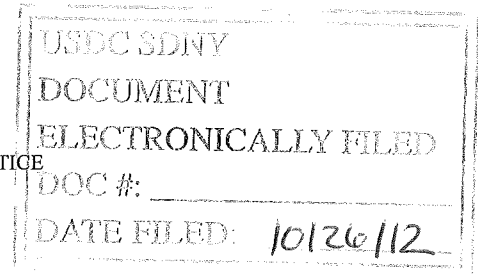


U.S. DEPARTMENT OF JUSTICE
Antitrust Division

MARK W. RYAN
Director of Litigation



950 Pennsylvania Avenue, N.W.
Washington, DC 20530-0001
(202) 532-4753 / (202) 514-6543 (fax)
E-mail: mark.w.ryan@usdoj.gov

S&F

October 17, 2012

10/26/12

The Honorable Denise L. Cote
United States District Judge
Daniel P. Moynihan U.S. Courthouse
New York, NY 10007-1312

Re: United States v. Apple, Inc., et al., No. 12-cv-2826 (DLC)
also file in 12-cv-3394 (DLC)

Dear Judge Cote: also file in 11-md-2293 (DLC)

In light of serious delays with Defendants' productions that have impacted and continue to impact the United States' ability to conduct depositions and prepare its expert reports and case, the United States respectfully requests that the close of discovery be extended for three months, and that all other dates, including those relating to experts and trial, be adjusted accordingly.

On September 21, the United States wrote to bring to the Court's attention a number of problems with respect to Apple's document production, and the effect that Apple's production delays were having on the discovery schedule. While we are pleased that the technical disputes related to Apple's production now appear to have been resolved, unfortunately the larger scheduling issue remains. And while the United States' September 21 letter focused only on Apple's production deficiencies and delays, recent conversations have made clear that the litigating publishers' timetables for productions are equally troubling. Indeed, beyond a sample set, as of today Penguin has failed to make any production in response to the document requests the United States served on May 31, while Macmillan's initial production of documents arrived only yesterday. Even more concerning, Penguin has indicated that it likely will not complete production until the end of November, and Macmillan requires at least a few more weeks before it will be in a position to estimate when its document production will be completed. The absence of documents has made taking depositions unfeasible — especially given the practical difficulties with having individuals sit for multiple depositions. Not a single deposition has yet been taken, and the only ones that reasonably can be scheduled now are a small number of Rule 30(b)(6) depositions on isolated topics that do not require extensive documents. These circumstances have compromised our ability to conduct full discovery in the allotted time, and have left us with no choice but to reluctantly make the instant request.

Initial document requests were served on Defendants almost five months ago — on Apple on May 21 and on Penguin and Macmillan on May 31. As of today, productions are only beginning

to trickle in. (We estimate we have received less than ten percent of the documents we anticipate Defendants producing.) Though the intervening months have, as noted in our prior letter, been replete with dragged out negotiations and assertions of tenuous positions, at this point the details truly are beside the point. Even with most issues now largely resolved, the ability to meet the current schedule has completely been compromised.

Recently, certain Defendants have asserted their production delays were caused, at least in part, by the breadth of the document requests, custodians, and search terms requested by the United States. They also have argued that they should not be subject to significant discovery given their prior productions in the investigations. Respectfully, those complaints ring hollow. Throughout the negotiation process the United States worked diligently to address any raised concern that a proposed custodian or search term was netting nonresponsive materials. At no point did any Defendant bring to the Court a dispute regarding the breadth of production. Rather, Defendants, after negotiations, agreed almost entirely with Plaintiffs on custodians and search terms, and only now, when confronted with their delays, are making these arguments to the Court.

We do not dispute that the parties are now working diligently to complete production in a timely fashion, and that they are investing, in some instances, sizeable resources to accomplish the goal. However, even enormous effort at this juncture cannot undo the damage caused by months of inertia. With an understood commencement of fact depositions in mid-September, the anticipation was that significant document production would be completed by the end of August. Instead, as of mid-October, document production is just beginning, and we estimate that it will not be until sometime in December that fact depositions will be able to begin in earnest. And, while the United States believes Defendants' actions constitute *per se* violations of the antitrust laws, we are mindful that at the moment we must respond to contrary assertions and present a rule of reason case as well, and be prepared to counter any justifications Defendants might seek to introduce to justify their collusive actions. Unfortunately, there simply is not enough time to take the necessary discovery — especially with initial expert reports currently due January 25.¹

Accordingly, the United States respectfully requests that the Court extend the cutoff for fact and expert discovery until June 21, 2013, and adjust all other remaining dates (and all dates relating to expert discovery, including reports) accordingly. At the same time, the United States requests that Defendants be ordered to continue production on the timetables they already have agreed to. In accordance with the Court's Individual Practices for Civil Cases, the United States notes that no previous requests to extend the schedule have been made. The United States also notes that it contacted all parties to ascertain their positions: all Plaintiffs consent to this proposed extension; Apple opposes the request; Macmillan does not take a position on the matter; and Penguin is "taking the United States' request under advisement."² As we recognize that parties may wish time to submit responses to this letter, the United States is prepared to discuss this issue in detail either during the scheduled October 19 conference call or at any other time the Court chooses.

¹ The United States also notes that a large volume of sales data to be analyzed by the experts, including data from third parties Barnes & Noble, Amazon, Walmart, and Costco, has not yet been completely produced and, in certain cases, may not be produced in its entirety for several months.

² At the Court's request, the United States is prepared to submit a proposed schedule reflecting the requested extension.

Respectfully submitted,

/s/ Mark W. Ryan
Mark W. Ryan

cc: All counsel of record