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

19 In re iPhone Application Litigation

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

**DEFENDANT APPLE INC.'S REPLY IN  
 FURTHER SUPPORT OF MOTION TO  
 STAY PROCEEDINGS**

Date: May 25, 2011  
 Time: 2:00 p.m.  
 Place: Courtroom 4

The Honorable Lucy H. Koh

1 **I. INTRODUCTION**

2 Defendant Apple Inc. (“Apple”) respectfully submits this reply in further support of its  
3 Motion to Stay these proceedings pending the resolution by the Judicial Panel on Multidistrict  
4 Litigation (“the Panel”) of Apple’s motion to transfer related actions to the United States District  
5 Court for the Northern District of California for coordinated or consolidated pretrial treatment  
6 pursuant to 28 U.S.C. §1407 (“the MDL Motion”). Dkt. No. 72. That Motion to Stay was joined  
7 by defendants AdMob, Inc. and Flurry, Inc. Dkt. Nos. 88, 89. Apple’s MDL motion seeks  
8 transfer of eleven actions currently pending in six jurisdictions. It is reasonable, though  
9 obviously not certain, that the MDL Panel may transfer those actions to this district for  
10 coordinated or consolidated treatment. Most parties joined Apple’s request for transfer to this  
11 Court, although certain plaintiffs requested transfer to Alabama or Puerto Rico. There remains a  
12 chance that the Panel will transfer to another jurisdiction. Because of these uncertainties—as to  
13 the way in which these actions should and will be handled if they are transferred here and as to  
14 whether the transfer will be to this Court at all (despite unanimity among the parties to these  
15 Consolidated Actions that they should be)—this Court’s and the parties’ resources will be more  
16 efficiently used by awaiting the transfer decision than by proceeding with these actions, only to  
17 see many of the issues adjudicated again once the MDL motion is decided. If these actions  
18 proceed, the Court could be in a position of deciding Apple’s motion to dismiss the Consolidated  
19 Complaint, which could then be superseded by an administrative complaint governing the MDL  
20 actions.

21 Apple’s motion seeks to conserve the resources of this Court and the parties to these  
22 actions by briefly staying the proceedings to avoid wasting the Court’s and the parties’ time and  
23 resources litigating issues or complaints that will necessarily change once the Panel orders  
24 transfer of the related actions pending around the country to a single jurisdiction for pretrial  
25 proceedings. It is routine procedure in this district and this division to stay proceedings pending  
26 an MDL transfer order for precisely these reasons. Plaintiffs proffer no reason to impose that  
27 burden on the Court and the parties other than their own tactically driven desire to procedurally  
28 advance the proceedings in this Court. That is not sufficient justification for putting the Court

1 and the parties to the expense of litigating a complaint's allegations or discovery issues that will  
2 need to be revisited when the actions are transferred and coordinated or consolidated in the  
3 transferee court. A stay is therefore warranted.

## 4 **II. PROCEDURAL HISTORY OF THESE ACTIONS**

5 At the time of the Initial Status Conference on April 6, 2011, and the entry of the April 7,  
6 2011 Scheduling Order, Apple had not filed its MDL Motion and had not made a determination  
7 whether to do so. On April 14, 2011, Apple filed its motion to transfer with the MDL Panel,  
8 which is now fully briefed. The April 7 Scheduling Order therefore did not take into account how  
9 the progress of these actions and considerations of judicial economy would be affected by the  
10 potential coordination or consolidation of multiple other actions in a few months' time. Apple  
11 promptly raised these considerations with its Motion to Stay.<sup>1</sup>

## 12 **III. STATUS OF MDL PROCEEDINGS AND RELATED ACTIONS**

13 Plaintiffs make much of the fact that none of the other actions is as procedurally advanced  
14 as these actions. *See Opp.* at 2, 4-6. But the procedural status of cases pending in other  
15 jurisdictions is irrelevant to whether this matter should proceed before this Court while Apple's  
16 MDL Motion is pending.<sup>2</sup>

17 Apple's goal is straightforward: Apple wishes to prevent all the courts presently tasked  
18 with the related actions, and the parties to them, from expending their time and resources  
19 adjudicating motions, engaging in discovery, and resolving other disputes before the cases are  
20 coordinated or consolidated. That coordination or consolidation, wherever it may occur, will  
21 likely result in non-trivial changes to the scope and complexion of the litigation. The related  
22 actions involve overlapping putative classes of plaintiffs, overlapping legal and factual claims,

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23 <sup>1</sup> Plaintiffs think it "significant" that Apple noticed its Motion to Stay for July 21, 2011. Pls.'  
24 Mem. in Opp. to Apple's Motion to Stay ("Opp.") at 3. Apple did so after calling the clerk for  
25 the next available hearing date as it was proceeding to file its Motion, consistent with the Court's  
26 instructions. Apple was preparing to seek expedited treatment of the Motion but did not need to  
do so because the Court quickly acted *sua sponte* to hear the Motion concurrently with the May  
25, 2011 Case Management Conference. Dkt. No. 74.

27 <sup>2</sup> Moreover, as Plaintiffs themselves explain, Apple is either seeking stays of the related actions,  
or the actions are not advancing because the defendants are awaiting service of the complaints.  
Opp. at 4, 6. If plaintiffs in any other jurisdictions take steps to advance those actions, Apple  
28 intends to seek appropriate relief from those courts.

1 and overlapping defendants. But the cases are not identical; there are defendants, claims, and  
2 facts alleged in other related actions not presently before this Court in the Consolidated  
3 Complaint.<sup>3</sup> Any decision this Court makes in these consolidated actions is likely to have  
4 implications for, but not fully resolve, issues raised in the related actions currently subject to  
5 Apple's MDL Motion. Neither this Court nor any other should be called upon to waste its  
6 resources in this situation, as Plaintiffs would have the Court do. Nor should Apple and other the  
7 other defendants facing litigation in multiple jurisdictions be put to the burden and expense of  
8 adjudicating issues *ad seriatim* while awaiting the determination of the Panel decision designed to  
9 prevent that from happening.

10 **IV. PLAINTIFFS OFFER INSUFFICIENT JUSTIFICATION FOR PROCEEDING**  
11 **WITH THESE ACTIONS**

12 Plaintiffs succeed in doing little more than pointing out that the Court is not *required* to  
13 stay these actions pending resolution of the MDL motion. *See* Opp. at 5-6. That is true, but it  
14 does not explain why the Court *should proceed*. Plaintiffs find little support for that proposition  
15 in the case law. In one case Plaintiffs cite, the court actually stayed the proceedings. *Bd. of Trs.*  
16 *of the Teachers' Ret. Sys. of the State of Ill. v. Worldcom, Inc.*, 244 F. Supp. 2d 900, 906 (N.D. Ill.  
17 2002). With one exception, the remaining cases they cite in which courts declined to stay  
18 proceedings were resolved that way because of pending meritorious remand motions. *See Ill.*  
19 *Mun. Ret. Fund v. Citigroup, Inc.*, 391 F.3d 844, 852 (7th Cir. 2004) (stay "not required where  
20 the court concludes that it lacks subject matter jurisdiction"); *Baker v. Asbestos Defs.*, No. C 04-  
21 2066, 2004 WL 2196814, at \*3 (N.D. Cal. Sept. 27, 2004) (declining to stay action pending  
22 JPML motion after considering and granting motion to remand); *Tortola Rests., L.P. v. Kimberly-*  
23 *Clark Corp.*, 987 F. Supp. 1186, 1188-89 (N.D. Cal. 1997) (denying motion to stay because of  
24 pending motion to remand, which court granted). There is no challenge to the Court's jurisdiction  
25 in these actions.

26 Plaintiffs fare no better with *Terkel v. AT&T Inc.*, Nos. C2837, 06C2680, 2006 WL

27 <sup>3</sup> For instance, plaintiffs in *Acosta, et al. v. Apple, Inc., et al.*, Case No. 11-CV-01326-JAF (D.  
28 P.R.), assert an action for conversion against eight app developers, representing both parties and a  
cause of action not at issue in these actions.

1 1663456, at \*2 (N.D. Ill. June 9, 2006). In that case, the court declined to stay the action pending  
2 an MDL motion to transfer because the defendants had failed to move for a stay of the most  
3 advanced case, which was not pending in the district to which defendants sought MDL transfer of  
4 the actions. *Id.* at \*2. The *Terkel* court therefore reasoned that the defendants “appear to be  
5 willing to have more than one judge decide the allegedly common or overlapping issues.” *Id.*  
6 That is not the case here. To the contrary, Apple has consistently acted to ensure that all common  
7 and overlapping issues can be determined before trial by a single judge.

8 Nor does *Terkel* support Plaintiffs’ argument that they will be prejudiced by a stay.  
9 Plaintiffs in the *Terkel* case alleged that the defendants were facilitating ongoing government  
10 surveillance of their telephone conversations. *Id.* at \*1. On that basis, the *Terkel* plaintiffs were  
11 seeking a preliminary injunction. *Id.* at \*3. Plaintiffs in these actions have not sought a  
12 preliminary injunction, thereby undermining their claim that determination of their allegations  
13 cannot await the outcome of the Panel’s decision, which is expected in two to three months’ time.

14 **V. CONCLUSION**

15 Plaintiffs fail to explain why this Court and the defendants should be put to the burden and  
16 inefficiency of proceeding with these actions pending the coordination or consolidation of all  
17 related actions requested by Apple’s MDL Motion. Accordingly, Apple respectfully requests that  
18 the Court grant its Motion to Stay these proceedings pending the resolution by the Judicial Panel  
19 on Multidistrict Litigation of Apple’s motion to transfer related actions to the United States  
20 District Court for the Northern District of California for coordinated or consolidated pretrial  
21 treatment pursuant to 28 U.S.C. §1407.

22  
23 Dated: May 18, 2011

HOGAN LOVELLS US LLP

24 By: /s/ Michael L. Charlson  
25 Michael L. Charlson

26 Attorneys for Defendant  
27 APPLE INC., a California corporation