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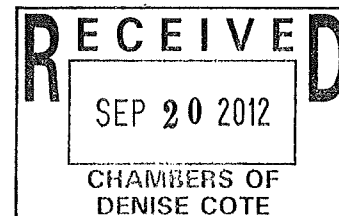
HAGENS BERMAN

September 20, 2012

Via E-mail

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

SBF  
 9/20/12



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 in response to Penguin's letter of September 19, 2012. Penguin's request to delay class certification is unwarranted. Penguin made no effort to confer with Class Plaintiffs or the Litigating States before contacting the Court. Had Penguin done so, it may not have caused the Court to expend resources on this issue.

Penguin is not a party to the State Plaintiffs' settlements with HarperCollins, Hachette, and Simon & Schuster. Potential class members are not releasing claims against Penguin, Macmillan, or Apple by those settlements. Final approval of the State Plaintiffs' settlements will therefore have *res judicata* effect only as to claims against the *settling defendants*.

Penguin's assertion that the settlements limit the scope of the "potential, certifiable class" *as to Penguin* is wrong. Critically, the settlements were executed pursuant to a "settlement complaint" that included 17 states that presently have not filed any claims whatsoever against Penguin, Macmillan and Apple. Thus, consumers in these 17 states (and 23 total jurisdictions) are represented by the Class Plaintiffs only – not by their states' attorney generals – going forward as to the non-settling defendants.<sup>1</sup> In fact, as Penguin should know, counsel for the State of Texas clarified this exact point in immediate response to the Court's comment quoted in Penguin's letter.<sup>2</sup> Nothing about the representation of these class members or any others against Penguin is contingent on the State Plaintiffs' settlements.

<sup>1</sup> The Court is aware that Minnesota's Attorney General did not join the settlement. As such, for those class members residing in Minnesota, the class claims include the settling defendants unless resolved prior to class certification.

<sup>2</sup> See Sept. 10, 2012 Hearing Transcript at 22:17-20, attached hereto as Exhibit A.

One further thing to note is that Class Plaintiffs are diligently working to determine the exact composition of the class they will seek to certify. Importantly in this regard, the Court should know that Class Plaintiffs and the Litigating States have been in constructive discussions about these issues for several months, very mindful of their duties to the constituencies they represent in this matter.<sup>3</sup>

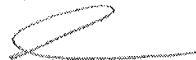
Thus, Penguin's basis to delay class certification does not warrant changing the schedule: class certification can proceed while the settlement proceedings run their course. Indeed, Class Plaintiffs have been aggressively pursuing massive amounts of transactional market data from parties and numerous third parties to adhere to the certification schedule the Court ordered. Not once has Penguin – or any Defendant – suggested delaying the certification schedule during the expenditure of this time and effort.

Finally, Penguin refers to a letter sent by Class Plaintiffs on September 13, 2012.<sup>4</sup> As the Court will see from this letter, Class Plaintiffs seek to streamline class certification discovery by asking whether any Defendant intends to raise a defense based on *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). If Defendants do not, Class Counsel would not move for class certification with all 25 named plaintiffs in the Consolidated Amended Class Action Complaint. Many of these plaintiffs were included to support alternative *indirect purchaser claim theories* to guard against the remote possibility that Defendants would make an *Illinois Brick* argument – which no Defendant has, to date. So, in stark contrast to Penguin's assertion that the class representatives are "a moving target," Class Counsel is focusing its aim on the bull's eye – seeking to lock in the real issues in dispute, avoiding needless waste of time and money, and moving for class certification with a small number of class representatives. This of course makes sense legally and for efficiency. Unfortunately, instead of jointly working to cut out unnecessary litigation, instead to support its desired delay Penguin miscasts Class Plaintiffs' efforts. Regardless, this issue should not impact the class certification schedule.

Respectfully, Penguin's request should be denied.

Respectfully,

HAGENS BERMAN SOBOL SHAPIRO LLP



Steve W. Berman

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

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<sup>3</sup> Penguin's concern over the impact of opt-outs is a red herring. There is no reason to expect a significant number of opt-outs at this time. Moreover, any issues relating to treatment of opt-outs is an issue that can, and should, be worked out between the Class Counsel and the Litigating States.

<sup>4</sup> See Jeff Friedman's September 3, 2012 Letter to Defense Counsel, attached hereto as Exhibit B.

# **EXHIBIT A**

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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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IN RE: ELECTRONIC BOOKS  
ANTITRUST LITIGATION,

11 MD 2293 (DLC)

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THE STATE OF TEXAS, et al.,  
Plaintiffs,

v. 12 CV 3394 (DLC)

PENGUIN GROUP (USA) INC., et  
al.,  
Defendants.

-----x

THE STATE OF TEXAS, et al.,  
Plaintiffs,

v. 12 CV 6625 (DLC)

HACHETTE BOOK GROUP INC., et  
al.,  
Defendants.

-----x

New York, N.Y.  
September 10, 2012  
4:00 p.m.

Before:

HON. DENISE COTE,  
District Judge

C9A3EBOC

1 they represent the citizens, the natural persons in Minnesota.  
2 And potentially whoever opts out of this settlement, I guess.  
3 And if there was notice in the parens patriae case before the  
4 class notice went out or at the same time, I'm just not sure.  
5 I guess --

6 MS. FISHER: Your Honor --

7 THE COURT: I'm speaking out loud here, and I don't  
8 really want counsel to just sort of speculate with me on the  
9 record. What I'd like you to do is think about these issues,  
10 discuss them with each other, and get back to me with respect  
11 to the sequencing of all this.

12 MS. FISHER: Your Honor, if I might, this is Rebecca  
13 Fisher again. I just need to clarify when we're talking about  
14 sending notice and what notice. Of course under the settlement  
15 complaint and the settlement we are asking for approval, that's  
16 notice for the settlement and opting in and opting out.

17 Going forward with the litigation, we have 54  
18 entities, essentially everybody in Minnesota in the settlement  
19 case. Going forward with the litigation, we have 33 entities  
20 only at this moment.

21 THE COURT: Oh.

22 MS. FISHER: So we are represented by attorneys  
23 general. And somebody needs to correct me here, but I am  
24 unaware that we need to send notice of other representation in  
25 that matter. The class certification of course needs to be

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

# **EXHIBIT B**


**HAGENS BERMAN**

Jeff Friedman  
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September 13, 2012

*Via E-mail*

<p>Walter B. Stuart IV          walter.stuart@freshfields.com          FRESHFIELDS BRUCKHAUS          DERINGER          601 Lexington Avenue          New York, NY 10022</p> <p><i>Counsel for Hachette Book Group, Inc.          and Hachette Digital, Inc.</i></p>	<p>Shepard Goldfein          shepard.goldfein@skadden.com          SKADDEN, ARPS, SLATE, MEAGHER          &amp; FLOM LLP          Four Times Square          New York, NY 10036</p> <p><i>Counsel for HarperCollins          Publishers, L.L.C.</i></p>
<p>Daniel S. Floyd          dfloyd@gibsondunn.com          GIBSON DUNN &amp; CRUTCHER LLP          333 South Grand Avenue          Los Angeles, CA 90071-3197</p> <p><i>Counsel for Apple Inc.</i></p>	<p>Daniel McInnis          dmcinnis@akingump.com          AKIN GUMP STRAUSS HAUER &amp;          FELD LLP          1333 New Hampshire Avenue, N.W.          Washington, DC 20036-1564</p> <p><i>Counsel for Penguin Group (USA) Inc.</i></p>
<p>James W. Quinn          james.quinn@weil.com          WEIL GOTSHAL &amp; MANGES LLP          767 Fifth Avenue          New York, NY 10153</p> <p>Helene D. Jaffe          hjaffe@proskauer.com          PROSKAUER ROSE LLP          Eleven Times Square          New York, NY 10153</p>	<p>Joel M. Mitnick          jmitnick@sidley.com          SIDLEY AUSTIN LLP          787 Seventh Avenue          New York, NY 10019</p> <p><i>Counsel for Holtzbrinck Publishers LLC          d/b/a Macmillan</i></p>

Defense Counsel  
September 13, 2012  
Page 2

Martha E. Gifford giffordlaw@mac.com LAW OFFICE OF MARTHA E. GIFFORD 137 Montague Street #220 Brooklyn, New York 11201  <i>Counsel for Simon &amp; Schuster, Inc. and Simon &amp; Schuster Digital Sales, Inc.</i>	
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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 Counsel:

Class Plaintiffs' operative complaint currently names 25 individual plaintiffs. Reducing this number would simplify the upcoming class certification process and streamline matters for all parties. However, if Defendants intend to assert that consumers are indirect purchasers who are barred from suing the publishers *under Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), then Class Plaintiffs may continue to include all 25 named plaintiffs, in case of the (exceedingly unlikely) eventuality that we must proceed under state antitrust statutes.

From Defendants' arguments and pleadings to date – in particular, your answers and asserted defenses – it appears that no Defendant is likely to raise an *Illinois Brick* argument. We would like to confirm that this is correct. Class Plaintiffs would accept a representation from counsel for each Defendant that they do not intend to argue that *Illinois Brick* bars consumers from suing them here.

Alternatively, we would serve a contention interrogatory to each Defendant to confirm this position; however, this would require your agreement to waive the time limitation of paragraph 6(f) of the Joint Initial Report as revised on July 6, 2012.

We would like to reach agreement on an efficient approach so as to not waste time and money. If we are unable, Class Plaintiffs will seek relief from the Court for the limited purpose of serving a contention interrogatory to each Defendant on this topic.



Defense Counsel  
September 13, 2012  
Page 3

We would appreciate your response by Wednesday, September 19, 2012.

Regards,

HAGENS BERMAN SOBOL SHAPIRO LLP

/s/

Jeff D. Friedman  
Attorney

Cc: All other Defense Counsel  
Gov't Counsel  
Steve Berman  
Kit A. Pierson