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June 20, 2012

BY HAND DELIVERY

The Honorable Denise L. Cote
United States District Judge
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street, Room 1610
New York, New York 10007-1312

Re: United States of America v. Apple, Inc., 12-cv-2826 (DLC) (ECF);
In re Electronic Books Antitrust Litigation, 11-md-02293 (DLC) (ECF);
Texas et al. v. Penguin Group (USA) Inc. et al., 12-cv-03394 (DLC) (ECF)

Dear Judge Cote:

We represent defendants Holtzbrinck Publishers, LLC d/b/a Macmillan ("Macmillan") and Verlagsgruppe Georg von Holtzbrinck GmbH ("Verlagsgruppe") in the above-referenced actions. We write briefly to outline the Macmillan and Verlagsgruppe positions concerning the remaining disputes among the parties with respect to the Joint Initial Report (the "Initial Report") and the discovery of Electronically Stored Information ("ESI") as set forth in the Joint Electronic Discovery Submission No. 1 and [Proposed] Order (the "ESI Order"), both filed with the Court on June 15, 2012.

Pretrial Schedule: Macmillan and Verlagsgruppe agree in substance with the position outlined in Apple, Inc.'s June 19, 2012 letter to the Court that the Department of Justice's ("DOJ") action for injunctive relief should be prioritized for discovery and proceed to trial before the Class and State cases. The DOJ action should not be delayed by class certification and damages issues relevant only to the Class and State Cases, and such issues should be litigated only after resolution of the DOJ case on summary judgment or at trial. Macmillan and Verlagsgruppe also are eager to establish on the merits that they have engaged in no price-fixing conspiracy or anticompetitive or collusive activity of any sort, and share Apple's desire for a speedy resolution of the DOJ's complaint. We have proposed a more extended pretrial schedule than either Apple or the plaintiffs, however, for several reasons.

First, Macmillan and Verlagsgruppe are concerned that the discovery schedule proposed by the other parties may be far too aggressive for them to meet given realistic constraints on time and resources. Macmillan is the smallest of the publisher defendants and lacks the litigation resources of Apple or, for that matter, the government. It has limited internal personnel that can be deployed to handle litigation requests. Macmillan already has produced

hundreds of thousands of pages in extensive discovery over the course of a two-year investigation conducted by the DOJ and the States, including the production of e-mails, calendars, phone records, and other documents, detailed responses to interrogatories and information requests, and two depositions of its CEO. That discovery was produced over a far-longer span of time than the schedule that plaintiffs now are proposing, and still it stretched Macmillan's resources to the maximum. The burden of any additional discovery plaintiffs intend to seek is entirely asymmetrical, because plaintiffs have disclosed that they have relatively little data and documents to produce beyond the contents of their investigative files. Unless the Court imposes tight restrictions on the default date range, number of discovery requests of defendants, and number of party depositions, Macmillan and Verlagsgruppe will require a pretrial schedule that permits them to complete such extensive new discovery in a timely and efficient manner.

Second, although the complaints in these actions assert only a purported U.S. conspiracy with respect to an alleged U.S. product market for eBooks, plaintiffs apparently intend to seek substantial additional foreign discovery, including a demand for an initial production of email and other documents produced to foreign regulators relating to allegations of a purported foreign conspiracy relating to foreign product markets. These discovery requests raise serious issues under foreign data privacy laws that restrict the collection, review, and transfer of such ESI in these U.S. actions, and will impose substantial and time-consuming additional compliance burdens on Macmillan and Verlagsgruppe. The non-settling defendants and plaintiffs have agreed to a process for negotiating in good faith a protocol to identify and produce foreign documents and witnesses that would be consistent with defendants' varying obligations under foreign data privacy laws (the settling defendants currently object to this procedure). (*See* Initial Report Ex. B item 3 at 37-39). Macmillan and Verlagsgruppe are concerned that the negotiation of such a protocol and other reasonable steps necessary to comply with foreign law necessarily will impose additional time other discovery burdens, and therefore have proposed a discovery schedule that includes sufficient time to address such concerns.

Finally, Macmillan and Verlagsgruppe object to plaintiffs' proposed schedule to the extent that it would require the parties to incur the burden and expense of preparing the DOJ case for trial before the Court has ruled on any summary judgment motion. Defendants do not believe that they should be required to conduct expensive preparations for trial if there is a pending motion for summary judgment that could limit the number of issues or parties that go to trial. We therefore propose a schedule in which all trial-related preparation dates will begin to run within ten weeks after the Court's decision on any summary judgment motion. (The Penguin defendants have advised us that they agree with Macmillan's positions in this section of this letter.)

Default Date Range for Production: Macmillan and Verlagsgruppe have proposed that the *default* date range for the production of documents and data in these actions should be tied to the date range for the productions that defendants have already made in the DOJ investigation:

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November 15, 2008 through November 15, 2010. (*See* ESI Order ¶ 4.1 at 4.) Macmillan and Verlagsgruppe recognize that there may be requests for production in some categories or for some custodians that would require negotiation of a different date range, and our proposal would permit the negotiation of alternative dates in such circumstances. But there is no justification for imposing a blanket expansion of the *default* dates for all categories of production more than a year earlier than the date of the DOJ production (to November 1, 2007), or more than two years after what has already been collected and produced (to the present), as plaintiffs propose.

Initial Production of Organizational Charts: The Initial Report indicates that Macmillan and Verlagsgruppe object to the scope of plaintiffs' demand for an initial production of all organizational charts and personnel directories over the last 5 years. (*See* Initial Report Ex. B item 4 at 39.) Macmillan and Verlagsgruppe do not believe this issue is a "dispute" requiring the Court's attention at this stage, but rather believe that the issue should and will be resolved as part of the customary discovery meet-and-confer process among the parties.

Macmillan's position is that it already has produced dozens of pages of relevant organizational charts and custodian information in the DOJ and State investigations that are sufficient to show the relevant corporate structure and personnel involved these actions, and will produce additional organizational charts to explain the relevant relationships to any parent entities. Verlagsgruppe maintains no organizational chart in the ordinary course, and objects to the production of a personnel phone directory that it does maintain to the extent that such production would violate applicable foreign privacy laws and regulations and impose unreasonable compliance burdens in connection with such foreign laws. Macmillan has offered to meet and confer with plaintiffs during the discovery process if plaintiffs believe that the documents produced by Macmillan should be further supplemented, and believes the issue should be resolved in this manner.[1]

Respectfully submitted,

Joel M. Mitnick

cc: All counsel of record by electronic mail

[1] As of the date of the ESI Order, Verlagsgruppe was still in the process of collecting information necessary to describe its plans for searching, collecting, and reviewing electronic discovery information subject to its document litigation hold notice for purposes of the ESI Order, but stated that it would use its best efforts to provide such information by June 21, 2012. (ESI Order ¶ 4.3 at 4-5.) Verlagsgruppe will provide the outstanding information to plaintiffs by June 21, and therefore submits that this issue will no longer be a dispute requiring the Court's attention at the June 22, 2012 conference.