This policy is consistent***
12 ***with Apple’s stated goal of driving iPod compressed audio player sales with iTunes Music***
13 ***Store . . .***”¹⁰ Apple iTunes owners are effectively coerced, on a class-wide basis, in to purchasing
14 iPods because they cannot directly play their iTunes downloads on any other digital music player.
15 Moreover, because of Apple’s technological tie, which it is undisputed that every class member is
16 subjected to, coercion can be shown on a class-wide or market level basis.

17 It is well-settled that inferring coercion on a class-wide basis is permissible. *See Paladin*
18 *Assocs., Inc. v. Montana Power Co.*, 328 F.3d 1145, 1161 (9th Cir. 2003) (suggesting that evidence
19 of tie-in requirement sent to customers at large would allow inference of coercion); *Hardy v. City*
20 *Optical, Inc.*, 39 F.3d 765, 770-71 (7th Cir. 1994) (coercion may be proved on a class-wide basis
21 with evidence of a “blanket policy”), *Moore*, 550 F.2d at 1217 (“coercion may be implied from a
22 _____

23 ⁹ *Moore*, 550 F. 2d at 1217; *accord Bogosian v. Gulf Oil Corp.*, 561 F. 2d 434, 449-50 (3d Cir.
24 1977) (“The issue is whether the seller acted in a certain way, not what the buyer’s state of mind
25 would have been absent the seller’s action.”); *Anderson Foreign Motors, Inc. v. New England*
26 *Toyota Distrib., Inc.*, 475 F. Supp. 973, 988 (D. Mass. 1979) (“The Supreme Court’s per se test is
designed to eliminate detailed evidentiary inquiries of the type that would be required to prove
individual buyer coercion. . . . It is the nature of the test that it focuses not on the buyer’s state of
mind but rather on the seller’s actions.”).

27 ¹⁰ *See* Haeggquist Decl. Ex. 1, French Aff. ¶47 (emphasis added).
28

1 showing that an appreciable number of buyers have accepted burdensome terms. . . . [In *Siegel*] we
 2 refused to accept appellant’s individual coercion theory and we were not troubled by the fact there
 3 was no evidence to show that each [class member] had been required to purchase the equipment,
 4 mixes, and packaging”); *Collins*, 168 F.R.D. at 675-76 (certifying tying claim where proof of
 5 coercion focused on the defendants’ conduct common to the putative class).

6 **(2) Coercion Can Be Found Where Two Products**
 7 **Are Not Purchased Simultaneously**

8 Plaintiff need not show that a consumer was required to buy the two products, the tied and
 9 tying product, together at the same time in order to prove a tie. An illegal tying claim may be
 10 established absent an explicit refusal by the defendant to sell the tying product unless the buyer also
 11 agrees to buy the tied product. *Ways & Means v. IVAC Corp.*, 506 F. Supp 697, 701 (N.D. Cal.
 12 1979), *aff’d*, 638 F.2d 143 (9th Cir. 1981); *see also Amerinet, Inc. v. Xerox Corp.*, 972 F.2d 1483,
 13 1500 (8th Cir. 1992). The Ninth Circuit and several other circuits have ruled that a consumer can
 14 show coercion when there is no other viable economic way but to purchase the tying and tied
 15 products. In *Ways & Means*, 506 F. Supp at 701, the court held that “separate availability will not
 16 preclude antitrust liability where a defendant has established its pricing policy in such a way that the
 17 only viable economic option is to purchase the tying and tied products in a single package.” *See also*
 18 *In re General Data Corp. Antitrust Litig.*, 490 F. Supp. 1089, 1110-11 (N.D. Cal. 1980) (fact that
 19 computer manufacturer technically offered buyers the option to purchase its computer and memory
 20 separately did not preclude liability for tying because the products essentially were required to be
 21 purchased together). The case of *Murphy v. Business Cards Tomorrow, Inc.*, 854 F.2d 1202 (9th Cir.
 22 1988), *overruled on other grounds*, 914 F.2d 1136 (9th Cir. 1990) (overruling portion of decision
 23 concerning Rule 11 sanctions), set forth the appropriate standard in the Ninth Circuit for what
 24 constitutes an illegal tying arrangement. “The essence of an antitrust tying violation is not the
 25 seller’s unilateral refusal to deal with a buyer who refuses to buy the tied product . . . but the use by
 26 the seller of its ‘leverage to force a purchaser to do something that he would not do in a competitive
 27 market.’” *Id.* at 1204 (quoting *Jefferson Parish*, 466 U.S. at 14 n.20; *U.S. v. Microsoft Corp.*, 253
 28 F.3d 34, 45 (D.C. Cir. 2001) (tying claim permitted where tying product, a computer operating

1 system, was used for purposes other than internet access for which the tied product, Internet
2 Explorer, was created). And in *Santa Cruz Med. Clinic v. Dominican Santa Cruz Hosp.*, No. C93
3 20613 RMW, 1995 WL 853037, at *13 (N.D. Cal. Sept. 7, 1995), the court utilized the “viable
4 economic option” standard, i.e., whether the tying product is “truly available” without purchase of
5 the tied products. Although in *Santa Cruz* the court found plaintiffs ultimately failed to adequately
6 plead sufficient facts to maintain a tying cause of action, the standard is instructive in this case,
7 nonetheless. “Tie-ins are non coercive, and therefore legal, only if the components are separately
8 available to the customer on a basis as favorable as the tie-in arrangement.” *Advance Bus. Sys. &*
9 *Supply Co. v. SCM Corp.*, 415 F.2d 55, 62 (4th Cir. 1969).

10 Here, it is clear that neither the iPod nor the iTunes music sold by Apple’s Music Store are
11 separately available to consumers on a basis as favorable as through the current tied arrangement. In
12 *N. Pac. R.R. v. United States*, 356 U.S. 1 (1958), the Supreme Court found an illegal tying
13 arrangement even though the plaintiffs could purchase the tying and tied products *separately*.
14 Defendant Northern Pacific leased land to the plaintiffs under the express condition that plaintiffs
15 “ship over its [defendant’s railroad] lines all commodities produced or manufactured on the land,
16 provided that its rates . . . were equal to those of competing carriers.” *Id.* at 3. Thus, the contract
17 permitted plaintiffs to lease land from the defendant railway company and still utilize transportation
18 services purchased from competitors, provided the competitors’ services were priced lower.
19 Plaintiffs were not required to demonstrate that they were coerced to lease the land and purchase
20 defendant’s transportation services. Rather, the Court found the defendant’s “preferential routing”
21 caused an unlawful restraint on trade because the defendant exploited its substantial economic power
22 by virtue of its extensive land holdings “to induce large numbers of purchasers and lessees to give it
23 preference, to the exclusion of its competitors, in carrying goods or produce from the land
24 transferred to them.” *Id.* at 7. The Supreme Court held that the defendant’s “preferential routing”
25 clause constituted an unlawful tying arrangement even though it technically allowed the lessee-
26 plaintiffs the option of purchasing transportation services *separately* from the defendants’ land lease.
27 *Id.* at 8, 12. Here, Apple is effectively forcing consumers to buy the tied and tying products, even if
28 not simultaneously.

1 None of the elements of plaintiff's tying claim turns on the individual circumstances of a
 2 particular product purchaser. Courts both within and outside of the Ninth Circuit have consistently
 3 certified similar tying claims for class-wide resolution.¹¹

4 **b. Plaintiff's Monopolization and Attempted**
 5 **Monopolization Claims**

6 Similarly, plaintiff's monopolization and attempted monopolization claims will be proven
 7 with reference to evidence that is completely common to the class. A monopolization claim requires
 8 (1) possession of monopoly power in the relevant market, (2) willful acquisition or maintenance of
 9 that power, and (3) antitrust injury. *See Austin v. McNamara*, 979 F.2d 728, 739 (9th Cir. 1992).
 10 The Ninth Circuit has explained that there are four requirements to show antitrust injury:
 11 "(1) unlawful conduct, (2) causing an injury to the plaintiff, (3) that flows from that which makes the
 12 conduct unlawful, and (4) that is of the type the antitrust laws were intended to prevent."
 13 *Knevelbaard Dairies v. Kraft Foods, Inc.*, 232 F.3d 979, 987 (9th Cir. 2000) (quoting *Am. Ad Mgmt.*,
 14 *Inc. v. Gen. Tel. Co.*, 190 F.3d 1051, 1055 (9th Cir. 1999)). *See* ¶¶54-60 (plaintiff's allegations of
 15 antitrust injury).

16 To show attempted monopolization, a plaintiff must ultimately prove (1) a specific intent to
 17 monopolize; (2) predatory or anticompetitive conduct; and (3) a dangerous probability of success in
 18 achieving monopoly power.¹²

19 As this Court has already found, "common questions of law and fact predominate over
 20 individual questions as to plaintiff's monopolization and attempted monopolization causes of
 21 action." 12/22 Order at 5. "Questions surrounding the willfulness of Apple's behavior are
 22 undoubtedly common to the class, as are questions of antitrust injury, especially if the injury alleged
 23 is that Apple uniformly charged consumers supracompetitive prices based on its purported monopoly

24 ¹¹ *See, e.g., Bafus*, 236 F.R.D. 652 (certifying tying claims); *see generally Image Tech.*, 1994
 25 WL 508735 (same); *In re Visa Check/Mastermoney Antitrust Litig.*, 192 F.R.D. 68 (E.D.N.Y. 2000),
 26 *aff'd*, 280 F.3d 124 (2d Cir. 2001) (same); *Little Caesar Enters., Inc. v. Smith*, 172 F.R.D. 236 (E.D.
 Mich.1997) (same); *Collins*, 168 F.R.D. 668 (same).

27 ¹² *See Spectrum Sports v. McQuillan*, 506 U.S. 447, 459 (1993); *Confederated Tribes of Siletz*
 28 *Indians of Or. v. Weyerhaeuser Co.*, 411 F.3d 1030, 1041-45 (9th Cir. 2005), *overruled on other*
grounds sub nom. Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., 549 U.S. 312 (2007).

1 position.” 12/22 Order at 5. Like the direct purchaser plaintiffs, here, Plaintiff also alleges that the
 2 antitrust injury caused by Apple’s monopoly power is that Apple was able to charge
 3 supracompetitive prices for its iPods. And, Dr. French has set forth an economic methodology to
 4 demonstrate that proof of impact and damages is possible on a class-wide basis. *See Haeggquist*
 5 Decl. Ex. 1, French Aff. 17, 35-69.

6 Accordingly, plaintiff has met the predominance requirement of Rule 23(b)(3) for her
 7 monopolization and attempted monopolization claims.

8 **c. Plaintiff’s California State Law Claims**

9 Plaintiff’s other state law claims also will be proven with common evidence on a class-wide
 10 basis.

11 **(1) California Business and Professions Code §17200**

12 Business and Professions Code §17200, also known as the Unfair Competition Law (“the
 13 UCL”), defines “unfair competition” to “mean and include any unlawful, unfair or fraudulent
 14 business act or practice.” *Id.* Because “section 17200 ‘is written in the disjunctive, it establishes
 15 three varieties of unfair competition – acts or practices [which] are unlawful, or unfair, or
 16 fraudulent.’” *Gregory v. Albertson’s, Inc.*, 104 Cal. App. 4th 845, 851 (2002).

17 Plaintiff alleges that Apple engaged in unfair competition under each of the three prongs.
 18 ¶¶108-115. Plaintiff need only prove a violation of one these three prongs to prevail. *Cel-Tech*
 19 *Commc’ns, Inc. v. L.A. Cellular Tel. Co.*, 20 Cal. 4th 163, 180 (1999).

20 Under the “unlawful” prong, the UCL “borrows” violations of other laws and treats them as
 21 independently actionable practices. *Cel-Tech*, 20 Cal. 4th at 180. “With respect to the unlawful
 22 prong, ‘[v]irtually any state, federal or local law can serve as the predicate for an action’ under
 23 section 17200.” *People ex rel. Lockyer v. Fremont Life Ins. Co.*, 104 Cal. App. 4th 508, 515 (2002)
 24 (emphasis omitted). Violations of state and federal antitrust statutes and the CLRA constitute
 25 violations under the unlawful prong of the UCL. *Quelimane Co. v. Stewart Title Guar. Co.*, 19 Cal.
 26 App. 4th 26 (1998) (violations of the Cartwright Act); *B.W.I. Custom Kitchen v. Owens-Illinois*, 191
 27 Cal. App. 3d 1341, 1348 n.6 (1987) (“Violations of the Cartwright Act are also unlawful business
 28

1 practices under the unfair competition statutes.”); *Falk v. Gen. Motors Corp.*, 496 F. Supp. 2d 1088,
2 1095-1096 (N.D. Cal. 2007) (violations of the CLRA).

3 Accordingly, the same common evidence that will be used to prove Apple violated state and
4 federal laws against monopolization and tying will be used to prove Apple violated the UCL.

5 **(2) The Consumer Legal Remedies Act**

6 The CLRA (Civ. Code §1770(a)(19)) provides:

7 The following unfair methods of competition and unfair or deceptive
8 acts or practices undertaken by any person in a transaction intended
9 to result or which results in the sale or lease of goods or services to
10 any consumer are unlawful:

11 * * *

12 (19) Inserting an unconscionable provision in the contract.

13 Plaintiff will demonstrate common impact for her claim under the CLRA using the same
14 evidence that will prove her federal antitrust claims. It is based on the same alleged conduct that
15 gives rise to the antitrust claims, and involves the same issues. As discussed above, these issues are
16 susceptible to class-wide proof.

17 **d. Antitrust Damages Can Be Proven on a Class-Wide
18 Basis**

19 “Courts recognize a somewhat relaxed standard of proof once the antitrust violation and
20 resulting injury have been proven. This is the logical result of an inability to ascertain exactly what
21 ‘plaintiff’s position would have been in the absence of defendant’s antitrust violation.’” *Microsoft*,
22 12/22 Order at 17 (citations omitted). California law provides that damages may be awarded based
23 on a defendant’s aggregate overcharge without proof that each class member was overcharged on the
24 amount thereof. *Bruno v. Superior Court*, 127 Cal. App. 3d 120, 128-29 & n.4 (1981). California’s
25 amendment of the Cartwright Act to expressly authorize indirect purchaser actions is a legislative
26 determination that it is possible to trace the overcharge to the ultimate victim and that plaintiffs
27 should be allowed to present their proof. *Union Carbide Corp. v. Superior Court*, 36 Cal. 3d 13, 21-
28 22 (1984). Since the statute was amended, our courts have routinely allowed indirect purchasers to

1 demonstrate the pass-through of defendant’s overcharge to the ultimate consumer on a class-wide
2 basis. *B.W.I.*, 191 Cal. App. 3d at 1352. (“[A] class should be able to show on a generalized basis
3 that its members absorbed at least some portion of the alleged overcharges.”) “Plaintiffs do not need
4 to supply a precise damage formula at the certification stage of an antitrust action . . . The Court
5 need only determine that plaintiffs have proffered a method that is not so insubstantial or
6 unreasonable as to amount to no method at all. They have met their low burden here.” *Rubber*
7 *Chemicals Antitrust Litig.*, 232 F.R.D. 346, 354 (N.D. Cal. 2005). Individual issues, even if they do
8 exist, are not an obstacle to class certification. Standard damage calculation techniques more than
9 satisfy this requirement. *In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, No. 02-
10 1486, 2006 WL 1530166, at *9 (N.D. Cal. June 5, 2006).

11 Here, Dr. French explains the methodology he will use to determine damages to the indirect
12 purchaser class. Haeggquist Decl. Ex. 1, French Aff. ¶¶64-69. Specifically, he sets out how to
13 calculate the overcharge to direct purchasers, and then to measure the amount of the overcharge
14 passed on to indirect purchasers. *Id.* ¶65. Dr. French describes three methods of measuring the
15 overcharge to direct purchasers: Temporal benchmarks, the yardstick approach, and margin
16 analysis. *Id.* ¶¶65-68. He also describes a more direct method of measuring the overcharge to
17 indirect purchasers, performing a regression analysis using retail iPod prices. *Id.* ¶69.

18 Dr. French’s report more than satisfies plaintiff’s burden of showing an available method of
19 proving impact by evidence applicable on a class-wide basis. His model employs class-wide proof,
20 and does not depend on individualized proof to determine damages. It is similar to other models that
21 courts have accepted as showing that damages can be shown using common proof for purposes of
22 class certification in antitrust cases involving allegations of overcharges.

23 In addition, Apple’s use of price lists is strong evidence of common impact in this case. *See*
24 *In re Citric Acid Antitrust Litig.*, No. 95-1092, 1996 WL 655791, at *7 (N.D. Cal. Oct. 2, 1996)
25 (“high list prices proved the fact of impact, even if the degree of impact differed between products
26 and purchasers”).

1 **2. A Class Action Is the Superior Method to Resolve Plaintiff's**
 2 **Claims**

3 Plaintiff also satisfies the requirement that a class action be superior to other methods of
 4 adjudicating the controversy. *See Valentino v. Carter-Wallace*, 97 F.3d 1227, 1235 (9th Cir. 1997)
 5 (“stating that the party seeking certification needs to make a “showing [as to] why the class
 6 mechanism is superior to alternative methods of adjudication”). A class action is superior where
 7 “class-wide litigation of common issues will reduce litigation costs and promote greater efficiency.”
 8 *Id.* at 1234. Rule 23(b)(3) provides four factors to be considered in this assessment:

- 9 (A) the class members’ interests in individually controlling the
 10 prosecution or defense of separate actions;
 11 (B) the extent and nature of any litigation concerning the
 12 controversy already begun by or against class members;
 13 (C) the desirability or undesirability of concentrating the litigation
 14 of the claims in the particular forum; and
 15 (D) the likely difficulties in managing a class action.

16 Here, each class member’s individual claim is relatively small in comparison to the expense
 17 of litigating an individual action. In addition, because class members’ claims are virtually identical,
 18 no one member of the class has an interest in controlling the litigation. Plaintiff is aware of no other
 19 litigation concerning the instant controversy. Even in cases where there are more complex issues
 20 and complexity, denial of class certification on manageability grounds is disfavored.¹³ For these
 21 very reasons this Court held in the related direct purchaser action that “a class action is the superior
 22 method to adjudicate plaintiffs’ claims. 12/22 Order at 12-13. Plaintiff Somers respectfully urges
 23 the Court to find the same here.
 24

25 ¹³ *See In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 140 (2d Cir. 2001)
 26 (“[F]ailure to certify an action under Rule 23(b)(3) on the sole ground that it would be unmanageable
 27 is disfavored and should be the exception rather than the rule.”) (internal quotation marks and
 28 citation omitted); *In re S. Cent. States Bakery Prods. Antitrust Litig.*, 86 F.R.D. 407, 423 (M.D. La.
 1980) (quoting *Manual for Complex Litigation* §1.43 n.72 (1977) (failure to certify a class on
 manageability grounds is disfavored and “should be the exception rather than the rule”).

1 **D. Choice of Law Issues Do Not Defeat Predominance of the Cartwright**
 2 **Act Damages Claim**

3 Plaintiff seeks certification of nationwide a damages class under California’s Cartwright Act
 4 because, *inter alia*, Apple is headquartered in California, and Apple’s wrongful conduct emanated
 5 from California. The presumption in the choice-of-law analysis is that California, as the forum state,
 6 will apply its own law. *Hurtado v. Superior Court*, 11 Cal. 3d 574, 581 (1974) (“even in cases
 7 involving foreign elements, the court should be expected, as a matter of course, to apply the rule of
 8 decision found in the law of the forum”).

9 Under California’s governmental interest analysis, California law applies unless:
 10 (1) California law conflicts with the law of another state; (2) the state whose law conflicts with
 11 California law has an interest in applying its own law; and (3) the foreign state’s interest in applying
 12 its own law would be more impaired than California’s interest in applying its own law if the law of
 13 such a state were not applied. *Washington Mut. Bank v. Superior Court*, 24 Cal. 4th 906, 919-20
 14 (2001); *Clothesrigger, Inc. v. GTE Corp.*, 191 Cal. App. 3d 605, 614 (1987); *see also In re MDC*
 15 *Holdings Sec Litig.*, 754 F. Supp. 785, 803 (S.D. Cal. 1990) (citing *Harmsen v. Smith*, 693 F.2d 932,
 16 946-47 (9th Cir. 1982)). The party arguing against application of the forum state’s law bears the
 17 burden of proving each of these three elements. *Hurtado*, 11 Cal. 3d at 579.

18 **1. California’s Laws Do Not Conflict with Those of Other States**

19 “‘When one of two states related to a case has a legitimate interest in the application of its
 20 law and policy and the other has none, there is no real problem; clearly the law of the interested state
 21 should be applied.’” *Hurtado*, 11 Cal. 3d at 580. This means the trial court may properly find
 22 California law applicable without proceeding to the second step in the analysis if the foreign law
 23 proponent fails to identify any actual conflict or to establish the other state’s interest in having its
 24 own law applied. *Washington Mut.*, 24 Cal. 4th at 919. Apple cannot show that California law
 25 conflicts with the law of another state. “[T]he idiosyncratic differences between state consumer
 26 protection laws are not sufficiently substantive to predominate over the shared claims.” *Hanlon*, 150
 27 F.3d at 1022-23. Therefore, application of California’s antitrust laws will not impair any other
 28 state’s interests.

2. No Other State Has an Interest in Applying Its Own Law

Even if Apple could show material differences between the laws of California and the other states, the Court must determine what interest, if any, each state has in having its own law applied. *Washington Mut.*, 24 Cal. 4th at 920. A court should decline to apply California law “only if it is shown that another state has a greater interest in having its law applied.” *In re Pizza Time Theatre Sec. Litig.*, 112 F.R.D. 15, 19 (N.D. Cal. 1986). Defendant cannot demonstrate that other states have an interest in applying their own laws. No state has an interest in preventing its citizens from invoking California law to remedy damage from activities that emanated from California. Moreover, courts have recognized California’s interest in providing a remedy for wrongful conduct that originated and occurred within the state, both to California residents, and to nonresidents as well. Indeed, a California appellate court reached precisely this conclusion in another case involving Apple. In *Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224, 241-44 (2001), the trial court certified a nationwide settlement class, holding that there were significant contacts with California to support certification of a nationwide class, and to justify subjecting defendant to California’s consumer protection laws. *See id.* at 232-34. Objectors argued that the court erred in certifying a nationwide class, “[b]ecause class members in other states had different rights and remedies under their state laws.” *Id.* at 237. Concluding, “California law controls in this case” (*id.* at 240), the *Wershba* court followed *Clothesrigger* where the court found sufficient contacts with California to allow application of its law to a nationwide class. *See Clothesrigger*, 191 Cal. App. 3d at 616 (“California’s more favorable laws may properly apply to benefit nonresident plaintiffs when their home states have no identifiable interest in denying such persons full recovery.”).

California is the epicenter of defendant’s anticompetitive activities. The core decision at issue here, namely the encoding of Apple’s music and video files with DRM, was made at Apple’s headquarters in California. *See Wershba*, 91 Cal. App. 4th at 242 (“the core decision at issue here, namely the change of policy . . . was made at Apple’s headquarters in California.”). This case is unlike other antitrust cases in which multiple defendants in different locations allegedly engaged in a conspiracy to fix prices. Here, a single defendant based in California is responsible for the whole of the anticompetitive acts alleged.

1 Certification of classes of indirect purchasers is common and is an important remedy that
 2 California and other states have made available to consumers. Unlike other indirect purchaser cases,
 3 involving raw materials that may be have been altered or processed as they pass from one entity to
 4 another, this case presents a very simple distribution chain: consumers bought a finished product
 5 from retailers that were not altered in any way. *See* Haeggquist Decl. Ex. 1, French Aff. ¶25.
 6 Moreover, plaintiff and millions of class members are located in California. As in *Clothesrigger*,
 7 there are significant contacts with California in this case to satisfy constitutional concerns and
 8 support certification of a nationwide class.

9 **3. Other State Laws Will Not Be Impaired If California’s Laws**
 10 **Were Applied to All Class Members.**

11 Only if Apple is able to establish that (1) the laws of the various states are materially
 12 different, and (2) each state has its own governmental interest in having its law applied to the multi-
 13 state class claims, does the Court then employ the third step in the governmental interest analysis:
 14 selecting the law of the state whose interests would be more impaired if its law were not applied. “In
 15 making this comparative impairment analysis, the trial court must determine ‘the relative
 16 commitment of the respective states to the laws involved’ and consider ‘the history and current status
 17 of the states’ laws’ and ‘the function and purpose of those laws.’” *Washington Mut.*, 24 Cal. 4th at
 18 920. California’s interest in protecting consumers from wrongful conduct that occurred in California
 19 and was perpetrated by a company headquartered in California would be more impaired if not
 20 applied than the interest of any other state. Apple has put itself at the heart of California’s interest in
 21 protecting consumers, namely to prevent California corporations from allowing consumer-harming
 22 practices such as these to emanate from California. It is clear that California cannot reasonably
 23 effectuate its policy if it does not extend to include class members residing in other states.¹⁴ Even

24 _____
 25 ¹⁴ *Bernhard v. Harrah’s Club*, 16 Cal. 3d 313, 322-23 (1976); *see also Wong v. Tenneco, Inc.*,
 26 39 Cal. 3d 126, 143 (1985) (“Application of Mexican law in this case would completely impair
 27 California’s interests in compensation, punishment and deterrence.”); *Havlicek v. Coast-To-Coast*
 28 *Analytical Servs. Inc.*, 39 Cal. App. 4th 1844, 1853 (1995) (California’s interest would be more
 impaired by the application of Delaware law where corporation operating out of California); *In re*
Seagate Techs. Sec. Litig., 115 F.R.D. 264, 272 (N.D. Cal. 1987) (state’s interest in preventing fraud
 by its corporations justifies application of its law); *In re Pizza Time Theatre Sec. Litig.*, 112 F.R.D.

1 assuming Apple could identify a genuine conflict between California and another state's laws, and
 2 that another state has an interest in applying its own law, Apple would be hard-pressed to show that
 3 another state's interests would be more impaired than California's interest in applying its own law
 4 especially due to California's commitment to protecting consumers. Apple cannot overcome the
 5 presumption that California law controls and may be applied to all Class members' claims.

6 **IV. THE COURT SHOULD APPOINT ZELDES & HAEGGQUIST, LLP AND**
 7 **MEHRI & SKALET, PLLC AS CLASS COUNSEL**

8 Rule 23(g) directs the court to appoint class counsel at the same time that it certifies a class.
 9 Here, the two firms of Zeldes & Haeggquist, LLP and Mehri & Skalet, PLLC have been litigating
 10 this case on behalf of indirect purchasers since December 2007. They have extensive experience in
 11 antitrust and consumer class action litigation.

12 The lawyers of Zeldes & Haeggquist, LLP have a long history of successfully litigating
 13 antitrust and consumer fraud class actions. Most recently, Zeldes & Haeggquist, LLP won final
 14 approval of a nationwide class settlement against Apple, Inc., concerning an alleged defect in the
 15 power adapter for its portable computers. *Gordon v. Apple, Inc.*, Case No. 5:06-CV-5358 JW (N.D.
 16 Cal.). Under the settlement, more than two million class members are eligible to receive cash
 17 refunds in the amount of \$25 to \$79. Zeldes & Haeggquist, LLP is also currently representing
 18 plaintiffs in two nationwide consumer fraud class actions, one against Public Storage, Inc. for its
 19 alleged deceptive and misleading advertising practices, *Hilary v. Public Storage, Inc.*, Case No.
 20 BC382782 (Cal. Superior Ct., Los Angeles); and the other against Nvidia for allegedly knowingly
 21 placing defective graphic cards into the marketplace impacting thousands if not millions of
 22 computers, *NBOA v. Nvidia*, Case 5:08-cv-05179-JW (N.D. Cal.). The firm also represents plaintiffs
 23 in two California employment class actions.

24 Zeldes & Haeggquist, LLP's founding partners come from the nation's largest plaintiffs'
 25 class action firm. While at their prior firm, Zeldes & Haeggquist partners litigated numerous
 26 nationwide consumer and antitrust class actions including *In re Payment Card Interchange Fee &*

27 15, 18 (N.D. Cal. 1986) (stating that California "has a strong interest in the allegedly fraudulent
 28 conduct of its corporations . . . and in protecting its residents and others from such fraud").

1 *Merch. Disc. Antitrust Litig.* (E.D.N.Y.), *In re Carbon Black Antitrust Litig.* (D. Mass.), *In re Med.*
2 *Waste Servs. Antitrust Litig.*, MDL No. 1546 (D. Utah), participated in the successful prosecution
3 and settlement of numerous other antitrust and unfair competition cases, including the Rubber
4 Chemicals indirect purchaser cases, which resulted in significant cy pres funds to non-profit groups
5 advocating for competition; the *Bank Privacy Cases* (Cal. Superior Ct., San Francisco), which
6 resulted in better bank privacy policies, funding to non-profit groups advocating for privacy rights,
7 and benefits to credit cardholders; and *Thomas & Thomas Rodmakers, Inc. v. Newport Adhesives &*
8 *Composites, Inc. (Carbon Fiber Antitrust Litig.)*, Case No. CV-99-7796 (C.D. Cal.), which resulted
9 in a \$675 million settlement for a class of purchasers that purchased allegedly price-fixed carbon
10 fiber and race discrimination underwriting class actions against large insurance companies for their
11 practice of intentionally charging African-Americans and other minorities more for life insurance
12 than similarly situated Caucasians (cases that collectively recovered over \$400 million for African-
13 Americans and other minority class members as redress for the civil rights abuses they were subject
14 to). See Haeggquist Decl. Ex. 3, Zeldes & Haeggquist, LLP Firm Resume for further details.

15 Mehri & Skalet, PLLC and its attorneys have an impressive history of accomplishment in
16 class actions that serve the public interest. As further detailed in the Firm Resume (Haeggquist Decl.
17 Ex. 4), Mehri & Skalet attorneys have achieved precedent-setting victories in litigation on behalf of
18 women and people of color in the workplace, securing both substantial monetary relief, and
19 systematic corporate reforms. The firm also has an impressive history of accomplishment in
20 consumer class actions, recovering on behalf of uninsured patients against a health care company
21 that engaged in discriminatory billing practices, securing full reimbursement of class members'
22 brake repairs in a class action against Ford Motor Company, achieving cash reimbursement and
23 discounts for purchasers of HP computers with a defective motherboard, and obtaining recovery of
24 Verizon's overcharges to small business owners.

25 The firm also has substantial experience in antitrust, securities and ERISA class action
26 litigation. The firm currently represents plaintiffs in two antitrust class action suits alleging
27 anticompetitive tying of cable television services with cable boxes, *In re Set-Top Cable Television*
28 *Box Antitrust Litigation*, MDL No. 1995, 08 CV 7616 (PKC) (S.D.N.Y.), and *Mays v. Comcast*

1 Corp., 09 CV 670 (JHL) (N.D. Ill). Mehri & Skalet attorneys also represent plaintiffs in *In re Puerto*
2 *Rican Cabotage Antitrust Litig.*, MDL-1960 (D.P.R.), *In re Chocolate Confectionary Antitrust Litig.*,
3 MDL-1935 (M.D. Pa.), and *In re Rail Freight Fuel Surcharge Antitrust Litig.*, MDL-1869 (D.D.C.).
4 Craig Briskin, an attorney with the firm, has been litigating antitrust class actions since 2001.

5 **V. CONCLUSION**

6 For the reasons stated herein, plaintiff asks the Court to grant her motion for class
7 certification, certify the proposed nationwide class pursuant to Federal Rule of Procedure 23(b)(2)
8 and (b)(3), and appoint the firms of Zeldes & Haeggquist, LLP and Mehri & Skalet, PLLC as Co-
9 Lead Class Counsel.

10 DATED: February 23, 2009

Respectfully submitted,

11 ZELDES & HAEGGQUIST, LLP
12 HELEN I. ZELDES
ALREEN HAEGGQUIST

13
14 s/ Helen I. Zeldes

HELEN I. ZELDES

15 655 West Broadway, Suite 1410
16 San Diego, CA 92101
17 Telephone: 619/955-8218
18 Fax: 619/342-7878
helenz@zhlaw.com
alreenh@zhlaw.com

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

25 Attorneys for Plaintiff Stacie Somers
26
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CERTIFICATE OF SERVICE

I hereby certify that on February 23, 2009, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses denoted on the attached Electronic Mail Notice List, and I hereby certify that I have mailed the foregoing document or paper via the United States Postal Service to the non-CM/ECF participants indicated on the attached Manual Notice List.

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on February 23, 2009.

s/ Helen I. Zeldes
HELEN I. ZELDES

ZELDES & HAEGGQUIST, LLP
HELEN I. ZELDES
ALREEN HAEGGQUIST
655 West Broadway, Suite 1410
San Diego, CA 92101
Telephone: 619/955-8218
Fax: 619/342-7878

Email Addresses: helenz@zhlaw.com
alreenh@zhlaw.com

1 **MAILING INFORMATION FOR CASE C 07-06507**

2
3 **Electronic Mail Notice List**

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

- 5 • **Craig L. Briskin**
cbriskin@findjustice.com, Pleadings@findjustice.com
- 6 • **Alreen Haeggquist**
alreenh@zhlaw.com
- 7 • **Robert Allan Mittelstaedt**
ramittelstaedt@jonesday.com, ybennett@jonesday.com
- 8 • **Tracy Strong**
tstrong@jonesday.com, dharmon@jonesday.com
- 9 • **Elaine Wallace**
rchavez@jonesday.com, ewallace@jonesday.com, clok@jonesday.com
- 10 • **Helen I. Zeldes**
helenz@zhlaw.com

11
12
13
14
15 **Manual Notice List**

16 The following is the list of attorneys who are not on the list to receive e-mail notices for this case
17 (who therefore require manual noticing).

18 **Steven A. Skalet**
Mehri & Skalet, PLLC
1250 Connecticut Avenue NW, Suite 300
19 Washington, DC 20036

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

1 **Manual Notice List**

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

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

7 Elaine A. Ryan
Bonnett Fairbourn Friedman & Balint, P.C
8 2901 N. Central Avenue
Suite 1000
9 Phoenix, AZ 85012

10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28