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October 25, 2012

VIA EMAIL

The Honorable Denise L. Cote
United States District Judge
Daniel Patrick Moynihan Courthouse
500 Pearl Street
New York, NY 10007-1312

Re: *United States v. Apple, Inc.*, et al., No. 12 Civ. 2826 (DLC)
also file in 12-cv-3394 (DLC)
also file in 11-md-2293 (DLC)

Dear Judge Cote:

We respectfully submit this letter on behalf of the non-settling parties in the above-captioned case pursuant to Your Honor's October 19, 2012 Order (the "Order") directing those parties to "confer with respect to a deposition schedule that would permit the June 3 trial to proceed as scheduled" and to "provide a joint submission reflecting this proposed schedule" by noon today.

The parties met and conferred twice yesterday, and discussed, among other issues, a timetable for Apple, Penguin, and Macmillan's (the "Non-Settling Defendants") remaining document productions; the number of depositions anticipated by each side; and the impact of class certification briefing in the putative class action on the discovery schedule in this matter. During their meet-and-confer conversations, the parties agreed to request a slight modification in the expert discovery schedule, as set forth below.

Despite meeting and conferring in good faith, the parties have not agreed upon a schedule for depositions. The Government and the Non-Settling Defendants' respective positions, as well as those of the Attorneys General and the putative Class, are set forth below in separate statements. These statements were prepared independently and are intended to reflect each side's response to the other's positions, as expressed during the meet-and-confer sessions and through further e-mail communications this morning.

The Government's Statement

The United States respectfully maintains that, for the reasons set forth in its October 17 letter to the Court, the current schedule for fact and expert discovery should be extended for three months and that all related deadlines be adjusted accordingly. We remain surprised

and disappointed that it was not until after we initially wrote the Court on September 21 that the Non-Settling Defendants were willing to produce any documents in response to our May requests, or provide timetables for production. We are equally troubled that as of today, the Non-Settling Defendants still have not produced even the majority of their responsive documents. With a June trial date, the Non-Settling Defendants will have succeeded in significantly shortening the discovery schedule and, in a number of respects, putting this case in line with the schedule originally proposed by Apple.[1]

That said, as the Court instructed, the parties have conferred with respect to a deposition schedule that would permit the June 3 trial to proceed as scheduled.

Document Production

During yesterday's meet and confer sessions, the Non-Settling Defendants reported as follows with respect to their document productions in response to the United States' May requests:

- Apple believes it is approximately 50-60 percent done with its production and will substantially complete that production by the end of October;

- Macmillan recently began its production, anticipates making another production shortly and believes that it will complete its production by the end of November; and

- Penguin, which to date has not made any production beyond a sample production, will make an initial production by the end of October that will include all responsive documents from eleven custodians of primary importance. Penguin did not provide any timetable for the completion of its production.

In order to meet a June 3 schedule, it is critical that the above timetables (and all dates set forth in the current schedule, including those relating to privilege logs) are met and that the productions themselves are complete.[2] In order to speed production along, the

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[1] The Plaintiff States do not oppose the request for a three-month extension of the schedule. Nonetheless, should they be placed on the same trial track, the Plaintiff States will be prepared to proceed to trial on June 3, 2013, subject to the schedule modifications and other conditions outlined below.

[2] The United States notes that Penguin has informed us that the agreed-upon search terms have only netted 5 percent responsive documents. The United States finds that assertion curious (and potentially troubling), given that we understand Apple's agreed-upon search terms have netted approximately 25-30 percent responsive documents.

United States will drop some of the previously agreed-upon custodians, and is currently discussing the specifics with the Non-Settling Defendants.

Depositions

The Non-Settling Defendants stated during the meet-and-confer session that they reasonably anticipate taking approximately 20-25 total depositions. The United States informed the Non-Settling Defendants that, until it has the opportunity to review their documents, it was not prepared to limit the number of depositions to which it is entitled under the Court's existing Scheduling Order. Nonetheless, the United States and Non-Settling Defendants have, this morning, exchanged initial lists of potential deponents. Our current best estimate is that all Plaintiffs will need 65-70 depositions. However, based on the exchanged lists, it appears there will be significant overlap between the two sides.

The parties appear to agree that meeting the June trial date likely will require that depositions be double- or even triple-tracked. In addition, the United States believes that in order to maintain the current schedule, it will need to begin depositions in the next few weeks — even before it has received or reviewed the Non-Settling Defendants' document productions. Accordingly, the United States wishes to reserve the right to re-depose certain witnesses if documents important to a witness's testimony are discovered after a deposition. We hope that no such requests will be necessary, but given that Non-Settling Defendants expressed that they likely would not agree to such an accommodation absent Court Order, we feel that we need to raise the issue now and reserve our rights to seek relief from the Court if necessary.

Expert Discovery Schedule

The parties have agreed to a requested modification to the schedule relating to expert reports and expert discovery. As noted in the United States' October 17 letter, a portion of the difficulty with meeting the current schedule relates to the need to conduct certain depositions prior to the submission of expert reports. While adjusting the expert dates does not resolve the issue, it does make it more likely that more depositions will be able to occur prior to the submission of expert reports.

The agreed-upon proposed date adjustments are as follows:

- Opening expert reports served — changed from January 25 to February 8

- Rebuttal expert reports served — changed from February 15 to March 1; and
- The close of expert discovery — changed from March 22 to March 29.

Class Plaintiffs' Statement on Class Certification Schedule

Federal Rule of Civil Procedure 23(c)(1)(A) instructs that the Court must determine whether to certify a class "[a]t an early practicable time after a person sues or is sued as a class representative, . . ." Plaintiffs filed their initial complaint on August 9, 2011. And after hearing from all parties on June 22, 2012, the Court set November 16, 2012, for Plaintiffs to file their certification motion — more than a year after Plaintiffs filed their original complaint. Class Plaintiffs have worked diligently to adhere to the schedule and intend to move for class certification on the schedule the Court ordered.

The Non-Settling Defendants' position is that it is unnecessary to proceed with class certification until some unspecified time after the Department of Justice trial in June 2013. When Plaintiffs' counsel asked for the Non-Settling Defendants' justification why the schedule should change, other than Defendants saying generally that it would "save everyone money," only Penguin offered an additional explanation. Penguin claimed Amazon has not produced enough information to date. But the Non-Settling Defendants have repeatedly asserted that any discovery beyond what the Department of Justice and the States acquired in the investigation phase should simply be "topping off" discovery. Moreover, Amazon produced a significant amount of transactional sales data — as did other parties and non-parties — during the investigation phase. And while data production is not yet complete, as the Court knows, class certification is not a merits determination and a final impact or damages model need not be presented. As for saving money, the class certification issues will have to be addressed eventually.

Given the emptiness of the Non-Settling Defendants' justification, it is more likely they believe avoiding certification until after a DOJ trial provides them a strategic benefit. Regardless, the Non-Settling Defendants' explanations do not justify the continuance they seek.

The Non-Settling Defendants' Statement

As they articulated to the Government during the parties' meet-and-confer conversations, Apple, Macmillan, and Penguin believe that the June 3 trial date is reasonable and achievable. The Non-Settling Defendants interpreted the October 19 Order as encouraging all parties to consider carefully the necessity of the depositions they seek in light of the agreed-upon June 3 trial date.

The Non-Settling Defendants' Document Production Is Compatible with a June 3 Trial

Each of the Non-Settling Defendants will have substantially completed their remaining document productions by the end of November, if not sooner. Specifically:

- **Apple:** With isolated exceptions (*e.g.*, certain redacted documents), Apple expects to complete its production by October 31. Any remaining documents will be produced within one to two weeks from that date. To date, Apple, which produced roughly 50,000 documents during the Government's pre-suit investigation, has produced approximately 180,000 documents in this litigation, and it expects to produce 300,000-400,000 documents in total by month's end.

- **Macmillan:** To date, Macmillan has produced approximately 35,000 documents, and roughly 100 spreadsheets in the litigation. Macmillan, which produced nearly 120,000 documents during the pre-suit investigation, expects to produce another 20,000 documents shortly and to complete its production by the end of November. Macmillan also represented that it could expedite its production by up to two weeks pending ongoing discussions with the Government concerning the scope of its requests.

- **Penguin:** Penguin, which produced 150,000 documents during the pre-suit investigation, will complete its production of documents from the 11 key custodians identified by the Government by the end of October. Given Penguin's ongoing objections to the breadth of the Government's requests, Penguin is engaged in ongoing negotiations with the Government with respect to additional custodians. Penguin maintains that if the Government approaches document discovery in a reasonable, targeted manner, Penguin could substantially complete its production by the end of November as well.

Despite the Government's Rejection of Targeted, Reasonable Limits on Depositions, the Non-Settling Defendants Are Prepared for a June 3 Trial

This morning, the Non-Settling Defendants shared with the Government the following list of fact witnesses who they currently believe are reasonably necessary to their defense. The Non-Settling Defendants understand that with one or two exceptions, each of these witnesses' testimony will be sought by the Government as well. While this list will likely change in modest ways as discovery proceeds, it represents the Non-Settling Defendants' good-faith estimate of the magnitude of necessary deposition discovery, which can easily be accomplished within the current schedule.

1. Arnaud Nourry, Chairman and CEO, Hachette Livre
2. Neil De Young, Executive Director of Digital Media, Hachette
3. Maja Thomas, Senior VP Digital, Hachette
4. David Young, CEO and Chairman, Hachette
5. Jonathan Miller, CEO of Digital Media, News Corp
6. Brian Murray, President and CEO, HarperCollins
7. Markus Dohle, Chairman and CEO, Random House
8. Madeline McIntosh, COO; former President, Sales, Operations & Digital, Random House
9. Carolyn Reidy, President and Chief Executive Officer, Simon and Schuster
10. Dennis Eulau, Executive Vice President, Operations and Chief Financial Officer, Simon and Schuster
11. Jeffrey Bezos, CEO, Amazon
12. Russ Grandinetti, VP Kindle, Amazon
13. Steve Kessel, Senior VP Kindle, Amazon
14. David Naggar, VP Content Acquisition, Amazon
15. Amazon's 30(b)(6) witness(es)

Additionally, the Non-Settling Defendants believe that they will need additional depositions from 4-6 third-party witnesses, to be determined at a later date.

Until confronted with the Non-Settling Defendants' list, the Government made no efforts to provide even a preliminary witness list, instead insisting that it would need up to the maximum 75 depositions allowable under the Joint Initial Report. It further represented that in order to meet a June 3 trial, it may need to take certain, unspecified depositions before year's end and reserved the right to "recall" witnesses pending later document productions or a "lack of opportunity" to review existing productions.

In response to the list furnished by the Non-Settling Defendants, the Government has now provided a list of 30 "very likely" deponents beyond those identified by the Non-Settling Defendants. It further represented, however, that given the "incomplete state of document production by parties and third parties" and given the timing of the Non-Settling Defendants' own provision of a deposition witness list, the Government cannot offer a "complete list . . . of [Plaintiffs'] more likely than not" deponents. The Government also has not retracted its statement that it may need to take as many as 75 depositions.

Putting aside the Government's inclusion on its list of witnesses who had little, if anything, to do with the events and allegations at issue, the Non-Settling Defendants remain baffled both by the Government's proposed number of depositions and its continued difficulties in identifying the witnesses they seek to depose.

First, this is not an ordinary civil litigation. Before filing its complaint, the Government spent 18 months investigating its claims. That investigation gave the Government access to hundreds of thousands of documents from the Non-Settling Defendants, the settling defendants, and third parties. Those productions have now been supplemented by another roughly 200,000 documents produced in this matter. The Government also took multiple depositions during the investigation. Finally, the Government interviewed dozens of other potential witnesses, including more than a dozen Amazon employees. The Government knows who the key witnesses are and which documents are central to their allegations. Indeed, they relied on this information in drafting their complaint. Under these circumstances, the failure of the Government—in light of the court order to develop a deposition schedule—is unreasonable.

Second, in any litigation, the number of depositions should be tailored to the facts and allegations at issue. While it might be appropriate to take dozens of depositions in a case alleging a decades-long conspiracy, setting a deposition schedule in an antitrust case is not a one-size-fits-all approach. This is not a merger case of broad factual scope or a case involving allegations dating back many years. Rather, there are three remaining defendants, three settling publishers, Amazon, and a few other market participants involved. The period of time directly relating to the core conspiracy allegations is very discrete, measured in months. Therefore, while deposition discovery will be needed with respect to those parties listed above, it defies credulity to suggest that anywhere near 75 witnesses will be required. Indeed, that the Antitrust Division routinely deposes large numbers of witnesses over short time frames in major merger cases both shows that the agreed-upon trial date is reasonable and highlights what is wrong with the Government's position about the appropriate number of depositions here.

Third, the Government appears not to have treated the June 3 trial date as a mandate. Its wide-ranging document demands, requiring review of millions of documents (many from peripheral second and third-tier custodians), were not tailored to the discovery period. In every regard—time period, number of custodians, extraterritorial discovery, scope of search terms—the discovery sought has been overbroad. While the Non-Settling Defendants have negotiated in good faith and expended enormous resources in working to complete these document productions, the amount of time it has taken is a direct result of the overbreadth of the Government's requests. Accordingly, the Government should not now be heard to argue that it does not have time to review the overbroad productions it sought. In any event, electronic discovery affords litigants many ways to search and prioritize review that would allow depositions to go forward in a timely and orderly fashion. Thus, although the Non-Settling Defendants have repeatedly attempted to accommodate the Government, the

Government's own strategy suggests that complying with a June 3 trial date was never a main priority.

The Non-Settling Defendants do not believe that the Government should be permitted to take 75 depositions in a case of this scale and dimension, nor do they believe that many of those listed on the Government's admittedly incomplete list of deponents belong there. Such a massive deposition schedule will not advance the truth-seeking process and will only operate to effectively filibuster this case and prejudice the Non-Settling Defendants by diverting their resources and attention from the main witnesses and issues in this case. Nevertheless, if the Court permits the Government to take 75 depositions, the Non-Settling Defendants are committed to finishing all depositions by the March 22 close of discovery. The Non-Settling Defendants further propose that:

- Depositions should begin promptly, and in no event any later than January 7;
- Certain witnesses whose documents have or soon will be fully produced could be deposed in December (with appropriate planning around the holidays to accommodate the witnesses' schedules); and
- Depositions could be multi-tracked, given the resources of all involved, to allow depositions to be completed by March 22.

Class Certification Briefing Should be Postponed Until After a June 3 Trial

The Non-Settling Defendants recognize that preserving the June 3 trial will require that they and their counsel devote significant resources to the depositions contemplated above. The Non-Settling Defendants also note that although they expect, with the Court's assistance, to obtain responsive data and documents from Amazon before deposing Amazon employees or other, relevant witnesses, they do not anticipate receiving such critical information in sufficient time to utilize them in the class certification process. Given the demands of the deposition schedule and otherwise preparing this case for trial, the likely unavailability of Amazon's documents before the Non-Settling Defendants' class certification opposition brief is due, and the fact that the Government's claims are solely for injunctive relief, the Non-Settling Defendants propose that class certification briefing be postponed until after the conclusion of the trial in this matter.

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The parties look forward to discussing the deposition schedule with you on Friday.

Respectfully submitted,

Orin Snyder /LHR

Orin Snyder

cc: All Counsel of Record