ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 20, 2013

The Honorable Denise Cote **Via ECF**
United States District Judge, Southern District of New York
500 Pearl Street, Room 1610
New York, NY 10007

Re: *Texas, et al. v. Penguin Group (USA) Inc., et al.*, No. 12-CV-3394 (DLC); *In re: Electronic Books Antitrust Litig.*, No. 11-md-02293 (DLC)

Dear Judge Cote:

Attached hereto as Exhibit 1 is a chart listing the state statutes pursuant to which the States contend Apple is liable for civil penalties.[1] The States provided Apple with a version of this chart on September 6 and have since met and conferred with Apple regarding our civil penalties claims.

This Court has jurisdiction to enforce state antitrust civil penalty statutes. *See New York v. Hendrickson Bros., Inc.*, 840 F.2d 1065, 1086 (2d Cir. 1988).[2] Apple contends that the Court has not determined that Apple violated the statutes listed on Exhibit 1. Apple is wrong. The Court concluded that Apple violated the state statutes enumerated in the States' Second Amended Complaint "to the extent those laws are congruent with Section 1" of the Sherman Act. *United States v. Apple Inc.*, __ F. Supp. 2d __, 2013 WL 3454986 at *59 (S.D.N.Y. July 10, 2013). Each of the statutes referenced in Exhibit 1 is congruent with Section 1, as set forth in detail in the States' May 6, 2013 Supplemental Memorandum of Law on State Law Claims (ECF No. 195).[3] In its opposition brief, Apple acknowledged that these statutes "parallel" and are "co-extensive" with Section 1, and that the States' claims under these statutes would rise or fall with the Section 1 claims. *See* Apple's May 17 Opposition to State Law Claims Memorandum at 4-5, 9, 11.[4] Apple cannot now escape the Court's holding that it violated state laws.[5]

---

[1] Additionally, 15 U.S.C. § 15e(2) provides that monetary relief recovered by the States as *parens patriae* under 15 U.S.C. § 15c(a)(1) may "be deemed a civil penalty by the Court."

[2] *See also In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.*, 906 F.2d 432, 465 (9th Cir. 1990); *New York v. Long Island Taxi*, 1989 WL 113871 at *1-*2 (E.D.N.Y. Sept. 20, 1989).

[3] The States voluntarily dismissed certain other state law claims, including all such claims arguably not congruent with the Sherman Act, prior to the liability trial. *See* ECF Nos. 227, 228.

[4] Apple's Opposition does not appear to have been filed on ECF, though it was submitted to the Court and served on the States. A copy is attached hereto as Exhibit 2.

[5] To the extent any of the relevant statutes require a finding of willfulness for imposition of a penalty, *see, e.g.*, VA. CODE § 59.1-9.11, the Court's opinion leaves no doubt that Apple acted willfully. *See, e.g.*, *Apple*, 2013 WL 3454986 at *41 (describing Apple as a "knowing and active member" of conspiracy and finding that Apple "not only willingly joined the conspiracy, but also forcefully facilitated it"); *47 (Apple "knowingly and intentionally participated in and facilitated" conspiracy and made a "conscious commitment to join a scheme" to raise prices); *57 (describing Apple's "active encouragement and assistance" and "knowing and active participation" in conspiracy).

Apple's violation of the relevant state statutes having been established, the amount of civil penalties to be imposed thereunder is to be determined by the Court. When state law claims are pending in federal court, federal law governs whether particular issues are to be decided by the court or the jury. *See Simler v. Conner*, 372 U.S. 221, 222 (1963).[6] This is true even where a state statute or constitution would guarantee a jury trial were the case pending in state court. *See Herron v. S. Pac. Co.*, 283 U.S. 91, 94-95 (1931).[7] Under federal law, the assessment of the appropriate amount of civil penalties is a matter for the Court, in its discretion. *See Tull v. United States*, 481 U.S. 412, 426-27 (1987).[8]

In assessing the appropriate amount of civil penalties to be imposed, courts consider factors such as: "(1) the good or bad faith of the defendants; (2) the injury to the public; (3) the defendant's ability to pay; (4) the desire to eliminate the benefits derived by a violation; and (5) the necessity of vindicating the authority of [the enforcement agency]." *United States v. Reader's Digest Ass'n*, 662 F.2d 955, 967 (3d Cir. 1981). The States intend to ask the Court to impose penalties after the May 2014 damages trial.

Apple has indicated that it believes the Court's imposition of civil penalties might have constitutional implications under the Eighth Amendment's Excessive Fines clause or the Due Process clause of the Fourteenth Amendment. While it is difficult to address these contentions in the abstract,[9] the States are confident that the Court will exercise its discretion with all applicable constitutional limitations well in mind. *See United States v. Bajakajian*, 524 U.S. 321, 334 (1998) ("grossly disproportional" fine may violate Eighth Amendment);[10] *St. Louis, I.M. & S. Ry. Co. v. Williams*, 251 U.S. 63, 66-67 (1919) (state statutory penalty violates Due Process only where it is "so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable").[11]

We are available to further address the above, or to address other issues related to the States' civil penalty claims, as the Court sees fit.

---

[6] *See also Germain v. Conn. Nat'l Bank*, 988 F.2d 1323, 1326 (2d Cir. 1993); *Empresa Cubana del Tabaco v. Culbro Corp.*, 123 F. Supp. 2d 203, 211 n.5 (S.D.N.Y. 2000); 9 Charles Alan Wright *et al.*, *Federal Practice & Procedure* § 2303 (3d ed. 2013) ("It now also is clear that federal law determines whether there is a right to a jury trial in a case involving state law that has been brought in federal court, and that in such a circumstance, state law is wholly irrelevant.").

[7] *See also Byrd v. Blue Ridge Elec. Coop., Inc.*, 356 U.S. 525, 538-39 (1958); *Goar v. Compania Peruana de Vapores*, 688 F.2d 417, 423-24 (5th Cir. 1982) (rule "requires trial of certain issues by a judge when state law might allow a jury trial").

[8] *See also United States v. J.B. Williams Co.*, 498 F.2d 414, 438 (2d Cir. 1974); *Hendrickson Bros.*, 840 F.2d at 1086.

[9] *See, e.g., United States v. Meisinger*, 2011 WL 4526082 at *6 (C.D. Cal. Aug. 26, 2011).

[10] That a finding of liability subjects a defendant to treble damages does not render imposition of penalties unconstitutionally excessive. *See, e.g., United States ex rel Tyson v. Amerigroup Ill., Inc.*, 488 F. Supp. 2d 719, 739 (N.D. Ill. 2007).

[11] Apple's counsel has, on several occasions, alluded to the Supreme Court's decisions in *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013) and *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011) as having some bearing on the States' claims for civil penalties. *See, e.g.*, Tr. of Aug. 9, 2013 Conf. at 39-40. While the States do not purport to understand Apple's argument, we note that both of those cases deal with the appropriate standards for certifying a class under Fed. R. Civ. P. 23 and neither deals with statutory civil penalties sought by governmental enforcers.

Respectfully,

Eric Lipman
Assistant Attorney General
Antitrust Section
(512) 463-1579
(512) 320-0975 (fax)
eric.lipman@texasattorneygeneral.gov

cc: All counsel