UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE ELECTRONIC BOOKS ANTITRUST LITIGATION	No. 11-md-02293 (DLC) ECF Case
This Document Relates to: ALL ACTIONS	CLASS ACTION

CLASS PLAINTIFFS' OPPOSITION TO APPLE INC.'S MOTION FOR SUGGESTION OF REMAND TO JUDICIAL PANEL FOR MULTIDISTRICT LITIGATION

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I. PRELIMINARY STATEMENT

Apple's request that this Court suggest the remand of the Plaintiffs' Class actions to their transferor courts under 28 U.S.C. § 1407(a) raises a single question:

> Can Apple withdraw its consent to try all the remaining issues in the Class and States' antitrust actions when (i) for nearly two years Apple acquiesced to the trial of all the cases in this venue, without ever suggesting venue here might be improper; (ii) with Apple's consent, this Court tried liability issues in a phase-one proceeding concerning the antitrust claims in the DOJ and the transferred States' actions; (iii) after this Court found Apple liable in the phase-one proceedings, ***Apple itself*** proposed that this Court should resolve the remaining issues in the Class case and in the DOJ and States' cases in a joint, second-phase trial: "[T]his Court should resolve class certification first, ***and then hold a joint jury trial on all remaining issues in the States' action and the class action.***"[1]; (iv) the transferred Class and State Plaintiffs agreed with Apple's proposal, and, with the parties' input, the Court entered just such a schedule; and (v) Class Plaintiffs made decisions and expended substantial resources in reliance on all parties' acquiescence to a second-phase trial of all remaining issues in this forum?

In spite of the long, uniform course of conduct evidencing all parties' consent to venue in this Court over the Class and States' actions sent here by the Judicial Panel on Multidistrict Litigation ("JPML"), Apple now suggests that transfer of the Class cases is "mandated" under 28 U.S.C. § 1407(a) and the Supreme Court's ruling in *Lexecon.*[2] Apple is wrong.

Because § 1407(a) involves only venue (and not jurisdiction), all of the authorities agree that § 1407(a) forum objections can be waived when the parties acquiesce to venue in the transferee court, and that the transferee court can enforce that waiver.[3] Indeed, the law requires

[1] Declaration of Steve W. Berman in Support of Class Plaintiffs' Opposition to Defendant Apple Inc.'s Motion for Suggestion of Remand ("Berman Decl."), Ex. 1 (emphasis added), filed concurrently herewith. All exhibit references hereto are to the Berman Declaration, unless otherwise noted.

[2] *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 36 (1998).

[3] *See infra* at 9-11.

that parties raise venue objections at an early time to prevent the waste of resources by the parties and the court.[4] Finally, courts are particularly reluctant to allow parties to game the system by withdrawing consent to venue when the other side would be prejudiced by a late change of venue.[5]

Under all the relevant facts, the Court should find that Apple consented to venue for a joint, second-phase trial in this forum, and should not permit Apple to withdraw that consent. As the record here shows:[6]

- Apple answered the State and Class Complaints (explicitly conceding venue is proper);
- Apple consented to a phase-one trial of liability in the transferred States' case, without ever suggesting that its consent was limited to either that case or to phase one of a bifurcated trial of that case;
- After the phase-one verdict, Apple affirmatively proposed that this Court complete the trial of the transferred State and Class cases here in a joint, second-phase trial;
- Plaintiffs also consented to venue in this Court;
- For an eighteen-month period after answering the Class Complaint, Apple ***never once*** suggested that venue would be improper in this forum;
- In reliance on the consent of all parties to this forum for a phase-two trial of all remaining issues, the Class and State Plaintiffs retained a joint expert for summary judgment and trial, made a host of other decisions and expended

[4] *See infra* at 11-12.

[5] *See infra* at 12-16.

[6] *See infra* at 4-9.

substantial resources based on all parties' understanding that a joint, second-phase trial would occur in this forum.

Neither *Lexecon* nor any other authority allows Apple to withdraw its consent in the midst of a bifurcated trial occurring in the very fashion Apple itself proposed simply because it has changed its view of the trial court and now wishes to game the system. This Court should deny Apple's request to suggest that the JPML remand the States' and Class cases, and the actions should proceed to trial on the schedule entered with the input of all of the parties.

In the event the Court allows Apple to revoke its consent to venue in this forum, this Court should still resolve all remaining pretrial issues, including *Daubert* and summary judgment issues that are now pending on a schedule entered with Apple's input. That is expressly permitted by 28 U.S.C. § 1407(a) and in keeping with the courts' uniform view that an early remand is inappropriate where, as here, judicial economy is promoted by completing the pretrial process in the transferee court.[7]

II. STATEMENT OF FACTS

A. The Initial Filings and the Transfer to This Venue

On August 9, 2011, Anthony Petru filed the first class action against Apple and the publisher defendants in the Northern District of California.[8] Additional class actions were filed in the Northern District of California, and in this venue ("SDNY Actions"). There can be no dispute that venue in this forum over Apple was proper under the Clayton Act.[9]

On December 9, 2011, the JPML transferred the California cases to this Court pursuant to 28 U.S.C. § 1407, and consolidated them with the SDNY actions for coordinated or consolidated

[7] *See infra* at 17-18.

[8] *Petru et al. v. Apple, Inc., et al.*, Case No. 3:11-cv-03892 (N.D. Cal.).

[9] *See* 15 U.S.C. §§ 15 and 22; *see also* 28 U.S.C. §§ 4 and 15.

pretrial proceedings.[10]

On April 11, 2012, State Attorneys General from 16 states filed a *parens patriae* action against Apple and the publisher defendants in the Western District of Texas (the "States' case" or "States' action").[11] On April 12, 2012, the DOJ filed a complaint against the same defendants in this venue.[12] On April 26, 2012, the JPML transferred the States' case to this Court.[13]

B. For Eighteen Months, Apple and All of the Parties in All of the Actions Consented to Venue in This Court for All Purposes, Including a Two-Phase Trial of All the Issues in All the Actions

Until recently, Apple, like all of the parties, repeatedly evidenced its consent to venue in this Court for ***all*** the related actions, and for ***all*** purposes, including a joint, phase-two trial of all remaining issues in all the actions.

Apple admitted that venue is proper in this judicial district in its Answers to the Class, State, and DOJ Complaints – without limiting its admission to pretrial proceedings.[14] Apple's original answers, filed after all actions were transferred to this district and consolidated, did not plead any defenses related to venue or § 1407.

In a June 22, 2012 conference, the Court and the parties discussed the course of this litigation. There was discussion about whether the DOJ, Class and States' cases would be resolved in a unitary trial, or whether two trials would be necessary to resolve all the actions.[15] Neither Apple nor any other party suggested that the States' or the Class Plaintiffs' actions

[10] Ex. 2 at 2-3.

[11] *State of Texas et al. v. Penguin Group (USA) Inc. et al.*, Case No. 1:12-cv-00324 (W.D. Tex. Apr. 11, 2012).

[12] *United States v. Apple, Inc., et al.*, No. 12-cv-2826 (S.D.N.Y. Apr. 12, 2012).

[13] Conditional Transfer Order, ECF No. 64, No. 12-cv-3390 (Apr. 26, 2012).

[14] Ex. 3, ¶ 55; Ex. 4, ¶ 10; Ex. 5, ¶ 20.

[15] Ex. 6 at 15:15-16:16; 21:5-23:2, 59:9-64:21; 70:22-71:10.

should be tried in their transferor jurisdictions. All parties evidenced the intent to try the totality of the litigation in this forum.

Apple then proceeded to trial in two of the three cases consolidated before this Court, including one (the States' action) that was transferred to this district pursuant to § 1407. At no time did Apple indicate that it was limiting its waiver of venue under § 1407 *only* as to the States' action, or *only* as to the liability portion of that case.

Following the verdict against Apple on liability in the trial of the States' and DOJ's claims against Apple, Apple affirmatively proposed that this Court resolve all the remaining issues in all of the cases in a second-phase trial. Apple urged that:

> The Court should stay the second phase of trial in the States' action, as well as the class action, pending Apple's appeal of the liability findings in the DOJ and States' action. In the alternative, ***this Court should resolve class certification first, and then hold a joint jury trial on all remaining issues in the States' action and the class action***.[16]

Apple's scheduling proposal also proposed dates for all the remaining pretrial events—including Class certification, *Daubert* motions, expert reports, summary judgment, motions *in limine*, and the final pretrial conference.[17] At no point did Apple suggest that venue was improper in this Court for summary judgment, *Daubert* motions, motions *in limine* or the joint, second-phase trial it proposed.

On August 2, 2013, the Class and the States proposed to the Court a schedule culminating in a joint, phase-two trial, which they had previously discussed in detail with Apple.[18] Class Plaintiffs specifically suggested "procedures and dates to unify the remaining proceedings,

[16] Ex. 1 at 12 (emphasis added).

[17] Ex. 1 at Ex. A.

[18] Ex. 7; Ex. 8.

culminating in a single trial against Apple to resolve damages claims by all e-book consumers." The Court subsequently adopted a similar schedule, setting a Joint Pretrial Order and trial-ready date on August 13, 2013.[19] At no point did Apple suggest that it had previously agreed to a limited waiver of venue for the first-phase trial only and that a joint, second-phase trial would be improper.

At the August 9, 2013 conference, the Court and the parties extensively discussed a second, joint trial in the same jurisdiction as the first trial. *See* Aug. 9, 2013 Tr. at 31-32[20] (The Court: "I need to determine whether I need a second trial. Whether it is a jury trial or not. If we're going to have a jury trial, whether I would use the record created at the jury trial to make a decision with respect to these civil penalties."); 33 (J. Friedman: "We would think there would be a single trial . . . . [I]t would be an expert on behalf of the class and the states. . . . And that would be the entirety of the matter, for the total damages in the United States."); 44 (O. Snyder: "We are not seeking to slow down any trial. We are suggesting a trial in a year and two months. That's what we're suggesting. If your Honor wanted to make a date between April and the fall, that might be reasonable."). At no point did Apple object to the prospect of a single second-phase trial in this district or try to claw back its agreement to try the second phase in this venue.

Also at the conference, the Court discussed with the parties the timing of the remaining pretrial events, including the schedule for summary judgment and *Daubert* briefing.[21] In response to a question from the Court, Class counsel confirmed that the same expert reports would be used in class certification proceedings and at trial.[22] While Apple argued for a longer

[19] Ex. 9.

[20] Berman Decl., Ex. 10.

[21] *Id.* at 48:25-49:16.

[22] *Id.* at 43:2-9.

schedule, at no point did Apple suggest that the summary judgment, *Daubert* and trial schedule it participated in setting before this Court should be scrapped because the State and Class cases should be transferred to two different districts.

Apple stipulated to the filing of the Consolidated First Amended Class Action Complaint and Apple's Amended Answer, proposing only "to amend its Answer to reflect *new* allegations in the First Amended Complaint and developments since Apple filed its Answer on May 29, 2012."[23] No new allegations or developments existed that affected Apple's admission that venue was appropriate.

Apple first suggested in its Amended Answer that venue was not proper in this judicial district on November 4, 2013, nearly 18 months after initially admitting that venue was proper.[24] This directly contradicted its previous admission that venue is appropriate, repeated in its original answers, even though *no* facts or allegations related to venue changed in the interim. The Consolidated First Amended Class Action Complaint, to which Apple was ostensibly responding in its November 2013 answer, contained the exact same venue allegation as the original, admitted venue allegation. But Apple waited ***another three months*** before filing its 11 page motion for suggestion of remand.

During the lengthy period during which all parties consented to venue in this forum, Class Plaintiffs made numerous strategic decisions based at least in part on Apple's consistent position (with the one exception of its November 2013 Amended Answer) that a joint, second phase trial with the participating Attorneys General would occur in this forum. These decisions include, but are not limited to:

[23] Ex. 11 (emphasis added).

[24] Ex. 12, ¶ 34.

a. Moving to certify a class covering only a subset of consumers who purchased e-books in jurisdictions for which State Attorneys General are not litigating;

b. Engaging a single, shared damages expert with the litigating State Attorneys General;

c. Developing and implementing research studies to test the perceptions, attitudes, and biases that may influence jurors in the Southern District of New York (and agreeing to commit hundreds of thousands of dollars to these exercises); and

d. Coordinating the development of responsibilities and strategy for the joint, second- phase trial to accommodate the interests of both the Class Plaintiffs and State Attorneys General.[25]

But for Apple's uniform advocacy for a joint, second-phase trial in this Court, Class Counsel likely would have made different decisions as to each of the items above and numerous others along the course of this litigation.[26]

Just two months before it first asserted that the cases should not be tried together, Apple demonstrated it planned on a joint trial in this forum, when it argued against findings from the liability phase trial being used in the second-phase damages trial. Apple claimed (incorrectly) that if such findings were used in the second proceeding, "a separate jury trial would be required since the jury deciding the Class action case (if certified) can be instructed only in accord with principles of collateral estoppel."[27] The entire premise of Apple's argument was a joint trial before this Court.

[25] Berman Decl., ¶ 3.

[26] *Id.* ¶ 4.

[27] Ex. 13 at n.1.

III. ARGUMENT

A. This Court Should Complete the Joint, Second-Phase Trial of All the Actions As Proposed by Apple and the Plaintiffs and Ordered by the Court

For at least 18 months, Apple consented to venue in this Court for the entirety of the pending Class and States' actions. The States and the Class Plaintiffs also consented—and a phase-one trial on liability took place in the States' action that had been transferred to this court under 28 U.S.C. § 1407. With the input of the parties and ***just as Apple itself proposed***, this Court scheduled a joint second-phase trial for ***all*** **t**he remaining issues in all the cases. Only after suffering a plaintiffs' verdict in the first-phase trial did Apple change course and seek a remand of the State and Class cases. Neither § 1407 nor the *Lexecon* decision authorize forum shopping between trials—let alone forum shopping between stages of the ***same trial***, as Apple now seeks.

1. Under § 1407(A), Parties May Consent to Venue in A Transferee Court and a Transferee Court Has the Authority to Enforce that Consent

Apple argues that, under 28 U.S.C. § 1407(a), this Court "has no power to retain [the Class case] for trial." Apple Br. at 5. But Apple reads the alleged venue "mandate" of § 1407(a) more broadly than has any other court, including the Supreme Court. In fact, all the authorities to consider the issue have held that the transferee court may keep the transferred case through trial upon the consent of the parties, and that the transferee court has the authority to enforce that consent.

Section 1407(a) provides, in relevant part:

> 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… Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated.

Although § 1407(a) compels the JPML to remand the cases it transfers to their originating districts at the conclusion of pretrial proceedings, the statute has never been interpreted to require the JPML to carry out this responsibility if the parties have otherwise agreed to remain in the transferee district court.

Apple relies heavily on *Lexecon*, but the Supreme Court there held only that a district court may not use other procedural devices, such as 28 U.S.C. § 1404(a), to "override a plaintiff's choice" of venue.[28] As the court noted in *Solis v. Lincoln Elec. Co.*,[29]

> A critical qualifier to the *Lexecon* analysis, however, is that § 1407(a) is not a *jurisdictional* limitation, but simply "a venue statute that … limits the authority of courts (and special panels) to override a plaintiff's choice." *Id.* at 42; *see In re: Carbon Dioxide*, 229 F.3d at 1326. This qualifier is critical because "venue is personal and waivable." *Catz v. Chalker*, 142 F.3d 279, 285-85 (6th Cir. 1998), *amended*, 243 F.3d 234 (6th Cir. 2001). Thus, a plaintiff may decide not to raise an otherwise-valid objection to venue and "consent to remain in the transferee district for trial." *Manual for Complex Litig., Fourth*, § 21.132 at 224.

It is black-letter law that an objection to venue "may be lost by failure to assert it seasonably, by formal submission in a cause, or by submission through conduct."[30] Thus the *Solis* court refused to allow the plaintiff to withdraw its consent to the transferee venue merely because it was unhappy with the course of the litigation.[31] Likewise, the Eleventh Circuit refused to allow a plaintiff to withdraw consent to the transferee venue, and rejected the argument that *Lexecon* construed § 1407(a) to be "self-executing, and thus rendered the transferee court powerless to

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[28] *Lexecon*, 523 U.S. at 42. In fact the focus in the reported cases is properly on whether the ***plaintiffs*** have waived their right to their chosen venue. *See, e.g., Armstrong v. LaSalle Bank Nat'l Ass'n*, 552 F.3d 613, 615 (7th Cir. 2009) (noting that "§1407(a) categorically limits the authority of courts to override the plaintiff's choice" of venue). Here, of course, Class Plaintiffs have acquiesced to venue in this forum.

[29] 2006 WL 266530 at * 4 (N.D. Ohio Feb. 1, 2006).

[30] *Freeman v. Bee Mach. Co.*, 319 U.S. 448, 453 (1943).

[31] 2006 WL 266530 at * 4.

retain control of the cases beyond the conclusion of pretrial proceedings regardless of appellants' acquiescence."[32]

Thus, the mere fact that the Class action came to this Court through the JPML is not dispositive. Instead, the key question for this Court is whether Apple has waived its right to venue in the transferor jurisdiction by acquiescing to venue in this Court for all purposes. And, as detailed *infra* at Section 3, Apple has plainly waived its right to transfer, and Plaintiffs have determined their course of conduct in this litigation at least in part based on that waiver.

2. The Law Requires Parties to Lodge Objections to Venue in A Timely Fashion to Prevent the Waste of Resources by Parties and Courts

Courts frown on litigants who attempt to game the system by waiting to see how their cases proceed before deciding to pose otherwise valid objections to venue. As the Seventh Circuit ruled in the context of waiver of the right to arbitrate:

> Selection of a forum in which to resolve a legal dispute should be made at the earliest possible opportunity in order to economize on the resources, both public and private, consumed in dispute resolution. This policy is reflected in the thirty-day deadline for removing a suit from state to federal court. Parties know how important it is to settle on a forum at the earliest possible opportunity, and the failure of either of them to move promptly for arbitration is powerful evidence that they made their election--against arbitration.[33]

Here, while well-aware that the Court and the parties were acting in reliance on its acquiescence to the full trial of the State and Class actions in this forum, Apple waited nearly two years before filing the instant motion. The motion is therefore untimely.

[32] *In re Carbon Dioxide Indus. Antitrust Litig.*, 229 F.3d 1321, 1325 (11th Cir. 2000).

[33] *Cabinetree of Wis. v. Kraftmaid Cabinetry*, 50 F.3d 388, 391 (7th Cir. 1995).

3. By Consenting to Trial in This Jurisdiction, Apple Has Waived Its Venue Objections, and Is Estopped From Raising Them Now

Simply put, Apple made its choice to try all the issues in all the cases in this Court, and cannot go back on that decision simply because it is unhappy with the verdict in the liability phase. By affirmatively requesting that this Court try all the cases to conclusion, and never hinting that it intended to object to venue here until after it had already suffered an adverse verdict in phase-one of the trial, Apple has waived any objection to venue, and must proceed with the joint second-phase trial ***it*** proposed.

In somewhat analogous circumstances to this case, the Eleventh Circuit denied a twelfth-hour request to remand cases to their transferor districts under § 1407(a). In that case, *In re Carbon Dioxide*,[34] plaintiffs from Mississippi and California requested that the Florida MDL district court suggest remand of their cases to the districts in which they were originally filed. The court's reasoning in denying the request was simple, and is compelling in this case: "If the Mississippi and California Plaintiffs believed that they had a right to have their cases remanded to their original districts, they should not have asked the [MDL] court to try the case in Orlando." *Id. Accord, e.g., Solis*, 2006 WL 266530 at * 5 ("[B]ecause the plaintiffs in this case joined the defendants in "explicitly request[ing] that this MDL court try all of the bellweather cases, … Solis's argument that § 1407(a) now requires this Court to remand his case to the Southern District of Texas, where it originated, is not well taken.")

Also instructive is *Tri-State Empl. Servs., Inc. v. Mountbatten Sur. Co., Inc.*,[35] where the Second Circuit found that defendant waived its right to enforce a forum selection clause by acquiescing to venue in this district:

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[34] 229 F. 3d at 1326.

[35] 295 F.3d 256 (2d Cir. 2002).

> Assuming *arguendo* the validity of the above mentioned forum selection clause (a question we need not decide), the existence of the clause is of no moment, for at least two reasons. First, because defendant failed to raise any venue challenge in a pre-answer motion or responsive pleading, *see* Fed. R. Civ. P. 12(h)(1)B), defendant is deemed to have waived any objection to venue. *See Concession Consultants, Inc. v. Mirisch*, 355 F.2d 369, 371 & n. 1 (2d Cir. 1966) ("Unlike the matter of jurisdiction, venue was (and remains) a privilege personal to each defendant, which can be waived, and is waived by him unless timely objection is interposed." (internal quotation marks and citation omitted)). ***Second, such waiver is supported by defendant's representation to the district court that the court constituted the proper forum.*** Def's Answer at ¶ 4.[36]

Likewise, the court in *Krape v.PDK Labs, Inc.* held that "[A] party's … representations to the court that it is the proper forum may waive its right to subsequently raise the claim that venue lies elsewhere."[37]

Like the plaintiffs in *In re Carbon Dioxide, Solis, Tri-State* and *Krape,* Apple consented to this forum. Throughout the year and one-half period following its Answers to the State and Class complaints, Apple ***never once*** suggested that trial would occur anywhere other than this forum. Apple went to trial ***in this forum*** in the liability phase of the transferred States' case, and ***never suggested*** that it was consenting to try only the first phase of that bifurcated case. And Apple ***affirmatively proposed*** that this Court "***hold a joint jury trial on all remaining issues in the States' action and the class action.***"[38] It is difficult to conceive of a stronger case of waiver by conduct than Apple's conduct in this action.

[36] *Id.* at 260, n.2 (emphasis added).

[37] 194 F.R.D. 82, 86 (S.D.N.Y. 1999).

[38] Berman Decl., Ex. 1 at 12 (emphasis added).

Apple relies on *Armstrong*,[39] which upheld a suggestion of remand, but that case is easily distinguished. There, the court found plaintiffs had not waived their right to their chosen venue when (i) the plaintiffs filed a consolidated complaint in the transferee court; (ii) shortly thereafter, the plaintiffs' proposed case management order cited *Lexecon* and explicitly noted the parties' right to a remand; and (iii) plaintiffs participated in the establishment of trial dates.[40] Here, in sharp contrast, Apple (i) did not ever suggest it wanted remand; (ii) consented to trial of the State case that was transferred to this Court by the JPML without stating that it consented to only phase one of that trial; (iii) proceeded to trial on the transferred State case and (iii) affirmatively ***proposed*** the final resolution of the State and Class cases through a joint phase-two trial. These facts are a far cry from *Armstrong*, where the court found that "The setting of trial dates as part of pretrial proceedings is not in itself incompatible with an intent to seek a § 1407(a) remand, particularly where the parties expressly point out that possibility early in the proceedings as was done here."[41]

Apple's manifest consent to venue in this forum greatly influenced Class Plaintiffs' entire course of conduct in this litigation. Accordingly, Apple is judicially estopped from withdrawing that consent. As the court recognized in *Dehaemers v. Wynee*,[42] a litigant may be estopped from raising a venue challenge in appropriate circumstance under the doctrine of judicial estoppel. As the Supreme Court has explained, judicial estoppel is an equitable doctrine designed to "'protect the integrity of the judicial process' by 'prohibiting parties from deliberately changing positions

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[39] 552 F.3d 613.

[40] *Id.* at 617-18.

[41] *Id.* at 618. Far from the mere "acquiescence" in the setting of trial dates in "an effort to facilitate the conclusion of the pretrial stage" as in *Armstrong* (*id.)*, Apple here affirmatively ***requested*** a joint phase-two trial to resolve the Class and States' case.

[42] 522 F. Supp. 2d 240, 246 (D.D.C. 2007).

according to the exigencies of the moment.'"[43] Though it did not establish an "exhaustive formula for determining the applicability of judicial estoppel," the Supreme Court delineated factors that "typically inform the decision whether to apply the doctrine in a particular case."[44] These include: (1) whether a party's later position is "clearly inconsistent" with its earlier position; (2) whether the party succeeded in persuading a court to accept its earlier position, creating a risk of inconsistent court determinations; and (3) whether the party seeking to assert the inconsistent position would derive an unfair benefit or impose an unfair detriment on its opponent.[45] All the Supreme Court's factors support a finding of estoppel here.

First, Apple's current remand request is inconsistent with its earlier requests that a joint second-phase trial occur in this forum.

Second, based in part on Apple's consent to jurisdiction and affirmative request for a joint, second-phase trial, this Court has ordered just that. And, if multiple transferor courts were to rule on such issues as the *Daubert* motions, the measure of damages, and the scope of collateral estoppel, there would be a substantial risk of inconsistent adjudications in the various forums.

Finally, Apple's proposed change of course would impose an unfair detriment on the State and Class Plaintiffs, who have made many decisions and expended resources based in whole or in part on the pending joint second-phase trial in this jurisdiction.[46] In addition to the other decisions made by Class Plaintiffs that cannot be undone, Class Plaintiffs (i) jointly retained a damages expert with the Attorneys General; (ii) developed and implemented research

[43] *New Hampshire v. Maine*, 532 U.S. 742, 749-50 (2001) (internal citations omitted).

[44] *Id.* at 750-51.

[45] *Id.*

[46] Berman Decl., ¶ 3.

studies to test the perceptions, attitudes, and biases that may influence jurors in the Southern District of New York (agreeing to commit hundreds of thousands of dollars to these exercises); and invested hundreds of hours in coordination with the State Attorneys General in preparation for a joint trial.[47] And, if Apple were to succeed in remanding these cases, the State and Class cases would be at a minimum forced to bear the time and expense necessitated by their motions to transfer their cases back to this forum.[48]

Apple made the strategic decision to waive any objection to venue because of the perceived benefits and efficiencies of trying all the cases in a single, albeit bifurcated, proceeding. It cannot go back on that decision now, especially where the State and Class Plaintiffs have relied on Apple's consent to venue in this forum.

B. Even If this Court Allows Apple to Withdraw Its Consent to Venue, It Should Resolve the Remaining Pretrial Issues in the Interest of Judicial Economy

Without regard to the appropriate standard for the *timing* of the remand of cases transferred by the JPML under 28 U.S.C. § 1407(a), Apple requests that this Court suggest the remand of the transferred Class case well ***before*** pretrial proceedings are completed. Under the proper standards, this Court should suggest the early remand sought by Apple ***only if*** judicial economy and efficiency will be promoted by the transfer. Because the progress of the transferred cases will be expedited by resolving the remaining pretrial issues in this forum, this

[47] While Apple may argue that the bulk of the expenses were incurred ***after*** it first suggested that it might seek remand in its November 2013 Amended Answer, it is worth noting that Apple waited ***an additional three months*** before filing the instant motion—knowing, all the while that Plaintiffs' joint-trial specific preparations were ongoing. Moreover, given the pending schedule adopted in part at Apple's request, Plaintiffs have no choice but to press on with their trial preparations.

[48] Apart from any § 1407(a) limitations, venue over the Class Plaintiffs' Clayton Act claims is plainly proper in this forum since Apple transacts business and is found within this District, and a substantial part of the events giving rise to Plaintiffs' claims occurred in this District. *See* 28 U.S.C. §§ 4 and 15; 15 U.S.C. §§ 15 and 22.

Court should reject Apple's request for an early remand out of hand (even if it allows Apple to withdraw its waiver and suggests remand of the transferred cases for trial).

As one court noted in rejecting the notion that transfer of an MDL case should occur *prior* to summary judgment briefing:

> This case clearly has not been terminated. Although discovery has been completed, pretrial proceedings still have not concluded, since "[p]re-trial, as an adjective, means before trial--… all judicial proceedings before trial are pretrial proceedings." *In re Plumbing Fixture Cases*, 298 F. Supp. 484, 494 (J.P.M.L. 1968). This means that pretrial proceedings do not conclude until a final pretrial order is entered, and that all prior proceedings – including rulings on motions for summary judgment—are pretrial proceedings that may properly remain before the transferee court. *See Lexecon …*, 523 U.S. 26, 34… (including summary judgment motions when considering pretrial proceedings under § 1407); *In re Rhone-Poulenc Rorer Pharmaceuticals, Inc.*, 138 F.3d 695, 697 (7th Cir. 1998) (stating that transferee judge has power to issue final pretrial order under F.R.C.P. 16; collecting authorities); *In re Patenaude*, 210 F.3d 135, 144-45 (3d Cir. 2000) (reviewing legislative history of § 1407 and other authorities and concluding that pretrial proceedings include summary judgment).[49]

Apple correctly notes that some courts have suggested remand prior to the completion of pretrial proceedings. *See* Apple Br. at 7 (citing *In re State Street Bank & Trust Co. Fixed Income Funds Inv. Litig.*).[50] But Apple fails to acknowledge the standards guiding courts' discretion in considering the timing of remand in § 1407(a) cases as articulated by the *In re State Street Bank* decision it cites:

> The Court's discretion to suggest remand [prior to the completion of pretrial matters] "generally turns on the question of whether the case will benefit from further coordinated proceedings as part of the MDL."[51] "The transferee court should consider when remand

[49] *United States ex rel. Hockett v. Columbia/HCA Healthcare Corp.*, 498 F. Supp. 2d 25, 37 (D.D.C. 2007).

[50] 2011 WL 1046162 (S.D.N.Y. Mar. 22, 2011).

[51] *In re Merrill Lynch Auction Rate Sec. Litig.*, 2010 WL 2541227, at *2 (S.D.N.Y. June 11, 2010) (quoting *In re Bridgetone/Firestone, Inc.* 128 F. Supp.2d 1196, 1197 (S.D. Ind. 2001).

> will best serve the expeditious disposition of the litigation." Manual for Complex Litigation, Fourth § 20.1333 at 225. Because the purpose of multidistrict litigation 'is for the convenience of the parties and witnesses and [to] promote the just and efficient conduct of the cases… [,] the decision of whether to suggest remand should be guided in large part by whether one option is more likely to insure the maximum efficiency for all parties and the judiciary." *United States ex rel Hockett* …., 498 F. Supp. 2d 25, …[52]

Here, there is no question but that keeping the State and Class cases through *Daubert* and summary judgment proceedings will best facilitate the expeditious disposition of the litigation, and will promote the just and efficient conduct of the cases. Indeed, the State and Class Plaintiffs have a jointly- retained damages expert, and the summary judgment briefing focuses on damages issues. Likewise, *Daubert* findings with respect to the damages experts opining on the same or similar issues should properly be made by one court—*this* Court—in order to lead to the efficient and expeditious resolution of the cases. Unlike in the cases where early remand was ordered, it cannot be said that all that remains after class certification is "case specific."[53] And, on the other central issue in Class Plaintiffs' summary judgment motion—the collateral estoppel effect of the phase-one finding of liability by this Court—this Court is uniquely-positioned to rule on the issue. It would be inefficient in the extreme to have other courts resolve that issue.

The facts here are therefore completely different from the facts in *In re State Street Bank*, where "the summary judgment motions in these [transferred] cases are case-specific," such that "deciding them in this Court does not gain anything in terms of judicial economy."[54]

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[52] *In re State St. Bank*, 2011 WL 1046162, at *4.

[53] Even when "everything that remains to be done is case-specific," however, it does not necessarily mean that "consolidated proceedings have concluded" and therefore remand is not mandatory even then. *In re Patenaude*, 210 F. 3d 135, 145 (3d Cir. 2000). The Court retains the discretion to take whatever actions promote judicial efficiency.

[54] 2011 WL 1046162, at *5.

Even in the absence of waiver, the propriety of this venue for all remaining pretrial matters cannot be questioned. Hence, this Court should resolve the *Daubert* and summary judgment motions in keeping with the current schedule.

IV. CONCLUSION

For the above stated reasons, this Court should reject Apple's request for a suggestion of remand to the JPML since Apple has repeatedly acquiesced to the trial of the State and Class cases in this forum and the Plaintiffs in both cases have acted in reliance on Apple's consent. But even if the Court allows Apple to withdraw its waiver of its venue objection, the Court should retain the cases through pretrial proceedings – including *Daubert* and summary judgment proceedings – in order to facilitate the expeditious and fair resolution of all the related cases.

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CERTIFICATE OF SERVICE

I hereby certify that on March 7, 2014, I electronically filed the foregoing document using the CM/ECF system which will send notification of such filing to the e-mail addresses registered in the CM/ECF system, as denoted on the Electronic Mail Notice List, and I hereby certify that I have caused to be mailed a paper copy of the foregoing document via the United States Postal Service to the non-CM/ECF participants indicated on the Manual Notice List generated by the CM/ECF system.

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