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February 14, 2013

OUR FILE NUMBER
027559-230

HIGHLY CONFIDENTIAL
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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
rparker@omm.com

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

Dear Judge Cote:

I respectfully submit this letter on behalf of Apple regarding a narrow but critical discovery dispute with Amazon. Amazon's decision to negotiate agency arrangements with the Defendant Publishers in 2010 is a core issue in this case. The government claims that the most favored nation ("MFN") clause in Apple's contracts "was the key commitment mechanism" to allow the Publisher Defendants to "force" Amazon to accept agency. (Compl. ¶¶ 78, 80.) Amazon is now attempting to block discovery into its decision to adopt agency by improperly invoking privilege. Denying Apple access to documents and testimony regarding this all-important decision will severely prejudice Apple and deny it a fair trial, particularly since Amazon's top eBooks executives, Russ Grandinetti and David Naggar, recently confirmed that they likely will testify at trial on the government's behalf.

At their late January depositions, Amazon executives Grandinetti and Naggar contradicted the government's core allegations that the Apple MFNs forced Amazon to adopt agency agreements with the five Publisher Defendants and were therefore improper or unlawful. Indeed, Mr. Grandinetti testified that Amazon *did not even know that Apple's contracts had MFNs* when Amazon decided to adopt agency. *See* Ex. A, Grandinetti Dep. Tr. at 203:10–204:3. And Mr. Naggar confirmed that *Amazon itself demanded MFNs* in its agency contracts for the same legitimate business purposes that motivated Apple to seek its MFNs. *See* Ex. B, Naggar Dep. Tr. at 151:15–152:14.

Although Mr. Naggar testified that Amazon switched to agency only after Macmillan threatened to withhold from Amazon titles (*i.e.*, Amazon would be "windowed") that it would provide to Apple, *see* Ex. B at 137:13–22, 139:20–140:8, both Amazon witnesses were instructed not to answer questions about the business rationale underlying Amazon's switch. Specifically, Amazon's counsel repeatedly instructed both witnesses not to testify about discussions at two meetings among Amazon's CEO, Jeff Bezos, and key eBooks executives

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concerning Amazon's potential move to agency—a January 24 meeting at Mr. Bezos's residence and a January 28 meeting at Amazon's offices. The claimed bases for those instructions were that counsel was present at each meeting and that the meetings' business discussions purportedly were inextricably "intertwined" with requests for legal advice. *See, e.g.*, Ex. A at 161:19–163:21, 170:9–15; Ex. B at 110:3–14, 122:6–124:8.

Amazon also appears to have cloaked its documents regarding its potential switch to agency with the Publisher Defendants in an overbroad blanket of privilege. On or before January 25, 2010, Amazon apparently told HarperCollins's CEO that it was preparing an analysis for Mr. Bezos describing "the pros and cons of moving to an agency model." *See* Ex. C. But Amazon has not produced any document or presentation reflecting such an analysis. In fact, Amazon has withheld in whole or part at least 368 documents between the date on which Amazon first learned that certain publishers were exploring a move to agency with Apple (January 18, 2010) and the date on which Amazon signed its first agency agreement (February 5, 2010). These documents include, for example, Mr. Grandinetti's notes from the January 24 meeting, as well as emails among several businesspeople (but copying an attorney) about agency negotiations with publishers and several emails with the subject "Agency Terms—Specifics." Although Amazon's log does not contain sufficient information to evaluate the privilege assertions, these and other documents appear to involve business, not legal, issues.

Under the law of this Circuit, communications and analyses concerning Amazon's business decision to adopt agency agreements with the Publisher Defendants are not privileged. *See Urban Box Office Network, Inc. v. Interfase Managers, L.P.*, No. 01 Civ. 8854, 2006 WL 1004472, at *4–5 (S.D.N.Y. Apr. 17, 2006) (privilege applies to legal, not business advice) (citing Second Circuit cases)). Inviting lawyers to meetings and copying them on emails do not transform a business decision into a legal one. *See id.* And even if some portions of these communications were privileged,¹ the privilege would apply only to the "limited and discrete portions [that] do describe explicit legal advice." *De Beers LV Trademark Ltd. v. DeBeers Diamond Syndicate Inc.*, No. 04 Civ. 4099, 2006 WL 357825, at *2 (Feb. 15, 2006) (Cote, J.).

Although the Amazon depositions to date have exposed a glaring hole in the government's case, Apple has been denied meaningful discovery into Amazon's critically important business decision to adopt agency. Without this evidence, Apple will be gravely prejudiced in its ability to challenge—and disprove—the core allegation that Apple's MFN "forced" Amazon into agency. *See, e.g., Villante v. Dep't of Corrs. of N.Y.C.*, 786 F.2d 516, 521 (2d Cir. 1986) (reversing summary judgment following denial of requested discovery because "facts which might reasonably have been obtained . . . would have answered the key question" in the case). Apple has met and conferred in good faith with Amazon's counsel but has not been able to reach a resolution of this dispute. Therefore, Apple respectfully requests the narrow relief necessary to provide it with a fair trial: an order compelling Amazon to provide both testimonial and documentary discovery into the rationale behind its business decision to adopt agency agreements for the sale of eBooks with the Publisher Defendants.

¹ Apple understands that part of Amazon's response to the Publisher Defendants' agency proposals was to submit a white paper to the government and urge it to investigate. During our unsuccessful meet and confer sessions with Amazon's counsel on the issue raised in this letter, we communicated that Apple is *not* seeking discovery into legal advice given regarding Amazon's regulatory strategy.

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Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Richard Parker / ENM". The signature is fluid and cursive, with the initials "ENM" written in a slightly different style at the end.

Richard Parker

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

Attachments