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June 20, 2012

Via Hand Delivery

The Honorable Denise L. Cote
United States District Court Judge
Southern District of New York
500 Pearl St., Room 1610
New York, NY 10007-1312

DLC
6/20/12

Re: *In re: Electronic Books Antitrust Litig.*, No. 11-md-02293 (DLC);
United States of America v. Apple, et al., No. 12-cv- 2826 (DLC);
The State of Texas v. Penguin Group (USA), Inc., No. 12-cv- 3394 (DLC)

Dear Judge Cote:

Class Plaintiffs write to summarize their position regarding certain disputes contained in Attachment B to the Joint Initial Report filed by the parties on June 15, 2012.

A. Case Schedule, Attachment B.1-2:

Class Plaintiffs' schedule reflects cooperative discussions with the United States Department of Justice ("DOJ") and the litigating State Attorneys General (collectively "Plaintiffs"). The Plaintiffs' schedule permits all three actions to be ready for trial by September 30, 2013.

The schedule is designed to achieve two overriding goals: (1) maximize efficient and orderly case management; and (2) provide the Court and parties flexibility to determine how the cases should be tried after discovery ends. Respectfully, it makes much sense for the Court to keep all options on the table at this early stage.

Efficient and orderly case management would be undermined by premature bifurcation or staggering of issues and cases; this would likely increase discovery disputes and needlessly delay proceedings. Under Defendants' approach, "class certification discovery" or "damages discovery" would happen sometime after a DOJ-only trial.[1] But Defendants have not identified specific discovery that is clearly separable from liability

[1] Daniel Floyd letter to the Hon. Denise L. Cote dated June 19, 2012, at 3.

evidence, after Plaintiffs have twice asked for specificity. Rather, Defendants acknowledged line drawing is difficult, liability and damage evidence indeed would overlap, and Defendants would have to look at discovery requests item-by-item and decide in the future. Moreover, Plaintiffs have not identified discrete discovery from Defendants that is unlikely to touch upon potential merits arguments, including pricing data which will be central to claims, defenses and damages in all three actions. As a result, bifurcating discovery and trial dates now would be artificial and create the risk for needing duplicative discovery, such as deposition testimony, and potentially cause needless disputes and delay. Thus, choosing a schedule based on these nuanced, abstract distinctions is unwarranted.

Indeed, we have already seen examples where an asymmetrical schedule has made orderly prosecution of the litigation more challenging, due to the stay applicable to Hachette, HarperCollins, and Simon & Schuster. For purposes of the Joint Initial Report and ESI Protocol, these Defendants stated they would only participate voluntarily and should not be treated as party Defendants. This has created early fault lines, and disputes arising therefrom, before the States have even presented the Court with a settlement to consider. Moreover, the total number of settling States is unknown at this time. Nesting in this ambiguity, the Defendants settling with the States have refused to even take a position on the schedule.

Finally, Plaintiffs' schedule provides the Court flexibility to later decide how these cases should be tried. Theories, defenses, documentary evidence, fact witnesses and expert opinions will be honed during the proceedings leading up to trial. This will best position the Court to assess what is fair to all parties and maximize efficiencies. There seems to be little offsetting benefit to adopt Defendants' schedule, especially since Macmillan and Penguin propose that a trial with the DOJ occur several months after Class Plaintiffs propose to be trial ready (including a class certification determination).

B. Status of Defendants Hachette, HarperCollins and Simon & Schuster, Attachment B.6:

The Court upheld Class Plaintiffs' Consolidated Amended Class Action Complaint ("CAC") on May 15, 2012, against each of these Defendants. Class Plaintiffs' CAC alleges these Defendants conspired with Defendants Apple, Macmillan and Penguin. Thus, unless and until there is a final judgment entered that disposes of the pending claims against each Defendant, they remain parties to the litigation – at a minimum in the Class Plaintiffs' case. Thus, all Defendants should be treated as parties at this time, the current stay should not be extended after July 11, and discovery should proceed against all Defendants.

It is premature to open the door to definitional disputes by affording different "non-party" treatment to these Defendants before the terms and scope of any agreements with the States are publicly aired. And in fact the current stay puts these co-conspirators in an anomalous position – exempt from responding to any discovery even though true third parties (non-conspirators) must respond to discovery now. The scope and terms of settlements with the States may eventually impact the proceedings; but we should not create a schism to await how and when each event unfolds.

One example illustrates this point. If fewer than fifty states agree to the settlement terms between Defendants and current litigating states, the Class Plaintiffs' case will proceed against all Defendants. Class Plaintiffs asked Defendants' counsel if they agreed with this proposition, and they were unable to articulate why they would not be parties to the litigation – even if only a single state did not sign on to the litigating states' settlement proposal. And if history is any guide, fifty-state settlements are the exception rather than the rule in these types of actions.

Moreover, there is no justification for reducing the number of interrogatories and requests for admissions for these three Defendants below the limit in the federal rules if they are parties in the class litigation. (Disputes, Attachment B.7-8.)

C. Number of Party and Non-Party Depositions, Attachment B.9-10:

Plaintiffs coordinated their proposal to ensure sufficient available depositions, given the three pending cases. The proposed number of depositions was informed by the DOJ's and the State's pre-filing investigation.

Respectfully,

HAGENS BERMAN SOBOL SHAPIRO LLP

Steve W. Berman
Attorney

Cc: All counsel of record (by e-mail)