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 APPLE INC.

10 UNITED STATES DISTRICT COURT  
 11 SOUTHERN DISTRICT OF CALIFORNIA

13 DAVID WALSH, an individual, on behalf of  
 himself, and on behalf of all persons similarly  
 14 situated,

15 Plaintiff,

16 v.

17 APPLE INC.; and DOES 1-10,

18 Defendants.

Civil No. 08 CV 1410 JM POR

**INDEX OF ATTACHMENTS TO  
 DEFENDANT APPLE INC.'S  
 NOTICE OF MOTION AND MOTION  
 TO TRANSFER VENUE PURSUANT  
 TO 28 U.S.C. § 1404(A)**

Date: November 14, 2008  
 Time: 1:30 p.m.  
 Dept.: 16  
 Judge: Hon. Jeffrey T. Miller

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CASE NO. 08 CV 1410 JM POR

**MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
DEFENDANT APPLE INC.'S  
MOTION TO TRANSFER VENUE  
PURSUANT TO 28 U.S.C. § 1404(a)**

Date: November 14, 2008  
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1 **I. INTRODUCTION**

2 The San Jose division of the Northern District of California is a much more convenient  
3 and appropriate forum for all parties in this action; the parties and the claims in this case have no  
4 connection to the Southern District of California at all. Plaintiff does not reside in the Southern  
5 District, and did not work for Apple in the Southern District. In fact, Apple does not employ any  
6 Network Engineers, the position at issue here, in the Southern District, and currently employs 23  
7 of its 27 Network Engineers in the Northern District. Litigating in the Northern District of  
8 California clearly will be more convenient for both parties as well as the witnesses, and provides  
9 easier access to evidence relating to Plaintiff's claims. Given the complete lack of contacts, it  
10 appears the case was filed in the Southern District only because Plaintiff's counsel's office is  
11 located near San Diego. This is not a legally valid reason to keep the case in the Southern  
12 District. Nothing renders this District an appropriate forum for this litigation. Therefore, for the  
13 convenience of parties and witnesses, and in the interest of justice, the Court should grant Apple's  
14 motion to transfer venue and order that this case be transferred to the San Jose division of the  
15 Northern District of California pursuant to 28 U.S.C. § 1404(a).

16 **II. FACTS**

17 Apple is a California corporation headquartered in Cupertino, California. Declaration of  
18 Heather Ramirez ("Ramirez Decl."), ¶ 3. Apple's headquarters contains many functional groups,  
19 including Engineering, Marketing, Sales, Legal, Human Resources, AppleCare, and Information  
20 Systems & Technology ("IS&T"). *Id.* Apple's main human resources and employee relations  
21 department personnel work out of the Cupertino location, and the IS&T group is based at Apple's  
22 headquarters in Cupertino, which is in the Northern District of California. *Id.* Network  
23 Engineers belong to the IS&T group. *Id.* Plaintiff was employed as a Network Engineer in the  
24 IS&T Group. *Id.* at ¶ 5.

25 Apple currently employs a total of 27 Network Engineers, with 25 located in Northern  
26 California: 23 are in Cupertino, California, and 2 are in Elk Grove, California. *Id.* at ¶ 4. The  
27 other 2 Network Engineers work in Austin, Texas. *Id.* There are no Network Engineers  
28 employed in San Diego or anywhere else in the Southern District of California. *Id.*

1 During his employment with Apple, Plaintiff David Walsh worked for Apple out of the  
2 Elk Grove, California facility. *Id.* at ¶ 5. Plaintiff also attended meetings and periodically  
3 performed work at Apple’s headquarters in Cupertino. *Id.* During the time Plaintiff worked as a  
4 Network Engineer for Apple, he reported to three managers who were based in Cupertino, and  
5 one based in Austin, Texas. *Id.* at ¶ 6. Thus, Plaintiff’s work assignments and communications  
6 from his managers mainly originated from Cupertino. *Id.* He also worked with other Network  
7 Engineers who were based out of Cupertino. *Id.*

8 In addition, all employment records kept by the Human Resources department are kept at  
9 Apple’s headquarters in Cupertino. *Id.* at ¶ 7. Further, to the extent any records needs to be  
10 collected from Apple’s servers (such as Plaintiff’s communications with his managers or other  
11 work related records), it will be processed and sent from an Apple facility in Cupertino. *Id.*

12 **III. ARGUMENT**

13 **A. This Action Should Be Transferred To The San Jose Division Of The**  
14 **Northern District Of California Pursuant To 28 U.S.C. § 1404(a)**

15 Under 28 U.S.C. § 1404(a), “[f]or the convenience of parties and witnesses, in the interest  
16 of justice, a district court may transfer any civil action to any other district or division where it  
17 might have been brought.” In deciding Section 1404(a) motions, courts generally consider  
18 several convenience and interest of justice factors. Convenience factors include the convenience  
19 of the parties and witnesses and the ease of access to the evidence, while interest of justice  
20 considerations include any local interest in the controversy, feasibility of consolidation, and  
21 familiarity of each forum with applicable law. *See Williams v. Bowman*, 157 F. Supp. 2d 1103,  
22 1106 (N.D. Cal. 2001).<sup>1</sup>

23 Here, the Northern and Southern Districts are equally familiar with applicable California  
24 and federal laws governing this case, and Apple is unaware of any action pending in the Northern  
25 or Southern District with consolidation possibilities. Therefore, these two factors are neutral.

26 <sup>1</sup> Some deference is also given to the plaintiff’s choice of forum, though less deference is given if a  
27 plaintiff brings the action on behalf of a class or if the claim did not arise from the chosen forum. *Lou v.*  
28 *Belzberg*, 834 F.2d 730, 739 (9th Cir. 1987). Here, Plaintiff attempts to bring the action on behalf of a  
class and the claim did not arise from the chosen forum, so Plaintiff’s choice of the Southern District is  
entitled to little (if any) deference.

1 However, each of the remaining factors clearly supports a transfer of this action to the San Jose  
2 division of the Northern District of California.

3 **1. Plaintiff Might Have Brought This Action In The Northern District Of**  
4 **California**

5 As a preliminary matter, there can be no dispute that this action could have been brought  
6 properly in the San Jose division of the Northern District of California. Venue is proper in a  
7 judicial district where the defendant resides. 28 U.S.C. § 1391(b). Pursuant to 28 U.S.C. §  
8 1391(c), a corporate defendant shall be deemed to reside in any judicial district in which it is  
9 subject to personal jurisdiction at the time the action is commenced. Apple resides in the  
10 Northern District of California because its principal place of business (Cupertino) is in Santa  
11 Clara County, it transacts business in the Northern District, and it is subject to personal  
12 jurisdiction there.

13 Specifically, the San Jose division is the proper venue within the Northern District to hear  
14 this case. Northern District Local Rule 3-2 governs the division assignment of cases in the  
15 Northern District. Rule 3-2(c) states that the action shall be assigned to the county in which the  
16 action arises. “A civil action arises in the county in which a substantial part of the events or  
17 omissions which give rise to the claim occurred[.]” N.D. Civil L.R. 3-2(c). Rule 3-2(e) states  
18 that civil actions which arise in the counties of Santa Clara, Santa Cruz, San Benito, or Monterey  
19 will be assigned to the San Jose division.

20 Here, the action has strong connections with Santa Clara County. As noted above, Apple  
21 is based in Cupertino, California. *See* Ramirez Decl., ¶ 3. And though Plaintiff worked out of  
22 Elk Grove in the Eastern District, his managers were located in Cupertino in Santa Clara County,  
23 and the IS&T group to which Plaintiff belonged is also based in Cupertino. *See id.* at ¶¶ 3, 5 and  
24 6. Plaintiff’s work assignments came from Cupertino, and he attended meetings and performed  
25 work in Cupertino. *Id.* at ¶¶ 5 and 6. Further, Network Engineers working for Apple within the  
26 Northern District all work out of Cupertino. *See id.* at ¶ 4. Because of all these connections with  
27 Santa Clara County, venue is proper in the San Jose division of the Northern District of  
28 California.

1                   2.     The Convenience Of Parties And Witnesses Weighs In Favor Of  
2                                   Transfer

3             The convenience of parties and witnesses is considered the most important factor in the  
4 determination of whether to transfer venue. *See Cento Group, SPA v. Oroamerica, Inc.*, 822 F.  
5 Supp. 1058, 1060 (S.D.N.Y. 1993) (“The convenience of parties and witnesses is considered the  
6 essential criteria under the venue statute ... and the most significant factor.”). Here, the  
7 convenience of both the parties and witnesses favors a transfer of this action to the Northern  
8 District of California. Plaintiff admits in the First Amended Class and Collective Action  
9 Complaint (“FAC”) that Apple’s corporate headquarters is located in Cupertino, California,  
10 which is in the Northern District. FAC, ¶ 1. Plaintiff also admits that many of Apple’s major  
11 functional groups are represented at Apple’s headquarters, including Engineering, Marketing,  
12 Sales, Legal, Human Resources, and AppleCare. *Id.* The IS&T group is also based in Cupertino.  
13 *See Ramirez Decl.*, ¶ 3.

14             Plaintiff resided in the Eastern District<sup>2</sup> and worked out of Apple’s Elk Grove facility as  
15 part of the IS&T group. *See id.* at ¶ 5. Elk Grove is near Sacramento, California, approximately  
16 100 miles northeast of San Jose. It cannot reasonably be disputed that traveling within the  
17 Northern District of California, or traveling from the Sacramento area to the San Jose division of  
18 the Northern District of California, is significantly easier and more convenient than traveling  
19 from either the Northern District or the Sacramento area all the way to San Diego in the Southern  
20 District. San Diego is approximately 450 miles from San Jose, and about 500 miles from Elk  
21 Grove. Indeed, Plaintiff traveled to Apple’s headquarters in the Northern District to attend  
22 meetings or perform work. *Id.* Thus, the Northern District is a more convenient forum for both  
23 Plaintiff and Apple.

24             Plaintiff alleges that certain members of the putative class are *possibly* located in San  
25 Diego County. FAC, ¶ 42. However, this is unsupported by the facts. As best as Apple can  
26 guess based on Plaintiff’s ambiguous class definition,<sup>3</sup> **almost all** of the putative class members

27 <sup>2</sup> Plaintiff does not allege his current residence in the Complaint, presumably because it is not in the  
28 Southern District and alleging it would further establish that the case is not conveniently venued there.

<sup>3</sup> Plaintiff purports to represent individuals in a staff position as a “Network Engineer, or in any other

1 are based in the Northern District and none are based in the Southern District. *See* Ramirez  
2 Decl., ¶ 4. Apple currently employs 27 Network Engineers, 23 of whom are based in Cupertino  
3 in the Northern District (25 total in Northern California). *Id.* Thus, it is clear that the Northern  
4 District is the more appropriate venue over the Southern District.<sup>4</sup>

5         Since 23 out of 27 Network Engineers currently employed by Apple are based in  
6 Cupertino, there is no doubt that almost all of the potential witnesses who have information about  
7 Network Engineers reside and work in the Northern District, including coworkers, managers,  
8 various human resources personnel, and other Apple employees. These witnesses will have  
9 information regarding Plaintiff’s working conditions and tasks, including facts which rebut  
10 Plaintiff’s allegations that Apple’s policies or instructions forced him to miss meal periods, work  
11 overtime, and perform non-exempt work. *See* FAC, ¶ 7. Since virtually all witnesses work  
12 within the Northern District, it would be highly inconvenient for them to travel to the Southern  
13 District to appear for various litigation proceedings. And to the extent some witnesses are based  
14 near Sacramento, it is also much more convenient for them to travel to the nearby Northern  
15 District than to the Southern District.

16         Plaintiff is well aware of this inconvenience. Tellingly, Plaintiff offered to conduct  
17 depositions in other districts in California more convenient to witnesses and parties. *See id.* at ¶  
18 42. However, this is insufficient to address the overall inconvenience and does not make an  
19 inappropriate forum proper. For example, witnesses will still need to travel to the Southern  
20 District if the case goes to trial. Some witnesses may have family obligations or pressing work  
21 assignments, and will have to rearrange both their home and work schedules in order to  
22 accommodate litigation schedules in this case. The impact on these witnesses is undoubtedly

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23 similarly situated position[.]” FAC, ¶ 13. As discussed in Apple’s accompanying Motion to Strike and  
24 For More Definite Statement, filed herewith, Apple is unsure which employees Plaintiff may be referring  
25 to with the phrase “or in any other similarly situated position.” But none of the employees with the job  
26 title of “Network Engineer” are employed by Apple in the Southern District. Ramirez Decl., ¶ 4. Even if  
27 a few Network Engineers had been employed by Apple in the Southern District or traveled to physically  
28 perform work there, this would not make the Southern District more convenient than the Northern District,  
where almost all of Apple’s Network Engineers are based. *See id.*

<sup>4</sup> No class has been certified, and of course, may never be. Apple does not concede that class certification is appropriate in this case, and intends to contest that issue vigorously. Apple further believes that a class cannot and will not be certified in this case. Nevertheless, consideration of the proposed class is appropriate for purposes of determining venue.

1 greater if they must travel from their homes in the Northern District or Sacramento area to San  
2 Diego.

3 The impact on Apple is also significant. Aside from lost work time, Apple would need to  
4 pay witnesses for travel, lodging, meals, and other related expenses. The expenses for witnesses  
5 residing in the Northern District or Sacramento area traveling to San Jose are minimal compared  
6 to expenses for travel to San Diego. In addition to expenses and compensation for the witnesses'  
7 time, Apple will face great interruption to its business by losing part of its work force for more  
8 time as a result of their participation in such an inconvenient forum. The convenience of the  
9 parties and witnesses therefore weighs heavily in favor of a transfer to the Northern District of  
10 California.

11 Further, to the extent non-party witnesses need to appear at trial, a district court's  
12 subpoena power extends only to areas anywhere within the district and/or one hundred miles of  
13 the place of trial. Fed. R. Civ. P. 45(b)(2). Thus, non-party witnesses, such as former employees,  
14 who live in the Northern District would be outside the geographic reach of the Southern District's  
15 subpoena power, and may not be available to the parties for trial. Given that the IS&T group is  
16 based in the Northern District, it is very likely that almost all non-party witnesses are in the  
17 Northern District. If the case is transferred, the Northern District will have subpoena power over  
18 witnesses who reside within that District or within 100 miles of the courthouse, which will give  
19 the parties greater access to these witnesses. Moreover, even if these witnesses agree to travel to  
20 Southern California voluntarily, they will still be inconvenienced by having to travel to Southern  
21 California, and so will their current employers. *See Shalaby v. Newell Rubbermaid, Inc.*, No.  
22 C06-07026 MJJ, 2007 U.S. Dist. LEXIS 81663, \*16 (N.D. Cal. Oct. 23, 2007) (“[W]hile the  
23 convenience of party witnesses is a factor to be considered, the convenience of non-party  
24 witnesses is the more important factor.”).

25 The only connection anyone in this case has to the Southern District is that Plaintiff's  
26 attorneys are located in or near the Southern District. It is well-settled, however, that the  
27 convenience of counsel is not a factor to be assessed in determining whether to transfer a case  
28 under § 1404(a). *See In re Volkswagen AG*, 371 F.3d 201, 206 (5th Cir. 2004). Plaintiff has



1 offered absolutely no reasons why this action is more convenient in the Southern District of  
2 California, and as shown herein, it isn't.

3 **3. The Ease Of Access To Evidence Weighs In Favor Of Transfer**

4 Since the IS&T group and Plaintiff's managers are based in the Northern District, many  
5 documents and evidence relating to Plaintiff's claims will come from Apple's facilities in the  
6 Northern District. First, all employment records maintained by Human Resources are kept at  
7 Apple's headquarters in Cupertino *See* Ramirez Decl., ¶ 7. Further, to the extent any electronic  
8 information needs to be collected from Apple's servers, it will be processed and sent from an  
9 Apple facility located in Cupertino. *Id.* No documents about Plaintiff's employment are held in  
10 the Southern District. *Id.* Therefore, this factor weighs in favor of a transfer.

11 **4. The Northern District Has More Interest Than The Southern District**  
12 **In This Action**

13 A major factor courts consider in the interest of justice element is whether one forum has  
14 more interest than another in the controversy. Here, the Northern District has a greater interest  
15 than the Southern District in litigating this action because, as described above, Apple's  
16 headquarters is located in the Northern District, almost every witness resides or works in the  
17 Northern District, and there are significantly more putative class members in the Northern  
18 District. *See id.* at ¶ 4. The Southern District does not have any interest in this action, since there  
19 are no Network Engineers employed in the Southern District.

20 In addition to these interests, the Northern District is better able to monitor compliance  
21 with certain remedies that Plaintiff seeks. Where injunctive relief is sought, a court will consider  
22 whether one court or the other will be "closer to the action" and better able to monitor compliance  
23 with any injunction that may be granted. *Law Bulletin Pub. Co. v. LRP Publ'n, Inc.*, 992 F. Supp.  
24 1014, 1020-21 (N.D. Ill. 1998). Here, Plaintiff seeks an injunction (*See* Prayer for Relief, ¶¶ 1B  
25 and 3D) as well as imposition of a constructive trust (*See* Prayer for Relief, ¶ 1D). Both of these  
26 forms of relief likely require monitoring by the court. While Apple strongly disputes that any  
27 such remedies are necessary, or that Plaintiff's claims have any merit whatsoever, it would  
28 certainly be easier for a court in the Northern District to monitor compliance with these requested

1 remedies. For these reasons, this factor also weighs in favor of a transfer.

2 **5. Plaintiff's Choice Of Forum Is Entitled To Less Weight**

3 Although a plaintiff's choice of forum is entitled to some deference in the Section 1404(a)  
4 equation, "it is not the final word." *Pacific Car & Foundry Co. v. Pence*, 403 F.2d 949, 954 (9th  
5 Cir. 1968). Indeed, if the "operative facts have not occurred within the forum and the forum has  
6 no interest in the parties or subject matter, [plaintiff's] choice is entitled to only minimal  
7 consideration." *Lou*, 834 F.2d at 739. Additionally, because Plaintiff seeks to proceed on behalf  
8 of a class, Plaintiff's choice of forum is entitled to less weight than that to which he might  
9 otherwise be entitled. *See id.* ("when an individual brings a derivative suit or represents a class,  
10 the named plaintiff's choice of forum is given less weight").

11 All of the convenience and interest of justice factors applicable to this action establish that  
12 the Northern District is a more appropriate and convenient forum than the Southern District, and  
13 this Court should thus grant Apple's motion to transfer venue to the San Jose division of the  
14 Northern District of California.

15 **IV. CONCLUSION**

16 For all of the foregoing reasons, Apple respectfully requests that the Court grant its  
17 motion to transfer venue and order that this action be transferred from the Southern District of  
18 California to the San Jose division of the Northern District of California.

19  
20 Dated: September 23, 2008

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