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Honorable Denise L. Cote
United States District Judge
United States Courthouse
500 Pearl Street, Room 1610
New York, New York 10007

WRITER'S E-MAIL ADDRESS
afrackman@omm.com

Re: United States v. Apple Inc., et al., 12-cv-02826 (DLC)

also file in 11-mc-351 (DLC)

Dear Judge Cote:

also file in 11-md-2293 (DLC)

As the Court requested at the October 9, 2012 conference, Apple Inc. (on behalf of all Defendants) sets forth its position on the remaining issues arising from Defendants' July 6 Subpoena to Amazon. Apple had hoped to submit a joint letter with Amazon, but understands that Amazon has submitted its own letter to the Court, so Apple has set forth its position below.

Custodians and Search Terms

Amazon has agreed to run 58 of the 111 search terms proposed by Apple against five of the 13 custodians proposed by Apple (all of whom were custodians for the CID production).¹ Of the remaining 53 search terms, Apple now agrees to narrow its request substantially and seeks only 11 additional terms (attached) that it believes are central to the issues in this case. And of the eight additional custodians that Apple originally requested, Apple now seeks only three.

The three additional custodians sought by Apple are:

- Jeff Bezos (CEO): Well over 10 percent of the emails in Amazon's CID production were sent to or from Mr. Bezos. That is not a surprise given the importance of the issues relevant to this case—pricing at least some books below cost, penalizing principal suppliers and raising issues about their conduct with the DOJ—to Amazon.

¹ They are: (1) Russell Grandinetti (VP, Kindle Content), (2) Steve Kessel (SVP, Worldwide Digital Media), (3) John Lange (Associate General Counsel, Kindle Content), (4) David Naggar (VP, Kindle Content), and (5) Laura Porco (Director, Kindle Books).

† In association with Tumbuan & Partners

- Ian Freed (VP, Kindle Division): Mr. Freed is a Vice President in Amazon's Kindle Division, who was involved in eBook negotiations with publishers. Given Kindle's centrality to this case, Apple contends that Mr. Freed's ESI should be searched for the entire relevant period.
- Aaron McGrath (VP, Associate General Counsel): Mr. McGrath is listed on the DOJ's Rule 26 disclosure as an individual likely to have discoverable information that the DOJ may use to support its claims. Apple believes that it is therefore entitled to a search of Mr. McGrath's electronic documents. However, to avoid undue burden, Apple would accept a sworn proffer from Amazon as to what he discussed with the DOJ, what his relevant testimony would be in this lawsuit, and confirming that he had nothing else to do with the matters relevant to the lawsuit. Apple also requests production of any documents from his files that were provided to the DOJ. With such a response, Apple would forego any ESI discovery from Mr. McGrath at this time, although it reserves its right to seek additional discovery following his deposition.

Non-ESI Requests

In lieu of the balance of Apple's suggested ESI searches, Apple will issue a 30(b)(6) subpoena to Amazon for testimony to help Apple identify specific additional documents for production. In the interim, Amazon should produce the following categories of documents, all of which were within the scope of the subpoena:

1. Strategic plans, competitive assessments, market assessments, studies, and Board materials and presentations regarding eBooks and specifically the agency model.
2. Documents concerning Amazon's involvement in regulatory investigations relating to eBooks, eReaders, print books, book publishing, or Apple, including communications with regulators.
3. Documents about this lawsuit, including correspondence with plaintiffs' counsel.
4. Full sets of the following internal reports for eBooks, physical Books, and Kindle (some of these reports, but we believe not complete sets, were produced to DOJ):
 - Annual Pricing Strategy
 - Quarterly Reviews
 - Quarterly Pricing Reviews
 - OP1s and OP2s (regularly-prepared strategy documents)
 - Monthly Cost Of Goods Sold ("COGS") Physical and Kindle
 - Monthly Business Reviews
 - Kindle Content Monthly Reports
 - Weekly Kindle Digital Business Reviews
 - Weekly Kindle Selection Reports

- Daily U.S. Agency Sales eBook Reports
- Kindle Cohort Analysis
- Glance Views, GVC, GVC Onsite, and Onsite TTM Share Reports (reports on eBook metrics that Amazon tracks)

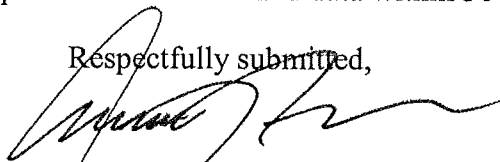
Scope

Amazon also has refused to produce any documents in any business line, including eBooks, that it deems to be “highly sensitive” or to contain “forward-looking strategy.” Apple contends that this is not an appropriate limitation, as there is a protective order in this case with an Attorney’s Eyes Only category, which should alleviate any valid confidentiality concerns.

Timing

In an effort to facilitate compromise, reduce the burden on the Court of adjudicating these outstanding issues, and to reduce the burden on Amazon, Apple has agreed to dramatically limit the scope of its proposed ESI. Given the upcoming trial date and the fact that Apple has been negotiating the scope of this subpoena with Amazon for over three months, Apple is requesting that the Court order Amazon to produce responsive documents and data within 30 days.

Respectfully submitted,



Andrew J. Frackman
of O'MELVENY & MYERS LLP

Enclosure

cc: Michael Kipling, Esq.,
Counsel of Record (via electronic mail)