IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

THE STATE OF TEXAS, *et al.*, Plaintiffs, v. PENGUIN GROUP (USA), INC., *et al.*, Defendants.	Civil Action No. 12-cv-3394 (DLC) ECF Case
IN RE ELECTRONIC BOOKS ANTITRUST LITIGATION	Civil Action No. 11-md-2293 (DLC) ECF Case

REPLY IN SUPPORT OF PENGUIN GROUP (USA), INC.'S MOTION FOR A JURY TRIAL ON THE PLAINTIFF STATES' CLAIMS

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INTRODUCTION

Penguin and the States agree that (i) "[t]he right to a jury trial is extremely important and worthy of protection"; (ii) Penguin's fundamental Seventh Amendment jury trial right was properly invoked under Rule 38, and (iii) accordingly, Penguin would ordinarily enjoy a jury right as to all of the States' claims. (Mem. in Opp. to Mot. for Jury Trial 1 ("Opp."); *see* Mem. in Supp. of Mot. for Jury Trial 6-13 ("Mem.")). Nevertheless, the States contend that Penguin waived that fundamental right, not because Penguin ever relinquished the right in so many words—no one suggests that Penguin explicitly abandoned the demanded jury on the States' claims—but because Penguin (i) demurred when asked generally if it "wanted to add" anything after the Court tentatively agreed to allow the States to participate at the June 3 bench trial on the DOJ's claims, and then (ii) raised its first objection 100 days before the bench trial. (Opp. 1.)

The "extremely important" right to a jury trial ought to be more "worthy of protection" than that. The Second Circuit agrees, holding in case after case that the right to a jury trial is too important, and the rules governing waiver too precise, to allow relinquishment except in the most clear and unequivocal circumstances. The States offer no contrary authority, relying instead exclusively on cases they acknowledge involve different procedural circumstances under a different rule. The States also accuse Penguin of "calculated" behavior, invoking "principles of fairness and equity" in asking this Court to deny Penguin its Seventh Amendment rights. But the States themselves have previously recognized that what occurred here is, at worst, a regrettable misunderstanding, hardly a "calculated," "strategic" "about-face."

In the end, the States will get their trial no matter what this Court decides. The only question is whether Penguin gets its undisputed right to a jury at that trial. Particularly because the States claim no harm, while prejudice is *presumed* for Penguin, and given that Second Circuit

precedent is strongly in Penguin's favor, the Court should grant Penguin's request for a jury trial on the States' claims.

ARGUMENT

Only one issue remains in dispute: whether Penguin voluntarily and intentionally waived its uncontested jury trial right, either formally by oral stipulation under Rule 39 or through a clear and unequivocal course of conduct. Either way the States have "[t]he burden of proving that a waiver was knowing and intentional[.]" *Sullivan v. Ajax Navigation Corp.*, 881 F. Supp. 906, 910-11 (S.D.N.Y. 1995).

A. Penguin Did Not Waive Its Right To A Jury Trial By Oral Stipulation

Rule 39 provides that, once the right to a jury trial is invoked, it may not be waived unless the "parties or their attorneys file a stipulation to a nonjury trial or so stipulate on the record." Fed. R. Civ. P. 39(a)(1). The States argue that Penguin waived its indisputable jury trial right though an allegedly "express" "stipulation on the record" at the October 26, 2012 telephone conference. (Opp. 8-9). Penguin did no such thing.

In fact, the States *cannot* show an 'express stipulation on the record' to a waiver of Penguin's Seventh Amendment right, given that the word "jury" was never uttered once by the Court or counsel in the 67-page transcript. The States' *actual* allegation is that "given the opportunity to object" to the Court's statement regarding the States' participation in the DOJ Trial, Penguin's counsel "said that he had nothing to add." (Opp. 1). Specifically, the States' "stipulation" argument boils down to these facts: (i) the Court stated during the October 26 telephone conference that the trial would proceed with "DOJ and the states against Apple, Macmillan and Penguin"; (ii) four transcript pages (and two separate attorney colloquies) later,

the Court asked Penguin's counsel, "is there anything that you wanted to add?"; and (iii) Penguin's counsel responded, "No, that's fine. No, your Honor. Thank you." (Opp. 8-9).[1]

In the States' view, Penguin's time-attenuated failure "to add" anything to an ambiguous question satisfies Rule 39's "stipulation" requirement. They are wrong. A "stipulation" is a "voluntary *agreement* between opposing parties concerning some relevant point." Black's Law Dictionary 1550 (9th ed. 2009) (emphasis added); *see Hester Indus., Inc. v. Tyson Foods, Inc.*, 160 F.3d 911, 916 (2d Cir. 1998) (stipulation is a "mutual agreement of the parties"); *United States v. Ceballos-Munoz*, 210 F.3d 356, *2 (2d Cir. 2000) (a stipulation "of course, by definition, is something to which [the defendant] agreed"). Counsel's demurrer when asked nonspecifically if he had anything "to add," by contrast, does not approach a "voluntary agreement"; on the contrary, it eschewed taking any position at all. It certainly is no "clear and unequivocal" renunciation of a constitutional right. *Tray-Wrap, Inc. v. Six L's Packing Co., Inc.*, 984 F.2d 65, 68 (2d Cir. 1993).

The States therefore err in equating Penguin's failure to object with an oral "stipulation" under Rule 39(a). They offer nothing supporting that equation, which is unsurprising: By "cloak[ing] the waiver process in a ritual that is almost sacramental," Rule 39(a) "assures that the precious right to a jury trial will not be frittered away by casual findings of waiver." *Tray-Wrap*, 984 F.2d at 66; *see Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 393 (1937) ("[A]s the right of jury trial is fundamental, courts indulge every reasonable presumption against waiver.").

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[1] The States try to compress the timeframe: "*Having ruled*, the Court asked Penguin's counsel if he had anything he wanted to add." (Opp. 9 (emphasis added)). That is inaccurate. The Court's question to Penguin came directly after lengthy colloquies with both Apple and Macmillan. (*See* Oct. 26, 2012 Hearing Tr. 54-58). And the last question the Court asked before inquiring whether Penguin's counsel had anything "to add" was, "So who wants to talk about class issues on behalf of Apple?" (*Id.* at 54).

For this reason, Second Circuit caselaw is unanimous: courts are not to find a clear and unequivocal jury trial waiver based on a plaintiff's "failing to object." *Gargiulo v. Delsole*, 769 F.2d 77, 78 (2d Cir. 1985) ("no merit" to argument that "plaintiffs failed to preserve their right to a jury trial by failing to object to the court notice that the case was on a nonjury calendar"); *see Tray–Wrap*, 984 F.2d at 68 (reversing for a jury trial because, among other reasons, "failure to object" to the defendant's written assertion that "the trial was to be nonjury" did not constitute waiver); *Heyman v. Kline*, 456 F.2d 123, 129 (2d Cir. 1972) (no waiver in counsel's "failure to object" to Judge's statement "in passing that this was a 'non jury trial'"). Given that the fundamental right to a jury trial is at stake, a finding that Penguin formally waived its properly demanded right based on a failure "to add" anything in response to an ambiguous question well after the Court's "ruling" would "fl[y] in the teeth of the meticulous provision made in Rule 39 for jury waivers." *Tray-Wrap*, 984 F.2d at 68. There was no Rule 39(a) waiver here.[2]

B. Penguin Did Not Waive Its Right To A Jury Trial Through Conduct

Next, the States contend that Penguin waived its right to a jury trial based on its conduct between June 2012 and February 2013. (Opp. 9-10). As with Rule 39 waivers, "the conduct said to constitute a waiver must be clear and unequivocal, as waivers are never to be lightly inferred." *Tray-Wrap*, 984 F.2d at 68 (emphasis added).

The States cite no cases suggesting that Penguin's course of conduct was "clear and unequivocal" or "informed and purposeful." (Opp. 10). Nor do the States dispute that the type of "conduct" that typically results in a finding of waiver-by-conduct in the Second Circuit is

[2] Citing Local Rule 6.2, the States point out that the Court need not accompany an oral ruling with a written order. (Opp. 8 (citing S.D.N.Y./E.D.N.Y. L. Civ. R. 6.2)). True enough. But under the same Local Rule, even if the Court's tentative statement at the conference could be considered an "oral decision," it was indisputably never entered on the docket. *See* L.Civ. R. 6.2 ("The notation in the docket of *** an oral decision that does not direct the submission or settlement of an order in more extended form shall constitute the entry of the order.").

"participation in a bench trial without objection[.]" *Royal Am. Managers, Inc. v. IRC Holding Corp.*, 885 F.2d 1011, 1018 (2d Cir. 1989). Because the States bear the burden of showing that Penguin's waiver was "knowing and intentional," their failure to cite even a single case in which conduct was construed as a waiver under remotely similar facts should alone defeat their "waiver by conduct" argument.[3]

While the States do try to distinguish two of Penguin's cited cases, they fail to do so meaningfully. Penguin has already explained in detail why *Tray-Wrap* and *Heyman* control on these facts (Mem. 16-19), but given the States' failure to cite any contrary precedent, the most important thing to note about these cases is that each involved, as here, "an objection to a bench trial before [the judge] started the trial." *Tray-Wrap*, 984 F.2d at 69; *see id.* (reversing and remanding for a jury trial when party objected for the first time at pretrial conference five days before trial); *Heyman*, 456 F.2d at 128 (jury trial demand properly made after alleged waiver but within time allowed by Federal Rules); *see also Gargiulo*, 769 F.2d at 78 (reversing and remanding for a jury trial when first objection to miscalendared bench trial was made on date of trial). Otherwise, those cases speak for themselves: "The right to a jury trial is too important *** and the usual procedure for waiver of the right too clearly set out by the Civil Rules for courts to find a knowing and voluntary relinquishment of the right in a doubtful situation." *Tray-Wrap*, 984 F.2d at 69 (quoting *Heyman*, 456 F.2d at 129).

The States also cite seven specific instances of purportedly "clear and unequivocal" conduct. But four of those seven instances are failures to object. (*See* Opp. 10-11 (alleging,

[3] By failing to argue the facts of even the three cases they previously cited to the Court – each of which found a waiver-by-conduct only after the waiving party failed to object until the date of the bench trial itself or later – the States implicitly concede that they are inapposite. (*See* Mem. 18 (distinguishing *M.O.C.H.A. Soc'y, Inc. v. City of Buffalo*, 689 F.3d 263, 282 (2d Cir. 2012); *Hill v. Airborne Freight Corp.*, 93 F. App'x 260, 262 (2d Cir. 2004); *Phlo Corp. v. Stevens*, No. 00 Civ. 3619 (DC), 2001 WL 1313387 at *2 (S.D.N.Y. Oct. 25, 2001))).

inter alia, that "[a]t the June 22, 2012 conference *** Penguin *** lodged no objection"). Again, "failing to object" does not constitute a "clear and unequivocal" waiver of the fundamental jury trial right. *See Gargiulo*, *Tray-Wrap*, and *Heyman*, *supra*.

As for the States' three remaining instances, all are documents Penguin signed—a "revised Joint Initial Report" on July 6, 2012 that noted the States' expressed desire to participate in the DOJ Trial, as well as two stipulations, one extending discovery deadlines on November 6, 2012 and the other extending witness list exchange deadlines on December 18, 2012. These documents show only that the States first wished to participate, and then planned to participate, in the June 3 DOJ Trial; they do not show that Penguin voluntarily and unequivocally agreed to defend against the States' claims *without a jury* even after Penguin settled with the DOJ. The States also take special pains to point out that the December 18 stipulation was signed the same day as the DOJ Settlement. But given that the States brought their claims against Apple, too, the stipulation's reference to "any trial on damages in the States' action" in no way shows that *Penguin* (as opposed to Apple alone) contemplated participating post-settlement in the DOJ Trial, or that Penguin was thereby agreeing to litigate liability with the States without a jury. (Opp. 6) Finally, the fact that the stipulation "only applied to witness lists for the June 3 bench trial" (Opp. 11) is meaningless, given that *all* parties to all three cases—including the class plaintiffs, Macmillan, and Apple—signed the same document whether they were participating in the June 3 bench trial or not.

C. Cases Interpreting Rule 38 Waivers Have No Bearing On Rule 39 Waivers

The States next offer a raft of cases (Opp. 15-19) in which parties waived their jury trial rights by failing to properly *demand* them under Federal Rule of Civil Procedure 38, with courts therefore applying a heightened showing beyond "mere inadvertence" to justify relief. But given

the States' concession that a proper Rule 38 demand was made in this case (Opp. 2, 8), their reliance on such cases is misplaced.

Rule 38 ("Right to a Jury Trial; Demand") addresses *demands* for jury trials, *see* Fed. R. Civ. P. 38(b)-(c), including waivers occasioned by a failure to timely serve or file such a demand, *see id.* 38(d). The States assert that in cases involving "a failure to make a timely request for a jury trial under" Rule 38, "the Second Circuit gives very limited discretion to judges to revive waived jury trial demands." (Opp. 17). Even if true, that is irrelevant. Because there is no dispute that a timely request *was* made under Rule 38 here, the controlling Rule is 39(a), which by its terms applies "[w]hen a jury trial has been demanded under Rule 38[.]" Fed. R. Civ. P. 39(a). As such, all of plaintiffs' cases discussing the standard under Rule 38 for "reinstating" a jury demand that was never adequately demanded in the first place have no bearing on this action. (Opp. 16-19 (collecting cases)). These cases are neither "instructive" nor "closely analogous" (*id.* 18)—and certainly not more authoritative than the many cases in Penguin's brief discussing the standard for waiver after a proper jury demand *has* been made. (*See* Mem. 13-19 (collecting cases)). Because a proper demand for a jury trial on the States' claims was made in this case, and Penguin never waived its jury trial right through an oral or written stipulation (or through conduct), it remains entitled to defend against the States' claims before a jury.[4]

[4] That Penguin never knowingly and voluntarily waived its jury trial right conclusively distinguishes this case from the only two cases the States cite involving initial jury trial demands under Rule 38 that were later *explicitly* waived via stipulations. *See Power v. Tyco Int'l (US), Inc.*, No. 02 Civ. 6444 (GEL), 2006 WL 1628588, at *3 (S.D.N.Y. June 13, 2006) ("Tyco admits that it consented to the CMP [case management plan], which states that this case will be tried by the Court," and "[t]he parties' formal proposal to the Court, and the Court's acceptance, of a CMP [case management plan] providing for a non-jury trial constitutes an express waiver of a jury trial"); *Musick v. Norton*, 215 F. Supp. 2d 171 (D.D.C. 2002) (no dispute that plaintiff, who filed a "Motion to Reinstate Request for Trial by Jury," had explicitly waived her right to a jury trial).

D. The States' Allegations Of Strategic Behavior Are Groundless

In the absence of a waiver, the Court's job is clear: "When a jury has been demanded under Rule 38 *** [t]he trial on all issues so demanded must be by jury[.]" Fed. R. Civ. P. 39(a). It is nevertheless worth noting that the States' current accusations of Penguin's strategic machinations are not only inconsistent with their own prior representation to the Court, but entirely miss Penguin's point.

The States have previously advised the Court that, before mid-February, "Penguin's counsel had apparently forgotten that the States would be participating in the June trial at all." (Ltr. from Plaintiff States to Hon. Judge Cote, Feb. 25, 2013 at 2 n.2). Today, however, the States accuse Penguin of making an "about-face" and a "calculated change in litigation strategy in the wake of Penguin's settlement with DOJ," designed "simply to serve its strategic interests." (Opp. 15). Under their new theory, "[i]t is apparent" that Penguin, ostensibly with full knowledge of an impending bench trial on the States' claims, decided to forgo asserting its jury trial rights immediately upon its settlement with the DOJ, but instead refrained for two months and, with "the dates for pretrial submissions" approaching, elected to ignore those deadlines and feign ignorance when the States inquired as to their status. (Opp. 15-16).

It need hardly be said that such allegations of "calculated" and "strategic" behavior are not only unfounded but senseless to boot. If Penguin understood that the Court and the parties expected that it would appear at the DOJ Trial despite the intervening settlement in December, what did it have to gain by standing pat for two months rather than objecting? The States certainly offer no plausible rationale. Instead, they confess that Penguin's "two month delay in raising the issue with the Court" under this scenario "is curious." (Opp. 15 n.5). In reality, there is nothing "curious" about it; the delay is easily explained by the fact that this was a genuine misunderstanding, neither "calculated" nor "strategic," confirmed by the fact that Penguin sought

to correct the mistake immediately upon learning of it 100 days before trial. For the same reason, the States' retort that "Penguin's objection was anything but immediate," based on their requests to participate in the DOJ Trial before Penguin settled with the DOJ, is off-base. (Opp. 15.)

In any event, the States miss Penguin's point entirely. Penguin's explanation of the "changed considerations" post-settlement describes the genesis of the misunderstanding and details why Penguin did not object to a bench trial on *the DOJ's claims*. The States nevertheless contend that Penguin changed its mind based on considerations of "whether a bench trial on the liability and injunctive relief portions of *the States' claims* would be to its advantage." (Opp. 2 (emphasis added)). Penguin did no such thing. What Penguin actually said was that it could not object to a bench trial with the DOJ; like the Court, Penguin assumed that the DOJ trial would have collateral estoppel effect on the consumer claims brought by the States and class; and Penguin accordingly had no occasion to object to the States' participation in the DOJ Trial as against Penguin, either. (*See* Mem. 19-22). Once Penguin settled with the DOJ, Penguin presumed that meant it would no longer be participating in the DOJ Trial. (*See id.* 21-22). Although this presumption turned out to be wrong, it does not show that Penguin's actions were "calculated," but rather the exact opposite: that Penguin's failure to object earlier was the result of a genuine misunderstanding.

The States' baseless allegations aside, the bottom line is that Penguin is asserting its jury trial right now because Penguin, by virtue of its DOJ settlement, is no longer forced to defend itself in a bench trial with presumptive collateral estoppel effect, but is instead entitled to a jury trial on all outstanding claims. The States do not dispute that the DOJ settlement had this effect. Again, Penguin deeply regrets any inconvenience it caused to the Court. But the fact remains that it has never offered a "clear and unequivocal" surrender of its constitutional rights.

E. Penguin's Potential Harms Outweigh Any Possible Prejudice To The States

Finally, Penguin's harm would be immediate and, in fact, presumed if it is denied a jury trial over its objections. *See Jolly v. Coughlin*, 76 F.3d 468, 482 (2d Cir. 1996) ("The district court *** properly relied on the presumption of irreparable injury that flows from a violation of constitutional rights."); *see also Matter of Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1295 (7th Cir. 1995) (noting that, on mandamus review of denial of jury trial, "the requirement of proving irreparable harm is relaxed"). The jury trial right is so "fundamental," *National Equipment Rental, Ltd. v. Hendrix*, 565 F.2d 255, 258 (1977), that Penguin would be entitled to seek "immediate review" of any wrongful denial "by way of a petition for mandamus." *In re Hooker Invs., Inc.*, 937 F.2d 833, 837 (1991). Indeed, "[t]he protection of the right conferred by the Seventh Amendment to trial by jury in federal civil cases is a traditional office of the writ of mandamus[.]" *Rhone-Poulenc Rorer*, 51 F.3d at 1303.

The States, in contrast, do not even assert prejudice. Instead, they "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," contending without further elaboration that those efforts "would be significantly derailed if Penguin's request to change the trier of fact at this late date were granted." (Opp. 19). But they do not explain why that is so, especially given that the States (not the DOJ) will already be responsible for proving their case against Penguin, that they are planning to go to a jury already with respect to damages, and the request at issue is only for that jury to hear their liability claims, as well.

CONCLUSION

For the foregoing reasons, Penguin respectfully requests that the Court grant Penguin's request to have the States' claims be tried at the already-contemplated damages jury trial with the States and consumer class.

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Respectfully submitted,

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