UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THE STATE OF TEXAS, Plaintiffs, v. PENGUIN GROUP (USA), INC., et al., Defendants.	:	12-CV-03394 (DLC)
IN RE ELECTRONIC BOOKS ANTITRUST LITIGATION	:	11-MD-02293 (DLC)

This Document Relates to:

ALL ACTIONS	:	

APPLE INC.'S REPLY IN SUPPORT OF MOTION FOR SUGGESTION OF REMAND TO THE JUDICIAL PANEL FOR MULTI-DISTRICT LITIGATION

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The thrust of Plaintiffs' oppositions is that Apple implicitly waived its right to seek remand under 28 U.S.C. § 1407(a) and consented to trial of the remaining claims in the above-captioned actions in this Court through its pretrial conduct. Class Pls. Opp. 9-16; States Opp. 8-9. Plaintiffs' position is not supported by the law or the facts. Apple did not, and could not, waive mandatory statutory remand under § 1407(a) by participating in a trial before this Court on *different* claims than those it now seeks to remand and, with respect to the putative class action, in a completely *different* case. Nor did Apple make such a waiver through its participation in *pretrial proceedings* before the Court. A finding otherwise would conflict with the very purpose of § 1407(a). Apple bore no obligation to "assert [its] intention to seek [§ 1407(a)] remand in order for the right to exist." *Armstrong v. LaSalle Bank Nat. Ass'n*, 552 F.3d 613, 616 (7th Cir. 2009). Nonetheless, Apple explicitly notified Plaintiffs of its objections to trial in this forum in its answer to Class Plaintiffs' amended consolidated complaint, filed in November 2013, over seven months before trial was scheduled to begin. Accordingly, pursuant to the mandatory language of § 1407(a) and the Supreme Court's decision in *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998), this Court must remand these actions back to their original, transferor courts at the close of pretrial proceedings.

I. Apple's Conduct Did Not Waive Or Otherwise Limit Its Statutory Right To Remand These Actions Under 28 U.S.C. § 1407.

A. Apple neither consented to trial on these claims in the Southern District of New York nor waived its right to object to venue there for trial purposes.

Although, as Plaintiffs note, "§ 1407(a) forum objections *can* be waived" (Class Pls. Opp. 1 (emphasis added)), there was no such waiver by Apple. Section 1407(a)'s remand requirement is mandatory (*see* 28 U.S.C. § 1407(a) (MDL actions "shall be remanded by the panel at or before the conclusion of such pretrial proceedings")), and thus courts do not infer waiver of this right lightly. *See, e.g.*, *Lexecon*, 523 U.S. at 36 n.1 (noting that "Rule 14(d)

precludes an inference of waiver from mere failure to request remand from the Panel"). To the contrary, as the Seventh Circuit has emphasized, "[t]he mandatory nature of the § 1407(a) transfer, and its statutory rather than contractual origin, counsel for a more rather than less restrictive waiver standard." *Armstrong*, 552 F.3d at 617; *see also id.* at 616 (holding that "[t]he standard for waiver under §1407(a) must be *at least as strong* as that employed in . . . arbitration cases") (emphasis added). None of Plaintiffs' proffered evidence of waiver (Class Pls. Opp. 2-3; States Opp. 8-9) meets this exacting standard and none of their cited cases are to the contrary. The Court is therefore required to issue a suggestion of remand to the Panel at the close of pretrial proceedings, at the very latest.

1. Apple's admission in its answers to the original class action, State, and DOJ complaints that venue is proper in the Southern District of New York does not constitute waiver. Contrary to Plaintiffs' argument (Class Pls. Opp. 4), any statement by Apple "recognizing that venue is proper in the transferee court . . . is not inconsistent with a desire to seek remand under § 1407(a)." *Armstrong*, 552 F.3d at 617 (rejecting defendant's argument that plaintiffs had waived their right to remand under *Lexecon* by filing a consolidated complaint that admitted venue was appropriate in the transferee court). Because "[v]enue may be proper in more than one court," admitting this fact is "not mutually exclusive" with an intent to seek remand at a later stage of the proceedings. *Id.* And in any event, Apple did challenge venue in this Court as proper "once pre-trial proceedings conclude" in its amended answer to the Class Plaintiffs' amended consolidated class action complaint filed seven months before trial was scheduled to commence. Dkt. 435 ¶ 34 (Nov. 4, 2013).[1] Additionally, as early as July 2012,

[1] Unless otherwise specified, references to docket entries are to the docket in *In re Electronic Books Antitrust Litigation*, No. 1:11-md-2293 (S.D.N.Y.).

Apple specifically reserved the right to raise all available defenses based on "improper venue." Dkt. 193 at 2 (July 6, 2012).

2. Apple's submission of a proposed scheduling order in August 2013 was not waiver. Plaintiffs recognize the Seventh Circuit's holding in *Armstrong* that participation in the establishment of trial dates does not constitute waiver of a party's right to § 1407(a) remand. Class Pls. Opp. 14. Plaintiffs nonetheless claim that Apple waived its right when it submitted a proposal arguing that the Court should stay the actions, or "[i]n the alternative . . . resolve class certification first, and then hold a joint jury trial on all remaining issues." 1:12-cv-02826, Dkt. 338 at 12 (Aug. 8, 2013). Plaintiffs' position is, on its face, irreconcilable with *Armstrong*.[2]

Moreover, Apple did not "affirmative[ly] request . . . a joint, second-phase trial" (Class Pls. Opp. 15); it submitted a request for a stay and in the alternative proposed a schedule in response to a Court order directing the parties to submit "joint or separate proposals as to completion of discovery and a schedule for any trial on damages." 1:12-cv-02826, Dkt. 327 at 1 (July 10, 2013). Apple's participation in such pretrial and trial scheduling is not waiver because "the establishment of trial dates is critical to pretrial proceedings in many respects, as in the promotion of the timely completion of discovery and the facilitation of settlement negotiations,"

[2] Plaintiffs' argument that the facts of this case "are a far cry from *Armstrong*" (Class Pls. Opp. 14) fails. Among other things, Plaintiffs glide over facts that are inconvenient to their position, like the fact that the *Armstrong* plaintiffs did not seek remand until *three days after* the close of pretrial proceedings (552 F.3d at 619), and after litigation had been pending in that jurisdiction for over five years. Yet the court found no waiver. Plaintiffs note that the *Armstrong* plaintiffs cited *Lexecon* in a case management order (Class Pls. Opp. 14), suggesting that somehow immunized them from a claim of waiver. But that order—the first and only mention of *Lexecon* before plaintiffs actually requested remand—was filed 15 months after the cases were transferred pursuant to § 1407(a). Corrected Br. of Pls.-Appellees at 9, *Armstrong*, 552 F.3d 613 (No. 07-2280), 2007 WL 2477603. Here, Apple explicitly invoked its right to raise venue objections in July 2012, only seven months after the JPML's December 2011 transfer order encompassing the class actions (MDL 2293, Dkt. 83 at 2 (Dec. 9, 2011)), and just three months after the Panel transferred the States' action (MDL 2293, Dkt. 98 at 1 (Apr. 18, 2012)). And Apple explicitly cited its right to *Lexecon* remand in its amended answer. Dkt. 435 ¶ 34 (Nov. 4 2013). Plaintiffs also attempt to differentiate *Armstrong* by making a fine (and meaningless) distinction between "participat[ing] in the establishment of trial dates" and "propos[ing]" trial dates, but then concede (as they must) that *Armstrong* held that "[t]he setting of trial dates as part of pretrial proceedings is not in itself incompatible with an intent to seek a § 1407(a) remand." Class Pls. Opp. 14 (quoting *Armstrong*, 552 F.3d at 619).

and it "may be an effort to facilitate the conclusion of the pretrial stage, rather than an agreement to forego the remand mandated by § 1407(a)." *Armstrong*, 552 F.3d at 618. Apple's scheduling proposal, which "outlined its views on the order and elements of the pre-trial proceedings," in the event its request for a stay was denied, sought to do just that. 1:12-cv-02826, Dkt. 338 at 9. As the *Armstrong* court concluded, that does not amount to waiver.

3. Apple's consent to and participation in the June 2013 trial was not waiver. That trial involved only the claims for injunctive relief asserted by the DOJ[3] and States—not any of the putative class' claims or States' claims for damages that Apple now seeks to remand. Apple never advocated for, much less consented to, a joint trial on *all* the related actions and for *all* claims, as Plaintiffs now assert. *See, e.g.*, Dkt. 170 at 39 (June 20, 2012) (Apple proposes DOJ trial only); 1:12-cv-03394, Dkt. 109 at 1 (June 27, 2012) (Apple did not oppose the States' request to participate in a joint bench trial with DOJ on "issues of liability and injunctive relief" only); Dkt. 313 at 2 (Apr. 24, 2013) ("At the time the June Bench Trial was scheduled, it was agreed that it would resolve claims for injunctive relief."). The trial, and Apple's consent thereto, was clearly limited to the DOJ's and States' claims for injunctive relief, and it did not encompass the class action claims at all. *See also* Oct. 26, 2012 Hr'g Tr. 59:17-60:10, *id.* at 54:2-5; June 22, 2012 Hr'g Tr. 73:1-5. Accordingly, Class Plaintiffs' claim that Apple's participation in that trial supports waiver of its § 1407(a) right to remand their separate action, in which a trial date had not even been set, is without merit and the class action must be remanded pursuant to § 1407(a).

[3] The DOJ action was originally filed in the Southern District of New York, and was not consolidated with the class and State actions as part of the multidistrict litigation proceedings.

Further, the fact that a transferee court has resolved *some* claims in an action does not nullify a party's right to seek remand for the remaining claims under § 1407(a). *See Lexecon*, 523 U.S. at 43 n.6; *see also Mann v. Lincoln Elec. Co.*, 2011 WL 3205549 (N.D. Ohio July 28, 2011) (granting remand of retrial back to transferor court where transferee court conducted original trial pursuant to a written *Lexecon* waiver). Apple's expressly limited consent to try the States' claims for injunctive relief in this Court is thus not inconsistent with its current motion seeking remand for the remaining claims in the States' action.

4. Plaintiffs' consent to venue in this Court does not trump Apple's right to object. Plaintiffs argue that their consent to remain in the transferee court should allow them to avoid § 1407(a)'s mandate. But the law requires that both parties waive their right to remand. *See, e.g.*, *In re Mentor Corp. Obtape Transobturator Sling Prods. Liab. Litig.*, 2014 WL 715579, at *2 (M.D. Ga. Feb. 24, 2014) (noting that "*[t]he parties* did not agree to waive their 28 U.S.C. § 1407(a) right to remand") (emphasis added); *In re Fosamax Prods. Liab. Litig.*, 2011 WL 1584584, at *1 (S.D.N.Y. Apr. 27, 2011) ("a transferee court lacks authority to conduct a trial of an MDL member case not originally filed in the transferee court without the consent of *the parties*") (emphasis added).[4] Nor is Plaintiffs' asserted desire to remain in this Court entitled to the "substantial deference" that may be given to plaintiffs' choice of forum under § 1404(a). *See* States Opp. 6-7. Again, the language of the statute is mandatory, without regard for a plaintiff's preference. *Lexecon*, 523 U.S. at 35.

[4] The States question whether, as a defendant, Apple has a right to request remand under § 1407. States Opp. 8 & n.7. Nothing in the language of § 1407(a), *Lexecon*, or the cases cited by the States limits the right to remand to plaintiffs alone. To the contrary, courts have not hesitated to consider remand requests brought by defendants. *See, e.g.*, *Risley v. Davol, Inc.*, 2008 WL 114962 (D.R.I. Jan. 10, 2008). Moreover, this Circuit recognizes that the right to challenge venue is "a privilege personal to *each defendant*." *Concession Consultants, Inc. v. Mirisch*, 355 F.2d 369, 371 n.1 (2d Cir. 1966) (emphasis added).

5. Apple's alleged failure to affirmatively assert its right to remand for an eighteen-month period was not waiver. Plaintiffs object to Apple's failure to suggest earlier that trial might "occur anywhere other than this forum" (Class Pls. Opp. 13), but parties need not "assert their intention to seek [§ 1407(a)] remand in order for the right to exist. Instead, the presumption is that the case will be remanded at the close of pretrial proceedings." *Armstrong*, 552 F.3d at 616. Thus, unlike invocation of a forum selection clause or other venue objections, moving for remand under § 1407(a) at the close of pretrial proceedings is entirely appropriate.[5] *Id.* at 619. Remand is not appropriate here until at least the Court issues a ruling on Class Plaintiffs' motion for class certification, which is still pending. *See* Mot. 7-8. In fact, even Class Plaintiffs argue that remand would not be appropriate until after the Court resolves the currently pending *Daubert* and summary judgment motions. Class Pls. Opp. 16-19. It would therefore have made little sense for Apple to move for remand before it did. There is no authority for the proposition that a party's invocation of § 1407(a) is untimely where pretrial proceedings remain ongoing.

The facts here are easily distinguishable from those where courts have found conduct unambiguous enough to actually constitute waiver of the § 1407(a) mandate. Indeed, Plaintiffs identify only two such cases. *See In re Carbon Dioxide Indus. Antitrust Litig.*, 229 F.3d 1321 (11th Cir. 2000); *Solis v. Lincoln Elec. Co.*, 2006 WL 266530 (N.D. Ohio Feb. 1, 2006). Neither is apposite. In *Carbon Dioxide*, the plaintiffs seeking remand had been affirmatively "fighting to keep their cases in [the transferee district], not to get them out." 229 F.3d at 1325. They strenuously opposed a pretrial motion to sever the cases for trial, repeatedly stipulated to venue in the MDL court, including at the final pretrial conference, and continued to pursue the case in

[5] A forum selection clause is properly invoked as a challenge to venue under Rule 12(b)(3), and such a challenge to venue is waived if a defendant fails to raise it in a 12(b) motion or include it in a responsive pleading. Fed. R. Civ. Proc. 12(h). Section 1407(a) is not a general venue statute. *See Lexecon*, 523 U.S. at 39 n.2.

the transferee court following the termination of the pretrial proceedings. Indeed, plaintiffs never even suggested the idea of transfer until the literal eve of trial—*after jury selection had already started*. *Id.* at 1325-27.

And in the other § 1407 case relied on by Plaintiffs, *Solis*, there was an express waiver of *Lexecon* by the party that later sought remand. There, plaintiffs "request[ed] that [the] MDL court try all of the bellweather cases," and the court specifically "raised the *Lexecon* issue with the parties and informed plaintiffs that any designated [bellweather] trial candidates would need to . . . waive any venue objections they might have." 2006 WL 266530, at *4-*5; *see also id.* at *4 (that plaintiffs "understood this direction is inherent in all of what occurred after"), *5 ("all of plaintiffs' actions in this litigation . . . confirm that . . . they agreed to waive any venue-based objection"). Additionally, the court found waiver because "all" of the plaintiffs' communications to the court had "confirm[ed]" that venue was proper in the transferee court, and proceedings in one of the contested trials had continued beyond the pretrial stage into preliminary jury selection before plaintiffs requested transfer. *Id.* at *2.

Plaintiffs' attempted reliance on cases in which a party has waived its right to enforce a forum selection clause or arbitration clause is also unpersuasive. First, as noted above, § 1407(a) is clearly distinct from other venue objections, where failure to raise "in a pre-answer motion or responsive pleading" can constitute waiver. *See Tri-State Emp't Servs., Inc. v. Mountbatten Sur. Co.*, 295 F.3d 256, 260 n.2 (2d Cir. 2002)*; see also Krape v. PKD Labs Inc.*, 194 F.R.D. 82, 86 (S.D.N.Y. 1999). Moreover, in the context of a right to enforce a forum selection or arbitration clause, "[s]election of a forum . . . should be made at the earliest possible opportunity" (*Cabinetree of Wis., Inc. v. Kraftmaid Cabinetry, Inc.*, 50 F.3d 388, 391 (7th Cir. 1995)), precisely because parties in such contexts do not expect to begin litigating a case in one forum

and then transfer to another. The exact opposite presumption guides cases transferred under § 1407(a), which are transferred expressly for the purpose of consolidated pretrial proceedings in a single venue before remand to another venue for trial, thus eliminating the need for parties to bring remand requests "at the earliest possible opportunity." *See also Armstrong*, 552 F.3d at 616 ("the presumption is that the case will be remanded at the close of pretrial proceedings").

B. Apple is not estopped from challenging venue for trial purposes.

Class Plaintiffs also argue that Apple should be judicially estopped from objecting to venue. But Class Plaintiffs cite just one district court case in support of their theory, and it is inapplicable because it did not concern § 1407. *See* Class Pls. Opp. 14 (citing *Dehaemers v. Wynne*, 522 F. Supp. 2d 240, 246 (D.D.C. 2007)). Judicial estoppel is a *discretionary* doctrine, (*see New Hampshire v. Maine*, 532 U.S. 742, 750 (2001)), and as such it cannot be used to frustrate the *mandatory* effect of a statute. *See United States v. Williams*, 612 F.3d 500, 513 (6th Cir. 2010) ("the mandatory language" of a statute "trumps the equitable policies underlying the discretionary doctrines of collateral estoppel and judicial estoppel").

In any event, none of the three judicial estoppel factors are met here. First, as explained above, Apple's motion for a suggestion of remand is not inconsistent with its earlier positions, much less "clearly inconsistent." *New Hampshire*, 532 U.S. at 750; *see also Wells v. Coker*, 707 F.3d 756, 760 (7th Cir. 2013) ("to qualify as a judicial admission, a statement must . . . be 'deliberate, clear and unambiguous'") (citation omitted). Second, Apple never "succeeded in persuading" the Court to adopt a prior contrary position on venue, and granting Apple's motion would not create a risk of inconsistent court determinations. *See New Hampshire*, 532 U.S. at 750. While this Court may have assumed that this district is the proper venue for trial under § 1407(a), it has never so ruled—and Apple has never asked it to. It cannot be that Apple has already convinced this Court to adopt its position when this is the first time the Court has

considered the issue. Class Plaintiffs' failure to point to any prior ruling on venue is thus fatal to its argument. *See Uzdavines v. Weeks Marine, Inc.*, 418 F.3d 138, 148 (2d Cir. 2005).

Finally, Apple would not derive any unfair benefit from its remand request, nor would it impose an unfair detriment on Plaintiffs. Plaintiffs argue that they "have made many decisions and expended resources based in whole or in part" on their expectation of a joint trial in this jurisdiction. Class Pls. Opp. 15. But the decisions Plaintiffs point to—to "jointly retain[] a damages expert with the Attorneys General" and to coordinate trial preparation (*id.* at 15-16)—are exactly the types of decisions that pretrial coordination of MDL actions is meant to facilitate, and likely *saved* Plaintiffs resources. There is no reason either set of Plaintiffs cannot continue to use the same damages expert in separate trials. Class Plaintiffs also argue that they have "agree[d] to commit hundreds of thousands of dollars" to jury research in the Southern District of New York (*id.* at 15-16), but do not indicate what actual expenditures have been made. Moreover, as Class Plaintiffs acknowledge (*id.* at 16 n.47), to the extent such money was spent after Apple filed its amended answer in November 2013, the class was clearly on notice that Apple would object to trial in this venue and thus made any decision to incur such expenses at its own peril. In fact, the class was on notice well over a year earlier, from July 2012 when Apple explicitly reserved its right to object to venue in this district for trial purposes. Dkt. 193 at 2.

II. These Actions Must Be Remanded To Their Original, Transferor Courts For Trial.

The States argue that *Lexecon*'s § 1407(a) analysis does not apply at all to their action because it might have been transferred to this Court under § 1407(h). But there is *no* order in this action transferring their action to this Court under § 1407(h). The JPML's Conditional Transfer Order of the States' action stated only that transfer was appropriate under § 1407, not § 1407(h). *See* MDL 2293, Dkt. 98 (Apr. 18, 2012). The States urge this Court to read an implicit invocation of § 1407(h) into the JPML's order because the Panel simply stated that

remand was appropriate for the "reasons" stated in its earlier December 9 order. States Opp. 5-6. It is pure speculation that the JPML intended, *sub silentio*, to change the underlying statutory justification for transfer; rather, its decision to reference its prior order strongly suggests that it considered the same provision to govern both transfers.[6] Accordingly, remand of the States' action is appropriate after this Court's ruling on Apple's motion to dismiss, and in fact mandated under § 1407(a), given that pretrial proceedings in that matter will have concluded. *See* Mot. 8.

Further, remand of the class action is appropriate upon this Court's decision on class certification. As Apple explained in its opening brief (*see* Mot. 7), Class Plaintiffs' pending motion for summary judgment and *Daubert* motions require judicial "determinations about the exclusion of expert testimony," resolution of which is best handled by "the court that will actually oversee the trial." *In re State St. Bank & Trust Co. Fixed Income Funds Inv. Litig.*, 2011 WL 1046162, at *9 (S.D.N.Y. Mar. 22, 2011). Class Plaintiffs try to distinguish *State Street Bank* on the ground that the expert testimony issues in Class Plaintiffs' summary judgment motion raise issues common to all of the pending actions (Class Pls. Opp. 17-18), but the court in *State Street Bank* rejected this very argument. Instead, it concluded that transferor courts are best situated to decide the admissibility of expert testimony, even where expert reports filed in separate cases are "nearly identical in most substantive respects." 2011 WL 1046162, at *9. Setting aside their waiver arguments, Class Plaintiffs do not dispute that remand is appropriate—at the very latest—after this Court rules on the pending *Daubert* and summary judgment motions. Class Pls. Opp. 16, 19.

[6] Although the December 9 order does not specifically invoke § 1407(a), there is no dispute that it was issued pursuant to that provision because § 1407(h), which applies to *parens patriae* actions brought under section 4C of the Clayton Act, could not apply to the class actions. In any event, just as "[t]he mandatory nature of the § 1407(a) transfer, and its statutory rather than contractual origin," caution courts against finding waiver too easily (*Armstrong*, 552 F.3d at 617), if there is any doubt of the provision under which the States' action was transferred, this Court should resolve it in a manner that preserves, rather than forfeits, the parties' statutory right to transfer.

Dated: March 14, 2014

Respectfully submitted,

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