

**BEFORE THE
UNITED STATES JUDICIAL PANEL ON
MULTIDISTRICT LITIGATION**

IN RE: GOOGLE PRIVACY POLICY
LITIGATION

MDL Docket No. _____

**MEMORANDUM OF LAW IN SUPPORT OF MOTION OF PLAINTIFF NICHOLAS
ANDERSON FOR THE TRANSFER OF RELATED ACTIONS TO THE NORTHERN
DISTRICT OF CALIFORNIA FOR COORDINATED OR CONSOLIDATED PRETRIAL
PROCEEDINGS PURSUANT TO 28 U.S.C. § 1407**

Plaintiff Nicholas Anderson in the action captioned *Anderson v. Google, Inc.*, 12-cv-01565 (N.D. Cal.) (filed March 29, 2012) respectfully submits this Memorandum of Law in support of his Motion pursuant to 28 U.S.C. § 1407 to transfer and coordinate or consolidate related actions in the Northern District of California.

BACKGROUND

This litigation consists of five class actions (the “Related Actions”), involving deceptive claims made by Google, Inc. (“Google”) related to the consolidation of user data under its new Privacy Policy, which went into effect March 1, 2012. Two Related Actions have been filed in the Northern District of California, one in the Southern District of New York, one in the District of New Jersey, and one in the Eastern District of Pennsylvania: (1) *Anderson v. Google, Inc.*, 12-cv-01565 (N.D. Cal.) (filed March 29, 2012); (2) *De Mars, et al. v. Google, Inc.*, 12-cv-01382 (N.D. Cal.) (filed March 20, 2012); (3) *Nisenbaum, et al., v. Google, Inc.*, 12-cv-02059 (S.D.N.Y.) (filed March 20, 2012); (4) *Villani, et al. v. Google, Inc.*, 2:12-cv-01740 (D.N.J.) (filed March 20, 2012); and (5) *Hoey v. Google, Inc.*, 2:12-cv-01448 (E.D. Penn.) (filed March

22, 2012).

Consolidation of the Related Actions in the Northern District of California is appropriate because the cases involve common questions of fact and a common defendant. Indeed, the Related Actions arise out of the same factual events and allege virtually identical conduct. All five actions are brought on behalf of Android phone owners with Google Accounts, and all allege that Google made misrepresentations concerning the consolidation of user data, in violation of various statutory and common laws.

Transfer of the Related Actions to one forum is essential so that they may be coordinated or consolidated for pretrial proceedings. This is necessary to eliminate duplicative discovery, prevent inconsistent pretrial rulings, and conserve the resources of the parties, their counsel, and the judges in the four separate federal judicial districts in which the Related Actions have been filed. Thus, transfer and coordination or consolidation will further the convenience of the parties and witnesses, and promote efficiency and judicial economy.

The most appropriate forum for transfer and coordination or consolidation is the Northern District of California. Supporting transfer and coordination or consolidation in the Northern District of California are the following factors: (1) Google has its principal place of business in Mountain View, California, making it likely that evidence and witnesses relevant to the Related Actions will be located within that district; (2) Google's Terms of Service contain a choice of law clause that states, "All claims arising out of or relating to these terms or the Services will be litigated exclusively in the federal or state courts of Santa Clara County, California, USA, and you and Google consent to personal jurisdiction in those courts;" (3) the Northern District of California is home to a substantial portion of the U.S. technology industry; and (4) the Court in the Northern District of California has the requisite experience and is well-equipped to preside over this multidistrict litigation, having recently handled two multidistrict cases against Google. Also, two of the five Related Actions were filed in the Northern District of California.

Accordingly, the Related Actions should be coordinated or consolidated in the Northern District of California pursuant to 28 U.S.C. § 1407.

ARGUMENT

I. The Related Actions Meet § 1407's Standards For Coordination And Consolidation Of Pretrial Proceedings

The Multidistrict Litigation Statute allows for coordination and consolidation of civil actions pending in different federal district courts where they involve common questions of fact, where consolidation is convenient for the parties and witnesses, and when it will promote the just and efficient conduct of the consolidated actions. 28 U.S.C. § 1407(a). The cases currently pending against Defendant Google listed in Schedule A meet these standards. As such, the Panel should transfer these cases for coordination and consolidation of pretrial proceedings. The Northern District of California is the most appropriate forum for such transfer.

A. The Related Actions Involve Common Questions of Fact

To be consolidated under 28 U.S.C. § 1407(a), all cases are required to have common questions of fact. See *In re Avandia Mktg., Sales Practices & Prods. Liab. Litig.*, No. 1871, 2008 WL 1391918 (J.P.M.L. Apr. 8, 2008) (ordering transfer and consolidation of marketing litigation); *In re Pepsico, Inc., Bottled Water Mktg. & Sales Practices Litig.*, No. 1903, 2008 WL 1944220 (J.P.M.L. Feb. 14, 2008) (transferring and consolidating where all of the “actions arise from allegations that Pepsi misled consumers of its Aquafina bottled water into believing that the water source of Aquafina was something different from and better than tap water”); *In re AOL Time Warner Sec. Litig.*, 235 F. Supp. 2d 1380, 1381 (J.P.M.L. 2002) (consolidating cases where “All actions share[d] factual questions arising out of alleged misrepresentations or omissions”).

All five Related Actions focus on the same alleged misconduct by Google – unlawful misrepresentations regarding its new Privacy Policy. Common questions of fact include, among others:

- a. Whether Google violated its previous privacy policy by merging data across products and services without consumers’ consent;
- b. Whether Google deceptively claimed that it would seek the consent of consumers

before using their personal information for a purpose other than that for which it was collected;

c. Whether Google misrepresented the ability of consumers to exercise control over their personal information;

d. Whether Google misrepresented the extent of its compliance with the U.S.-EU Safe Harbor Framework by claiming that the company complied with the framework while violating the principles of Notice and Choice;

e. Whether Google's new privacy policy deceptively claims that it does not sell personal information to advertisers when advertisers can, and in fact do, purchase targeting from Google that uses the consumer's personal information and Google profits as a result;

f. Whether Google's new privacy policy allows Google to profit from the deceptive use of consumers' personal information through acquisition of a large share of advertising revenue;

g. Whether Google's opt-out practices for its new privacy policy are deceptive and misleading;

h. Whether consumers can effectively opt-out of Google's new privacy policy;

i. Whether Google should, alternatively, provide an opt-in measure for its new privacy policy;

j. Whether Android users can effectively opt-out of Google's new privacy policy;

k. Whether Android users are entitled to the cost of purchasing a new device or reimbursement for the purchase of their current Android device;

l. Whether Google concealed or failed to disclose material information concerning its advertising practices and future plans for revenue growth;

m. Whether Plaintiffs are entitled to injunctive relief; and

n. Whether Plaintiffs are entitled to damages and attorneys' fees.

These substantially overlapping factual allegations and legal issues are sufficient to merit transfer and coordination or consolidation. *See, e.g., In Re Air Crash at Tegucigalpa, Honduras*, 598 F. Supp. 2d 1368, 1369 (J.P.M.L. 2009) (“[W]e find that these two actions involve common

questions of fact, and that centralization under Section 1407 in the Southern District of Florida will serve the convenience of the parties and witnesses and promote the just and efficient conduct of this litigation.”); *In re First Nat. Bank, Heavener, Okl. (First Mortg. Revenue Bonds)*, 451 F. Supp. 995 (J.P.M.L. 1978) (“Transfer under Section 1407 is thus necessary, even though only two actions are involved, in order to prevent duplicative pretrial proceedings and eliminate the possibility of inconsistent pretrial rulings.”).

B. Transfer Will Promote the Just and Efficient Conduct of the Related Actions

In light of the common factual allegations asserted and similar legal theories pursued by Plaintiff in the Related Actions, coordination or consolidation will serve the “convenience of the parties and witnesses and promote the just and efficient conduct” of the litigation. 28 U.S.C. § 1407(a); *see also, In re Am. Family Mut. Ins. Co. Overtime Pay Litig.*, 416 F. Supp. 2d 1346, 1347 (J.P.M.L. 2006) (directing centralization “in order to eliminate duplicative discovery; prevent inconsistent pretrial rulings, particularly with respect to class certification; and conserve the resources of the parties, their counsel and the judiciary”).

Consolidating or coordinating the Related Actions will eliminate duplicative discovery because Plaintiff will seek to develop similar evidence, including evidence of the misrepresentations made with respect to Google’s Privacy Policy, and the Defendant’s knowledge of its misrepresentations. *In re Vonage Mktg. & Sales Practices*, No. 1862, 2007 WL 2386424 (J.P.M.L. Aug. 15, 2007) (ordering cases transferred to a single district so that a single judge “can formulate a pretrial program” that allows discovery “on common issues”).

Moreover, that Plaintiff in the Related Actions represent virtually the same proposed nationwide class weighs heavily in favor of transfer and coordination or consolidation. The “overlapping class allegations contained in the complaints raise the indubitable possibility of inconsistent class determinations by courts of coordinate jurisdiction.” *In re Roadway Express, Inc. Emp’t Practices Litig.*, 384 F. Supp. 612, 613 (J.P.M.L. 1974). The Panel has “consistently held that the existence of and the need to eliminate this possibility presents a highly persuasive reason favoring transfer under Section 1407.” *Id.*; *see also, In re Plumbing Fixture Cases*, 298

F. Supp. 484, 493 (J.P.M.L. 1968) (explaining that § 1407 was designed to prevent “pretrial chaos” resulting from “conflicting class action determinations”).

Thus, where, as here, transfer to a single court will avoid duplicative discovery and potentially conflicting pretrial rulings, transfer for pretrial purposes is warranted to promote the interest of judicial economy and efficiency.

II. The Northern District of California is the Most Appropriate Forum

In determining the appropriate forum for the Related Actions, the Panel may consider, *inter alia*, the location of the parties and the evidence, and the resources and experience of the transferee court. Here, these factors favor transfer to the Northern District of California.

A. The Parties and Evidence Are Located in the Northern District of California

One significant consideration of the Panel in determining the appropriate transferee forum is the location of the parties, witnesses, and documents. *See In re Auto. Refinishing Paint Antitrust Litig.*, 177 F. Supp. 2d 1378, 1379 (J.P.M.L. 2001) (choosing transferee forum, in part, because “pertinent documents and witnesses can be expected to be found in [its] vicinity”). Here, Defendant Google is based out of Mountain View, California, in the Northern District of California. *See* <http://www.google.com/about/company/culture.html>. The Northern District of California is therefore an appropriate forum. *See In re Chocolate Confectionary Antitrust Litig.*, MDL 1935, 2008 WL 926121 (Apr. 7, 2008) (centralization appropriate where “defendant Hershey’s worldwide headquarters are located” in district); *In re Carbon Black Antitrust Litig.*, 277 F. Supp. 2d 1380, 1381 (J.P.M.L. 2003) (consolidating eight actions in the district where one defendant had its principal place of business).

Similarly, the majority of the documents and the witnesses are likely to be found in the Northern District of California. Because Defendant Google’s principal place of business is in the Northern District of California, the documentary evidence relevant to this litigation is likely to be located there. Witnesses with knowledge of Defendant’s misrepresentations regarding its privacy policies are also likely to be found in California, a significant factor weighing in favor of transfer to the Northern District of California. *See In re Vonage Mktg. & Sales Practices*, 2007

WL 2386424 (“The District of New Jersey is a likely source of relevant documents and witnesses, inasmuch as [defendant’s] headquarters are located there.”); *cf. In re Reformulated Gasoline (RFG) Antitrust & Patent Litig.*, 370 F. Supp. 2d 1357, 1358-59 (J.P.M.L. 2005) (transferring to the district where the defendant was located and the documents and witnesses were likely to be found).

First, all five Related Actions allege Google consolidated user data for advertising purposes. Anderson Complaint, ¶¶ 3-8; De Mars Complaint, ¶¶ 16-19; Nisenbaum Complaint, ¶¶ 16-19; Villani Complaint, ¶¶ 16-19; and Hoey Complaint, ¶¶ 16-19. Internal documents and memoranda about Google’s advertising programs will be pivotal to the Related Cases. These documents may explain the reason why Google consolidated user data, and whether Google was truthful in its public statements concerning its new Privacy Policy. These documents are likely to be found at Google’s Mountain View headquarters, in the Northern District of California.

Second, it is likely that the executives and engineers who decided to consolidate user data work at the Mountain View headquarters. If it is necessary to depose any Google employees, the Northern District of California is the most convenient venue.

Third, Google holds records indicating the number of users affected by the new Privacy Policy. It will likely be necessary to discover these documents to determine numerosity for class certification, and these documents will be necessary to determine damages. These records are likely to be found at Google’s Mountain View headquarters, in the Northern District of California.

Fourth, all five Related Actions allege there is no effective way to opt out of Google’s consolidation of user data. *See, e.g.*, Anderson Complaint, ¶ 11; De Mars Complaint, ¶ 23; Nisenbaum Complaint, ¶ 23; Villani Complaint, ¶ 23; and Hoey Complaint, ¶ 23. Any relevant evidence is likely held at Google’s Mountain View headquarters, in the Northern District of California.

Fifth, all five Related Actions quote James Whittaker, a former Google employee. *See, e.g.*, Anderson Complaint, ¶¶ 59-60, 68, 86; De Mars Complaint, ¶ 90; Nisenbaum Complaint, ¶

90; Villani Complaint, ¶ 89; and Hoey Complaint, ¶ 88. Mr. Whittaker was a Google Engineering Director that worked on the Google+ project in Mountain View, California. *Id.* After resigning from Google, he explained in a blog post that Google felt threatened by Facebook and decided to expand its user data for advertising purposes. *Id.* Mr. Whittaker may be an important witness in the Related Actions. The Northern District of California is a convenient venue for his testimony.

Sixth, Plaintiff Anderson requested in his CLRA demand letter that Google preserve its advertising contracts. Anderson Complaint, Exh. A. These contracts may contain evidence demonstrating how user data influenced advertising decisions. These contracts are also relevant to Google's statement that, "We are not selling our users' data." These contracts are likely to be found at Google's Mountain View headquarters, in the Northern District of California.

Seventh, Plaintiff Anderson requested in his CLRA demand letter that Google preserve documents comparing its user data to its competitors, including Facebook. Anderson Complaint, Exh. A. These documents are likely held at Google's Mountain View headquarters, in the Northern District of California.

Eighth, Plaintiff Anderson requested in his CLRA demand letter that Google preserve technical documents about how it consolidated user data. Anderson Complaint, Exh. A. These documents will be relevant to show how Google handled user data prior to the new Privacy Policy, and how it handled user data afterwards. These documents are likely held at Google's Mountain View headquarters, in the Northern District of California.

Ninth, Plaintiff Anderson requested in his CLRA demand letter that Google retain customer communication and complaints about the consolidation of user data. Anderson Complaint, Exh. A. These documents will demonstrate how the new Privacy Policy affected consumers, and whether they were misled by Google's representations. These documents are likely to be found at Google's Mountain View headquarters, in the Northern District of California.

Additionally, more Related Actions were filed in the Northern District of California than

any other jurisdiction. Many plaintiffs are from California, purchased an Android phone in California, and signed up for a Google Account in California. This, too, favors transfer to the Northern District of California.

B. Google's Terms of Service Contains a Choice of Law Clause for the Northern District of California

The Northern District of California is the proper venue for litigation about Google's privacy policies. Since April 6, 2007, Google's User Agreement contained a choice of law clause for federal or state courts of Santa Clara County, California. It provides:

The laws of California, U.S.A., excluding California's conflict of laws rules, will apply to any disputes arising out of or relating to these terms or the Services. All claims arising out of or relating to these terms or the Services will be litigated exclusively in the federal or state courts of Santa Clara County, California, USA, and you and Google consent to personal jurisdiction in those courts.¹

To the extent that Google Account holders agree to these terms, they are *required* to litigate their claims in the Northern District of California. It is therefore the proper district for consolidation.

C. The Northern District of California Plays a Vital Role in the U.S. Technology Industry

Northern California has been at the forefront of the United States technology industry for decades. The Northern District of California is home to a substantial portion of America's technology industry including Google, Facebook, Yahoo!, Apple, and Intel. The inextricable strong connection between technology and Northern California weighs heavily in favor of centralization in the Northern District of California. *See In re: Oil Spill by the Oil Rig Deepwater Horizon in the Gulf of Mexico, on April 20, 2010, MDL 2179, 2010 WL 3166434* (Aug. 10, 2010) (transferring case to "geographic and psychological 'center of gravity'"); *In re Fresh and Process Potatoes Antitrust Litig.*, 744 F. Supp. 2d 1381 (J.P.M.L. 2010) (holding that transfer to the District of Idaho was appropriate because it is where much of the domestic potato industry is based).

¹ See <http://www.google.com/intl/en/policies/terms/> (last accessed March 30, 2012).

All five Related Actions allege that Google actually decided to consolidate user data in an effort to compete with Facebook, which is also based in the Northern District of California. *See, e.g.*, Anderson Complaint, ¶¶ 56-60; De Mars Complaint, ¶¶ 17-19; Nisenbaum Complaint, ¶¶ 17-19; Villani Complaint, ¶¶ 17-19; and Hoey Complaint, ¶¶ 17-19. The competition between Google and Facebook is a material factor in each case, and it supports transfer to the Northern District of California, as both companies are based in the Northern District of California.

D. The Northern District of California Has The Requisite Experience and Resources to Adjudicate the Related Actions

The Northern District of California is an ideal forum in which to centralize the Related Actions because of its expertise in multidistrict litigation. The Northern District of California has the right balance of expertise and resources to handle the Related Actions.

Since 2010, the Northern District of California handled two multidistrict cases against Google. First, *In re Google Inc. Street View Electronic Communications Litigation*, MDL 2184 (Aug. 17, 2010), comprised of more than a dozen class action suits filed across the country, challenging the acquisition of publicly broadcast Wi-Fi data by Google's StreetView vehicles from open and unencrypted wireless networks. Second, *In RE: Google Android Consumer Privacy Litigation*, MDL 2264 (Aug. 15, 2011), comprised of eight class action suits filed across the country, involving claims that Google's Android operating system or apps downloaded to Android devices mishandled user information, including information about users' locations.

Therefore, the Northern District of California is the proper venue to consolidate litigation concerning Google's privacy policies.

CONCLUSION

Accordingly, Plaintiff Nicholas Anderson respectfully requests that the Panel grant his Motion and transfer the Related Actions to the Northern District of California for coordinated or consolidated pretrial proceedings.

Dated: April 2, 2012

Respectfully submitted,

By: /s/ Sarah N. Westcot
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