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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

In re iPhone Application Litigation	Case No. CV-10-5878 LHK (PSG) **INITIAL JOINT CASE MANAGEMENT STATEMENT** Date: May 25, 2011 Time: 2:00 p.m. Place: Courtroom 4 The Honorable Lucy H. Koh

Plaintiffs and Defendants Apple Inc., AdMob Inc., Flurry, Inc., MobClix, Inc., Pinch Media, Inc., Millennial Media Inc., and AdMarvel, Inc. ("Defendants")[1] hereby submit this Initial Joint Case Management Statement.

The Parties address below as many of the issues in these consolidated actions as they believe they can at this early stage. Plaintiffs believe that the pending motion before the Judicial Panel on Multidistrict Litigation (the "Panel") to transfer these and other related cases filed around the country to the Northern District of California for coordinated or consolidated pretrial treatment pursuant to 28 U.S.C. § 1407 (the "Panel proceedings") should not impact the ability to meaningfully discuss most of the points of this case management statement, especially in light of the fact that no progress whatsoever has been made in any other jurisdiction and many have either agreed to a stay or have not been served. Reasonable case management can ensure that the case can move forward, and the Court can set meaningful dates without creating the risk of a duplication of efforts.

Defendants believe that the ability to provide certain detail is constrained at this juncture by the Panel proceedings. While the Parties appearing on this Statement have endorsed transfer of the various lawsuits to this Court, parties to the lawsuits pending in Alabama and Puerto Rico have urged that the cases be transferred to those districts. Even if there were unanimity about venue, the Panel could elect to transfer the cases as it sees fit. Although a hearing on the motion to transfer is not yet on calendar, the Parties anticipate that the matter will be heard at the Panel's scheduled July 28, 2011 session in San Francisco and that a decision will issue shortly thereafter. To avoid potential replication of activity, or activity that would become unnecessary depending upon the Panel's decision and resulting coordination or consolidation, Defendants believe that it will be efficient for both the Parties and the Court to defer certain issues until the Panel acts, as discussed below.

1. JURISDICTION AND SERVICE

All parties have been served. Numerous parties to the pre-consolidation actions have not

[1] The Consolidated Complaint names other defendants who have not yet appeared in these actions and are therefore not included in this Statement.

been included in the Consolidated Complaint after entering into tolling and discovery agreements.

Defendants will argue as part of their anticipated motions to dismiss that Plaintiffs have failed to allege cognizable injury such that these actions present no case or controversy under Article III of the U.S. Constitution and that this Court lacks jurisdiction for this reason. Defendants otherwise agree that subject matter jurisdiction properly lies in this Court.

2. FACTS

The Consolidated Complaint alleges that certain software applications ("apps") that can be downloaded by users from Apple's Internet App Store to work on Apple iPhone, iPad, or iPod touch devices capture and misuse personal identifying information of device users by transmitting information, including the Unique Device Identifier ("UDID") associated with each device. In addition, the Consolidated Complaint alleges that geolocation histories are created and stored unencrypted on user devices. The Consolidated Complaint further alleges that Apple "designs its mobile devices to be readily accessible to ad networks and Internet metrics companies to track consumers and access their personal information. … These companies, by helping finance third party apps, gain access to consumers' mobile devices to collect personal information they use to track and profile consumers, such as consumers' cellphone numbers, address books, unique device identifiers, and geolocation histories …." Compl. ¶ 6. The Consolidated Complaint asserts causes of action against Apple and eight ad networks and Internet metrics companies.

The Consolidated Complaint is brought by five named Plaintiffs who purport to represent a class of all U.S. residents who have downloaded an app from the App Store on an Apple device from December 1, 2008 through April 21, 2011. Compl. ¶ 99.

Defendants do not at this point in the litigation admit or deny any allegation or concede Plaintiffs' ability to demonstrate the truth of any allegation. Without limiting the generality of this statement, Defendants dispute that users' information was misused or collected or used without authorization, or that users were harmed by the practices alleged in the Consolidated Complaint.

3. LEGAL ISSUES

The Consolidated Complaint claims that the alleged collection and misuse of user

information from the devices constitutes violations of various statutes and common law principles concerning personal privacy and consumer protection. The Consolidated Complaint alleges causes of action against all Defendants for violations of: the Computer Fraud and Abuse Act, 18 U.S.C. § 1030, *et seq.*; the Computer Crime Law, Cal. Penal Code § 502, *et seq.*; Trespass to Chattels; the Consumer Legal Remedies Act, Cal. Civil Code § 1750, *et seq.*; and the Unfair Competition Law, Cal. Bus. & Prof. Code §17200, *et seq.* The Consolidated Complaint also alleges three causes of action against only Apple, for negligence, violation of the Consumer Legal Remedies Act, Cal. Civil Code § 1750, *et seq.*, and breach of the implied covenant of good faith and fair dealing; and one cause of action against only the other Defendants, for unjust enrichment.

Defendants believe that Plaintiffs' allegations are legally insufficient for myriad reasons, including their failure to allege standing, harm, and causation, and are vulnerable to meritorious legal defenses, including defenses based, among other things, on federal statute and Plaintiffs' own authorization of the alleged misconduct. Defendants also expect to challenge class certification based on typicality and commonality grounds, among others.

Defendants believe that in the event that additional actions are consolidated with these actions as a result of the Panel proceedings, there may be changes to the allegations, defendants, proposed class, or named plaintiffs that will alter the legal issues currently raised by the Consolidated Complaint.

Plaintiffs do not anticipate the need to amend or alter the allegations irrespective of the actions of the Panel. Plaintiffs see the other cases pending before the Panel as either unveiled copycat actions or actions that state claims narrower than the Consolidated Complaint.

A more specific definition of outstanding legal issues will be possible following disposition of anticipated motions to dismiss.

4. MOTIONS

On May 5, 2011, Apple filed a Motion to Stay all proceedings in these actions pending resolution of its motion pending before the Panel to transfer related actions to the Northern District of California for consolidation or coordination pursuant to 28 U.S.C. § 1407. Pursuant to the Court's *sua sponte* Order Setting Hearing and Briefing Schedule (Dkt. No. 74), that motion is

scheduled to be heard on May 25, 2011, concurrently with the scheduled Case Management Conference.

Apple filed a Motion to Enlarge Time seeking additional time until June 13, 2011 in which to respond to the Consolidated Complaint (Dkt. No. 93), which Plaintiffs oppose (Dkt. No. 97). Unless the Court grants the Motion to Enlarge Time, the Court's April 7, 2011 Order Regarding Case Schedule and Case Management (Dkt. No. 66) ("CMO No. 1"), would require Apple to file a motion to dismiss on May 23, 2011, two days before Apple's Motion to Stay is heard. Plaintiffs have agreed to give defendants newly named, or defendants previously named but that did not previously appear in the pre-consolidation actions,[2] until June 13, 2011 to respond to the Consolidated Complaint. If Apple's Motion to Stay is granted, no party would need to respond to the Consolidated Complaint until after the Panel proceedings are resolved.

Defendants expect to file motions to dismiss. The Parties believe that further motion practice is likely, including motions directed to class certification and dispositive motions. It is also possible that matters will arise during discovery that may require resolution by the Court.

5. AMENDMENT OF PLEADINGS

Plaintiffs believe there may be additional advertising networks and metrics providers who would be appropriate defendants. Plaintiffs intend to focus early discovery on identifying any such additional parties. In addition, there may be a need to bring several of the defendants subject to a tolling agreement back into the litigation. Plaintiffs would plan to add any new defendants prior to moving for class certification so long as needed discovery has been provided. Plaintiffs believe that any further amendment of the Consolidated Complaint can be complete within 120 days after a ruling on class certification. Defendants reserve their rights to object, if appropriate, to Plaintiffs' efforts to amend the Consolidated Complaint.

6. EVIDENCE PRESERVATION

The Parties each represent that they are complying in good faith with their obligations to

[2] These "New Defendants" are AdMob, MobClix, Pinch Media, TrafficMarketplace.com, Millennial Media Inc., AdMarvel, Inc., and Quattro. Plaintiffs have also agreed, subject to the approval of the Court, to give Flurry until June 13, 2011 to respond to the Consolidated Complaint.

preserve potentially relevant documents. Plaintiffs believe that more specific discussions about the scope of document preservation activity, including electronic discovery, record management and destruction practices, and any related instructions or correspondence with potential or actual custodians, are needed but should be deferred until all defendants are available to participate.

Defendants each have taken and are taking appropriate steps to ensure the preservation of evidence related to the matters alleged in the Consolidated Complaint.

7. DISCLOSURES

CMO No. 1 provides that Apple and Flurry are to provide initial disclosures on June 22, 2011. New Defendants are to provide initial disclosures by July 6, 2011. It is Defendants' position that the Parties' initial disclosure obligations would be stayed pending resolution of the Panel proceedings if Apple's Motion to Stay is granted. Plaintiffs believe that disclosure obligations should be unaffected by any stay.

8. DISCOVERY

CMO No. 1 provides that Plaintiffs will not serve discovery until after the May 25, 2011 Case Management Conference, and no discovery has been served. Plaintiffs desire to move forward with limited document discovery and believe that discovery narrowly tailored to the issue of contracts between Parties and identification of additional parties would be appropriate during the pendency of the Panel proceedings and ensure no duplication of efforts. If additional discovery is appropriate after the exchange of initial disclosures, the Parties will meet and confer to discuss discovery issues and attempt to ensure they are not burdensome. In addition to merits discovery, Defendants expect to propound discovery requests to the named Plaintiffs focused on standing (or lack thereof) and the propriety of class certification. Defendants' position, however, is that both class and merits discovery would be stayed if the Court grants Apple's Motion to Stay.

9. CLASS ACTIONS

Plaintiffs believe this action is maintainable as a class action under Fed. R. Civ. P. 23(a) and (b)(2) and (b)(3), and Plaintiffs provide the following information:

Class Definition – The action is brought on behalf of the following Class initially defined

as:

> All persons residing in the United States who have downloaded software from the App Store on a mobile device that runs Apple's iOS, (iPhone, iPad and/or iPod Touch), from December 1, 2008 to the date of the filing of this Complaint.

The "Class Period" is December 1, 2008 to the present.

Numerosity – While the precise number of Class members is unknown to Plaintiffs at this time, Plaintiffs estimate that the Class consists of millions of members.

Common Questions – There are many questions of law and fact common to Plaintiffs and the Class Members, and those questions predominate over any questions that may affect individual Class Members. Common questions for the Class include, but are not limited to the following:

a. whether Defendants, without authorization, tracked and compiled information to which Class Members enjoyed rights of possession superior to those of Defendants;

b. whether Defendants, without authorization, created personally identifiable profiles of Class Members;

c. Whether Defendants violated: (i) the Computer Fraud and Abuse Act, 18 U.S.C. § 1030; (ii) California Business and Professions Code § 17500; (iii) California Business and Professions Code § 17200; (iv) the California Computer Crime Law, Penal Code § 502; and (v) other violations of common law.

d. Whether Defendants misappropriated valuable information assets of Class Members;

e. Whether Apple violated its own Terms and Privacy Policies by sharing Plaintiffs' personal information with App developers, third-party advertisers, and online tracking companies;

f. Whether Defendants created or caused or facilitated the creation of personally identifiable consumer profiles of Class Members;

g. Whether Defendants continue to retain and/or sell, valuable information assets from and about Class Members;

h. What uses of such information were exercised and continue to be exercised by

Defendants;

i. Whether Defendants breached their contracts, and if so, the appropriate measure of damages and remedies against Defendants for such breaches;

j. Whether Defendants invaded the privacy of Class Members; and

k. Whether Defendants have been unjustly enriched.

Typicality – Plaintiffs' claims are typical of those of the Class. Plaintiffs and all Class members were users of Apple devices and customers of the App Store during the Class Period.

Adequacy – Plaintiffs have no interests adverse or antagonistic to those of the Class and have retained competent and experienced class counsel to prosecute the action.

Superiority – A class action is superior to all other available methods for the fair and efficient adjudication of this controversy because joinder of all members is impracticable. Furthermore, as the damages suffered by individual Class members may be relatively small, the expense and burden of individual litigation makes it impossible for members of the Class to individually redress the wrongs done to them. There will be no difficulty in the management of this case as a class action.

Additionally, the Class may be certified because:

- the prosecution of separate actions by the individual members of the Class would create a risk of inconsistent or varying adjudication with respect to individual Class members which would establish incompatible standards of conduct for Defendants;
- the prosecution of separate actions by individual Class members would create a risk of adjudications with respect to them that would, as a practical matter, be dispositive of the interests of other Class members not parties to the adjudications, or substantially impair or impede their ability to protect their interests; and
- Apple and the other Defendants have acted or refused to act on grounds generally applicable to the Class, thereby making appropriate final and injunctive relief with respect to the members of the Class as a whole.

Barring substantial delays caused by discovery disputes, Plaintiffs anticipate bringing their motion for class certification within 120 days after the filing of responsive pleadings by all

Defendants.

Defendants intend to take discovery focused on facts relevant to class certification. Without prejudging the outcome of that discovery, Defendants anticipate that they may challenge class certification through a preemptive motion.

10. RELATED CASES

On April 19, 2011, Apple filed with the Judicial Panel on Multidistrict Litigation a motion to transfer several related actions to the United States District Court for the Northern District of California for coordinated or consolidated pretrial treatment pursuant to 28 U.S.C. §1407. In addition to the four actions consolidated in this litigation, the following cases have been identified to the Panel as related:

- *Christina Jenkins and Jessica Veffer, individually and on behalf of all others similarly situated, v. Apple, Inc.*, Case No. 11-CV-01828 LHK (N.D. Cal.)[3]
- *Leah Thompson and Patricia Harp, individually and on behalf of all others similarly situated v. Apple, Inc.*, Case No. 11-CV-03009-PKH (W.D. Ark.)
- *Natasha Acosta and Dolma Acevedo-Crespo, individually and on behalf of all others similarly situated v. Apple Inc., Gogii, Inc., Pandora Media, Inc., Backflip Studios, Inc., The Weather Channel, Inc., Dictionary.com, LLC, Outfit7 Ltd., Room Candy, Inc., and Sunstorm Interactive, Inc.*, Case No. 11-CV-01326-JAF (D.P.R.)
- *Marcia Burke and William C. Burke, III, Individually and on Behalf of All Others Similarly Situated, v. Apple Inc.; Pandora Media, Inc.; and Does 1-10*, Case No. 11-CV-01376 (N.D. Ala.)
- *Jarrett Ammer, Individually and on Behalf of All Others Similarly Situated v. Apple, Incl.; Pandora Media, Inc.; and Backflip Studios, Inc.*, Case No. 11-CV-02841-JFM (S.D.N.Y.)
- *Kevin Burwick and Heather Kimbrel, Individually and on Behalf of All Others Similarly Situated v. Apple, Inc. and Pandora Media, Inc. and Does 1-10*, Case No. 11-CV-03450-JFW (C.D. Cal.)
- *Lymaris M. Rivera Diaz, Individually, and on behalf of all others similarly situated v. Apple, Inc., Pandora Media, Inc., The Weather Channel, Inc., and Does 1-10*, Case No. 11-CV-1433-FAB (D.P.R.)

Apple intends to promptly file tag-along notices notifying the Panel of the following related actions:

- *Arun Gupta, individually and on behalf of all others similarly situated v. Apple Inc.*, Case No. 3:11-cv-02110-WHA (N.D. Cal.)
- *Cynthia O'Flaherty v. Apple Inc.*, Case No. 3:11-cv-00359-MJR-DGW (S.D. Ill.)

[3] Per the Court's May 6, 2011 Related Case Order (Dkt. No. 76), the Court determined that the *Jenkins* action is related to these actions, and the *Jenkins* action was reassigned to this Court. As of this filing, the Court has not acted to consolidate the *Jenkins* action into this proceeding.

- *Eric Snyder and Zachary Richardet v. Apple Inc*., Case No. 4:11-cv-00784-RWS (E.D. Mo.)
- *Juan Carlos Velez-Colon v. Apple Inc.*, Case No. 5:11-c-v-02270-PSG (N.D. Cal.)
- *Sharon Leslie Normand, individually and on behalf of all others similarly situated v. Apple Inc*., Case No. 11-2317-HRL (N.D. Cal.)
- *William Moylan, Individually and on Behalf of All Others Similarly Situated v. Apple Inc*., Case No. 1:11-cv-03268-RWG (N.D. Ill.)

As explained in Apple's Motion to Stay, Apple expects that the Panel will grant its motion to transfer these actions, and it has suggested that the transfer be to the Northern District of California; that decision is anticipated within three months' time.

Apple intends to file an Administrative Motion to Relate the *Gupta*, *Colon*, and *Normand* cases to these actions. Defendant Flurry, Inc. filed on May 11, 2011 an Administrative Motion to Relate the *King, et al. v. Google, et al.* case (Dkt. No. 80) to these actions.

11. RELIEF

Plaintiffs seek the following relief:

A. declare that Defendants' actions violate the statutes and common-law jurisprudence set forth above;

B. award injunctive and equitable relief as applicable to the Class *mutatis mutandis*, including:

i. prohibiting Defendants from engaging in the acts alleged above;

ii. requiring Defendants to provide reasonable notice and choice to consumers regarding Defendants' data collection, profiling, merger, and deanonymization activities;

iii. requiring Defendants to disgorge to Plaintiffs and Class Members or to whomever the Court deems appropriate all of Defendants' ill-gotten gains;

iv. requiring Defendants to delete all data from and about Plaintiffs and Class Members that it collected and/or acquired from third parties through the acts alleged above;

v. requiring Defendants to provide Plaintiffs and other Class Members

reasonable means to decline, permanently, participation in Defendants' collection of data from and about them;

vi. awarding Plaintiffs and Class Members full restitution of all benefits wrongfully acquired by Defendants through the wrongful conduct alleged above; and

vii. ordering an accounting and constructive trust to be imposed on the data from and about Plaintiffs and Class Members and on funds or other assets obtained by unlawful means as alleged above, to avoid dissipation, fraudulent transfers, and/or concealment of such assets by Defendants;

C. award damages, including statutory damages where applicable, to Plaintiffs and Class Members in an amount to be determined at trial;

D. award restitution against Defendants for all money to which Plaintiffs and the Class are entitled in equity;

E. restrain, by preliminary and permanent injunction, Defendants, its officers, agents, servants, employees, and attorneys, and those participating with them in active concert, from identifying Plaintiffs and Class Members online, whether by personal or pseudonymous identifiers, and from monitoring, accessing, collecting, transmitting, and merging with data from other sources any information from or about Plaintiff and Class Members;

F. award Plaintiffs and the Class their reasonable litigation expenses and attorneys' fees; pre- and post-judgment interest to the extent allowable; restitution; disgorgement and other equitable relief as the Court deems proper; compensatory damages sustained by Plaintiffs and the Class; statutory damages, including punitive damages; and permanent injunctive relief prohibiting Defendant from engaging in the conduct and practices complained of herein.

Defendants deny that Plaintiffs or the class they purport to represent is entitled to any relief based on the claims purportedly asserted in the Consolidated Complaint.

12. SETTLEMENT AND ADR

Plaintiffs believe that ADR generally, and private mediation specifically, can be particularly productive at even the early stages of a litigation so long as the parties have a good understanding of the factual background of the claims being litigated and all parties are willing to engage in the process. Plaintiffs believe they can engage in meaningful mediation at this juncture and do not believe the procedural posture is an impediment. However, doing so with unwilling defendants is unlikely to result in success and, as set forth below, Defendants indicate that they believe discussions are premature at this time.

Defendants do not believe that it is possible to state actionable claims based on the facts and circumstances alleged here. Accordingly, Defendants do not believe that settlement discussions would be appropriate at this time, given the serious challenges to the viability of the Consolidated Complaint that are expected. Moreover, with Panel proceedings pending and uncertainty concerning what actions, parties, and allegations (if any) will be before the Court, Defendants believe that discussion of alternative dispute resolution or other settlement discussions is premature at this time.

13. CONSENT TO MAGISTRATE JUDGE FOR ALL PURPOSES

The Parties decline to consent to have a Magistrate Judge conduct all further proceedings.

14. OTHER REFERENCES

As explained above, these actions are already the subject of Panel proceedings.

The Parties do not believe there is a present need for a special master. The Parties do not believe referral of these actions to binding arbitration is indicated or appropriate.

15. NARROWING OF ISSUES

Defendants plan to file motions to dismiss all causes of action asserted in the Consolidated Complaint. Defendants believe that until those motions are decided, and until the effect of the Panel proceedings is determined, it is unclear what the issues in these actions will be – or indeed what actions may be part of these proceedings, if any. Accordingly, Defendants believe that efforts at narrowing the issues would be premature.

16. EXPEDITED SCHEDULE

At this point, the Parties do not believe that these consolidated actions present issues that can or should be handled on an expedited basis.

17. SCHEDULING

Plaintiffs believe that a schedule can be discussed and entered into at this point using the date of the filing of responsive pleadings by Defendants as a baseline date. As set forth above, Plaintiffs believe that they can file their motion for class certification within 120 days thereafter. Since Defendants will not engage in further discussion on a schedule at this point, stating Plaintiffs' position on the other dates would not be productive without Defendants' cooperation or initial disclosures. Plaintiffs believe that Defendants' stated concern about additional parties and counsel ignores the fact that no other action pending has had any progress whatsoever and that this Court has appointed leadership.

Defendants believe it is premature to propose further scheduling until the Panel acts on the pending motion for transfer. Indeed, Apple has moved the Court to stay these actions pending the Panel's determination of Apple's motion to transfer. Defendants expect to work with all parties, including parties that may be new to these proceedings, to establish a reasonable schedule for discovery, dispositive motions, and trial once the effect of the Panel proceedings on these actions is known.

Beyond the uncertainty resulting from the pending Panel proceedings, Defendants note that several Defendants were served for the first time in any of these actions just in the past week. Those Defendants are not yet in a position to make or agree to scheduling proposals.

18. TRIAL

Plaintiffs have demanded a trial by jury of all issues so triable. The Parties believe it is premature to estimate the length of any trial.

19. DISCLOSURE OF NONPARTY INTERESTED ENTITIES OR PERSONS

Apple filed its Certification of Interested Parties or Entities on May 13, 2011 (Dkt. No. 87). As Apple stated in that Certification, Apple has no parent corporation. According to Apple's Proxy Statement filed with the United States Securities and Exchange Commission in

January 2011, there are no beneficial owners that hold more than 10% of Apple's outstanding common stock. As of this date, Apple is unaware of any person or entity other than the named parties with a financial or other interest that could be substantially affected by the outcome of the proceeding.

AdMob filed its Certification of Interested Parties or Entities on May 11, 2011 (Dkt. No. 79). As AdMob stated in its certification, AdMob is a wholly-owned subsidiary of Google Inc., a publicly traded company.

Flurry and Pinch Media are in the process of preparing their Certifications of Interested Parties or Entities and expect to file them shortly.

MobClix's parent corporation is Velti plc, a corporation incorporated under the laws of Jersey, the Channel Islands. As of this date, other than its parent and the parties named in the proceeding, MobClix is unaware of any other person or entity with a financial interest in the subject matter in controversy or in a party to the proceeding or other interest that could be substantially affected by the outcome of the proceeding.

Millennial Media is in the process of preparing its Certification of Interested Parties or Entities and expects to file it shortly.

AdMarvel filed its Certification of Interested Parties or Entities on May 18, 2011.

20. OTHER MATTERS

If the Panel sends all cases to this Court, the Parties believe it will be useful to schedule a further Case Management Conference shortly after the Panel resolves Apple's motion for transfer.

The Parties are currently unaware of other matters that may facilitate the just, speedy, and inexpensive resolution of these actions.

Respectfully submitted,

Dated: May 18, 2011

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ATTESTATION

Pursuant to General Order No. 45, Section X (B), I, Michael L. Charlson, attest that concurrence in this Initial Joint Case Management Statement has been obtained.

DATED: May 18, 2011

/s/ *Michael L. Charlson*
Michael L. Charlson