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14 Attorneys for Defendant
 15 APPLE INC., a California corporation

16 UNITED STATES DISTRICT COURT
 17 NORTHERN DISTRICT OF CALIFORNIA
 18 SAN JOSE DIVISION

19 In re iPhone Application Litigation
 20

Case No. CV-10-5878 LHK (PSG)

**DEFENDANT APPLE INC.'S NOTICE OF
 MOTION AND MOTION TO STAY
 PROCEEDINGS AND MEMORANDUM
 OF POINTS AND AUTHORITIES IN
 SUPPORT THEREOF**

Date: July 21, 2011
 Time: 1:30 p.m.
 Place: Courtroom 4

The Honorable Lucy H. Koh

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NOTICE OF MOTION AND MOTION TO STAY PROCEEDINGS

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE THAT Defendant Apple Inc., through its attorneys of record herein, on July 21, 2011 at 1:30 p.m., or as soon thereafter as the matter may be heard by the Court, in the Courtroom of the Honorable Lucy H. Koh, located at the Robert F. Peckham Federal Building, 280 South First Street, Fifth Floor, San Jose, California, will, and hereby does, move the Court for an order staying proceedings in these actions pending resolution of the motion pending with the Judicial Panel on Multidistrict Litigation to transfer related actions for coordinated or consolidated pretrial treatment pursuant to 28 U.S.C. §1407. This motion will be made on the grounds that a stay of proceedings will conserve judicial resources and serve the interests of the parties. This motion also will be based upon this Notice; the attached Memorandum of Points an Authorities; the complete files and records of these actions; and such other matters and arguments as may come before the Court, including those raised in connection with reply briefing and oral argument relating to this motion.

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 These consolidated actions are among seven virtually identical putative class actions (the
4 “Actions”) pending in three different judicial districts throughout the country against defendant
5 Apple Inc. (“Apple”) regarding the operation of three Apple products or services—the iPhone, the
6 iPad, and the App Store. A stay of these actions is warranted to avoid duplicative and
7 overlapping litigation, a waste of judicial resources, and potentially conflicting rulings in the
8 Actions. On April 19, 2011, Apple filed with the Judicial Panel on Multidistrict Litigation (“the
9 Panel”) a motion to transfer the Actions to the United States District Court for the Northern
10 District of California for coordinated or consolidated pretrial treatment pursuant to 28 U.S.C.
11 §1407 (“the MDL Motion”).¹

12 This Court clearly has the power to grant a stay, and a stay would promote judicial
13 economy and avoid prejudice to the parties. For those reasons, federal courts have typically
14 concluded that it is appropriate to stay preliminary pretrial proceedings while an MDL motion is
15 pending. Where, as here, the Actions have just commenced and there has been little activity in
16 the case, a brief stay pending determination of the MDL Motion will not prejudice Plaintiffs.
17 Moreover, the need for a stay is immediate. Absent a stay, the Court and the parties will face
18 imminent deadlines for motions directed at the pleadings, pretrial and other case management
19 orders, exchange of initial disclosures, and commencement of discovery. Such duplicative
20 proceedings prior to the MDL determination would inevitably result in duplication of effort by
21 the parties, waste of judicial resources, and the risk of conflicting rulings.

22 **II. BACKGROUND**

23 Apple, headquartered in Cupertino, California, is one of the nation’s leading technology
24 companies. Apple manufactures and sells the iPhone, a revolutionary device combining three
25 products—a mobile phone, a widescreen iPod with touch controls, and a breakthrough Internet
26 communications device with desktop-class email, web browsing, searching and maps—into one

27 _____
28 ¹ Apple is seeking similar stays in the other actions in which Apple has been served with a
complaint.

1 small and lightweight handheld device. Apple also manufactures and sells the iPad, a multi-
2 purpose mobile device for browsing the web, reading and sending email, viewing photos,
3 watching videos, listening to music, playing games, reading e-books and more. In conjunction
4 with the manufacture and design of the iPhone and iPad, Apple offers the App Store, a service
5 that allows customers to discover and download third-party software applications (“apps”) to their
6 devices. At last count, more than 350,000 apps had been developed and made available in the
7 App Store for use on Apple’s iPad and iPhone products. These apps enable iPhone and iPad
8 users to perform a vast array of tasks from making restaurant reservations to finding up-to-date
9 news reports to learning when the next city bus will arrive.

10 All the plaintiffs in the Actions allege that some third-party app developers—or, more
11 precisely, the apps that they developed—improperly collect, use, and distribute iPhone and iPad
12 users’ personal information. Each complaint alleges that Apple allowed, or failed to prevent, the
13 app developers’ conduct in violation of federal and state privacy laws. These copy-cat actions
14 were filed in rapid succession following the release of a *Wall Street Journal* article entitled “Your
15 Apps Are Watching You” on December 18, 2010. In that article, the press reported on whether
16 the use of certain apps resulted in the collection and transmission of personally identifying user
17 information. All of the complaints originally filed refer to that article. The Actions are all in
18 preliminary stages, and no responses to the complaints have been filed.

19 **III. ARGUMENT**

20 **A. All Proceedings Should Be Stayed Pending Resolution Of Apple’s MDL** 21 **Motion.**

22 This Court has broad discretion and authority to stay proceedings before it. Such power to
23 stay is “incidental to the power inherent in every court to control the disposition of the causes on
24 its docket with economy of time and effort for itself, for counsel, and for litigants.” *Landis v. N.*
25 *Am. Co.*, 299 U.S. 248, 254 (1936); *Rivers v. The Walt Disney Co.*, 980 F. Supp. 1358, 1362
26 (C.D. Cal. 1997) (granting motion to stay proceedings pending Panel’s resolution of transfer
27 motion).

28 Moreover, federal courts have routinely concluded that it is appropriate to stay

1 preliminary pretrial proceedings while a motion to transfer is pending before the Panel, both to
2 conserve judicial resources and to avoid prejudice to the parties. *Milrot v. Apple Inc.*, 2010 WL
3 3419699, at *1 (S.D. Fla. Aug. 27, 2010) (staying individual action pending MDL transfer of
4 multi-district litigation related to Apple’s iPhone 4 because case was not procedurally advanced
5 and stay would increase judicial economy); *Good v. Prudential Ins. Co. of Am.*, 5 F. Supp. 2d
6 804, 809 (N.D. Cal. 1998) (“Courts frequently grant stays pending a decision by the MDL
7 Panel”); *see also Sanborn v. Asbestos Corp., Ltd*, 2009 WL 195922, at *2 (N.D. Cal. Jan. 27,
8 2009) (quoting *Good*, 5 F. Supp. 2d at 809). *See also Tran, et al. v. Apple, Inc., et al.*, Case No.
9 09-CV-04242-JW (N.D. Cal. Oct. 16, 2009), Order Granting Defendants’ Unopposed Motion to
10 Stay Proceedings (Dkt. No. 29) (stay of proceedings pending resolution of MDL motion to
11 transfer to that court); *In re Apple iPod Nano Litig.*, Case No. 05-CV-04244-RMW (N.D. Cal.
12 Feb. 6, 2006), Order Granting Defendant Apple Computer, Inc.’s Motion to Stay Proceedings
13 (Dkt. No. 26) (same).

14 When considering a motion to stay based on a pending MDL motion, federal district
15 courts examine (1) the interests of judicial economy and efficiency; (2) the hardship and inequity
16 to the moving party if its motion is not granted; and (3) the extent to which the non-moving party
17 will be prejudiced if proceedings are stayed. *Rivers*, 980 F. Supp. at 1362. An analysis of these
18 factors clearly demonstrates the propriety of a stay here.

19 **B. Judicial Resources Will Be Conserved If This Court Grants Defendant’s**
20 **Motion For A Stay.**

21 Entry of a stay will conserve judicial resources because the MDL Motion is likely to be
22 granted, rendering pre-consolidation proceedings in the coordinated cases duplicative and
23 inefficient. Grant of the MDL Motion is likely because, as the Panel has recognized,
24 consolidation is called for “when two or more complaints assert comparable allegations against
25 identical defendants based upon similar transactions and events.” *In re Air West Inc. Sec. Litig.*,
26 384 F. Supp. 609, 611 (J.P.M.L. 1974); *see also In re Ford Motor Co. Crown Victoria Police*
27 *Interceptor Prods. Liab. Litig.*, 229 F. Supp. 2d 1377, 1378 (J.P.M.L. 2002); *In re Cuisinart Food*
28 *Processor Antitrust Litig.*, 506 F. Supp. 651, 654-55 (J.P.M.L. 1981). Here, absent centralization,

1 there will be seven actions proceeding in three jurisdictions involving overlapping factual
2 allegations, claims, and putative classes. Moreover, a strong consideration favoring centralization
3 is the specter of conflicting decisions regarding class certification. *See, e.g., In re Haw. Hotel*
4 *Room Rate Antitrust Litig.*, 438 F. Supp. 935, 936 (J.P.M.L. 1977) (“Section 1407 centralization
5 is especially important to ensure consistent treatment of the class action issues.”); *In re NorthStar*
6 *Educ. Fin., Inc.*, 588 F. Supp. 2d 1370, 1370 (J.P.M.L. Dec. 3, 2008) (centralizing actions to
7 prevent inconsistent pretrial rulings especially because of class certification issues). Here, all the
8 cases are purported class actions on behalf of overlapping groups of putative class members, so
9 the risk of conflicting class certification decisions is manifest. In sum, the relevant factors
10 militate strongly in favor of MDL treatment. *See Ramos-Martir v. Astra-Merck, Inc.*, 2005 WL
11 3088372, at *1 (D.P.R. November 17, 2005) (“Given the possibility of transfer, the Court is
12 inclined to agree with defendants as to the undesirability of expending judicial resources
13 familiarizing ourselves with the intricacies of the instant case.”).

14 Accordingly, entry of a stay here will allow this Court to avoid duplicative pretrial
15 proceedings and needless expenditure of the Court’s resources. *See Rivers*, 980 F. Supp. at 1360.
16 Further, transfer of the Actions would potentially subject any pretrial rulings in this and the other
17 Actions to reconsideration by the transferee court. *See id.* at 1361; *see also U.S. Bank, Nat’l*
18 *Ass’n v. Royal Indem. Co.*, 2002 WL 31114069, at *2 (N.D. Tex. Sept. 23, 2002) (without stay,
19 defendant would be “forced to conduct discovery and file dispositive motions with the Court
20 [and] an excessive amount of time, money and energy could potentially be wasted”); *In re*
21 *Upjohn Co. Antibiotic Cleocin Prods. Liab. Litig.*, 81 F.R.D. 482, 486-87 (E.D. Mich. 1979),
22 *aff’d*, 664 F.2d 114 (6th Cir. 1981) (requiring transferee court to harmonize inconsistent pretrial
23 orders after consolidation). Similarly, there would be a significant risk of conflicting rulings by
24 courts in the other pending Actions that would have to be resolved by the transferee court. For all
25 these reasons, a stay is necessary and appropriate to promote the efficient use of judicial
26 resources.²

27 _____
28 ² If the Actions are transferred to this district, as Apple has requested, then Apple intends to work
with all plaintiffs to propose an appropriate case management schedule for all the Actions.

1 **C. Defendants Will Be Prejudiced Unless The Stay Is Granted.**

2 As the courts have recognized, failure to stay one of multiple actions pending
3 determination of an MDL motion imposes unnecessary burden and hardship on the defendant.
4 *See Nielsen v. Merck & Co.*, 2007 WL 806510, at *2 (N.D. Cal. 2007) (noting prejudice to
5 defendant “from being forced to litigate the same jurisdictional issue in multiple forums”);
6 *Arthur-Magna, Inc. v. Del-Val Fin. Corp.*, 1991 WL 13725, at *1 (D.N.J. 1991). These
7 considerations compel a stay here. Plaintiffs’ factual allegations in each case are that Apple
8 allowed third-party app developers to collect, transmit, and misuse supposedly personal
9 identifying information of iPhone and iPad users, and it follows that the discovery requests will
10 mirror the similarities of the factual allegations. It is therefore inevitable that plaintiffs in the
11 multiple Actions will all serve Apple with similar discovery requests for documents, other written
12 discovery, and depositions. Defendants should not be made to analyze, investigate, and collect
13 information responsive to differing discovery requests on substantially similar issues. A
14 temporary stay is particularly imperative as a matter of fairness to Defendants’ witnesses, who
15 should not be required to appear for multiple depositions in the various Actions.

16 It would also impose substantial hardship on Defendants if they are required to litigate
17 motions to dismiss, motions for class certification, and other pretrial motions in no fewer than
18 three different courts. Moreover, the risk of conflicting rulings on these issues, and the class
19 certification issue in particular, would obviously be prejudicial to both Defendants and the
20 putative class members. This is especially so because all the Actions purport to assert claims on
21 behalf of overlapping classes of iPhone and iPad users.

22 **D. Plaintiffs Will Suffer No Prejudice If This Court Orders A Stay.**

23 Plaintiffs will not be prejudiced if this Court enters a stay pending determination of
24 Apple’s MDL Motion. To the contrary, Plaintiffs should have no more interest than Apple in
25 duplicative, wasteful, and potentially conflicting pretrial proceedings. Any delay necessarily will
26 be of limited duration, since the stay will be in effect only until the Panel issues its decision. *See*
27 *also California ex rel. Vicente v. Eli Lilly and Co.*, 2007 WL 4358224, *1 (N.D. Cal. Dec. 13,
28 2007) (granting stay pending MDL transfer because “any delay from a stay is minimal”);

1 *Gonzales v. General Motors Corp.*, 2007 WL 2406871, *1 (N.D. Cal. Aug. 20, 2007) (“judicial
2 economy factor outweighs any prejudice Plaintiffs claim from a stay” pending MDL transfer).
3 Further, the case is in its infancy. *See Milrot*, 2010 WL 3419699, at *1 (case not procedurally
4 advanced at just under 60 days old with only complaint and premature motion for summary
5 judgment filed). Any possible inconvenience from such minimal delay is far outweighed by the
6 considerations of judicial economy and fairness addressed above.

7 **IV. CONCLUSION**

8 A stay is plainly warranted to prevent the prejudice resulting from duplicative, unfairly
9 burdensome discovery and motion practice and the risk of conflicting rulings. Judicial economy
10 also compels a stay of these actions. Therefore, Apple respectfully requests that this Court enter
11 an order staying all proceedings in these actions pending the Panel’s determination of the MDL
12 Motion.

13
14 Dated: May 5, 2011

HOGAN LOVELLS US LLP

By: /s/ Michael L. Charlson

Michael L. Charlson

Attorneys for Defendant
APPLE INC., a California corporation