UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PEOPLE OF THE STATE OF NEW YORK, by LETITIA JAMES, Attorney General of the State of New York,

Plaintiff,

- against -

AMAZON.COM, INC., AMAZON.COM SALES, INC., and AMAZON.COM SERVICES LLC,

Defendant.

Case No. 1:21-CV-1417 (JSR)

DEFENDANTS' REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF THEIR MOTION TO TRANSFER

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PRELIMINARY STATEMENT

The Office of the Attorney General ("OAG") makes only a halfhearted attempt to explain why the Southern District of New York is a better venue for this case than the Eastern District, and its arguments are wholly unpersuasive. Though the OAG reluctantly concedes that "many" of the operative facts of this case took place in the Eastern District, Dkt. 22 at 19, the truth is that *all* of the facts arose in the Eastern District and the OAG has not and cannot identify any relevant connection with the Southern District. The Eastern District is where both Amazon facilities at issue are located, and where Amazon supposedly took "retaliatory" action against Christian Smalls and Derrick Palmer for their deliberate and repeated violations of Amazon's health and safety rules. The Eastern District is also where all of these issues are being litigated, or were recently decided, in three related cases. Even the OAG grudgingly admits that judicial economy favors the Eastern District. And, following every relevant fact and every other previously filed case, the Eastern District is where Amazon first filed suit to enjoin the OAG's unlawful attempts to regulate Amazon's COVID-19 workplace responses—a lawsuit over which it is "beyond dispute" the Eastern District has jurisdiction. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96 n.14 (1983).

The OAG would prefer to avoid these determinative facts by making this motion about subject-matter jurisdiction, but that is the subject of the parties' parallel briefing on the OAG's motion to remand. Amazon will not rehash those arguments here; for reasons fully explained in Amazon's notice of removal and its opposition to the OAG's motion to remand, this Court assuredly has subject-matter jurisdiction. Moreover, even were the Court to harbor any doubt on that score, the Court need not resolve all questions concerning its subject-matter jurisdiction before transferring the case to the Eastern District. The Eastern District is fully versed on the facts of this dispute and of course capable of deciding any jurisdictional questions in the first instance. The OAG's arguments present no obstacle to this Court transferring the case to the Eastern District.

ARGUMENT

I. The OAG Ignores The "Bright-Line Rule" Requiring Transfer To The Eastern District To Resolve The Applicability Of The First-Filed Rule.

The OAG argues at length that the first-filed rule does not require transfer of this case, but the OAG ignores this District's "bright-line rule for situations such as this: The court before which the first-filed action was brought determines which forum will hear the case." *MSK Ins., Ltd. v. Emp'rs Reinsurance Corp.*, 212 F. Supp. 2d 266, 267 (S.D.N.Y. 2002). Under this rule, the Eastern District should decide in the first instance whether Amazon's first-filed case determines the venue for the OAG's mirror-image case.

The OAG's contrary arguments only serve to illustrate the wisdom of this "bright-line rule." The first-filed rule "is based on principles of judicial economy, comity, and an interest in avoiding duplicative litigation." *Pergo, Inc. v. Alloc, Inc.*, 262 F. Supp. 2d 122, 131 (S.D.N.Y. 2003). The comity interests avoid the unseemliness of a court passing judgment on a previously filed case pending before a judge in another district and "the possibility of inconsistent rulings." *Donaldson, Lufkin & Jenrette, Inc. v. L.A. Cty.*, 542 F. Supp. 1317, 1321 (S.D.N.Y. 1982). In the face of these commonsense principles, the OAG asks this Court to make a preemptive determination that Amazon's case pending before another district judge in another judicial district was "improperly filed." Dkt. 22 at 1. It is the OAG's invitation to prejudge matters assigned to Judge Cogan that is improper. This District's "bright-line" rule determining that Judge Cogan apply the first-filed rule in the first instance ensures that proper respect is given to sister courts.

There is no basis to depart from that rule here. The OAG claims a special circumstance for "improper anticipatory declaratory actions," Dkt. 22 at 9, but the argument rests on a mischaracterization of Amazon's first-filed case. In addition to seeking declaratory relief, Amazon brought a claim seeking "[i]njunctive relief preventing" the Attorney General "from causing the

OAG to purport to exercise regulatory authority over (1) workplace safety responses to COVID-19 and (2) claims of retaliation against workers who protest working conditions." Dkt. 13-2 at 64. "[I]t is beyond dispute that federal courts have jurisdiction over suits . . . seek[ing] injunctive relief from state regulation, on the ground that such regulation is pre-empted by a federal statute." *Shaw*, 463 U.S. at 96 n.14. Amazon brought its action in the Eastern District as soon as the OAG's attempts to regulate in these areas crystallized into a substantial and imminent threat that would support injunctive relief; in response, the OAG hurriedly filed this mirror-image action in an attempt to preclude Amazon's injunctive claims. *See* Dkt. 13 ¶¶ 46-49; Dkt. 23 at 19-24. It is the OAG's case, not Amazon's, that was "improperly filed."

That the OAG has "has yet to answer Amazon's complaint," Dkt. 22 at 9 & n.8, should carry no weight in the transfer analysis. Disappointingly, the OAG omits from its brief that in exchange for Amazon agreeing to extend the OAG's March 5 deadline for answering Amazon's complaint, the OAG agreed "not to argue that [Amazon's] consent . . . counts against" Amazon's arguments that its lawsuit should proceed first. Schwartz Decl., Ex. A. The OAG should not now be permitted to argue, in breach of that commitment, that the agreed-upon stay of its response deadline weighs against application of the first-filed rule.

The OAG's argument is unavailing in any event. The OAG's case is at a more "preliminary" stage than Amazon's because the only issues presented here are "'threshold grounds for denying audience to a case on the merits.'" *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 431 (2007) (citation omitted). The OAG has not argued that Amazon's case is in the wrong forum, and any such argument would not be plausible.

II. The OAG's Arguments Against Transfer To The Eastern District Are Unavailing.

A. The OAG Identifies No Valid Reason Why It Could Not Have Brought Its Claims In The Eastern District.

The OAG could have filed this case in the Eastern District—where the two Amazon facilities at issue are located, where all the relevant events occurred, and where the two individuals whom the OAG featured in its complaint filed complaints of their own: Derrick Palmer, who filed an identical claim under New York Labor Law § 200, and Christian Smalls, who filed suit regarding workplace safety measures and alleged retaliation. The Eastern District has personal jurisdiction over Amazon, as the pending related cases show, and the OAG does not argue otherwise. *See Dwyer v. Gen. Motors Corp.*, 853 F. Supp. 690, 691-92 (S.D.N.Y. 1994) ("A 'district or division where it might have been brought' has been interpreted to mean a district where venue might have been proper and where the defendant would have been subject to process.").

Instead, the OAG quibbles that Amazon did not "discuss[]" or "mention[]" the Eastern District's subject-matter jurisdiction, as if Amazon had not fully presented its jurisdictional arguments in the parties' parallel briefing on the motion to remand. But Amazon has made clear why the federal courts have subject-matter jurisdiction. First, there is diversity jurisdiction because New York State is only a nominal party and the real parties in interest whom the OAG purports to represent are citizens of different states than Amazon. *See* Dkt. 23 at 7-15.[1] Second, the OAG's claims require proving violations of federal law and thus raise a disputed and substantial federal issue. *Id.* at 15-19. Third, the OAG's declaratory judgment claims apprehend claims available to—and actually brought by—Amazon that present a federal question. *Id.* at 19-24. That

[1] In using this briefing to expand on its jurisdictional arguments, the OAG reinforces why there is diversity jurisdiction. The OAG's admission that it "brought this case . . . on behalf of the State to protect New Yorkers," Dkt. 22 at 1, confirms that the real parties in interest are the New York citizens employed at JFK8 and DBK1. Neither these individuals, nor Mr. Palmer and Mr. Smalls, are citizens of the same states as Amazon, thus ensuring complete diversity. *See* Dkt. 23 at 7-10.

conclusion does not vary district-by-district; the Eastern District would have subject-matter jurisdiction for the identical reasons this Court has subject-matter jurisdiction.

B. No "Deference" Is Owed To The OAG's Choice Of A Forum Having No Connection To This Case.

The "locus of operative facts" is a "primary factor in determining whether to transfer venue." *Mohamed v. Tesfaye*, 2019 WL 1460401, at *5 (S.D.N.Y. Jan. 24, 2019). Here, the OAG does not seriously dispute that all of the facts at issue occurred in, and are occurring in, the Eastern District. Because the OAG "has not shown that any of the operative facts arose in the Southern District of New York," the locus of operative facts "substantially favors transfer." *Id.*

The OAG's only argument for why the Southern District should retain this case—that the OAG's choice of forum should be given "deference," Dkt. 22 at 11-12—is buried at the end of its brief and wholly unpersuasive. Any claim of "deference" to the OAG's choice of forum should be viewed with deep skepticism here, *see id.*, given the utter lack of any connection between the facts of this case and the Southern District. No "deference" is warranted.

The OAG concedes, as it must, that a plaintiff's choice of forum is not afforded its typical deference where, as here, "the operative events happened away from that forum." Dkt. 22 at 14; *see also IXI Mobile (R&D) Ltd. v. Samsung Elecs. Co.*, 2015 WL 4720293, at *8 (S.D.N.Y. Aug. 6, 2015) ("[T]he weight afforded to a plaintiff's choice is diminished where the operative facts lack a meaningful connection to the chosen forum."). It is clear on the face of the OAG's complaint that the facilities in question are, and *all* of the events in dispute happened, in the Eastern District. The OAG cannot identify *any* operative facts occurring in the Southern District. That is why all three prior cases involving these same facilities and events were filed in the Eastern District.

The OAG's two post hoc attempts to manufacture a connection to the Southern District strain credulity. First, the OAG argues that the Southern District is an appropriate forum because

"the operative facts took place in New York City" and commuting times between the facilities and the two courthouses supposedly are comparable. Dkt. 22 at 13-14. The argument borders on frivolous. Congress did not create a "District of New York City," and it did not express any intention to make transfer under 28 U.S.C. § 1404 uniquely difficult for the Eastern and Southern Districts because they cover parts of the same city. Rather, they are independent judicial districts that routinely transfer cases between each other where the circumstances call for it, as they do here. *See*, *e.g.*, *Williams v. 563-569 Cauldwell Assocs. LLC*, 2013 WL 1344672, at *1 (S.D.N.Y. Mar. 28, 2013) (noting case removed to Eastern District and then transferred to Southern District); *Crotona 1967 Corp. v. Vidu Bros. Corp.*, 2010 WL 5299866, at *1-2 (S.D.N.Y. Dec. 21, 2010) (transferring to Eastern District where "all of the[] actions which are the predicate for this case took place"). The mere fact that they are independent judicial districts creates inconveniences arising from the risks of piecemeal litigation and inconsistent judgments. As a defendant in three of the four pending cases, Amazon does not have the luxury of treating the Southern and Eastern Districts as fungible.

Second, the OAG makes the curious claim that the Southern District is its "home forum," Dkt. 22 at 12, but the OAG is a statewide agency that has 13 regional offices throughout New York (including three in the Eastern District, and one just blocks from the Eastern District courthouse), *see* OAG, *Regional Office Contact Information*, https://tinyurl.com/9f3z27, and it is responsible for representing the entire State, not just Manhattan. It is difficult to understand why the OAG does not consider itself at "home" in New York outside of Manhattan, such as on Staten Island and in Brooklyn. Regardless, courts afford the plaintiff's choice of forum less weight "where the *operative facts* lack a meaningful connection to the chosen forum," and the OAG identified no such connection here. *IXI Mobile*, 2015 WL 4720293, at *8 (emphasis added). Indeed, the OAG

elsewhere has "argue[d] that [p]laintiff's choice of forum should be 'afforded little weight' because the operative facts of the litigation do not bear any connection to the Southern District of New York." *Hamilton v. Mead*, 2019 WL 949009, at *8 (S.D.N.Y. Feb. 14, 2019) (granting OAG's motion to transfer to Northern District of New York). The OAG's rejection here of the law on which it previously relied highlights the impropriety of its filing in Manhattan.

C. The OAG Concedes That Judicial Economy Favors Transfer.

The OAG reluctantly concedes that judicial economy might weigh in favor of transfer to the Eastern District. Dkt. 22 at 16. This factor, along with the locus of operative facts, should control the transfer analysis. "Issues of judicial economy and avoiding inconsistent results in related actions can be decisive, even when most other factors would ordinarily sustain a plaintiff's choice of forum." *JetBlue Airways Corp. v. Helferich Patent Licensing, LLC*, 960 F. Supp. 2d 383, 400 (E.D.N.Y. 2013) (alteration omitted); *see also McGraw-Hill Cos. v. Jones*, 2014 WL 988607, at *10 (S.D.N.Y. Mar. 12, 2014) ("[E]xistence of a related action in the transferee district . . . can be decisive."). The OAG fails to explain why its selection of a forum with *no* connection to the facts at issue outweighs the significant judicial economy that would be achieved through transfer to the Eastern District, where three cases involving the same facts, parties, and issues are or recently were pending.

The OAG does not dispute that Amazon's suit against the OAG raises parallel issues regarding the OAG's enforcement jurisdiction. This alone weighs heavily in favor of transfer to the Eastern District. It is "quite clear that to permit a situation in which two cases involving precisely the same issues are simultaneously pending in different District Courts leads to the wastefulness of time, energy and money that § 1404(a) was designed to prevent." *Ferens v. John Deere Co.*, 494 U.S. 516, 531 (1990) (alterations omitted).

The OAG nevertheless argues against transfer on this ground because Amazon's case is "an improper anticipatory declaratory judgment action" and "is at a preliminary stage." Dkt. 22 at 15. As discussed, the only "improper" action is the OAG's lawsuit filed in hurried response to Amazon's injunctive suit, *see supra* at 3; in any event, the Eastern District should decide such questions under this Court's bright-line rule dictating that the court in which a case was first filed determines the applicability of exceptions to the first-filed rule. Furthermore, as noted, Amazon's suit is at a "preliminary stage" because of Amazon's courtesy in stipulating to extend the OAG's answer deadline—a courtesy that the OAG has repaid by breaching its reciprocal promise to not argue that Amazon's stipulation counts against its argument that its case should proceed first. The OAG should not be rewarded for its breach.

The OAG argues that the lawsuit filed against Amazon by Mr. Smalls "involves different causes of action from the instant case," Dkt. 22 at 15, but how the claim is pleaded is not the operative question. "Identical causes of action need not have been pled in both actions for transfer to be warranted; all that is required is that the two actions hinge upon the same factual nuclei." *JetBlue*, 960 F. Supp. 2d at 400-01. As the OAG recently explained to the Eastern District in unsuccessfully challenging the assignment of Amazon's case to Judge Cogan, the *Smalls* complaint "ask[s] the court to determine the lawfulness of Amazon's health and safety conditions [and] of its discharge of Smalls." Letter, *Amazon.com, Inc. v. Att'y Gen. Letitia James*, No. 1:21-cv-767 (E.D.N.Y Feb. 19, 2021), ECF No. 15.[2] That is the gravamen of the OAG's complaint as well. The OAG thus concedes that Mr. Smalls' claims hinge on the same facts and seek the same

[2] The OAG falsely claims that Amazon "fail[ed] to mention" that the *Smalls* case was pending before Judge Kovner rather than Judge Cogan. Dkt. 22 at 15-16. Amazon expressly identified the presiding judges in its case citations. Moreover, while transfer to Judge Cogan would best promote efficiency given the overlap of parties and claims here with the case before him, transfer to either Judge Cogan or Judge Kovner would prevent inconsistent judgments and promote efficiency.

determination as those pled by the OAG. Transfer to the Eastern District would avoid the wastefulness arising from litigating these substantially similar cases in separate districts.

Although the *Palmer* litigation is now on appeal to the Second Circuit, it would still substantially promote judicial economy to transfer this case to the Eastern District. The OAG's alleged facts, claims, and requested relief significantly overlap with those recently adjudicated by Judge Cogan in *Palmer*—an action in which the OAG participated ostensibly as an *amicus curiae*, with whose plaintiffs the OAG executed a common interest agreement, and the outcome of which the OAG concedes may affect its ability to bring claims under New York Labor Law § 200. *See* Dkt. 18 at 4, 10-13. Should the case be remanded, it also will return to Judge Cogan. The commonality of the two cases is self-evident, and the efficiencies that would result from his consideration of both cases do not disappear because *Palmer* is on appeal.

III. This Court Has The Authority To Transfer This Action Without Resolving The OAG's Motion To Remand.

Although the reasons for transferring this case to the Eastern District are overwhelming, the OAG attempts to avoid the issue altogether by claiming its motion to remand "supersedes and obviates Amazon's motion to transfer." Dkt. 22 at 3. The OAG's arguments in favor of remand are wrong for reasons that Amazon explained in its opposition to the motion to remand. *See* Dkt. 23. But the OAG's remand arguments are irrelevant to the transfer question because this Court clearly has the power to transfer this case even without addressing the OAG's motion to remand.

"Jurisdiction is vital only if the court proposes to issue a judgment on the merits." *Sinochem*, 549 U.S. at 431 (alteration omitted). Accordingly, "a federal court has leeway to choose among threshold grounds for denying audience to a case on the merits." *Id.* Dismissal on *forum non conveniens* grounds, for example, "'den[ies] audience to a case on the merits,'; it is a determination that the merits should be adjudicated elsewhere" and so may be made prior to

resolving questions of subject-matter jurisdiction. *Id.* at 432. The OAG questions the relevance of *forum non conveniens* motions to the dispute here, Dkt. 22 at 5 n.5, but they are, as Amazon explained, the international equivalent of a motion to transfer. *See* Dkt. 18 at 20-21. Indeed, "[f]or the federal court system, Congress has codified the doctrine and has provided for transfer, rather than dismissal, when a sister federal court is the more convenient place for trial of the action." *Sinochem*, 549 U.S. at 430 (citing 28 U.S.C. § 1404(a)).

"[C]ourts may decide a challenge to venue before addressing the challenge to subject-matter jurisdiction in the interests of adjudicative efficiency." *Pablo Star Ltd. v. Welsh Gov't*, 170 F. Supp. 3d 597, 602 (S.D.N.Y. 2016); *cf. McGraw-Hill*, 2014 WL 988607, at *1 (transferring case and declining to address personal jurisdiction). In *Crotona 1967 Corp. v. Vidu Brother Corp.*, for example, the court transferred the case from the Southern District to the Eastern District without ruling on objections to jurisdiction based on failure to join indispensable parties. 2010 WL 5299866, at *1-2. In *Alim NY, LLC v. Nissan North America, Inc.*, the court denied a motion to remand actions to New York State Court and instead dismissed the action pursuant to the first-filed rule, which obviated the need to "make a determination as to whether [the court] has or lacks subject matter jurisdiction." 2017 WL 6611049, at *2-3 (S.D.N.Y. Oct. 23, 2017).

The "critical point" is that resolving Amazon's motion to transfer "does not entail any assumption by the court of substantive law-declaring power." *Sinochem* 549 U.S. at 433. There is also "no genuine risk that the more convenient forum will not take up the case" because "[p]roceedings to resolve the parties' dispute are underway" in the Eastern District. *Id.* at 435. Accordingly, although this Court can and should deny the OAG's motion to remand, it ultimately need not resolve all questions of subject-matter jurisdiction before transferring the case.

CONCLUSION

Amazon respectfully requests that the Court grant its motion to transfer this action.

Dated: March 17, 2021

Respectfully submitted,

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