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October 16, 2012

*MBF*  
*10/26/12*

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

**Re:** *In re: Electronic Books Antitrust Litigation, No. 11-md-02293-DLC (S.D.N.Y)*  
also file in 11-mc-351 (DLC)

Dear Judge Cote:

also file in 12-cv-2826 (DLC)

This letter is submitted on behalf of Amazon.com, Inc. ("Amazon") in response to Apple's October 15, 2012 letter to the Court. Amazon responded to Apple's position regarding additional custodians and search terms in its own October 15 letter report to the Court. This letter responds to the new matters raised in Apple's letter.

**Scope:** Amazon's nonpublic strategies and plans have little probative value as to the conduct of the parties or their state of mind and Amazon should not be compelled to disclose such information, particularly to its competitors. *Arista Records LLC v. Lime Group*, 2011 U.S. Dist. LEXIS 22426, at \*6 (W.D. Wash. 2011); *U.S. v. CBS, Inc.*, 103 F.R.D. 365, 368 (C.D. Cal. 1984). The Protective Order in this case is well crafted, but there are practical limits to any such order. Outside counsel cannot use highly confidential information without consulting with their clients; that process will inevitably reveal Amazon's competitively sensitive information. The risk of leakage increases when experts rely on confidential information in their reports and testimony. To the extent such information is used in public hearings or at trial, the risk of disclosure increases dramatically; as a nonparty, Amazon will not be present at those hearings to protect its interests. *See In re eBay Seller Antitrust Litigation*, 2009 U.S. Dist. LEXIS 123714, at \*\*10-11 (W.D. Wash. 2009).

In response to the CIDs, Amazon already has produced strategic documents relating to ebooks. More recent strategic planning documents (including but not limited to the Kindle OP1 planning document prepared in late 2011) are especially sensitive for obvious reasons; even to the extent they discuss products or strategies that Amazon abandoned or that have recently become public, they may be "extrapolated and interpreted to reveal [Amazon's] current strategy[.]" *Zenith Radio Corp. v. Matsushita Elec.*, 529 F. Supp. 866, 891 (E.D. Pa. 1981).

Apple cannot show a substantial need for Amazon's nonpublic planning documents that outweighs Amazon's interests. *Gonzalez v. Google, Inc.*, 234 F.R.D. 674, 684 (N.D. Cal. 2006).

**Timing:** Given the scope of Apple's subpoena (including the enormous volume of data demanded) and the need to respond simultaneously to Plaintiffs' subpoena, it is simply not possible to complete the production in 30 days. Amazon has been working diligently to gather and prepare potentially responsive material for review and will begin production on a rolling basis within the next week or two. Amazon will continue to make all reasonable efforts to expedite its production but given the scope and extreme sensitivity of the materials demanded, the production (including data) cannot be substantially completed prior to the end of this year.

**"Targeted" Requests:** The Court suggested *targeted* document requests in lieu of burdensome ESI searches, but only one of Apple's requests (No. 3) is actually targeted and two of them seek to intrude into Amazon's forward-looking strategies.

1. Strategic plans/market assessments regarding eBooks: Amazon's key planning and strategy documents include Monthly Business Reviews and OP1s for Kindle, which are among the most sensitive documents in the Company. Distribution within Amazon is limited on a need-to-know basis. Historical versions of these documents were previously produced to the government (designated as Highly Confidential); Amazon objects to compelled production of more recent versions to its competitors, notwithstanding the Protective Order.

2. Documents regarding other investigations: Documents relating to governmental investigations other than the federal and state efforts that led to this litigation are irrelevant; it is unreasonable to demand that Amazon search its files for such documents. Non-privileged documents regarding the investigations that led to this lawsuit have been produced.

3. Documents about this lawsuit: Correspondence between Amazon and the DOJ or State AGs has been produced. We are not aware of any correspondence involving class counsel other than correspondence between Amazon's outside counsel and class counsel, which we understand Apple will receive from class counsel. Any internal communications on this topic are irrelevant and, in any event, are certain to be privileged.

4. "Full sets" of various reports for ebooks, physical books, Kindle: Some of these documents (OP1s, Monthly Business Reviews, COGS reports) reveal highly sensitive competitive information and Amazon objects to producing that information to its competitors, as discussed above. Many of the other reports listed are circulated frequently within the Company and are quite similar from one day to the next. To the extent the latter reports are captured by the ESI search that Amazon has agreed to conduct, it will produce them. But it is unduly burdensome to require Amazon to locate every single such report created over a five-year time period. The reports for *physical books* are irrelevant and burdensome to gather. Finally, such reports regarding devices implicate the trade secret issues addressed above.

The Honorable Denise L. Cote

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October 16, 2012

Sincerely,

KIPLING LAW GROUP PLLC

A handwritten signature in black ink, reading "Michael E. Kipling". The signature is fluid and cursive, with the first name "Michael" and last name "Kipling" clearly legible, and "E." in the middle.

Michael E. Kipling  
Counsel for Nonparty Amazon.com, Inc.

cc: Counsel for Apple, Inc.