UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

IN RE ELECTRONIC BOOKS ANTITRUST LITIGATION	)	**No. 11-md-02293(DLC)** **ECF Case**
This Document Relates to:		
THE STATE OF TEXAS, *et al.*,	)	**No. 12-cv-3394(DLC)**
Plaintiffs,	)	
v.	)	
PENGUIN GROUP (USA), INC., *et al.*,	)	
Defendants.	)	

PLAINTIFF STATES' MEMORANDUM IN OPPOSITION TO PENGUIN GROUP (USA), INC.'S MOTION FOR A JURY TRIAL ON THE PLAINTIFF STATES' CLAIMS

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I. INTRODUCTION

Penguin frames the central issue raised by its pending motion as: How important is the right to trial by jury to litigants in American courts? If that were the real question, the answer would require very little debate. The right to a jury trial is extremely important and worthy of protection. But that is not the issue here. Rather, Penguin's motion requires this Court to address a different question: Under what circumstances may a party who has waived its right to a jury trial, both by oral stipulation on the record at a Court conference and through repeated, unequivocal, informed conduct, rescind that waiver for strategic reasons? Relevant case law and principles of fairness and equity dictate that those circumstances should be exceedingly rare.

Penguin is a sophisticated corporate litigant represented by experienced counsel. When the Court ordered last October that the States' claims against Penguin would be tried to the bench beginning on June 3, 2013, counsel acknowledged the Court's order and, given the opportunity to object, said that he had nothing to add. The Court's order was not "tentative," as Penguin argues in its brief, and did not come out of the blue. The issue of a June 3 bench trial on the liability and injunctive relief aspects of the States' claims had first been raised at an earlier conference in June of last year, following which the States made a formal request, by letter to the Court, to participate in such a trial. Penguin did not object to such a procedure at that earlier conference, in response to the States' letter, or at any time prior to the Court's order. Neither Penguin's attempts to minimize the import of the order nor its continued references to the June 3 trial as "the DOJ trial" alter the facts. Penguin waived its right to a jury trial, both by oral stipulation and by conduct, and is now, less than three months before trial commences, asking the

Court to reinstate that right.

Penguin's own briefing reveals that, despite its apologies for any "confusion" caused by its position and its reference to its waiver of its right to a jury on the States' claims as a "simple misunderstanding," Penguin seeks to rescind its waiver for strategic reasons. Penguin admits that its December 18, 2012 settlement with the United States Department of Justice ("DOJ") "materially changed" its considerations as to whether a bench trial on the liability and injunctive relief portions of the States' claims would be to its advantage. That may well be true. But what the Penguin/DOJ settlement did not change was the nature of the States' claims, such that Penguin would be entitled to revive its right to a jury trial after having waived it.

Penguin's right to a trial by jury on the liability and injunctive relief aspects of the States' claims was waived. That waiver was knowing and intelligent, and Penguin has presented the Court with no basis for rescinding it.

II. BACKGROUND

After transfer from the United States District Court for the Western District of Texas, and consolidation with the related cases brought by class plaintiffs and DOJ, thirty-three states and territories[1] (the "States") filed their Second Amended Complaint in this action against Penguin Group (USA), Inc. ("Penguin") and two other Defendants on May 11, 2012. The complaint included a demand for a jury trial. On June 22, 2012, the Court held a status conference, at which all parties to the related cases were represented by counsel. The Court and the parties discussed in detail at the June status conference the

[1]Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, District of Columbia, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Maryland, Massachusetts, Michigan, Missouri, Nebraska, New Mexico, New York, North Dakota, Ohio, Pennsylvania, Puerto Rico, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, West Virginia and Wisconsin.

extent to which the related cases could be tried together, whether such a trial would be to the Court or to a jury, the timing of such a trial, and the Court's bench trial procedures. *See* Tr. of June 22, 2012 Conf. at 14-17; 20-28; 30; 59-74, attached as Exhibit 1 to the Declaration of David Ashton, submitted herewith ("Ashton Decl."). The Court considered various alternatives presented by the parties, and concluded that a bench trial to begin on June 3, 2013, at which at least the claims asserted by DOJ would be adjudicated by the Court, would be most efficient. *See id.* at 69-70. The States raised the possibility of participating in such a bench trial to resolve issues of liability and injunctive relief related to their claims. *See id.* at 71 (". . . I think the States would be willing to entertain moving forward on the June trial schedule on matters related to liability and injunction as a bench trial if the Court feels it is appropriate to move forward in that manner."). The Court responded to this suggestion by calling it "creative" and "helpful." *Id*. No party, including Penguin, raised any objection to the States' suggestion. Moments later, near the conclusion of that conference, the Court confirmed that a bench trial would be scheduled for June 3, acknowledged that the issue of which parties would participate in that trial was not yet clear, and committed to getting a scheduling order to the parties. *See id*. at 72-73. The Court offered counsel for all parties opportunities to raise any additional issues or pose questions to the Court. While several counsel present took the Court up on its offer, counsel for Penguin did not. *See id.* at 74-76.

Following the June 22 status conference, on June 26, 2012, the States submitted a letter to the Court confirming their request to have all issues of liability and injunctive relief in their case tried to the Court concurrently with DOJ's claims. The letter pointed out that no party had objected to proceeding in this manner when the idea was first raised

at the June 22 conference. *See* Ashton Decl., Ex. 2. The letter was copied to counsel for all parties, and docketed as part of the record in this action. *See* No. 12-cv-03394(DLC), ECF No. 109. Neither Penguin nor any other party voiced an objection after the submission or docketing of the States' letter. On July 6, 2012, the parties executed and filed a revised copy of the Joint Initial Report governing these related actions. Attachment A to that Report was a revised schedule of pretrial deadlines, which explicitly noted the States' then pending request to have "all issues of liability and injunctive relief in the State Action tried to the Court concurrently with the DOJ Action." Ashton Decl., Ex. 3 at 37.

Penguin correctly points out that the issue of the States' participation in the June 3 trial was not resolved immediately, and that the Court so noted during a September 10, 2012, telephonic conference regarding preliminary approval of the States' settlements with HarperCollins, Hachette, and Simon & Schuster. *See* Tr. of Sept. 10, 2012 Conf. at 20-21, Ashton Decl., Ex. 4.[2]

The issue was resolved, however, at a telephonic conference on October 26, 2012. At that conference, the Court and the parties again discussed at length the contours of the June 3 bench trial – what issues would be tried, and who would be participating. The Court made clear that these were issues of primary importance at the conference:

> I want to make sure that we understand what is happening at the June trial as opposed to any damages trial that might be held later. . . . You know, if we're going to be ready to go to trial in June, we have to, I think, all have clarity about who's going to be at the table and what are the issues that are being tried . . . .

Tr. of Oct. 26, 2012 Conf. at 32, Ashton Decl. Ex. 5. The Court's reference to "any

[2] The transcript of the September 10 conference indicates that Penguin did not attend, through counsel or otherwise.

damages trial that might be held later" was a clear indication that the Court had in mind the States' request to try the liability and injunctive relief aspects of its claims to the bench on June 3.

Later at the conference, the States' participation in the June 3 trial was explicitly raised. The Court, in opening further discussion of the June 3 trial, said: "I think I know that at the June trial, on the plaintiffs' side of the table will be DOJ and the states." *Id*. at 53. The States responded to the Court's request for clarification as to which states, in particular, would be participating and class counsel stated their intention not to participate in the trial. *See id.* at 53-54. The Court then ordered, clearly and unequivocally, with reference to the June 3 trial: "Okay. So what we have then is DOJ and the states against Apple, MacMillan and Penguin." *Id.* at 54.

Counsel went on to discuss with the Court various issues related to the June 3 trial, with repeated reference to the liability and injunctive relief aspects of the States' claims being adjudicated at that trial. *See id.* at 54-57. The Court explicitly invited counsel for the defendants to raise any additional issues. When asked by the Court if he had anything he wanted to add, Penguin's counsel responded: "No, that's fine. No, your Honor. Thank you." *Id.* at 58. Later in the conference, the Court twice more invited counsel to raise issues or objections or seek clarification related to the June 3 trial, the second time addressing Penguin's counsel directly by name. *See id.* at 63-64; 66. Counsel's only response was, again, "No, your honor, and thank you." *Id.* at 66.

On November 19, 2012, the Court entered a Joint Stipulation and Order Regarding Revised Schedule for Expert Discovery. Penguin was a party to that stipulation, signed on November 6, which extended certain dates related to expert

discovery. *See* Ashton Decl., Ex. 6. In recognition of the Court's order as to the claims and parties at issue in the June 3 trial, the stipulation expressly carved out "experts and expert discovery related to damages in the States' action, or damages, class certification, or liability in the class litigation," with those topics subject to later negotiation between the relevant parties. *Id.* at 1-2.

On December 18, 2012, Penguin and DOJ announced that they had reached a settlement of DOJ's claims against Penguin. On that same day, the parties – including Penguin – executed and submitted to the Court a Joint Stipulation and Proposed Order Regarding Date for Exchange of Initial Trial Witness Lists. *See* Ashton Decl., Ex. 7. The stipulation explicitly refers to the "exchange of initial trial witness lists for the trial commencing June 3, 2013," extending the date for such exchange to February 15, 2013. It goes on to provide that: "For the avoidance of doubt, this stipulation does not pertain to the trial in the class litigation, *In re Electronic Books Antitrust Litigation*, 11-md-02293, or to **any trial on damages** in the States' action, *State of Texas v. Penguin Group (USA), Inc. et al.*, 12-cv-03394." *Id.* at 2 (emphasis added). The Court entered the joint stipulation as an order the next day, December 19, 2012.

When Penguin failed to meet the extended deadline for exchanging initial trial witness lists in advance of the June 3 trial, the States contacted Penguin's counsel to ask that the witness list be provided as soon as possible. Penguin's counsel responded by asserting it was "not a party any more to the June 3 DoJ trial." *See* Feb. 19 email thread between E. Lipman and D. McInnis, Ashton Decl., Ex. 8. Penguin also asserted that the States were not parties to the June 3 trial and, curiously, instead of offering support for its assertions, purported to quote (inaccurately) class counsel's statement at the October 26,

2012 conference regarding the Class's intent not to participate in the trial.

In a letter dated February 22, 2013, Penguin *for the first time* notified the Court that it objected to participating in a bench trial adjudicating the liability and injunctive relief portions of the States' claims. *See* Ashton Decl., Ex. 9. Penguin's letter stated that it had "come to [Penguin's] attention" that the States expected Penguin to defend itself at the June 3 trial. The letter focused on why Penguin's participation in the June 3 trial did not "make sense" from Penguin's perspective in light of its settlement with DOJ. It denied that the Court had "entered an order" on Penguin's participation in the June 3 trial, characterizing the above-referenced excerpts from the October 26 conference as mere "discussion." The letter mentioned Penguin's Seventh Amendment right to a jury on the States' claims only in passing, noting that Penguin's participation in the June 3 trial "may also implicate" that right. *Id*.

The States responded to Penguin's letter by their own letter to the Court dated February 25, 2013. *See* Ashton Decl., Ex. 10. The court heard argument on this issue at a telephonic conference on February 26 and, on February 27, issued an order denying Penguin's request not to participate in the June 3 trial. *See* Ashton Decl., Ex. 11. The Court's order did grant Penguin leave to file a motion to relieve itself from the obligation to participate in the June 3 trial. *Id*. It is that motion to which the States now respond.

III. ARGUMENT

Penguin's argument in support of its motion seems to rest on the proposition that a jury trial, once requested by any party, becomes virtually etched in stone and impossible to waive. Neither the Federal Rules of Civil Procedure nor the applicable case law supports such a rigid proposition. Waiver can be accomplished through written

stipulation, filed with the Court, or by oral stipulation on the record. *See* Fed. R. Civ. P. 39(a)(1). A party can also waive its right to a jury trial through conduct. *See, e.g., Kahn v. General Motors Corp.*, 865 F. Supp. 210, 212-13 (S.D.N.Y. 1994) (citing cases). Penguin has waived its right both by oral stipulation on the record and by its conduct.

A. Penguin Waived its Right to a Jury Trial by Stipulating to That Waiver on the Record

The Federal Rules dictate that, even where a jury trial has been properly demanded by a party to a civil action, the parties may stipulate to have issues as to which that demand applies tried to the bench either by written stipulation filed with the Court or orally, on the record. *See* Fed. R. Civ. P. 39(a)(1). As described above, Penguin so stipulated on the record at the October 26, 2012 telephonic conference, after the Court had ordered that both it and the States would participate in the June 3 trial. While Penguin attempts to downplay both the import of the Court's order and its own participation at the conference, the record is clear.

After a lengthy and detailed discussion of the plans for a June 3 bench trial, the Court ordered that such a trial would proceed with "DOJ and the states against Apple, Macmillan and Penguin." Tr. of Oct. 26 Conf., Ashton Decl., Ex. 5 at 54. There was no ambiguity in the Court's words. All parties, having heard the discussion that preceded the order and in light of the prior discussions of, and submissions related to, this issue, were well aware that the Court was ruling on the States' request to try the liability and injunctive relief aspects of its claims against the remaining defendants to the bench on June 3. That the Court did not subsequently issue a separate written order to that effect does not make its ruling any less an "order" of the Court. *See* S.D.N.Y./E.D.N.Y. Local

Civ. R. 6.2 (an oral decision on a motion that does not finally determine all claims for relief "shall constitute the order" unless the Court otherwise directs).

Having ruled, the Court asked Penguin's counsel if he had anything he wanted to add. He responded: "No, that's fine. No, your Honor. Thank you." Ashton Decl., Ex. 5 at 58. In the face of the Court's order, counsel's statement rises above the level of a simple "failure to object." Memorandum of Law in Support of Penguin Group (USA), Inc's Motion for a Jury Trial on the Plaintiff States' Claims ("Penguin Br.") at 14. The Court and the other parties to this litigation should be able to rely upon the statements of Penguin's counsel on the record and in open court. Penguin's waiver was neither "inadvertent," *see Washington v. New York City Bd. Of Estimate*, 709 F.2d 792, 797 n.4 (2d Cir. 1983), nor based on "[m]ere silence," as Penguin argues. Penguin Br. at 15. The waiver was express, was made on the record, and was transcribed by a court reporter. The waiver meets the requirements of Rule 39(a)(1), and Penguin should be held to it.

B. Penguin Waived its Right to a Jury Trial through Clear and Consistent Conduct

Even viewing the facts most favorably to Penguin, and interpreting Rule 39(a)(1) in the strictest possible way, does not alter the result here. Penguin does not dispute that parties may waive a previously requested jury trial by their conduct, in addition to waiver by the means specified in Fed .R. Civ. P. 39(a). S*ee, e.g., Hill v. Airborne Freight Corp.*, 93 Fed. Appx. 260 (2d Cir. 2004) ("The right to a jury trial may be waived by the conduct of the parties."); *Phlo Corp. v. Stevens*, 2001 WL 1313387 (S.D.N.Y. Oct. 25, 2001), *aff'd on other grounds*, 62 Fed. Appx. 377 (2d Cir. 2003) (finding waiver even though no explicit discussion of jury vs. bench trial where "it was clear to everyone . . .

that the case was to be tried to the Court without a jury").

The court in *Tray-Wrap, Inc. v. Six L's Packing Co., Inc.,* 984 F.2d 65 (2d Cir. 1993), one of the primary cases relied upon by Penguin, acknowledged that, while waivers should not be inferred "lightly," waiver by conduct may be found where the conduct in question is "clear and unequivocal." *Tray-Wrap,* 984 F.2d at 68. Penguin's course of conduct between June

22, 2012 and its first indication that it preferred not to participate in the June 2013 trial, in February 2013, was informed and purposeful, and meets that standard. Specifically:

- At the June 22, 2012 conference, the issue of the States' potential participation in a June 3 bench trial, to the extent of the adjudication of the liability and injunctive relief aspects of its claims, was clearly raised. Penguin, still indisputably a defendant in the States' case, lodged no objection, either when the issue was first raised or after the Court offered all counsel an opportunity to address any outstanding issues or ask questions.
- On June 26, 2012, the States submitted a letter to the Court, formally requesting to participate in the June 3 bench trial. Penguin submitted no objection, nor a response of any kind, to the States' letter, either shortly after the letter was filed or at any time over the subsequent months while the request was pending.
- On July 6, 2012, Penguin signed on to the revised Joint Initial Report, which specified on the attached case schedule that the States had requested to participate in the June 3 bench trial as against Penguin and the other remaining defendants.
- After the Court's explicit recognition on the record at the September 10, 2012 conference that the issue of who would participate in the June 3 bench trial had not been resolved, Penguin made no submission to the Court on the matter.[3]
- On October 26, 2012, the court raised and ruled on the issue of who would participate in the June 3 bench trial. Penguin's counsel participated in the conference but, when given the opportunity to speak to the issue after the court ruled, said only that he had nothing to add. Counsel also declined to address the issue on two subsequent occasions later in the conference.

[3] Even though Penguin was apparently not represented at the September 10 conference, which related primarily to the States' settlements with other publishers, it obviously had access to the transcript, which is referenced in its brief on the instant motion.

- On November 6, 2012, Penguin signed on to a stipulation extending the deadlines for certain expert discovery that drew a clear distinction between matters that would be tried as part of the June 3 bench trial and those that would not.
- On December 18, 2012 – the very day Penguin announced that it had settled its claims with DOJ – Penguin signed on to a stipulation extending the deadline for the exchange of initial trial witness lists. The stipulation was explicit that it only applied to witness lists for the June 3 bench trial, and carved out those issues that were not to be tried at that time.

It was only in February 2013, after failing to timely produce its initial witness list pursuant to the December 18 stipulation, that Penguin first objected to participating in the June 3 trial. Even if the Court were to conclude that Penguin did not waive its right to a jury trial by oral stipulation at the October 26 conference, Penguin's unwavering and informed conduct evidencing its knowledge that the States' liability and injunctive claims against it would be tried to the Court amounts to a waiver.

In its brief, Penguin relies on two cases in which the Second Circuit declined to find waiver where the events in question were ambiguous or where the district court's mentions that certain claims would be resolved via a bench trial were made "in passing." *See* Penguin Br. at 16-17 (citing *Tray-Wrap,* 984 F.2d at 68 and *Heyman v. Kline,* 456 F.2d 123, 129). An examination of the facts set forth in those opinions reveals that they are easily distinguished, and demonstrates why Penguin's conduct, in contrast to that of the parties in those cases, is sufficient to support a finding of waiver.

In *Tray-Wrap,* the Second Circuit reversed the district court's finding that the plaintiff had waived its right to a jury, holding that there had been no explicit waiver pursuant to Fed. R. Civ. P. 39 and, on the record presented to the court, it was "impossible" to find an "informal waiver," *i.e.*, a waiver by conduct. *Tray-Wrap,* 984 F.2d at 69. That "record" was less than complete because the district court docket sheet

for the first three and a half years after the case was filed had "been lost and all attempts to locate the missing pages had failed." *Id*. at 66. And, according to the court, "[t]herein lies the problem." *Id.* At the district court level, the case had been assigned to three different district court judges, one of them at two different points in time. *Id*. The defendant alleged that the plaintiff had waived its right to a jury at a pretrial conference during the period for which the docket sheet had been lost. Plaintiff denied any such waiver, there was no record of the conference, and the judge who conducted the conference was, because of illness, unable to provide his personal recollection of the disputed conference. *Id*. at 66-67.

Against that background, the district court based its finding of waiver, which it held had been effected at the disputed pretrial conference, on a note from the previously assigned judge indicating, apparently without further elaboration, that the case was set for a bench trial; a note produced by defense counsel, taken contemporaneously with the disputed pretrial conference, indicating that the case was to be tried to the court; and a letter written by counsel to his client four days later stating that the case would be non-jury. *Id.* at 67. The record also apparently contained a letter to the court from defense counsel indicating that the trial was a non-jury trial, and a letter to the court from plaintiff's counsel indicating that the case was "scheduled for trial before Your Honor." *Id.* In reversing the district court's holding that plaintiff had waived its jury trial right, the Second Circuit noted that it was "impossible to reconstruct what went on during [the disputed pretrial] conference," and that there were no factual findings made by the district court as to whether plaintiff's counsel "affirmatively stipulated" to a bench trial as opposed to merely remaining silent or even as to "the extent to which the matter was

discussed." *Id*. at 68. Thus, the court held that it was "impossible to construct a waiver on so skimpy a record." *Id.*

In *Heyman,* the Second Circuit based its finding that no waiver had occurred in large part on the fact that the district court's references to a "non jury trial" and to "handl[ing] [the case it]self" were made "in passing" during a discussion "which was concerned solely with the mechanics of scheduling." *Heyman,* 456 F.2d at 128-29. The court also placed great weight on the fact that the conference at which the court made these references took place prior to the time that the parties were required to make a timely jury demand, and that, because of the context of the discussion, the court's remarks could reasonably have been interpreted as referring only to a preliminary injunction hearing and not to the trial on the merits. *Id.* at 129. The court held that "an offhand remark by [the district court judge] during the scheduling of a hearing for a preliminary injunction when [the defendant] had yet to file his answer, and there was still time before a jury demand had to be made, cannot fairly be construed to evidence any intent to waive [defendant's] right to a jury trial." *Id*. at 129-30.

Contrasting the factual scenarios underlying *Tray-Wrap* and *Heyman* with the facts of this case is instructive. Here, Penguin does not deny being on notice of the States' request to have their liability and injunctive relief claims tried to the bench beginning on June 3, 2013. There was no ambiguity in the colloquy at the June 22, 2012 conference or in the States' letter of June 26, 2012. No court records have been lost. The October 26, 2012 conference was transcribed by a court reporter, and the statements of the Court and all counsel are matters of record.[4] The Court's order as to the June 3 trial – that it would

[4] Nor can Penguin claim that the States' withdrew their request for a bench trial at any time before the October 26 conference, wherein the Court ordered and Penguin stipulated to the bench trial. *See Tanvir v.*

involve "DOJ and the states against Apple, Macmillan and Penguin" – was not made "in passing" during a conference on another subject. Penguin cannot claim it believed that the order related to anything other than a trial on the merits of the States' claims nor that, at the time of any of its relevant conduct, the issues to be tried were up in the air. The same judge of this Court has presided over these cases from their inception, and is fully apprised of all relevant proceedings.

Faced with such a record, Penguin falls back on attempts to cast the Court's ruling as insufficient, noting the lack of a "formal order" from the Court on this issue. Penguin Br. at 16; *see also id.* at 4 (Court "never granted the States' request and never entered any order granting them leave to participate in the DOJ trial"). Penguin characterizes the Court's order as "a tentative decision" that the Court "seemed to reach." *Id.* at 16. The attempt is unavailing. The Court's order was clear, and the applicable rules confirm that an oral ruling on any issue not affecting the ultimate determination of claims is equally as valid as a "formal" written order. *See* S.D.N.Y./E.D.N.Y. Local Civ. R. 6.2; *Nutronics Imaging, Inc. v. Danan*, 2000 WL 1469309 at *2 (E.D.N.Y. Aug. 8, 2000) (Rule 6.2 "evidences the intent of the courts of the Eastern District of New York to dispense with formal classifications of court rulings and adopt a procedure by which a ruling of the Court is an order, whether designated as such in writing or by oral decision").

Based on its contention that the Court's October 26, 2012 ruling did not constitute a "formal order," Penguin claims that it "immediately and vociferously objected upon first learning that it was expected to defend against the States' claims without a jury during the DOJ trial," citing to the transcript of the February 26, 2013 conference.

Laporte, 169 F.R.D. 292, 294 (S.D.N.Y. 1996) (declining to find waiver where party had withdrawn its bench trial proposal and record reflected no indication that opposing party had informed court of its consent prior to withdrawal).

Penguin Br. at 16. Penguin's objection was anything but immediate. It was on notice no later than June 26 of last year of the States' request to have issues of liability and injunctive relief tried to the Court. It was on notice no later than October 26 of last year of the Court's ruling that the June 3 bench trial would include the States' claims against Penguin. By its conduct in the interim, Penguin waived its right to a jury trial.

C. Penguin's Right to a Jury Trial, Having Been Waived, Cannot be Revived Simply to Serve its Strategic Interests

As established above, Penguin waived its right to a jury trial on the liability and injunctive relief portions of the States' claims. Despite that waiver, Penguin now contends that the Court should revive that right. While Penguin claims that its lengthy delay in notifying the Court of its change in position was due to, "at worst . . . [a] simple misunderstanding," Penguin Br. at 1, its brief confirms that the about-face was actually the product of a calculated change in litigation strategy in the wake of Penguin's settlement with DOJ. Penguin asserts that "the minute Penguin settled with DOJ on December 18, 2012," its strategic considerations "materially changed."[5] Penguin Br. at 21. Those changed considerations were based on the fact that the settlement between Penguin and DOJ eliminated the possibility of a liability finding against Penguin in the DOJ case, of which the States (and the class) might take advantage pursuant to the doctrine of collateral estoppel. *See id*. From Penguin's perspective, its settlement with DOJ eliminated the "anticipated efficiencies" of a joint bench trial on the States' liability

[5] If, in fact, the effect of the DOJ settlement on Penguin's considerations as to whether to seek to avail itself of its previously waived right to a jury were so immediately obvious, its two month delay in raising the issue with the Court, especially in light of the witness list stipulation it signed on the very same day the settlement was announced, is curious. To the extent Penguin "assumed" that the Court and the other parties would share its conclusions about whether a June 3 trial of the States' claims was still appropriate in light of the settlement, *see* Ashton Decl. Ex. 9 [Penguin 2/22 letter], its assumption was unjustified, and provides no basis for reinstating its right to a jury trial.

and injunction claims. But Penguin's determination that its settlement with the DOJ improved its chances of a favorable verdict from a jury on the States' claims does not provide a basis for rescinding its waiver. It is apparent that, in the wake of the DOJ settlement, and as the June 3 trial date (and the dates for pretrial submissions) approached, Penguin's strategy shifted.

While the Penguin/DOJ settlement may have altered the landscape as to Penguin's strategy, it had no effect on the nature of the States' claims, or on the method by which the Court had already ordered them to be adjudicated. At the June 3 trial, the States will be presenting evidence bearing on the existence of the conspiracies they have alleged, their formation, and the participation of the conspirators, including Apple and Penguin. While the States question the accuracy of Penguin's prediction that the DOJ will not be putting on evidence bearing on Penguin's culpability at the June 3 trial, *see* Penguin Br. at 21, the States most certainly will. Because of the nature of the conspiracies alleged, there will be significant overlap in the evidence bearing on the liability of the remaining defendants, and the actions of even those conspirators who have settled claims against them will be relevant.

The most that can be said with respect to Penguin's settlement with DOJ is that it eliminated some claims that were set for trial on June 3. This provides no basis for reinstating a waived right to a jury trial. Litigants' attempts to rescind a waiver even by purporting to add additional claims and issues are unavailing when the parties are on notice that the allegedly "new" issues fall within the scope of the bench trial. *See, e.g.*, *Westchester Day School v. Village of Mamaroneck*, 504 F.3d 338, 356-57 (2d Cir. 2007). Certainly, the elimination of claims and parties cannot justify rescinding a waiver.

This Court has often recognized the important considerations inherent in the decision of whether to reinstate a jury demand once it has been waived. Many such instances have arisen in the context of parties whose waivers resulted from a failure to make a timely request for a jury trial under Fed. R. Civ. P. 38. In such cases, the Second Circuit gives very limited discretion to judges to revive waived jury trial demands, holding that something beyond "mere inadvertence" is necessary to justify relief. *See, e.g., Lombas v. Moran Towing & Transp. Co.*, 1995 WL 2137 at *1 (S.D.N.Y. Jan. 3, 1995), *aff'd*, 1996 WL 282003 (2d Cir. 1996). In *Lombas*, this Court held that even the fact that defendant had not been sufficiently prejudiced by plaintiff's delay in seeking to make a belated jury demand was insufficient to overcome the delay itself and the plaintiff's lack of excuse for it. *Id.* at *6-*7.

Similarly, in *Reefer Express Lines (Bermuda) Pty., Ltd. v. Arkwright-Boston Mfrs. Ins. Co.*, 87 F.R.D. 133, 135 (S.D.N.Y. 1980), plaintiff failed to provide the court with any valid reasons for its delay in seeking a jury trial. The court, therefore, attributed the delay to a "belated change of strategy by counsel" and denied the motion in order to prohibit plaintiff from making an "end run" around its previous waiver of a jury trial. *Id.* In *Alvarado v. Santana-Lopez*, 101 F.R.D. 367, 368 (S.D.N.Y. 1984), defendants claimed that they were unable to assess the need for a jury until discovery was completed and they had "evaluate[d] the facts, issues, and legal positions of all the respective parties." Even though it refrained from opining on whether the jury trial waiver resulted from oversight or from a "calculated gamble," the court held that defendants' strategic move was insufficient to support their belated jury demand. *Id.* at 368-69; *see also Davidson Pipe Co., Inc. v. Laventhol & Horwath*, 125 F.R.D. 363, 371 (S.D.N.Y. 1989) (courts

frequently refuse to reinstate jury rights waived when belated request results from change in litigation strategy).

This line of cases is instructive and closely analogous to the facts underlying Penguin's pending motion. Penguin has failed to provide any reasonable explanation for the eight-month delay in objecting to the States' request to try a portion of their case to the bench, instead confirming that it was the result of a strategic choice. As such, it must be held to its waiver. *See Power v. Tyco Int'l (US), Inc.*, 2006 WL 1628588 at *3-*5 (S.D.N.Y. June 13, 2006) (finding waiver and refusing to reinstate jury right where defendant agreed to a bench trial and failed to seek a jury until its "litigation strategy regarding the importance of a jury trial and the desirability of filing a Rule 39(b) motion changed"). Precedent and sound policy considerations dictate against allowing relief from jury trial waivers in such situations, especially late in the litigation. *See Clorox Co. v. Stanson Detergents, Inc.*, 1985 WL 2309 at *2 (S.D.N.Y. Aug. 12, 1985) (allowing belated jury trial demands based on litigation developments encourages litigants to "go shopping for sympathetic triers of fact").

The District Court for the District of Columbia was presented with an issue similar to that on the instant motion in *Musick v. Norton*, 215 F. Supp. 2d 171 (D.D.C. 2002). There, plaintiff waived a previously-requested jury trial and then filed a motion to reinstate her jury demand just two months prior to the start of trial. The court held that:

> [N]o authority supports the proposition that a plaintiff may make a jury demand in accordance with Rule 38; waive it in open court after conferring with counsel; then "reinstate" the jury demand over one year later, after both the close of discovery and the deadline for filing dispositive motions, and two months before the trial is scheduled to commence, simply because she "decided that her case would be better tried to a jury." Accordingly, plaintiff's request to do so will be denied.

Id. at 173.

The court in *Musick* gave significant weight to the fact that defendant's decisions regarding the conduct of discovery and whether to file a motion for summary judgment were largely dependent upon plaintiff's waiver of a jury. *Id.* at 172-73. The States urge the Court to consider the parties' efforts over the past five months to prepare for a bench trial in accordance with the Court's established procedures for such proceedings. Those efforts would be significantly derailed if Penguin's request to change the trier of fact at this late date were granted. The courts of this Circuit recognize that it is important for both the court and the parties "to know at an early stage in the litigation who the fact finder will be." *Jones v. Hirschfeld,* 2003 WL 21415323 at *5 n.17 (S.D.N.Y. June 19, 2003) (citing cases).

The parties and the Court have known since October 26, 2012 that the States' claims, as to liability and injunctive relief, would be adjudicated by the Court at a trial beginning on June 3. None of the developments in these cases since the Court's ruling, including Penguin's settlement with DOJ, present a valid basis for changing that.

III. CONCLUSION

For the foregoing reasons, Plaintiff States respectfully request that the Court deny Penguin's Motion for a Jury Trial on the Plaintiff States' Claims. If, and only if, the Court determines that Penguin has not waived its right to a jury trial, or that the right should be reinstated despite a valid waiver, the States request that their claims against Penguin be heard, in their entirety, as part of the contemplated "later damages trial," and that the parties be afforded the right to move for summary judgment, in accordance with the schedule included in the revised Joint Initial Report, as filed on July 6, 2012.

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