IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

Coronavirus Reporter, *Plaintiff*, v. Apple Inc., *Defendant*.	§ § § § § § § § § §	Civil Action No. 1:21-cv-00047-LM

APPLE INC.'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO TRANSFER VENUE PURSUANT TO 28 U.S.C. § 1404(a)

PRELIMINARY STATEMENT

This case should be transferred to the U.S. District Court for the Northern District of California. Coronavirus Reporter ("Plaintiff") is bound by the mandatory forum-selection clause within the Apple Developer Program License Agreement (the "DPLA"). That clause requires lawsuits like Plaintiff's—which challenge Apple's discretionary decisions about application ("app") distribution on its App Store—be brought in the Northern District of California (the "Northern District"). The Supreme Court has held that a mandatory forum-selection clause receives "controlling weight," especially when, as here, public interests strongly favor transfer.

Even if the mandatory forum-selection clause did not apply, the Court should transfer the action under 28 U.S.C. § 1404(a) to the Northern District. Virtually all operative events occurred there; the vast majority of likely witnesses live and work there; all relevant documents are located there; and Apple resides there. In stark contrast, the District of New Hampshire lacks any nexus to Plaintiff's allegations. No parties reside in New Hampshire; not a single alleged event occurred in this state; and Plaintiff has not pled that any likely witnesses reside in New Hampshire. The presumption in favor of a plaintiff's chosen forum falls away when the plaintiff—here, a Wyoming corporation—is not a resident of that forum. This is a paradigmatic case for transfer.

Apple respectfully requests that the Court grant Apple's motion to transfer venue.

BACKGROUND

Apple launched the iPhone in 2007, revolutionizing mobile computing. In July 2008, Apple introduced the App Store, a platform for app developers to distribute apps to iOS device users. Since then, Apple has relentlessly prioritized user security and privacy, allowing Apple to provide consumers and developers with a high-quality, secure, and reliable experience.

Apple requires that any person who wishes to distribute an app through the App Store agree to the Apple Developer Agreement ("Developer Agreement") and the DPLA. (Decl. ¶ 5.) The

Developer Agreement governs basic elements of a developer's relationship with Apple, such as confidentiality and protection of Apple's intellectual property rights. (*See* Ex. A.) The DPLA governs distribution of apps through the App Store and provides access to developer tools, software, and other Apple intellectual property for app creation. (*See* Ex. C.)

Apple obtains developers' agreement to these contracts through knowing and voluntary online consents. Developers review the Developer Agreement and the DPLA in an online portal. (Decl. ¶ 5.) Apple instructs developers—in bolded, capitalized text—to read each agreement before clicking a button to confirm they agree to its terms. (Decl. ¶ 5; Exs. A, B, C at 1.) Each agreement also notifies developers that it is a "legal agreement between You and Apple." (Exs. A, B, C at 1.) Calid Inc. ("Calid"), the developer of the Coronavirus Reporter app, agreed to the Developer Agreement by April 24, 2017. (Decl. ¶¶ 6, 7; Am. Compl. ("Compl.") ¶¶ 14 (pp. 6–7 (to distinguish duplicated paragraph numbers)), 62.) Calid agreed to the DPLA on December 29, 2019 and again on July 30, 2020 to accept new terms not relevant here. (Decl. ¶ 8; Exs. B, C.)

In addition to those agreements, developers must abide by the App Store Review Guidelines (the "Guidelines"). (Decl. ¶ 9; Ex. D.) The Guidelines set forth the standards Apple applies when reviewing apps for distribution on the App Store, a process known as "App Review." (Decl. ¶¶ 9, 11, 12.) The teams responsible for App Review and setting, updating, and revising the Guidelines are primarily based within the Northern District. (Decl. ¶¶ 11–13.) No employees who perform App Review, or set App Store policy, live or work in New Hampshire. (*Id.*)

Plaintiff is a Wyoming corporation that "previously transacted business under the name Calid." (Compl. ¶ 14 (pp. 6–7).) Plaintiff filed a complaint on its own behalf on January 19, 2021, *see* Civil Cover Sheet, ECF No. 1-1, which it amended on March 4, 2021. Plaintiff alleges that, in February 2020, an "*ad hoc* group of health care and computer science experts" developed

Plaintiff's eponymous app. (Compl. ¶ 1.) The app allegedly would have allowed users to "self-identify" potential COVID-19 symptoms. (*Id.* ¶¶ 2, 30.) Plaintiff identifies Dr. Robert Roberts as Plaintiff's Chief Medical Officer. (*Id.* ¶ 3.) Dr. Roberts's curriculum vitae indicates that he works and lives in Arizona and has been affiliated with the University of Arizona since 2015. (Compl. Ex. A, at 1, 3, ECF No. 17-3.) Plaintiff does not identify where any other individual involved in developing the Coronavirus Reporter app works or lives.

Plaintiff allegedly completed its app on March 3, 2020, and submitted it to Apple for review. (*Id.* ¶¶ 1, 3.) On March 14, 2020, Apple published a news release through its developer web portal, announcing Apple's policy governing the review of apps related to COVID-19. (Decl. ¶ 10; Ex. E.) Apple stated it was working to ensure that developers presenting apps related to the COVID-19 pandemic "are from recognized entities such as government organizations, health-focused NGOs, companies deeply credentialed in health issues, and medical or educational institutions." (Ex. E.) The policy continued: "Only developers from one of these recognized entities should submit an app related to COVID-19." (*Id.*)

Apple allegedly rejected Plaintiff's app and denied an appeal of that decision on March 26, 2020, because the app was not from a "recognized institution" and because the app's "user-generated data ha[d] not been vetted for accuracy by a reputable source." (Compl. ¶¶ 3, 5, 31, 33.) Plaintiff claims Apple later approved a "similar" app from a U.K. hospital and another Florida-based "COVID app." (*Id.* ¶¶ 51–52.) Apple also allegedly partnered with "Google and several other universities to create a contact-tracing COVID app." (*Id.* ¶¶ 7, 54.)

Plaintiff concedes "Apple has some reasonable right to quality control and law enforcement via its App Store." (*Id.* ¶ 83.) Still, Plaintiff claims Apple violated the Sherman Act and breached its contractual obligations by rejecting Plaintiff's app. (*See id.* ¶¶ 79, 90, 110, 116.)

LEGAL STANDARD

This Court may transfer "any civil action to any other district" if the action "might have been brought" there, or the parties have consented to venue there, and transfer will enhance "the convenience of parties and witnesses, in the interest of justice." 28 U.S.C. § 1404(a). The transferor court has "wide latitude" in deciding a motion to transfer. *Jackson Nat'l Life Ins. Co.* v. *Economou*, 557 F. Supp. 2d 216, 220 (D.N.H. 2008).

Where, as here, the parties, and closely-related nonparties, have agreed to a valid contract containing a forum-selection clause, courts follow a three-step analysis to determine whether the clause requires transfer. First, courts determine if the clause is mandatory—meaning that the parties have agreed to litigate *exclusively* in a particular forum—or permissive. *See Claudio-De León* v. *Sistema Universitario Ana G. Méndez*, 775 F.3d 41, 46 (1st Cir. 2014). If it is mandatory, second, courts assess whether the clause covers the plaintiff's claims, applying principles of contract interpretation. *See Huffington* v. *T.C. Grp., LLC*, 637 F.3d 18, 21 (1st Cir. 2011). If the clause covers the alleged claims, the clause is "prima facie valid"; and courts ask, third, whether the plaintiff has made a "strong showing" that the clause "should be set aside." *M/S Bremen* v. *Zapata Off-Shore Co.*, 407 U.S. 1, 10, 15 (1972); *see also Claudio-De León*, 775 F.3d at 48. When a mandatory forum-selection clause controls, it must be "given controlling weight in all but the most exceptional cases." *Atl. Marine Constr. Co., Inc.* v. *U.S. Dist. Ct. for the W. Dist. of Texas*, 571 U.S. 49, 60 (2013) (quoting *Stewart Org., Inc.* v. *Ricoh Corp.*, 487 U.S. 22, 33 (1988) (Kennedy, J., concurring)). Finally, in the face of a mandatory forum-selection clause, courts may not consider private interests relevant to transfer, including the plaintiff's choice of forum, and public-interest factors "rarely defeat a transfer motion." *See id.* at 63–64.

If a court concludes that a forum-selection clause is permissive or does not control, then it weighs private and public-interest factors under Section 1404(a) to evaluate if transfer would serve

"the convenience of parties and witnesses" and "the interest of justice." *See also Jackson*, 557 F. Supp. 2d at 220. (identifying factors). In this circumstance, the court also considers efficiency and judicial economy. *See Highfields Cap. I LP* v. *Perrigo Co., PLC*, No. CV 19-10285-GAO, 2020 WL 1150000, at *2 (D. Mass. Mar. 10, 2020).

ARGUMENT

I. This Action Must Be Tried in the Northern District of California Because Plaintiff Agreed to a Mandatory Forum-Selection Clause.

A. Plaintiff is bound by the DPLA's forum-selection clause.

Calid, under which name Plaintiff "previously transacted business," entered into the DPLA, a "valid contract containing a forum selection clause." *Alice Peck Day Mem'l Hosp.* v. *Vermont Agency of Hum. Servs.*, No. 20-CV-919-LM, 2021 WL 736146, at *3 (D.N.H. Feb. 25, 2021); (Compl. ¶ 14 (p. 7); Decl. ¶¶ 6, 8). The DPLA instructs developers to "carefully" read its terms and conditions, which "constitute a legal agreement between You and Apple." (Exs. B, C, at 1.) Those terms and conditions include a mandatory forum-selection clause. (Exs. B, C § 14.10; *see infra* Section I.B.) Calid, which developed the Coronavirus Reporter app, accepted all terms and conditions when Calid executed the DPLA. (Decl. ¶¶ 6, 8.) The DPLA is valid, and Plaintiff identifies no basis to set it aside. *Cf. Net2Phone, Inc.* v. *Superior Court*, 135 Cal. Rptr. 2d 149, 152–53 (Ct. App. 2003); Restatement (2d) of Contracts § 22(1) (1981); *see also infra* Section I.D.

That Calid executed the DPLA does not make it any less binding on Plaintiff, Coronavirus Reporter. A "non-party may be bound by a forum-selection clause where that party is so 'closely related to the dispute such that it becomes foreseeable that it will be bound.'" *Cameron* v. *X-Ray Pro. Ass'n*, 2017 DNH 032, 13 (quoting *Hugel* v. *Corp. of Lloyd's*, 999 F.2d 206, 209 (7th Cir. 1993)). That standard is easily met here. Plaintiff concedes it "previously transacted business under the name Calid." (Compl. ¶ 14 (pp. 6–7).) And Plaintiff repeatedly refers to the Coronavirus

Reporter app as "Plaintiff's app"—a representation that can be true only if Plaintiff and the app's developer, Calid, are functionally equivalent.[1] In such circumstances, Plaintiff cannot claim it was not "foreseeable that it will be bound" by the DPLA that Calid executed. *Europa Eye Wear Corp.* v. *Kaizen Advisors, LLC*, 390 F. Supp. 3d 228, 231 (D. Mass. 2019); (Compl. ¶ 62). Moreover, because Plaintiff seeks redress for the alleged breach of a contract *Calid* entered into, and the alleged rejection of an app that *Calid* developed, (Decl. ¶¶ 6–8), Plaintiff is "closely related to the contractual relationship" here and "the factual allegations underlying this dispute." *Cameron*, 2017 DNH 032, at 13. Plaintiff is thus bound by the DPLA and its forum-selection clause.

B. The DPLA's forum-selection clause is mandatory.

The DPLA's forum-selection clause provides that "Any litigation . . . between You and Apple arising out of or relating to this Agreement, the Apple Software, or Your relationship with Apple ***will take place in the Northern District of California***, and You and Apple hereby consent to the personal jurisdiction of and ***exclusive venue*** in the state and federal courts within that District." (Exs. B, C § 14.10 (emphasis added).). This forum-selection clause is "plainly mandatory" because it "contain[s] clear language indicating that jurisdiction and venue are appropriate *exclusively* in the designated forum." *Autoridad de Energía Eléctrica de Puerto Rico* v. *Vitol S.A.*, 859 F.3d 140, 145–46 (1st Cir. 2017) (emphasis added) (quoting *Claudio-De León*, 775 F.3d at 46). In *Autoridad*, the First Circuit explained that the verb "will" and the adjective "exclusive" to modify "venue" indicate a mandatory clause. *Id.* at 146. The clause here uses the same terms in the same context, making the clause mandatory, not permissive.

C. The mandatory forum-selection clause covers Plaintiff's claims.

Plaintiff's claims fall within the mandatory forum-selection clause because they "aris[e]

[1] *See, e.g.*, Compl. ¶¶ 3, 5–6, 8, 15 (p. 6), 14 (pp. 6–7), 24–25, 27, 31–32, 45, 47, 50–53, 56, 98.

out of" and "relat[e] to" the DPLA and Plaintiff's "relationship with Apple." (Exs. B, C § 14.10). "The First Circuit has interpreted the term 'relating to' in forum selection clauses to be very broad." *Bagg* v. *HighBeam Rsch., Inc.*, 862 F. Supp. 2d 41, 45 (D. Mass. 2012) (citing *Huffington*, 637 F.3d at 22); *see also Carter's of New Bedford, Inc.* v. *Nike, Inc.*, 790 F.3d 289, 293 (1st Cir. 2015) (enforcing "unambiguously broad" clause covering "*any action* arising out of or in connection with" agreement). "[S]tatutory claims may 'relate to' a contract and fall within the scope of a forum selection clause, even if the complaint contains no explicit contract claims." *Cameron*, 2017 DNH 032, at 9–10 (quoting *Bagg*, 862 F. Supp. 2d at 45).

Here, Plaintiff brings intertwined contractual and federal statutory claims that relate to and arise out of the DPLA. At bottom, Plaintiff complains that Apple did not approve Plaintiff's app but approved other apps related to COVID-19.[2] The DPLA squarely governs the challenged conduct, namely, Apple's "[s]election" of apps for "distribution via the App Store." (Ex. B § 6.8; Ex. C § 6.9.) Developers "understand and agree" that Apple may reject their app in Apple's "sole discretion." (Ex. B § 6.8(b); Ex. C § 6.9(b).) Here, Plaintiff takes aim at exactly this discretionary review process, alleging Apple breached its contractual obligations and violated antitrust laws when it rejected the Coronavirus Reporter app. (*See supra* note 2.)

Plaintiff's contract claims are even more closely related to the DPLA, despite Plaintiff's obfuscation. The "promise" Apple purportedly breached—that "entities with 'deeply rooted medical credentials' were permitted to publish COVID apps on the App Store"—is nowhere in the Developer Agreement, as Plaintiff alleges. (Compl. ¶ 101; Ex. A.) Instead, the relevant policy—whose contents Plaintiff misrepresents in any event—was published through the developer web portal, thus incorporated, if at all, into the DPLA. (*See* Exs. B, C § 6.1 (developers "warrant" that

[2] *See* Compl. ¶¶ 3, 5–6, 8, 13 (p. 5), 15 (p. 6), 15 (p. 7), 23, 27, 31–34, 36–40, 45–53, 56, 63–69, 71, 76–77, 81, 84–85, 88, 93–98, 101–106, 109–111, 116, 118–19.

their app complies "with any additional guidelines that Apple may post on the Program web portal").) To the extent Apple breached any purported "promise" within its COVID-19 policy (which it did not), that policy reflected Apple's "sole discretion" to select apps for distribution via the App Store. (Ex. B §§ 3.2(g), 6.8; Ex. C §§ 3.2(g), 6.9.) Plaintiff's claims to *enforce* Apple's COVID-19 policy thus clearly *relate* to the DPLA, bringing them within the DPLA's forum-selection clause. *See Huffington*, 637 F.3d at 22–23.

D. Plaintiff cannot overcome the strong presumption in favor of enforceability.

Because the DPLA's forum-selection clause is mandatory and governs the claims here, it is presumed valid. *Claudio-De León*, 775 F.3d at 48. Plaintiff cannot make the "strong showing" required to set it aside. *See id.* at 48–49 (citing *Bremen*, 407 U.S. at 10, 15).

Plaintiff suggests that the Developer Agreement's forum-selection clause is invalid because it is contained within an alleged "monopolistic contract" that is "a violation of the Sherman Act." (Compl. ¶ 12 (p. 6).) Whether applied to the *DPLA*—which the Complaint fails to mention—or the *Developer Agreement*, Plaintiff's suggestion is wrong.[3] To be set aside, a mandatory forum-selection clause must itself be procured by fraud or be unconscionable. *Huffington*, 637 F.3d at 23–24. No such allegations have been—or could be—made here; courts routinely enforce such clauses within standard terms of service and terms of use. *E.g.*, *Silva* v. *Encyclopedia Britannica Inc.*, 239 F.3d 385, 389 (1st Cir. 2001) (enforcing "boilerplate" forum-selection clause and finding defendant's "alleged bargaining power is not relevant" when "no evidence" suggested plaintiff "was coerced"); *Comput. Servs. Grp., Inc.* v. *Apple Comput., Inc.*, No. 01 Civ. 7918 (RCC), 2002 WL 575649, at *2 (S.D.N.Y. Apr. 16, 2002). Courts also routinely

[3] That Plaintiff did not mention the DPLA in its Complaint does not create an escape hatch from the DPLA's mandatory forum-selection clause. *See Noel* v. *Walt Disney Parks and Resorts U.S., Inc.*, No. 10-40071-FDS, 2011 WL 1326667, at *3 (D. Mass. Mar. 31, 2011); *Huffington*, 637 F.3d at 21; Compl., *Huffington* v. *T.C. Grp. LLC*, 685 F. Supp. 2d 239 (D. Mass. 2010) (No. 09-11256-PBS).

enforce forum-selection clauses within allegedly anti-competitive contracts. *E.g.*, *Cung Le* v. *Zuffa, LLC*, 108 F. Supp. 3d 768, 776–78 (N.D. Cal. 2015). If Plaintiff instead means the clause should be set aside just because Plaintiff lacked an opportunity to bargain with Apple over its terms, the First Circuit has rejected that proposition too. *See Rivera* v. *Centro Medico de Turabo, Inc.*, 575 F.3d 10, 18–19 (1st Cir. 2009).

Plaintiff's other allegations fare no better. Plaintiff suggests that the forum-selection clause does not bind some of its corporate officers, including Dr. Robert Roberts, who purportedly did not "personally" waive venue in New Hampshire. (Compl. ¶¶ 12 (p. 6), 14 (pp. 6–7).) But Plaintiff ignores the well-settled principle that forum-selection clauses bind non-signatories if they are closely related to the contractual dispute. (*See supra* Section I.A.) Plaintiff also claims transfer to the Northern District would give Apple an "unfair advantage" because Apple employs "tens of thousands of individuals there." (Compl. ¶ 12 (p. 6).) Plaintiff has it backwards. As set forth below, transfer is appropriate precisely because the Defendant resides in the Northern District, as do most of the likely witnesses and evidence. The forum-selection clause here is enforceable.

E. The public-interest factors favor transfer.

Because the forum-selection clause is mandatory, this Court may not consider any private-interest factors relevant to transfer. *See Atl. Marine*, 571 U.S. at 64. Rather, Plaintiff must show that the "public-interest factors overwhelmingly disfavor a transfer." *Id.* at 67. Plaintiff cannot do so here because the public-interest factors strongly favor transfer to the Northern District.

1. Local interest in the controversy and the burden of jury duty.

Local interest in the lawsuit strongly favors transfer. Plaintiff's claims lack any nexus to New Hampshire. Plaintiff, a Wyoming corporation, alleges no anticompetitive effects felt in New Hampshire or any other injuries localized to New Hampshire residents. *See Rivera-Carmona* v. *Am. Airlines*, 639 F. Supp. 2d 194, 198 (D.P.R. 2009) (granting transfer based, in part, on the

"burden" of imposing jury duty on forum residents who "have no relation to the litigation"). Instead, Plaintiff's allegations relate either to Apple's App Review process—no part of which occurs in New Hampshire—or grandiose theories about Apple's purported role as a gatekeeper to "the ***global*** internet backbone."[4] (Compl. ¶ 66 (emphasis added); Decl. ¶¶ 12, 13.)

By contrast, the Northern District has a strong nexus to the litigation. Apple is headquartered there, where thousands of its employees reside. (Decl. ¶ 3.) A number of those employees are likely to be witnesses in this case. (Decl. ¶¶ 11–14.) The Northern District also has a "strong local interest" concerning alleged misconduct "within its jurisdiction," and in "providing its citizens who have been named as defendants with an opportunity to defend themselves." *Commodity Futures Trading Comm'n* v. *Cromwell Fin. Servs., Inc.*, 2006 DNH 019, 14. "New Hampshire simply does not have the type of interest in the outcome that [the Northern District] does." *Adam* v. *Hawaii Prop. Ins. Ass'n*, 2005 DNH 048, 11.

2. The proposed forum's familiarity with the governing law.

The Northern District's familiarity with the Sherman Act, especially as applied to App Store cases, favors transfer. A half dozen cases bringing antitrust claims challenging Apple's App Store policies, just as this case does, are pending in that district. Northern District courts have related all these cases before a single District Court judge, the Honorable Yvonne Gonzalez Rogers,[5] and some cases brought by app-developers, like Plaintiff here, have been consolidated "to assure consistent rulings . . . and to avoid unnecessary duplication of effort." Order Granting

[4] *See* Compl. ¶¶ 3, 5–6, 8, 10–15 (pp. 4–6), 12 (p. 6), 14–15 (pp. 6–7), 17–24, 27, 31–40, 45–53, 56–69, 71, 76–77, 81–85, 88, 91–97, 101, 104, 106, 109–11, 116, 118–19.

[5] *See* Order Granting Admin. Mots. to Relate Cases, *Cameron* v. *Apple Inc.*, No. 19-cv-03074 (N.D. Cal. Aug. 22, 2019) (relating *Cameron*, *Sermons* v. *Apple Inc.* and *Pepper* v. *Apple Inc.*); Related Case Order, *Epic Games, Inc.* v. *Apple Inc.*, No. 20-cv-05640 (N.D. Cal. Aug. 19, 2020) (relating *Epic* and *Cameron*); Related Case Order, *SaurikIT, LLC* v. *Apple Inc.*, No. 20-cv-08733 (N.D. Cal. Jan. 8, 2021) (relating *Pepper* and *SaurikIT*); Related Case Order, *Pistacchio* v. *Apple Inc.*, No. 20-cv-07034 (N.D. Cal. Nov. 2, 2020) (relating *Pepper* and *Pistacchio*); *see also* Order Granting Stipulation Consolidating Related Consumer Cases for All Purposes, *Pepper* v. *Apple Inc.*, No. 11-cv-06714 (N.D. Cal. Oct. 29, 2019).

Stipulation Consolidating Related Developer Cases for All Purposes at 2, *Cameron* v. *Apple Inc.*, No. 19-cv-03074 (N.D. Cal. Nov. 5, 2019); *see* N.D. Cal. Civ. R. 3-12(a) (relation proper when cases involve "substantially the same parties, property, transaction or event" and relation would avoid "an unduly burdensome duplication of labor and expense or conflicting results"). As Judge Gonzalez Rogers observed, antitrust issues raised by the various App Store challenges "concern novel and innovative business practices in the technology market that have not otherwise been the subject of antitrust litigation." *Epic Games, Inc.* v. *Apple Inc.*, No. 4:20-cv-05640-YGR, 2020 WL 5993222, at *6 (N.D. Cal. Oct. 9, 2020). The Northern District's deep experience with the Sherman Act in the App Store context specifically, and the "possibilities of consolidation," favor transfer. *Cianbro Corp.* v. *Curran-Lavoie, Inc.*, 814 F.2d 7, 11 (1st Cir. 1987).

Plaintiff also alleges contract claims arising nominally out of the Developer Agreement but, in reality, also the DPLA. (Compl. ¶ 110; *see supra* Section I.C.) Both agreements state that they will be "construed in accordance with" California law and, in the case of the DPLA, "the laws of the United States" as well. (Ex. A § 17; Exs. B, C § 14.10.) While this Court "is certainly capable of applying" California law, "this factor favors transfer to a court staffed by judicial officers accustomed to applying [California] law on a daily basis." *MSPA Claims 1, LLC* v. *Covington Specialty Ins. Co.*, 2019 DNH 050, 14; *Jackson*, 557 F. Supp. 2d at 223–24.

3. Administrative difficulties caused by court congestion.

Court congestion favors transfer, or is, at worst, neutral. As of September 30, 2020, there were 1,062 pending cases per judgeship in the District of New Hampshire compared to 870 in the Northern District. Administrative Office of the United States Courts, *Federal Court Management Statistics* (Sept. 2020); *see Cuadrado Concepción* v. *United States*, No. 19-1430 (RAM), 2019 WL 5847216, at *5 (D.P.R. Nov. 7, 2019). Although the number of weighted filings per judgeship in the Northern District is higher, the Northern District's "familiarity with related litigation lessens

any burden transferring this case would impose." *MSPA*, 2019 DNH 050, at 13.

II. The Northern District of California Is the More Convenient Venue.

Even if Plaintiff had not agreed to a mandatory forum-selection clause (which it did), this case should also be transferred under a straightforward Section 1404(a) analysis. The case could have been brought in the Northern District. *See* 28 U.S.C. § 1404(a). Transfer would also serve the "interest of justice" and "the convenience of parties and witnesses." *Id.*

A. This case "might have been brought" in the Northern District.

It cannot be disputed that this case "might have been brought" in the Northern District. 28 U.S.C. § 1404(a). Apple is a California corporation headquartered in Cupertino, within the Northern District. *See* 28 U.S.C. § 1391(b)(1); (Decl. ¶ 3.) A substantial part of the alleged events took place there. 28 U.S.C. § 1391(b)(2); (Decl. ¶¶ 11–13); *see also infra* Section II.C.1. And Plaintiff has consented to personal jurisdiction and venue in the Northern District through both the Developer Agreement and the DPLA. (Compl. ¶ 62; Ex. A § 17; Exs. B, C § 14.10.) *See Pierce* v. *Biogen U.S. Corp.*, No. 18-12510-DJC, 2019 WL 2107278, at *4 (D. Mass. May 14, 2019).

B. The public-interest factors overwhelmingly favor transfer.

As discussed, the public-interest factors heavily favor transfer. *See supra* Section I.E.

C. The relevant private-interest factors overwhelmingly favor transfer.

1. Location of the operative events in the case.

The location of the operative events strongly favors transfer and undercuts the presumption in favor of plaintiff's chosen forum. *Cromwell*, 2006 DNH 019, at 10; *McFarland* v. *Yegen*, 699 F. Supp. 10, 15–16 (D.N.H. 1988). Plaintiff challenges Apple's App Review procedures and, specifically, Apple's alleged decision to reject "Plaintiff's app" for distribution on the App Store. (*See supra* notes 2, 4.) App Review, and related policy decisions, however, occur primarily in the Northern District and not at all in New Hampshire. (Decl. ¶¶ 11–13.)

Plaintiff fails to allege ***any*** event that occurred in New Hampshire. Courts in this Circuit routinely grant transfer under similar circumstances. *See, e.g.*, *Cromwell*, 2006 DNH 019, at 10 (operative events occurred in Florida because solicitations at issue emanated from Florida, even if some were directed into New Hampshire); *MSPA*, 2019 DNH 050, at 9 (although "class action allegations potentially involve conduct throughout the country," all operative facts alleged occurred in Florida); *Negron Miro* v. *TOTE Servs., Inc.*, No. 17-2284 (DID), 2018 WL 8583059, at *5 (D.P.R. Sept. 25, 2018). Plaintiff alleges that "Apple transacts business in New Hampshire." (Compl. ¶ 12 (p. 6).) But Apple's three retail stores within the state have nothing to do with Plaintiff's claims, and Plaintiff does not allege otherwise. (Decl. ¶ 15.)

2. Convenience of the witnesses.

Witness convenience is "the most important" factor and here weighs strongly in favor of transfer. *Jackson*, 557 F. Supp. 2d at 222 (citation omitted); *MSPA*, 2019 DNH 050, at 9. The witnesses here will likely be Apple employees involved in App Review decisions and procedures; those witnesses live and work in the Northern District. (Decl. ¶¶ 11–13.) The fact that "nearly every important witness" here "resides or works in" the Northern District favors transfer, *Jackson*, 557 F. Supp. 2d at 222, especially considering the time and expense that would result from having to transport the witnesses to this district, *Beland* v. *U.S. Dep't of Transp.*, 2001 DNH 042, 8.

By contrast, not a single likely witness resides or works in New Hampshire. (Decl. ¶¶ 11–15.) The Complaint vaguely mentions that "some officers . . . reside" here. (Compl. ¶¶ 12 (p. 6), 14 (p. 6–7).) But these alleged officers are unnamed, and Plaintiff fails to explain how they could be witnesses. Even if any of these individuals resides in New Hampshire, that hardly cuts against transfer; the question is which venue would be convenient for *most* key witnesses, not just a few. *See Jackson*, 557 F. Supp. 2d at 222; *MSPA*, 2019 DNH 050, at 10. Finally, Plaintiff references Dr. Roberts's involvement in its app, but Dr. Roberts works and lives in Arizona, far closer to the

Northern District than New Hampshire. (Compl. ¶¶ 3, 5, 25, 76, Compl. Ex. A, at 1, ECF No. 17-3.)

Courts also favor transfer when important nonparty witnesses are beyond their subpoena power. *See MSPA*, 2019 DNH 050, at 11–12; *Beland*, 2001 DNH 042 at 9. Here, Plaintiff alleges Apple developed a contact-tracing app with Google, which is headquartered in the Northern District. (Compl. ¶¶ 7, 54–58, 85.) A court in that district would have subpoena power over any Google employees and former Apple employees based there, *see* Fed. R. Civ. P. 45(c), confirming that witness-convenience heavily favors transfer.

3. Accessibility and location of sources of proof.

The accessibility and location of potential evidence favors transfer. Apart from individual witnesses, other likely sources of proof "are the institutions where some of these witnesses work and potentially relevant documents are maintained." *Jackson*, 557 F. Supp. 2d at 222. Because all relevant App Review work took place in the Northern District, the relevant documentary evidence is also located there, (Decl. ¶ 11), which simply "underscores the substantial interest that [the Northern District] has in the outcome of this case." *See Adam*, 2005 DNH 048, at 11.

4. Convenience of the parties.

The parties' convenience strongly supports transfer. In weighing this factor, courts generally look to where the parties reside. *See McEvily* v. *Sunbeam-Oster Co.*, 878 F. Supp. 337, 344 (D.R.I. 1994) (granting transfer to Florida because plaintiff was not a resident of Rhode Island, and defendant corporation was headquartered in Florida).

Apple is headquartered in the Northern District. (Decl. ¶ 3.) Plaintiff is a Wyoming corporation, (Compl. ¶ 14 (pp. 6–7)), which negates any presumption in favor of its chosen forum. *MSPA*, 2019 DNH 050, at 7–8; *Bowen* v. *Elanes N.H. Holdings, LLC*, 166 F. Supp. 3d 104, 108 (D. Mass. 2015) (plaintiff's choice carried "little to no weight" where it was not resident of forum);

IMS Glob. Learning Consortium, Inc. v. *Schs. Interoperability Framework Ass'n*, No. 17-10437-GAO, 2018 WL 662479, at *3 (D. Mass. Feb. 1, 2018) (similar); *800-Flowers, Inc.* v. *Intercont'l Florist, Inc.*, 860 F. Supp. 128, 135 (S.D.N.Y. 1994) (similar).

5. Existence of a forum-selection clause.

The existence of a forum-selection clause, even if permissive, is a significant factor in the transfer analysis. *See OsComp Sys., Inc.* v. *Bakken Express, LLC*, 930 F. Supp. 2d 261, 275–76 (D. Mass. 2013). Plaintiff is subject to the mandatory forum-selection clause in the DPLA. *See supra* Section I. Plaintiff is also bound by the Developer Agreement, (Compl. ¶ 62; *cf. supra* Section I.A), which provides that the parties "submit to" venue in the Northern District. (Ex. A § 17.) Accordingly, Plaintiff has consented to venue in the Northern District.

D. Efficiency and judicial economy also favor transfer.

"Considerations of efficiency and judicial economy" bear on the transfer analysis, *MSPA*, 2019 DNH 050, at 14, and favor transfer when a case before the transferor court "raises many of the same legal and factual issues raised" in the transferee court, *Pure Distribs., Inc.* v. *Baker*, 2000 DNH 116, 5. Similar efficiency concerns that motivated the relation, consolidation, and joint discovery orders in the Northern District justify transfer here. (*See supra* Section I.E.2; Order Granting Stipulation Regarding Coordination of Disc., *In re Apple iPhone Antitrust Litig.*, No. 11-cv-06714 (N.D. Cal. Jan. 6, 2020).) Because this case may "involve many of the same witnesses and documentary exhibits" as the App Store antitrust cases in the Northern District, "it would be both inconvenient to those witnesses and an inefficient use of judicial resources to allow substantially similar actions to proceed in different forums." *Pure*, 2000 DNH 116, at 5.

CONCLUSION

For the foregoing reasons, Apple respectfully requests that the Court transfer this case to the Northern District of California.

Respectfully submitted,

APPLE INC.
By and through its attorneys,

Date: March 11, 2021

By: /s/ Kevin O'Shea

SULLOWAY & HOLLIS, PLLC
Kevin M. O'Shea, Esquire
New Hampshire Bar No. 15812
Allyson L. Moore, Esquire
New Hampshire Bar No. 272208
9 Capitol Street
Concord, New Hampshire 03301
(603) 223-2800
koshea@sulloway.com
amoore@sulloway.com

PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP
Jessica E. Phillips, Esquire
Admitted Pro Hac Vice
Martha Goodman, Esquire
Admitted Pro Hac Vice
2001 K Street, NW
Washington, DC 20006-1047
(202) 223-7300
jphillips@paulweiss.com
mgoodman@paulweiss.com

CERTIFICATE OF SERVICE

I hereby certify that this pleading was filed through the ECF/CM system and will be sent to all parties of record through ECF/CM.

Counsel for Coronavirus Reporter
Keith Mathews, Esquire
Associated Attorneys of New England
P.O. Box 278
Manchester, NH 03105
(603) 622-8100
keith@aaone.law

Date: March 11, 2021 By: /s/ Kevin O'Shea