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APPLE INC.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

AARON FRIEDMAN, on behalf of himself and all others similarly situated,

Plaintiffs,

v.

APPLE INC., a California corporation; AT&T MOBILITY, LLC, and DOES 1 through 10, inclusive,

Defendants.

Case No. 10-CV-2403 JLS POR

APPLE INC.'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ITS MOTION TO TRANSFER

Date: May 19, 2011
Time: 1:30 p.m.
Ctrm: 6
Hon. Janis L. Sammartino

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INTRODUCTION

This case should be transferred to the Northern District of California. It is a copycat action, asserting the same claims and involving the same parties as three putative class actions filed months earlier in the Northern District of California (the "Northern District Actions"). All the actions are based on effectively identical allegations regarding Apple and AT&T Mobility LLC ("ATTM")'s marketing of an unlimited data plan for the 3G-enabled iPad ("iPad 3G"). The putative California class of iPad 3G customers that plaintiff Friedman seeks to represent is entirely subsumed by the putative nationwide class in the Northern District Actions.

Because they were filed much earlier, the Northern District Actions are procedurally far more advanced than this case: the Northern District Actions have been consolidated, a counsel structure has been established, a Master Consolidated Complaint has been filed, Apple has answered the complaint, ATTM has filed motions in response to the complaint, and discovery has already begun against Apple. In contrast, all that has occurred here is the filing of the complaint.

Transfer is required by the "first-filed" rule as well as by 28 U.S.C. § 1404(a). Proceeding with this case in parallel with the Northern District Actions will necessarily result in duplicative motion practice and discovery, a waste of resources, and a significant risk of conflicting rulings. Transfer also will facilitate access to documents and witnesses, lower litigation costs, and result in greater convenience for the parties and witnesses. This action should be transferred to the Northern District of California.

FACTUAL BACKGROUND

Plaintiff's complaint asserts the same allegations as those made in three earlier-filed complaints filed against Apple and ATTM in the Northern District of California: *Weisblatt v. Apple Inc., AT&T, Inc., and AT&T Mobility LLC,* No. 10-CV-2553; *Logan v. Apple Inc. and AT&T Mobility LLC,* No. 10-CV-2588; and *Osetek v. Apple Inc.*, No. 10-CV-4253. (Declaration of Stuart C. Plunkett in Support of Apple Inc.'s Motion to Transfer ("Plunkett Decl."), Exs. A-C) The earliest of these complaints was filed *over five months* before plaintiff

filed this action on November 22, 2010. (Plunkett Decl. Ex. A (*Weisblatt* filed June 9, 2010); *see also* Plunkett Decl. Ex. B (*Logan* filed June 11, 2010), Ex. C (*Osetek* filed Sept. 20, 2010))

As in the Northern District Actions, Friedman's complaint challenges Apple and ATTM's advertising respecting an unlimited data plan for the iPad 3G and consumers' ability to switch between unlimited and limited data plans. (*Compare* Compl. ¶ 1 *with* Plunkett Decl. Ex. D at ¶¶ 1-5) Like the Northern District Actions, plaintiff asserts claims for fraud, negligent misrepresentation, and violation of California's Unfair Competition Law and False Advertising Law.[1] (*Compare* Compl. ¶¶ 57-99 *with* Plunkett Decl. Ex. D ¶¶ 93-133, 152-169) He also asserts a claim for negligence. (Compl. ¶¶ 52-56) He asserts these claims on behalf of a California class of iPad 3G purchasers, which is completely encompassed by the nationwide class asserted in the Northern District Actions. (*Compare* Compl. ¶ 35 *with* Plunkett Decl. Ex. D at 85)

The Northern District Actions have been consolidated before Judge Ronald M. Whyte; plaintiffs filed their Master Consolidated Complaint on December 10, 2010. (Plunkett Decl. Exs. D, E) Apple answered the Master Consolidated Complaint on January 13, 2011 and ATTM filed Motions to Dismiss and to Strike on January 14 (which are still pending). (Plunkett Decl. Exs. F, G) Judge Whyte has appointed Lead and Class Counsel. (Plunkett Decl. Ex. H) Plaintiffs have served Apple with requests for production, and plaintiffs and Apple have exchanged initial disclosures. (Plunkett Decl. Exs. I-J)[2]

Apple's decisions regarding iPad 3G marketing and advertising were made at Apple's headquarters in Cupertino, California. (Declaration of Deborah House in Support of Apple Inc.'s Motion to Transfer ("House Decl.") ¶ 2) Accordingly, Apple's relevant documents and

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[1] The Northern District Actions also assert claims for violation of the Consumers Legal Remedies Act and unjust enrichment. (Plunkett Decl. Ex. D ¶¶ 134-151, 170-175)

[2] On October 18, 2010, Judge Whyte ruled on ATTM's Motion to Compel Arbitration Or, In The Alternative, To Stay Case, denying the motion without prejudice and limiting discovery to written discovery relevant to claims against Apple, pending the United States Supreme Court's decision in *AT&T Mobility LLC v. Concepcion*. *See Weisblatt v. Apple, Inc.*, No. C-10-02553 RMW, 2010 U.S. Dist. LEXIS 113663, at *13 (N.D. Cal. Oct. 18, 2010).

witnesses are located in the Northern District of California. (*Id.* ¶ 3) Neither Apple nor ATTM, nor their witnesses or documents, are located in the Southern District of California. (*Id.* ¶¶ 3-4)

In light of the pendency of the Northern District Actions, Apple has repeatedly requested that Plaintiff stipulate to a transfer to that forum. (Plunkett Decl. ¶ 12) Plaintiff has acknowledged that this case may "arise from the same circumstances and allegations" and "involve common questions of law and fact" as the Northern District Actions (Joint Motion to Extend Defendants' Time to Respond to Class Action Complaint 2, ECF No. 9), but has failed to respond to Apple's requests for nearly three months. Plaintiff's failure to respond has required Apple to file this motion.

ARGUMENT

This case should be transferred to the Northern District of California pursuant to the first-filed rule and 28 U.S.C. § 1404(a).

I. THE PENDENCY OF IDENTICAL, EARLIER-FILED ACTIONS IN THE NORTHERN DISTRICT OF CALIFORNIA WARRANTS TRANSFER

A. The "First-Filed" Rule Requires Transfer to the Northern District of California

Because this action is identical in all material respects to the earlier-filed Northern District Actions, the "first-filed" rule dictates transfer. The first-filed rule is a "generally recognized doctrine of federal comity which permits a district court to decline jurisdiction over an action when a complaint involving the same parties and issues has already been filed in another district." *Pacesetter Sys., Inc. v. Medtronic, Inc.*, 678 F.2d 93, 94-95 (9th Cir. 1982) (citing *Church of Scientology of Cal. v. U.S. Dep't of the Army*, 611 F.2d 738, 749 (9th Cir. 1979)). "The primary purpose behind the first-to-file rule is to avoid unnecessarily burdening the federal judiciary and to avoid conflicting judgments." *Jumapao v. Wash. Mut. Bank*, No. 06-CV-2285 W (RBB), 2007 U.S. Dist. LEXIS 88216, at *4 (S.D. Cal. Nov. 30, 2007) (citing *Church of Scientology*, 611 F.2d at 750). Because the first-filed rule promotes judicial efficiency, the Ninth Circuit has held that it "should not be disregarded lightly." *Alltrade, Inc. v. Uniweld Prods., Inc.*, 946 F.2d 622, 625 (9th Cir. 1991).

Courts look to three requirements in applying the rule: (1) the chronology of the actions, (2) the similarity of the parties, and (3) the similarity of the issues. *Tompkins v. Basic Research LLC*, No. CIV. S-08-244 LKK/DAD, 2008 U.S. Dist. LEXIS 81411, at *17 (E.D. Cal. Apr. 22, 2008) (citing *Alltrade*, 946 F.2d at 625). "Exact parallelism between the two actions need not exist; it is enough if the parties and issues in the two actions are 'substantially similar.'" *Fossum v. Nw. Mut. Life Ins. Co.*, No. C10-2657 SI, 2010 U.S. Dist. LEXIS 99904, at *6 (N.D. Cal. Sept. 16, 2010) (citation omitted); *see also Meints v. Regis Corp.*, No. 09cv2061 WQH (CAB), 2010 U.S. Dist. LEXIS 14120, at *7 (S.D. Cal. Feb. 16, 2010).

These requirements are easily satisfied here. All three Northern District Actions were filed long before this case was filed in November 2010. The parties are the same: Apple and ATTM are defendants in all the actions; Plaintiff and the class he seeks to represent are members of the putative nationwide class in the Northern District Actions. *See Fossum*, 2010 U.S. Dist. LEXIS 99904, at *6 (finding substantial similarity of parties where putative California class in second-filed action was subsumed within nationwide class in first-filed action); *Tompkins*, 2008 U.S. Dist. LEXIS 81411, at *19 (same); *see also Persepolis Enter. v. UPS, Inc.*, No. C-07-02379 SC, 2007 U.S. Dist. LEXIS 68699, at *5-6 (N.D. Cal. Sept. 7, 2007) ("The first-to-file rule requires the court in a class action suit to compare the proposed classes, not their representatives.").

The factual issues in the cases are identical: the complaints all assert that Apple and ATTM represented that purchasers of the iPad 3G would be able to switch between unlimited and limited data plans at any time, but the unlimited data plan was discontinued on June 7, 2010. (*Compare* Compl. ¶ 1 *with* Plunkett Decl. Ex. D at ¶¶ 1-5) This case and the Northern District Actions assert substantially the same legal claims as well. *See Tompkins*, 2008 U.S. Dist. LEXIS 81411, at *20 (finding substantial similarity of issues where both actions alleged that defendants engaged in misrepresentations regarding their product, and asserted many of the same claims); *Jumapao*, 2007 U.S. Dist. LEXIS 88216, at *6 (finding substantial similarity where both actions arose from defendant's alleged failure to pay overtime and minimum wages, and asserted the same claims); *Inherent.com v. Martindale-Hubbell*, 420 F. Supp. 2d 1093, 1099

(N.D. Cal. 2006) (finding substantial similarity where both actions asserted similar claims that would require resolution of the same factual and legal issues).

Permitting this later-filed case to proceed in parallel with the Northern District Actions poses precisely the risks the first-filed rule is intended to prevent: duplicative litigation, waste of judicial resources, and inconsistent rulings. In contrast, if transferred, this action will be consolidated with the Northern District Actions and assigned to the same judge, who will be able to manage all the actions to avoid duplicative litigation and inconsistent rulings. *See* Fed. R. Civ. P. 42. The first-filed rule dictates a transfer to the Northern District.

B. Section 1404(a) Also Requires Transfer to the Northern District of California on the Basis of Judicial Economy

Section 1404(a) also compels transfer. Under section 1404(a), a case may be transferred to another district court if (1) venue would be proper in the proposed new court,[3] (2) the transfer would serve "the convenience of parties and witnesses," and (3) the transfer would promote "the interest of justice." 28 U.S.C. § 1404(a). Of the various factors courts consider in evaluating the convenience of parties and witnesses and the interest of justice, the pendency of similar litigation is sufficient, *by itself*, to compel a transfer. *See, e.g., King-Scott v. Univ. Med. Pharm. Corp*., No. 09-cv-02512 BEN (WVG), 2010 U.S. Dist. LEXIS 44256, at *4-6 (S.D. Cal. May 6, 2010); *Shelby v. Factory Five Racing, Inc.*, No. CV 08-7881 CAS (JTLx), 2009 U.S. Dist. LEXIS 15830, at *11-12 (C.D. Cal. Feb. 23, 2009); *Elecs. for Imaging, Inc. v. Tesseron, Ltd*, No. C 07-05534 CRB, 2008 U.S. Dist. LEXIS 10844, at *4 (N.D. Cal. Jan. 29, 2008); *In re Genesisintermedia, Inc. Sec. Litig.*, No. CV 01-09024 SVW (Mcx), 2003 U.S. Dist. LEXIS 27565, at *13-14 (C.D. Cal. June 13, 2003).

As the United States Supreme Court has noted, "[t]o permit a situation in which two cases involving precisely the same issues are simultaneously pending in different District Courts

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[3] Venue in diversity cases is proper in any district where the defendant resides. 28 U.S.C. § 1391(a)(1). Here, Apple's principal place of business is in the Northern District of California. (*See* Compl. ¶ 30) Venue is proper as to ATTM as well, as evidenced by its presence as a defendant in the Northern District Actions.

leads to the wastefulness of time, energy and money that § 1404(a) was designed to prevent." *Cont'l Grain Co. v. The Barge FBL—585*, 364 U.S. 19, 26 (1960); *see also Jolly v. Purdue Pharma L.P.*, No. 05-CV-1452 H (POR), 2005 U.S. Dist. LEXIS 44599, at *7 (S.D. Cal. Sept. 28, 2005) (quoting *Cont'l Grain Co.*) "Litigation of related claims in the same tribunal is strongly favored because it facilitates efficient, economical and expeditious pre-trial proceedings and discovery and avoids duplic[ative] litigation and inconsistent results." *Id.* (citing *Durham Prods, Inc. v. Sterling Film Portfolio, Ltd., Series A*, 537 F. Supp. 1241, 1243 (S.D.N.Y. 1982)); *see also Billing v. CSA-Credit Solutions of Am., Inc.*, No. 10-cv-0108 BEN (NLS), 2010 U.S. Dist. LEXIS 63314, at *13-14 (S.D. Cal. June 22, 2010) (transferring action to forum where related litigation was pending to avoid duplicative litigation, further judicial economy, and prevent the waste of resources); *Viper Networks, Inc. v. Rates Tech., Inc.*, No. 09cv768 L (RBB), 2009 U.S. Dist. LEXIS 110058, at *11 (S.D. Cal. Nov. 23, 2009) (same).

Because all the actions are substantially identical and the consolidated Northern District Actions are more procedurally advanced, judicial economy alone warrants transfer.

II. THE OTHER SECTION 1404(A) FACTORS ALSO WEIGH HEAVILY IN FAVOR OF TRANSFER TO THE NORTHERN DISTRICT OF CALIFORNIA

Although the Court need not reach the other section 1404(a) factors, they also strongly favor transfer to the Northern District. In making a transfer determination, courts consider various factors in addition to judicial economy, including: (1) ease of access to sources of proof; (2) the respective parties' contacts with the forum; (3) the contacts relating to the plaintiff's cause of action in the chosen forum; (4) differences in costs of litigation in the two forums; (5) the convenience of parties and witnesses; and (6) the plaintiff's choice of forum. *Billing*, 2010 U.S. Dist. LEXIS 63314, at *13 (citing *Jones v. GNC Franchising, Inc.*, 211 F.3d 495, 489-99 (9th Cir. 2000)); *Jolly*, 2005 U.S. Dist. LEXIS 44599, at *4.

A. Ease of Access to Sources of Proof and Relevant Contacts with the Transferee Forum Favor Transfer

Apple is headquartered in the Northern District of California and Apple documents and witnesses relevant to this dispute are located in that district. (House Decl. ¶¶ 3-4) By contrast, no relevant Apple documents are located in the Southern District of California. (*Id.* ¶ 4) Plaintiff will likely have few, if any, relevant documents. A transfer will thus ease the access to sources of proof. *Atkins v. Magic Sliders, L.P.*, No. 10cv1533 IEG (WVG), 2010 U.S. Dist. LEXIS 132481, at *5 (S.D. Cal. Dec. 15, 2010); *Steelcase Inc. v. Haworth, Inc.*, No. CV 96-1964 JGD (AJWx), 1996 U.S. Dist. LEXIS 20674, at *11 (C.D. Cal. May 17, 1996). Transfer also will avoid inefficient, overlapping discovery. *Billing*, 2010 U.S. Dist. LEXIS 63314, at *14-15 (transfer to forum in which related case was pending would ease access to proof because of likelihood of overlapping discovery); *King-Scott*, 2010 U.S. Dist. LEXIS 44256, at *5 (same).

Further, relevant Apple conduct took place in Cupertino in the Northern District of California; neither Apple nor ATTM is located in the Southern District of California. These factors also support transfer. *Jolly*, 2005 U.S. Dist. LEXIS 44599, at *5; *Cohn v. Oppenheimerfunds, Inc.*, No. 09cv1656-WQH-BLM, 2009 U.S. Dist. LEXIS 106749, at *13-14 (S.D. Cal. Nov. 12, 2009) (citing *In re Yahoo! Inc.*, No. CV 07-3125 CAS (FMOx), 2008 U.S. Dist. LEXIS 20605, at *25-26 (C.D. Cal. Mar. 10, 2008)).

B. The Cost of Litigation Weighs in Favor of Transfer

The cost of litigation also favors transfer. Litigation costs are substantially reduced when related actions are litigated in the same forum. *See Jolly*, 2005 U.S. Dist. LEXIS 44599, at *7; *Cohn*, 2009 U.S. Dist. LEXIS 106749, at *19. Litigating the case in the forum where the relevant sources of proof are located will also reduce costs. *Atkins*, 2010 U.S. Dist. LEXIS 132481, at *6-7; *Italian Colors Rest. v. Am. Express Co.*, No. C 03-3719 SI, 2003 U.S. Dist. LEXIS 20338, at *14 (N.D. Cal. Nov. 10, 2003).

C. The Convenience Of The Parties And Witnesses Favors A Transfer

The balance of convenience strongly favors transfer. This Court has repeatedly recognized that the convenience of the parties and witnesses will be better served if all related cases proceed in the same forum, since it avoids duplicative litigation and travel to two different forums. *See Cohn*, 2009 U.S. Dist. LEXIS 106749, at *15-16 (citing *Alexander v. Franklin Res., Inc.*, No. C 06-7126 SI, 2007 U.S. Dist. LEXIS 19727 (N.D. Cal. Feb. 14, 2007) and *Papaleo v. Cingular Wireless Corp.*, No. C-07-1234 MMC, 2007 U.S. Dist. LEXIS 34448 (N.D. Cal. Apr. 26, 2007)); *Jolly*, 2005 U.S. Dist. LEXIS 44599, at *5-6; *Viper Networks*, 2009 U.S. Dist. LEXIS 110058, at *8. Moreover, as noted above, the relevant Apple witnesses are located in the Northern District. A transfer will be more convenient for ATTM as well. Because ATTM is headquartered in Atlanta, Georgia, ATTM and its witnesses will have to travel in any event, and it will be substantially more convenient for them to travel to one forum rather than two. The balance of convenience thus favors transfer.

Plaintiff's convenience does not alter this conclusion. Because he has brought this case as a class action, the facts regarding Plaintiff's transaction will not be central to the litigation and his involvement will be minimal. *Jolly*, 2005 U.S. Dist. LEXIS 44599, at *6. Any inconvenience to Plaintiff posed by a transfer is thus outweighed by the judicial efficiency and convenience to Apple, ATTM, and their witnesses. *Id.*

D. Plaintiff's Choice of Forum Warrants Little Deference

Plaintiff's choice of forum should be accorded little deference. "[W]here, as here, a plaintiff asserts his or her claim on behalf of a class, a plaintiff's choice of forum is given less weight." *Billing*, 2010 U.S. Dist. LEXIS 63314, at *14; *King-Scott*, 2010 U.S. Dist. LEXIS 44256, at *5. That weight is additionally diminished where "substantial judicial resources will be saved and the fear of inconsistent outcomes will be abated by transferring venue." *Id.* Deference to Plaintiff's choice of venue is also greatly reduced because the Northern District is also in the Ninth Circuit. *In re Yahoo!*, 2008 U.S. Dist. LEXIS 20605, at *16 ("plaintiffs' choice of the Central District is far less compelling because the Northern District is also in the Ninth Circuit").

CONCLUSION

Both the first-filed rule and section 1404(a) compel a transfer to the Northern District of California, where this case can be litigated in conjunction with the three identical consolidated actions. Judicial economy, comity, the location of events and documents, litigation costs, and the convenience of the parties and witnesses all dictate a transfer. Apple respectfully requests that its motion be granted.

Dated: March 4, 2011

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