

MEMORANDUM OF LAW

I. BACKGROUND

The instant litigation relates to the iPhone 4 — a mobile phone, an iPod music player, and an Internet communications device — which is manufactured and sold by Apple. Plaintiff filed a putative Class Action Complaint on June 30, 2010, against Apple and AT&T Inc. (“AT&T”). Plaintiff filed an Amended Class Action Complaint (“Amended Complaint”) on August 2, 2010, *inter alia*, naming AT&T Mobility LLC (“ATTM”) as a defendant. The Amended Complaint alleges nine causes of action related to the iPhone 4.

The putative class consists of purchasers of the iPhone 4 nationwide. Fourteen similar putative class actions¹ are currently pending in seven district courts in six states (together with the instant action, the “Actions”), including nine in the Northern District of California, where Apple’s corporate headquarters are located.² On July 15, 2010, plaintiff Popik filed a motion with the Panel seeking to transfer the Actions to the Northern District of California, San Francisco Division. Later the same day, plaintiffs Goodglick and Tietze also filed motions with the Panel seeking to transfer the Actions to the Northern District of California. On July 19, 2010,

¹ The fourteen pending actions are as follows: *Aguilera v. Apple Inc et al.*, Case No. 3:10-cv-03056-RMW (N.D. Cal.); *Bensberg v. Apple Inc. et al.*, Case No. 8:10-cv-01146-CJC (C.D. Cal.); *Benvenisty v. Apple Inc.*, Case No. 5:10-cv-02885-RMW (N.D. Cal.); *Dydyk v. Apple Inc.*, Case No. 5:10-cv-02897-RMW (N.D. Cal.); *Fasano v. Apple, Inc. et al.*, Case No. 5:10-cv-03010-RWW (N.D. Cal.); *Gionis v. Apple Inc. et al.*, Case No. 1:10-cv-11110-DPW (D. Mass.); *Goodglick v. Apple Inc. et al.*, Case No. 5:10-cv-02862-RMW (N.D. Cal.); *Mayo v. Apple Inc.*, Case No. 5:10-cv-03017-RMW (N.D. Cal.); *Milrot v. Apple, Inc. et al.*, Case No. 10-CV-61130-JIC (S.D. Fla.); *Nguyen v. Apple, Inc.*, Case No. 3:10-cv-00252-KMH (S.D. Tex.); *Popik v. Apple Inc. et al.*, Case No. 5:10-cv-02928-RMW (N.D. Cal.); *Purdue v. Apple Inc.*, Case No. 3-10-cv-00687-AAT (M.D. Tenn.); *Rodgers v. Apple Inc.*, Case No. 5:10-cv-02916-RMW (N.D. Cal.); and *Tietze v. Apple Inc.*, Case No. 5:10-cv-02929-RMW (N.D. Cal.).

² Similar actions also are pending in six California state courts, as follows: *Balooch v. Apple Inc.*, Case No. 30-2010-00385372-CU-BT-CXC (Superior Court of California (Orange County)); *Bensberg v. Apple Inc.*, Case No. 30-2010-00384893-CU-BT-CXC (Superior Court of California (Orange County)); *Garcia v. Apple, Inc.*, Case No. 1-10-CV-176695 (Superior Court of California (Santa Clara County)); *Vines v. Apple, Inc.*, Case No. 1-10-CV-176961 (Superior Court of California (Santa Clara County)); *Hurtado v. Apple, Inc.*, Case No. 37-2010-00096200-CU-BCCTL (Superior Court of California (San Diego County)); and *Musin v. Apple, Inc.*, Case No. 1-10-CV-177126 (Superior Court of California (Santa Clara County)). There is also a single case pending in Florida state court, *De Rose v. Apple Inc.*, Case No. 10 31020 (Circuit Court of the Seventeenth Judicial Circuit (Broward County)).

plaintiff Milrot filed a motion to transfer the Actions to the Southern District of Florida. On August 6, 2010, plaintiffs Alan Benvenisty, Anthony Cologna, and Joy Bearden filed a response in support of transfer to the Northern District of California. The motions are still pending with the JPML. On August 16, 2010, plaintiff Mayo filed a response in support of transfer to the Northern District of California. The Panel has set the motions for hearing on September 30, 2010.

For the reasons that follow, this Court should stay the instant proceedings against Apple pending a transfer decision by the JPML.

II. ARGUMENT

THIS COURT SHOULD STAY THE PROCEEDINGS IN THIS ACTION TO CONSERVE JUDICIAL RESOURCES, AVOID DUPLICATIVE LITIGATION, PREVENT PREJUDICE TO THE PARTIES, AND INCREASE EFFICIENCY AND CONSISTENCY

A. This Court Has The Authority To Stay Proceedings Pending Before It

This Court enjoys “the power inherent in every court to control disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.” *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936); *see also Popoola v. Md.-Individual Practice Ass’n*, 2001 U.S. Dist. LEXIS 6875 at *5 (D. Md. May 29, 2001); *Amdur v. Lizars*, 372 F.2d 103, 106 (4th Cir. 1967). This inherent power extends to cases such as this in which one or more motions to transfer are pending before the JPML. In such cases, courts routinely stay preliminary pretrial proceedings to conserve judicial resources, avoid duplicative litigation, and prevent prejudice to the parties. *See, e.g., Rivers v. The Walt Disney Co.*, 980 F.Supp. 1358, 1362 (C.D. Cal. 1997); *Litchfield Co., LLC v. BP*, 2010 U.S. Dist. LEXIS 70513, at *5 (D.S.C. July 14, 2010). Courts commonly stay such actions because “[a] stay pending the [JPML]’s decision can increase efficiency and consistency, particularly when the transferor court believes that a transfer order is

likely and when the pending motions raise issues likely to be raised in other cases as well.”

Manual for Complex Litigation § 22.35 (4th ed. 2004). In the instant case, all of these factors weigh in favor of a stay.

B. Granting A Stay In This Action Will Help Conserve Judicial Resources, Avoid Duplicative Litigation, And Increase Efficiency And Consistency

Granting a stay in this action will prevent the parties and this Court from engaging in substantial activity that is likely to prove unnecessary, potentially duplicative and inconsistent with similar activity in the other iPhone 4 actions. If this Court does not stay the instant proceedings, multiple deadlines are likely to pass, requiring significant action by the parties and unnecessarily consuming judicial resources. Such action includes the filing of responsive pleadings or motions to dismiss; discovery and related motion practice; pretrial and other case management orders; and the exchange of initial disclosures. In addition, Plaintiff will eventually have to file a motion for class certification. If a transfer is ordered, all such action will take place in the consolidated MDL, conserving this Court’s judicial resources, as well as those of the courts where the other iPhone 4 actions are pending. If a stay is denied, not only will such litigation activity occur in this case, but similar activity will simultaneously occur in the other thirteen iPhone 4 actions, resulting in inefficiency and potentially inconsistent results. Such results thwart the very purposes of the MDL process. Accordingly, this action should be stayed.

C. Apple Would Be Prejudiced If A Stay Is Denied

Failure to stay one of multiple actions pending a ruling on an MDL motion imposes an unnecessary burden and hardship on the defendant. *See Nielsen v. Merck & Co.*, No. C07-00076 MJJ, 2007 WL 806510 at *2 (C.D. Cal. 2007); *Arthur-Magna, Inc. v. Del-Val Fin. Corp.*, CIV.A. No. 90-4378, 1991 WL 13725 at *1 (D.N.J. 1991). If this Court refuses to grant a stay, Apple will have to take all action necessary to meet the deadlines noted above, including

filing responsive pleadings, exchanging initial disclosures, and engaging in discovery necessary to resolution of this action. The parties will be required to meet and confer on case management issues that will necessarily be discussed anew in the transferee court. As discussed below, a transfer order is likely in this litigation. However, absent a stay, such transfer is likely to occur after some or all of the above activity has already taken place. The result is that, not only will the time, effort and resources of Apple have been expended needlessly, but Apple may find itself in a consolidated action before a different court that has made rulings inconsistent with those of this Court. This result would clearly prejudice Apple, and a stay should be granted.

D. No Party Will Be Prejudiced By The Grant Of A Stay

Conversely, grant of a stay will not prejudice any party. The Amended Complaint was served less than two weeks ago, and there has been virtually no activity related to the merits of the action other than Plaintiff's filing a motion to dismiss (without prejudice) Linda Wrinn as a plaintiff. Any delay resulting from a stay would be minimal, and, at this early stage of the proceedings, would have no significant impact on the litigation.

E. A Transfer Order Is Likely

Given the geographic diversity of the individual actions currently pending (California, Florida, Maryland, Massachusetts, Texas, and Tennessee), the similarity of the claims for relief, and the strong potential for conflicting rulings in the various actions, there is a strong likelihood that the JPML will transfer all of the Actions to one district. In fact, all parties agree that transfer is appropriate. It is also likely that the transfer will not be to this District. Nine of the fourteen Actions are currently pending in the Northern District of California, which is also where Apple is headquartered. This District is not a central location for these actions. Accordingly, this Court should stay the instant proceedings pending a ruling by the JPML.

III. CERTIFICATE OF GOOD FAITH CONFERENCE

The undersigned certifies that, in a good faith effort to resolve the issues raised by this Motion, he has discussed the matter with counsel for Plaintiff. Counsel for Plaintiff, Mr. Daniel Sage Ware, agreed via teleconference on August 17, 2010, not to oppose this motion.

IV. CONCLUSION

A stay of the instant proceedings against Apple is necessary to conserve judicial resources, avoid duplicative litigation, prevent prejudice to the parties, and increase efficiency and consistency. The grant of a stay will not prejudice any party, but the denial of a stay will result in substantial prejudice to Apple. The necessity of a stay is amplified by the fact that a transfer order by the JPML is likely, and the transfer is likely to be to a different district. For these reasons, this Court should enter an order staying all proceedings against Apple pending a transfer decision by the JPML.

Dated: August 18, 2010.

/s/ DANIEL P. WESTMAN

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on August 18, 2010, a copy of the foregoing *Consent Motion To Stay Proceedings* was electronically filed with the Clerk of Court using the CM/ECF system, which will automatically send email notification of such filing to the following attorneys of record:

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