

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION

IN RE: KABA SIMPLEX LOCKS ) CASE NO. 1: 11 MD 2220  
MARKETING AND SALES PRACTICES )  
LITIGATION ) JUDGE DONALD C. NUGENT  
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) ORDER  
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This case is before the Court on Plaintiff's Motion for Direct Filing. (ECF #53). Defendants have filed a Memorandum in Opposition to Plaintiffs' Motion for Direct Filing, (ECF #58), and Plaintiffs filed a Reply in support of their motion. (ECF #63). Plaintiffs proposed a direct filing order that would allow the parties to bypass application to the Judicial Panel on Multi-District Litigation ("JPML") and to file tag along cases in this Multidistrict Litigation ("MDL") directly in this district regardless of where venue would otherwise be proper. Assuming that the Panel would eventually transfer all new cases submitted as tag along cases in this MDL, the Plaintiffs contend that a direct filing order would increase efficiency and reduce the costs associated with bringing such actions into the fold of these MDL proceedings. Defendants object to the imposition of a direct filing order arguing that a bypass of the JPML would deprive them of protections offered by the process set forth in the legislation creating

multi-district litigation.

The argument here comes down to an issue of whether a transferee judge can override the general requirements for venue in order to streamline MDL proceedings. The parties agree that the venue at issue would be limited to the location of the pre-trial proceedings, and would not affect substantive choice-of-law decisions, or where the case would ultimately be tried. We must therefore, look first to the general provisions set forth by Congress. The venue statutes (outside of the MDL statute) do not, themselves, distinguish between venue for trial and venue for pretrial proceedings only. The general rule is that venue founded on the diversity of the parties may be brought only in (1) a judicial district where any defendant resides, if all Defendants reside in the same State, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred . . . , or (3) a judicial district in which any defendant is subject to personal jurisdiction at the time the action is commenced, if there is no other district in which the action may otherwise be brought. 28 U.S.C. § 1391. Neither party argues that the anticipated new filings against the MDL Defendants will be properly venued in the Northern District of Ohio. Therefore, generally this Court would not be the proper venue in which to file those actions.

There are several statutory exceptions, which could expand the options for proper venue, however. Many require that the case remain in the district in which it was brought, or that it be transferred only to another district or division where the case could have originally been brought. See, e.g., 28 U.S.C. § 1404. These do not assist the Court in this instance, as there is no indication that any of the anticipated tag along cases would be properly brought in this district, absent the MDL designation.

Title 28 U.S.C. § 1407 authorizes an exception to the general venue principles when an MDL is created in accordance with the statute. Section 1407 authorizes the transfer of civil actions involving one or more common questions of fact, pending in different districts, to a single district for “coordinated and consolidated pretrial proceedings.” *Id.* The statute sets forth very precise procedures for such transfers, mandating that the transfers be made by the JPML, and that the cases be remanded by the JPML at or before the conclusion of pretrial proceedings. *Id.* The statute provides for a series of due process protections that must be implemented prior to any transfer under section 1407. 28 U.S.C. §1407 (c). Nothing in this statute provides any authority for the transferee judge in an MDL to issue a direct filing order that would bypass the JPML and the due process proceedings set forth in the statute, regardless of the efficiencies that may be gained by such an order. *Cf. Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 118 S.Ct. 956 (1998).

Section 1407 does give the JPML the authority to create rules that would assist it in conducting its business, so long as those rules are not inconsistent with other Acts of Congress and the Federal Rules of Civil Procedure. 28 U.S.C. § 1407(f). The United States Supreme Court has made clear that this precludes the Panel from creating rules that would override the venue provisions created by the legislature. *Lexecon, Inc.*, 523 U.S. 26, 118 S. Ct. 956. Rule 7.1 of the JPML creates a means by which potential tag along actions may be transferred to an already established MDL transferee judge. The rule includes procedures that must be followed by the Panel and by the parties prior to any transfer of potential tag along actions. *Id.* The rules do not give transferee courts the authority to by pass these procedures through a direct filing order, or otherwise authorize them to accept any cases that could not have originally been

brought in their district.<sup>1</sup>

Finally, Title 28 U.S.C. § 1406(b), provides that a district court may maintain jurisdiction over “any matter involving a party who does not interpose timely and sufficient objection to the venue.” This is in accordance with United State Supreme Court cases that have held venue, although defined by legislation, is a waivable restriction that does not affect the subject matter jurisdiction of the courts. *See, e.g., Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165, 168, 60 S. Ct. 153, 154 (1939); *Olberding v. Illinois Cent. R.R. Co.*, 346 U.S. 338, 340, 74 S.Ct. 83, 85 (1953). In all instances known to this Court, in which a direct filing order has previously been issued, the parties have either agreed to, or at least failed to object to, its issuance. Thus, at least an argument of waiver, if not an explicit waiver of venue rights for pre-trial proceedings was in place in each of those cases, including every case cited by the parties in support of their positions on this matter.<sup>2</sup> In contrast, the Defendants in this litigation have lodged an opposition to the motion for a direct filing order, precluding the application of 28 U.S.C. § 1406(b) and rendering the Supreme Court cases acknowledging the effectiveness of a wavier of venue inapplicable in this instance.

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Rule 7.2 does indicate that if potential tag-along actions are filed in the transferee district, they do not require Panel action. This must be read, however, to address cases where venue is proper in the transferee court even absent any MDL designation. To read it otherwise would conflict with the general venue legislation instituted by Congress and the procedures set forth in 28 U.S.C. § 1407 requiring the JPML to transfer appropriate cases to the transferee court, and would, therefore, violate the principles set forth in *Lexecon, Inc.*, 523 U.S. 26, 118 S. Ct. 956.

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In researching this issue, the Court obtained an informal opinion from a staff attorney at the JPML which indicated that the Panel was not aware of any transferee courts that had ever issued a direct filing order over the objection of one of the parties, nor was it aware of any authority that would authorize such an action by a transferee court.

Based upon the representations of counsel for both parties, the anticipated tag along cases currently ready for filing would likely be transferred to this Court by the JPML by way of a conditional transfer order, and would be appropriate for inclusion in this MDL. Absent a limited waiver of venue for pre-trial proceedings, which would then pave the way for a direct filing order to be jointly crafted by the parties to protect the substantive rights of the Defendants and allow the Court to remand cases to the appropriate districts following the MDL discovery and pretrial proceedings, each of these cases will have to be filed in their individual districts, be submitted to the JPML for consideration, have transfer stayed for the amount of time set forth under the JPML rules, and then be transferred by the original district courts to this district for filing. This process will to some degree negatively impact the economies and efficiencies offered by the creation of the MDL designation, and the Court would strongly urge the Defendants to reconsider their opposition to such an order. Defendants should review the reasons for their concerns to determine whether their interests might be better served by consenting to a direct filing order that would both increase the effectiveness and efficiency of the MDL proceeding, and allow them to protect their substantive rights on issues such as choice of law and venue options for trial. However, if the Defendants decide to maintain their objection to the issuance of a direct filing order, this Court is powerless under the current legislation to issue such an order.

In sum, Congress has created several statutes that address where an action may be brought and how venue should be decided. These include a specific statute allowing the JPML to consolidate cases from various districts in a single district for the convenience of the parties and efficiency of the litigation. None of these statutes, however, provide any authority for this

Court to require or otherwise authorize cases that do not satisfy the general venue requirements for this district to be filed here as tag along cases an MDL. Only the JPML has that statutory authority. Further, although the parties may agree to waive venue, which could arguably provide a basis upon which a direct filing order would be permissible, Defendants have not done so in this case. Therefore, this Court finds that there is no basis upon which it has the legal authority to issue the requested direct filing order in the instant case. For the reasons set forth above, Plaintiffs' Motion is DENIED. (ECF #53). IT IS SO ORDERED.

/s/ Donald C. Nugent  
Donald C. Nugent  
UNITED STATES DISTRICT JUDGE

Date: August 1, 2012