

1 Chief Judge Marsha J. Pechman
2
3
4
5
6

7 **UNITED STATES DISTRICT COURT**
8 **FOR THE WESTERN DISTRICT OF WASHINGTON**

9 IN RE ELECTRONIC BOOKS ANTITRUST
10 LITIGATION

Case No. 12-mc-00186-MJP

11 **NOTICE OF MULTIDISTRICT**
12 **LITIGATION**

13 Action Pending in:
14 United States District Court, Southern District
15 of New York (11-md-02293-DLC)

16 Amazon.com, Inc. (“Amazon”) moved on Friday to quash a non-party subpoena served
17 on it by defendants in a consolidated multidistrict litigation (“MDL”) pending before The
18 Honorable Denise Cote in the Southern District of New York. In a highly confidential
19 submission, defendants requested permission from Judge Cote, also on Friday, to move to
20 compel Amazon’s compliance with that same subpoena. Defendants respectfully request that
21 this Court transfer Amazon’s motion to Judge Cote so that it can be considered with related
22 issues in the MDL.

23 It is common for the court handling an MDL litigation to resolve discovery disputes
24 arising from subpoenas served in other districts. Federal law provides that an MDL judge may
25 “exercise the powers of a district judge in any district for the purpose of conducting pretrial
26 depositions in such coordinated or consolidated pretrial proceedings.” 28 U.S.C. § 1407(b). The

NOTICE OF MULTIDISTRICT LITIGATION - 1
CASE NO. 12-MC-00186-MJP

1 vast majority of federal courts to consider the issue have interpreted Section 1407(b) as
2 conferring jurisdiction on the MDL judge over disputes relating to non-party document
3 subpoenas. *See, e.g., U.S. ex. rel. Pogue v. Diabetes Treatment Ctrs. of America, Inc.*, 444 F.3d
4 462, 469 n. 4 (6th Cir. 2006) (“the rationale underlying the MDL statute . . . requires the
5 conclusion that Section 1407(b)’s grant of authority applies to both deposition subpoenas and
6 documents-only subpoenas”); *In re Welding Rod Prods. Liab. Litig.*, 406 F. Supp. 2d 1064,
7 1066–7 (N.D. Cal. 2005) (transferring motion to quash document subpoena to MDL judge, who
8 was “readily familiar with the underlying issues” and explaining that “most courts” apply
9 Section 1407(b) to document subpoenas); *In re Subpoenas Served on Wilmer, Cutler &*
10 *Pickering and Goodwin Proctor LLP*, 255 F. Supp. 2d 1, 2 (D.D.C. 2003) (remitting motion to
11 quash subpoena duces tecum to MDL judge, who was “already familiar with [the] massive
12 litigation” and had consented to hearing motions to quash).¹ The sole case cited by Amazon,
13 *SEC v. CMKM Diamonds, Inc.*, 656 F.3d 829 (9th Cir. 2011), is inapposite because it did not
14 involve an MDL and has nothing to do with Section 1407(b).
15
16

17 There are clear efficiencies in having a single court adjudicate discovery disputes in an
18 MDL such as this, involving 30 different actions from 3 different districts. Furthermore, Judge
19 Cote has presided over these actions for approximately nine months, she is familiar with the
20 issues and parties in the case, and she already has presided over discovery disputes on related
21

22 ¹ Three years before the holding in *In re Welding*, another court in the Northern District of California held that
23 Section 1407(b) does not apply to document subpoenas. *See VISX, Inc. v. Nidek Co.*, 208 F.R.D. 615, 616 (N.D.
24 Cal. 2002). But several courts have criticized and disagreed with the holding in *VISX*. *See In re Welding*, 406 F.
25 Supp. 2d at 1066 (explaining that *VISX*’s holding does not comport with the purpose of Section 1407 and is contrary
26 to the weight of authority); *U.S. ex rel. Pogue v. Diabetes Treatment Centers of America, Inc.*, 238 F. Supp.2d 270,
275 (D.D.C. 2002) (disagreeing with *VISX* because most courts have extended Section 1407 to the enforcement of
document subpoenas); *HCA, Inc. v. U.S. ex rel. Pogue*, No. 3:02-MC-0047, 2002 WL 31953748, at *4 (M.D. Tenn.
Nov. 21, 2002) (disagreeing with *VISX*’s holding because it contained “little analysis of the purpose of section
1407(b) or other case law” and finding the reasoning of contrary cases “more persuasive”).

1 issues in the MDL—including another dispute between two parties that relates to Amazon. The
2 parties, recognizing these efficiencies, agreed in their Initial Report that Judge Cote would “to
3 the full extent allowed by law . . . hear any discovery disputes regarding non-party subpoenas
4 served in connection with the actions, including motions to quash or modify and motions to
5 compel.” (Attached as Exhibit A.) In reviewing this section of the draft Joint Initial Report at a
6 status conference, Judge Cote confirmed that she was “happy” to “exercise jurisdiction over
7 discovery disputes.” (See Transcript of 6/22/2012 Status Conference (attached as Exhibit B) at
8 28:5–9.) Accordingly, defendants, as required by Judge Cote’s rules, have filed a pre-motion
9 letter bringing the dispute with Amazon before the MDL court.
10

11 For these reasons, defendants respectfully request that this Court transfer the present
12 dispute to Judge Cote to be considered as part of the MDL.
13

14 DATED: September 17, 2012.

15 By s/Christopher B. Wells
16 Christopher B. Wells, WSBA No. 08302
wellsc@lanepowell.com

17 By s/Michelle K. Peterson
18 Michelle K. Peterson, WSBA No. 33598
petersonm@lanepowell.com

19 LANE POWELL PC
20 1420 Fifth Avenue, Suite 4100
21 Seattle, WA 98101
(206) 223-7000

22 *Attorneys for Apple Inc.*
23
24
25
26

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington, that on the 17th day of September, 2012, the document attached hereto was presented to the Clerk of the Court for filing and uploading to the CM/ECF system. In accordance with their ECF registration agreement and the Court's rules, the Clerk of the Court will send e-mail notification of such filing to all CM/ECF participants and any non-CM/ECF participants will be served in accordance with the Federal Rules of Civil Procedure.

Majorie Alison Walter
KIPLING LAW GROUP PLLC
3601 FREMONT AVENUE N
STE 414
SEATTLE, WA 98103
206-545-0347
Email: walter@kiplinglawgroup.com

- by **CM/ECF**
- by **Electronic Mail**
- by **Facsimile Transmission**
- by **First Class Mail**
- by **Hand Delivery**
- by **Overnight Delivery**

Michael E Kipling
KIPLING LAW GROUP PLLC
3601 FREMONT AVENUE N
STE 414
SEATTLE, WA 98103
206-545-0345
Fax: 206-545-0350
Email: kipling@kiplinglawgroup.com

- by **CM/ECF**
- by **Electronic Mail**
- by **Facsimile Transmission**
- by **First Class Mail**
- by **Hand Delivery**
- by **Overnight Delivery**

s/ Peter C. Elton

Peter C. Elton