

**EXHIBIT 13**



**Allegaert Berger & Vogel LLP**

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August 3, 2012

**BY EMAIL**

Bonnie L. Jarrett, Esq.  
Kirkland & Ellis LLP  
601 Lexington Avenue  
New York, New York 10022

J.T. Colby & Co. et al. v. Apple Inc.,  
No. 11-cv-4060 (DLC) (S.D.N.Y.)

Dear Bonnie:

I write in response to your August 1, 2012 letter. Pursuant to the Court's rules, we are happy to meet and confer with you at a mutually agreeable time, either in person or by telephone, on any of the issues which appear in your letter or with regard to any of our responses contained herein. If any issues remain unresolved by our responses below, we request to meet and confer with you and your colleagues in a good faith effort to resolve the following issues.

**Interrogatory Responses**

First, Plaintiffs believe that they have complied fully with their obligations by their Responses and Objections to Apple Inc.'s Second Set of Interrogatories. However, without waiving any objections therein, and in the interest of moving things along, Plaintiffs will agree to supplement their responses to Interrogatory No. 9, to "segregate the information by mark" as a courtesy. That being said, Plaintiffs cannot supply that information by your suggested date of August 8, 2012, due to the work required. Plaintiffs believe that they can provide you with a supplemented response to Request No. 9, by Monday, August 13, 2012. In the event that this becomes untenable, we will endeavor to inform you that additional time is needed prior to that date.

With respect to Requests Nos. 10 and 11, Plaintiffs confirm that their responses thereto set forth all information known to them. Additionally, with respect to Request No. 11, as you noted in your letter, Plaintiffs have objected to this request on several grounds and continue to stand on those objections. Additionally, Plaintiffs note that, pursuant to Rule 33(d)(2) of the Federal Rules of Civil Procedure, Defendant has been supplied with all of Plaintiffs' business records, including those pertaining to advertising. Plaintiffs have no further obligation to supply



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you with information to identify specific documents, particularly given Plaintiffs' standing objections to the underlying request and by virtue of the fact that the burden imposed by this would be the same for Plaintiff as it would be for Defendant.

### **Initial Disclosures**

Plaintiffs confirm that we will serve amended initial disclosures pursuant to Rule 26(a)(1) of the Rules of Civil Procedure, removing Mr. Butler from the list of individuals that we intend to rely upon. However, Plaintiffs are not currently in a position to serve such Amended Initial Disclosures on Monday, August 6, 2012, as your letter proposes. We will serve our amended initial disclosures later next week.

### **Privilege Logs and Excluded Documents**

As we discussed in the meet and confer on July 12, 2012, and as confirmed in your letter of July 13, 2012, Plaintiffs are willing to exchange privilege logs, but have concerns as to the format, date range, and other details thereof. For instance, we noted during our meet and confer that we had a particular issue with your proposed cut-off date of June 15, 2011, in light of actions taken by Apple after that date, including but not limited to, Apple's amendment of the proposed class of goods associated with its alleged "ibooks" trademark. Additionally, the exchange of privilege logs is likely to be affected by the resolution of issues related to the "excluded documents," discussed below. Finally, we also note that Defendant has not yet committed to a date by which it will provide a privilege log, and the outcome of these issues will obviously affect such date. As those issues are still outstanding, despite the parties' agreement to give the matter further thought, we cannot commit to an exchange of privilege logs by your proposed date of August 8, 2012. We are open to meeting, either in person or telephonically, to discuss these issues.

With respect to the "excluded documents," I understand from my colleague Partha Chatteraj that, in your off the record discussions which took place while he was in your offices for depositions in this matter, Partha stated that we would be willing to adhere to the offer of prior counsel to review documents excluded by privilege searches made by your vendor, but would first need the data to review. We have made several requests for the return of Plaintiffs' hard drive, and the data that was excluded from processing following the privilege search. (See Partha P. Chatteraj Letters dated May 31, 2012 and June 13, 2012.) Defendant has refused to return this data each time, instead stating that you "are not required to return any other copies of materials that Plaintiffs have produced." (Bonnie L. Jarrett Letter dated June 11, 2012).

Plaintiffs cannot review what they do not have. You identified the steps taken by your e-discovery vendor, vDiscovery, to process Plaintiffs' hard drive in the document you supplied by email on June 14, 2012, in connection with your turning over the processed data from the hard drive, labeled "Overview" and attached hereto as Exhibit 1. In that document, you



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describe the steps that were taken in preparation for the review of the data contained on the hard drive:

vDiscovery created a forensic copy of a hard drive received from the Kirkland & Ellis and was requested to copy the data to their network and ingest the data in preparation for searching. vDiscovery also performed an analysis on the data set and found Mac OS9 Outlook Express Files which were converted to mbox files using a third-party application, "Emailchemy 11.2.1: Forensic Edition". Since the hard drive is Mac formatted, some files required to be exported from our forensic software, Encase. There were a total of 342 files that were unable to export programmatically and a report listing these files was provided. Additionally, forty archives failed to load during ingestion and were reported as exceptions.

vDiscovery ingested 891 GBs. After ingestion, vDiscovery identified PDFs and Office type files without extracted text and attempted to OCR the documents. Search terms were applied to the non-duplicate data set to identify responsive documents. The responsive documents were then screened for privileged by applying the privileged search terms. The reviewable data set [{"Universe of Documents" LESS all "Privileged"}] that hit on "Responsive" terms] was then converted to TIFF and provided in a Concordance format using the specs listed below.

As is clear from the above, Plaintiffs require the actual "excluded documents" in order to review them. These documents have been formatted into a file type suitable for forensic searching, OCR has been applied, and searches for privileged terms have been done. That the "excluded documents" have not yet been "converted to TIFF and provided in a Concordance format" does not negate the fact that these documents have undergone roughly 90% of the process necessary to be searched for purposes of responsiveness. As such, please provide us with the "responsive documents" marked privileged as a result of being "screened for privilege" in the manner described above and Plaintiffs will work diligently to review those documents.

### **Plaintiffs' Document Production**

With respect to the files listed on Exhibit A of your letter, Plaintiffs note that the vast majority of these files appear to be artifacts created by Mac OS X when folders are opened (e.g. the file listed on pg. 12 as 20120720\_Plaintiffs\_Productions\20120720\_Plaintiffs\_Productions\.Spotlight-V100\Store-V2\C16275D4-E8E3-4083-925A-379C6C40B726\tmp.SnowLeopard (emphasis added)).<sup>1</sup> As

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<sup>1</sup> Additionally, I note that, with regard to the thumb drive that was produced in native format during Mr. Colby's July 20, 2012 deposition, you appear to have altered the file structure and directory from that which appeared on the original thumb



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you know from your inspection of Plaintiffs' premises, both in Manhattan and on Shelter Island, Plaintiffs' business is primarily done on Apple computers. Because Plaintiffs provided Defendant with a copy of their entire hard drive for inspection in order to fulfill their discovery obligations, and because the thumb drive provided to Defendant on July 20, 2012, was an update thereto, certain elements of the operating system used by Plaintiffs' computers were necessarily included. Though it is unlikely to lead to any discoverable information, to the extent that you feel you need access to these files, it is likely that your client could be instructive in this matter.

As to other files listed on Exhibit A of your letter which were created by Plaintiffs, those files can be opened using the programs Microsoft Word, Microsoft Excel, Quark, Adobe Acrobat, or Adobe InDesign. We are informed that because these files were created using Apple products, you may have some issues opening the files if you are using a Windows PC. From our own experience, I can inform you that it may be helpful to add a Windows file extension in the file name (e.g., adding .xls, .doc, or .pdf), as this will solve most issues you have with opening the files. If this proves to be too burdensome, however, your client may be helpful in procuring an Apple computer for you to view those files.

With regard to your note that you are unable to locate documents within Plaintiffs' production sufficient to identify how many books are sold through "brick-and-mortar stores" as opposed to online retailers, notwithstanding Mr. Colby's identification during the 30(b)(6) deposition on July 18, 2012, of the TR.Trans files as files containing such information, I once again note that we have provided you with all of Plaintiffs' business records in the manner in which they have been kept. In any event, though Mr. Colby testified truthfully and correctly that that information is contained in the TR.Trans files, we understand that the TR.Trans files draw information related to sales through "brick-and-mortar stores" from two spreadsheets which may present the information in a manner more suited to your needs. Those two spreadsheets, which appear on Exhibit A at page 8 of your letter, have file names 20120720\_Plaintiffs\_Productions\20120720\_Plaintiffs\_Productions\\_NBNTTransFile.xlscomplete and 20120720\_Plaintiffs\_Productions\20120720\_Plaintiffs\_Productions\\_NBNTTransFile.xlsx. I note that I was able to open these two files on my PC by changing the file extension to .xls (e.g., 20120720\_Plaintiffs\_Productions\20120720\_Plaintiffs\_Productions\\_NBNTTransFile.xls). We are informed that columns S and T contain information as to copies shipped to "brick-and-mortar stores" by store name and state.

As to any other documents you are having trouble locating, without waiving any rights or objections we may have, we will endeavor to respond to any further inquiries to the extent feasible, and we welcome the opportunity to speak with you, on the phone or in person, at a mutually convenient time, in order to resolve any remaining issues.

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drive. For this same reason, we are also unable to confirm that the files we refer to are the same as those you list in Exhibit A.



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Very truly yours,

A handwritten signature in black ink, appearing to read 'David A. Shaiman', with a long horizontal flourish extending to the right.

David A. Shaiman

cc: All counsel of record (by email)

**EXHIBIT 1**

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**Metadata Fields:** See Excel titled "Field List.xlsx"

**Processing Time Zone:** EST

**Starting Number:** COLBYHD0000001

**Volume Name:** COLBYHD001

**E-mail Format:** HTM/MHTML

**OLE Extraction:** No (Only extract attachments to emails)

**General Tiff Conversion:**

- Black and white
- Placeholder images for all files that cannot be converted to TIFF will read, "See Native File"
  - An exception report will be provided for all files that cannot be converted to TIFF. The report will have the following fields:
    - BEGDOC
    - FILENAME
    - FOLDERPATH
    - DOCUMENT EXTENSION
    - FILESIZE
    - EXCEPTION REASON (i.e. corrupted file, password protected file, etc.)

**Excel/Spreadsheet/DBs Tiff Conversion:**

Provide in native format

**Power Point Tiff Conversion:**

- Print Slides – full page in landscape

**Word Tiff Conversion:**

- Field Replacement (date/time fields and filename fields)



- Show field codes

**\*\*FINAL VERSION ONLY\*\***

**Final Deliverable:**

- Single page, Black and white TIFFs
- Document level text files
- Native Files (for all documents)
- Concordance v.8.26 Database
- OPT image load file