BEFORE THE UNITED STATES
JUDICIAL PANEL ON MULTI-DISTRICT LITIGATION

In re: APPLE, INC. DEVICE PERFORMANCE LITIGATION	MDL DKT. NO.: _____

CORRECTED MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR TRANSFER OF ACTIONS TO THE NORTHERN DISTRICT OF CALIFORNIA AND FOR CONSOLIDATION PURSUANT TO 28 U.S.C. § 1407

Pursuant to 28 U.S.C. § 1407 and JPML Rule 6.2, Nicole Gallmann, plaintiff in the case styled *Gallmann v. Apple, Inc.*, U.S. District Court for the Northern District of California, Case No. 5:17-cv-07285, respectfully moves for an Order transferring the 19 currently-filed cases listed in the Schedule of Actions filed concurrently herewith (collectively, "the Actions"), as well as any tag-along cases subsequently filed involving similar facts or claims, to the U.S. District Court for the Northern District of California for coordination or consolidation. The Actions satisfy the requirements for consolidation and transfer pursuant to Section 1407, and for the reasons discussed below, the Northern District of California is the appropriate Transferee Court. In the alternative, Plaintiff requests transfer to the Northern District of Illinois.

I. Background of the Litigation

Movant is the plaintiff in one of 19 cases filed to date against Apple, Inc. ("Apple") relating to the recently disclosed news that Apple had been quietly "throttling" the performance of older model iPhones for almost a year. On January 23, 2017, Apple, Inc. released an updated mobile operating system called iOS 10.2.1. The update ostensibly addressed aging batteries in iPhone models 6 (and 6 Plus), 6S (and 6S Plus), and SE (along with the iPhone 7, see footnote

below, the "Devices"),[1] and Apple expressly represented that the purpose was to prolong the useful life of the Devices. Apple also promised to "deliver the best experience for customers, which includes overall performance and prolonging the life of their devices." For example, the update specifically sought to prevent the handset from shutting down if a performance spike drew too much power—i.e., turning off unexpectedly as if the phone was dead while the phone's battery still had a charge.

While the battery issue was a minor reported problem at the time, the iOS update did far more than address shutdowns on those few phones that experienced shutdowns – it also surreptitiously throttled the performance speed on all Devices by as much as 70 percent. Furthermore, the update did not even fully address the purported battery "shutdown" issue: 20 percent of iPhone 6S and 30 percent of iPhone 6 devices that previously experienced unexpected shut down issues continued to experience those issues, according to a statement released by Apple.

Most importantly, Apple also promised consumers that for those who need it, a message will appear on the screen inside Settings if that phone's "battery needs service." Apple represented that such a message will "add a bit more transparency to people wondering when Apple considers the battery worn down enough to get swapped out." Apple even offered consumers tips regarding when to swap out a battery. However, despite all of these disclosure opportunities, Apple never informed consumers that the 10.2.1 update reduced the small chance unexpected phone shutdowns by slowing all Devices' performance dramatically. Worse, Apple broke its promise to notify consumers experiencing these issues that "the [device's] battery needs

[1] The iPhone 7 was not initially impacted. However, the relevant feature at the center of the iOS 10.2.1 update was later extended to iPhone 7 with the release of iOS 11.2.

service." Because Apple failed to inform consumers that the performance issues were artificially caused by the iOS update in conjunction with an older (but still perfectly functional) battery, consumers were denied the opportunity to make an informed decision regarding whether to upgrade their device or instead simply replace the battery.

Apple's failure to disclose the impact of the iOS update 10.2.1 (and the later iOS 11.1) and remedy the issues it produced (and purported to resolve) has to date resulted in 19 separate class actions filed nationwide. While the claims asserted differ somewhat from complaint to complaint, all name Apple as a defendant, all relate to the identical facts, and all seek certification of a similar class of affected consumers. Consistent with the Panel's course in recent data breach litigation, Plaintiff seeks the consolidation and transfer of the Actions to the United States District Court for the Northern District of California, San Jose Division, where Apple is headquartered. All of the class actions filed against Apple contain common questions of fact. Moreover, because Apple's actions have received a great deal of publicity and just yesterday (December 28, 2017) Apple admitted the problem and offered an apology, see *https://www.apple.com/iphone-battery-and-performance/* ("We know that some of you feel Apple has let you down. We apologize."), a number of tagalong cases will likely be filed in the future.

II. LEGAL STANDARD

Transfer and consolidation is appropriate when actions pending in different judicial districts involve similar questions of fact such that consolidating pretrial proceedings would "promote the just and efficient conduct of such actions." 28 U.S.C. § 1407. In relevant part, Section1407 provides as follows:

> When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any

> district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the judicial panel on multidistrict litigation authorized by this section upon its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions.

Id.; *see also, e.g., In re Nifedipine*, 266 F.Supp.2d 1382, 1382 (J.P.M.L. 2003).

III. ARGUMENT

A. The Litigation Satisfies the Requirements for Consolidation and Transfer Under 28 U.S.C. § 1407

Pretrial transfer and consolidation under section 1407 is appropriate and necessary here. The Actions involve identical facts, the same defendant, and same proposed class. The number of cases grows by the day. Unless these cases are consolidated, the parties will incur excessive costs due to duplicative discovery, and will face the risk of inconsistent rulings on a variety of matters.

1. The Litigation Involves Common Questions of Fact

In assessing the appropriateness of consolidation under Section 1407, the Panel looks to the pleadings to determine the extent to which common questions of fact are present. The Complaints in these cases clearly present common questions of fact. Each Complaint is based on allegations that Apple surreptitiously included code it is operating system that dramatically reduced Device performance, without informing customers for almost a year. In addition, the Complaints all seek certification of a national class. This Panel has consistently consolidated consumer class actions that involve common questions of fact and propose a national class. "[A] potential for conflicting or overlapping class actions presents one of the strongest reasons for transferring such related actions to a single district for coordinated or consolidated pretrial proceedings which will include an early resolution of such potential conflicts." *In re Plumbing Fixtures*, 308 F. Supp. 242, 244 (J.P.M.L 1970)).

2. The Parties Face Duplicative Discovery Absent Transfer and Consolidation

Transfer and consolidation of the Actions would promote efficiency and minimize the potential for duplicative discovery. *See, e.g., In re Foundry Resins*, 342 F. Supp. 2d 1346, 1347 (J.P.M.L. 2004). Because each Action is based upon the same facts, plaintiffs in each of the actions are, in turn, likely to seek overlapping discovery. *See In re Auto Body Shop*, 2014 WL 3908000, at *1-2 (J.P.M.L. 2014) (noting that transfer and consolidation were appropriate to eliminate duplicative discovery when the actions shared a common factual core). The Actions are also likely to involve complicated technical issues regarding the computer code behind the iOS updates that may result in expert reports and *Daubert* briefing and hearings. Should expert evidence be needed, therefore, these issues would be more efficiently handled in a consolidated proceeding. *See, e.g., In re Natrol, Inc. Glucosamine/Chondroitin*, 2014 WL 2616783, at *1 (J.P.M.L. 2014). Similarly, plaintiffs in each Action are likely to seek to depose many of the same Apple witnesses, which again favors centralization. *See, e.g., In re Auto Body Shop*, 2014 WL 3908000, at *1 (J.P.M.L. 2014) (transfer before a single judge was beneficial because he or she could "structure pretrial proceedings to accommodate all parties' legitimate discovery needs while ensuring that common witnesses are not subjected to duplicative discovery demands"); *In re Enfamil Lipil*, 764 F. Supp. 2d 1356, 1357 (J.P.M.L. 2011) ("Centralizing the actions will allow for the efficient resolution of common issues and prevent unnecessary or duplicative pretrial burdens from being placed on the common parties and witnesses.").

Given the similarity of the Actions and the potential for duplicative discovery, transfer and consolidation would inevitably conserve the resources of the parties. *See, e.g., In re Air Crash at Dallas/Fort Worth Airport*, 623 F. Supp. 634, 635 (J.P.M.L. 1985). It would also conserve the resources of the judiciary, as it would assign responsibility for overseeing a pretrial

plan to one judge as opposed to 19 different federal judges. *See, e.g., In re Pineapple*, 342 F.Supp.2d 1348, 1349 (J.P.M.L. 2004).

3. Transfer and Consolidation Will Prevent Inconsistent Pretrial Rulings

The Panel considers the possibility of inconsistent rulings on pretrial issues because of the possible res judicata or collateral estoppel effects on other cases. *See In re Enron Securities Derivative & ERISA Litig*., 196 F. Supp. 2d 1375, 1376 (J.P.M.L. 2002) (granting a transfer in part to prevent inconsistent pretrial rulings, particularly with respect to questions of class certification). Because of the similarity of the allegations in the Complaints, and the likelihood that future filed actions will contain the same, the possibility of inconsistent rulings on pretrial motions is substantially increased. In addition, Apple is likely to present the same pretrial motions (including dispositive motions) in each action and assert the same discovery objections and privileges. Inconsistent rulings would pose a serious problem, in that the Actions seek to certify overlapping classes. In addition, Apple will likely assert the same defenses in opposition to Plaintiffs' claims, creating a substantial risk of inconsistent pretrial rulings. In light of this risk, it would be in the best interests of all involved—the parties, the witnesses and the Courts—to transfer and centralize the Actions. As the Panel has previously recognized, centralization is appropriate to prevent inconsistent pretrial rulings on common factual issues. *In re Dow Chem*., 650 F. Supp. 187, 188 (J.P.M.L. 1986).

4. There is a Sufficient Number of Actions to Support Transfer and Centralization

As stated above, there are currently 19 cases pending and Plaintiff believes that many more will follow, given Apple's recent apology. The Panel has routinely ordered centralization of far fewer cases, some as few as three. *See In re Wireless Telephone Replacement Protection Programs Litig*., 180 F. Supp. 2d 1381, 1382 (J.P.M.L. 2002) (granting transfer and

centralization of three consumer protection cases and determining that pending motions can be presented to and decided by the transferee judge); *In re Philadelphia Life Ins. Co. Sales Practices Litig.*, 149 F. Supp. 2d 937, 938 (J.P.M.L. 2001) (granting transfer of two deceptive insurance sales cases and finding that such transfer would promote the just and efficient conduct of the litigation). Given the substantial number of current and likely tag-along actions, transfer and centralization is appropriate.

B. The Northern District of California is an Appropriate Transferee Forum

The Panel can consider the nexus between the transferee forum and the parties to the litigation when resolving requests for transfer under 28 U.S.C. § 1407. A significant "nexus" exists when a party who is common to all actions (e.g., the sole defendant) is headquartered or has facilities that are located within the transferee court's jurisdiction, such that relevant witnesses and documentary evidence common to all the actions are likely to be found there. *See, e.g., In re Sears, Roebuck & Co. Tools Mktg. & Sales Practices Litig.*, 381 F.Supp.2d 1383, 1384 (J.P.M.L. 2005) ("relevant discovery will likely be found within this district, because Sears's corporate headquarters and many of its documents and witnesses are located there"); *In re Google Inc. St. View Elec. Commc'ns Litig.*, 733 F.Supp.2d 1381, 1382 (J.P.M.L. 2010) (transferring to Northern District of California where "[t]he sole defendant, Google, is headquartered there, and most relevant documents and witnesses are likely located there."); *St. Jude Med., Inc., Silzone Heart Valves Products Liab. Litig.*, MDL No. 1396, 2001 WL 36292052, at *2 (J.P.M.L. Apr. 18, 2001) (transferring litigation to district because "as the situs of the headquarters of the sole defendant in all actions, the district is likely to be a substantial source of witnesses and documents subject to discovery").

In this instance, the Northern District of California has the strongest nexus to this litigation as Apple's headquarters are located within that district. As such, documents relevant to determining the key issues are within the Northern District of California, and the majority of witnesses regarding the same are also located there. It is therefore common practice for cases to be consolidated in the home district of the defendant. *See, e.g., In re Yahoo! Inc. Customer Data Sec. Breach Litig*., 223 F. Supp. 3d 1353, 1354-55 (J.P.M.L. 2016) ("We conclude that the Northern District of California is an appropriate transferee district for this litigation. Defendant Yahoo's corporate headquarters is located within the district, and therefore relevant documents and witnesses are likely to be located there.").

In the alternative, recognizing that the caseload in the Northern District of California is heavy, Plaintiff in the alternative respectfully requests transfer to the Northern District of Illinois. The N.D. Ill. has a significantly larger number of Art. III judges as the N.D. Cal. (31 vs. 16) and yet far fewer MDLs (13 vs. 21). *See* United States JPML Statistical Analysis of Multidistrict Litigation Under 28 U.S.C. § 1407, Fiscal Year 2017. The Northern District of Illinois is also geographically central because the plaintiffs are spread throughout the country.

IV. CONCLUSION

Plaintiff respectfully requests that the Panel grant her Motion for Transfer and Consolidation of all Related Actions, as well as any subsequently filed actions containing similar allegations, to the United States District Court for the Northern District of California.

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Respectfully submitted,

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