

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

IN RE ELECTRONIC BOOKS ANTITRUST  
LITIGATION

No. 11-md-02293 (DLC)

UNITED STATES OF AMERICA,

No. 12-cv-02826 (DLC)

Plaintiff,

ECF Case

v.

APPLE, INC., *et al.*,

Defendants.

**DECLARATION OF DAVID A. ZAPOLSKY**

I, David A. Zapolsky, do hereby declare:

1. I am Vice President and General Counsel of Amazon.com, Inc. ("Amazon"). In 2010, I was Vice President and Associate General Counsel, Litigation and Regulatory. In that role, my responsibilities included providing legal advice to Amazon regarding litigation; disputes that might give rise to litigation; and regulatory matters, including competition-related issues.

2. I understand that Apple is challenging Amazon's claim of attorney-client privilege as to two meetings that I attended on January 24 and 28, 2010. I participated in these meetings along with Michelle Wilson, General Counsel of Amazon at the time, and several senior executives of Amazon, including Jeff Bezos (CEO) and Russ Grandinetti (VP, Kindle).

3. Both of these meetings were called for the purpose of obtaining legal advice regarding Amazon's response to what appeared to be collusive behavior by five of the largest publishers and Apple. To the extent there was discussion of business issues during these meetings, it was incidental to and intertwined with the legal advice we provided. I do not believe

it would be possible to disclose these discussions without revealing the substance of the legal advice we provided.

4. In order to understand why our legal advice was inseparable from the business issues surrounding agency, it is necessary to have in mind the context of these meetings, including information Amazon was receiving from publishers and the press around this time.

5. As the Court is aware, during the summer and fall of 2009, Amazon encountered “windowing” (delayed release) of particular ebooks by most of the largest publishers, but the windowing was infrequent and limited to certain high-profile titles. That changed in early December. On December 3, Arnaud Nourry, CEO of Hachette, told David Naggar (Amazon VP – Kindle Content) during a breakfast meeting in New York that Amazon’s pricing was a “big problem for us”; that if Amazon would raise its prices even a dollar or two, it would solve the problem; and that they had spoken to other retailers about this. Mr. Naggar reminded Mr. Nourry that he could not discuss consumer pricing with him, but noted that he did not think Amazon would be changing its pricing structure. Later that same day, a Hachette employee told another Amazon employee that Hachette had decided to window all their new releases going forward. In a follow-up communication on December 4, Maja Thomas of Hachette told Laura Porco (Director, Kindle Vendor Management) that the new windowing policy was “about [Amazon’s] pricing.” Over the next few days, Mr. Nourry sent several emails to Jeff Bezos in which he reiterated that Amazon’s pricing was a problem. Hachette made it clear that they would not window new releases if Amazon raised consumer prices.

6. On the heels of Hachette’s announcement (*see* ¶ 5), on December 9, 2009, Simon & Schuster announced publicly that it would be delaying ebook editions of all of its new releases starting January 1, 2010. Over the next few weeks, HarperCollins and Macmillan also confirmed

that they would be delaying ebook versions of several new titles. Amazon strongly objected and was working on its response to this more widespread windowing in mid-January, 2010.

7. On Monday, January 18, 2010, a Random House employee told Laura Porco that she had heard that Simon & Schuster, Hachette and HarperCollins would soon be offering new ebook licensing terms under which publishers, rather than retailers, would set the retail price. That same day, industry consultant Michael Cader of Publishers Lunch emailed David Naggar seeking comment on the “Apple-and-beyond ebook selling model that publishers are working on[.]” On January 19, Publishers Lunch reported in a remarkably detailed article that the Big Six publishers were all negotiating agency terms with Apple, which presented publishers with “the opportunity to change the basic selling terms of ebooks with at least one other major trading partner in a way that lets publishers take back control of pricing and reassert their vision of the value of an electronic version of a book.” Over the course of the following five days, Simon & Schuster, Hachette, Macmillan and HarperCollins each confirmed they were considering moving to agency terms with Amazon over Amazon’s strong objections.

8. All of this information pointed strongly to the existence of an illegal (possibly criminal) price-fixing conspiracy by the five publishers and one or more retailers. By January 23, we had discussed these developments with and obtained legal advice from three different outside law firms with antitrust expertise (including current counsel of record for Amazon in this matter). Against this background, any discussion between Amazon’s counsel and the Kindle business team regarding the shift to agency was inseparable from the privileged discussion of legal issues arising from the Defendants’ conduct. In short, Amazon sought and received guidance from its counsel to avoid the very liability that the publisher Defendants and Apple are facing now.

9. The first meeting that is the subject of Apple's motion took place on January 24. I attended a meeting that morning with Ms. Wilson, Mr. Bezos, and the senior executives at Amazon responsible for the Kindle business. The meeting was called to discuss Amazon's legal rights in responding to the nearly simultaneous demands by several of the largest publishers, described above, to change the business model for ebooks and the apparent involvement of Apple in facilitating this shift. To the extent business strategy was discussed, it was inextricably entwined with legal considerations, in light of the extraordinary events leading up to this meeting.

10. On Tuesday, January 26, the Wall Street Journal reported that publishers were "locked in secret 11<sup>th</sup>-hour negotiations with Apple Inc. that could rewrite the industry's revenue model after the technology giant unveils its highly anticipated table device Wednesday."

11. On Wednesday, January 27, in a widely-publicized event, Apple announced that the iPad would be launched in April and that ebooks from five of the six largest publishers would be available in Apple's digital bookstore; these were the five publishers who had agreed to require agency terms. After the launch, Apple CEO Steve Jobs gave an interview with Walt Mossberg of the Wall Street Journal in which he was asked why customers would pay higher prices for ebooks sold in the iBookstore when they could get the same title from Amazon for less. Jobs clearly stated that they would not be able to; that "the prices will be the same" and that "Publishers are actually withholding their books from Amazon, because they're not happy with it." (This portion of the interview was videotaped by a blogger and widely circulated.)

12. The following day (Thursday, January 28), John Sargent, the CEO of Macmillan, met with Amazon Kindle executives in Seattle, including Russ Grandinetti, David Naggar, and Laura Porco and presented an ultimatum: either Amazon would agree to agency terms or

Macmillan would delay the release of all new eBook titles for seven months following the release of the print book.

13. After Mr. Sargent left Amazon, Ms. Wilson, Mr. Leslie, and I participated in a meeting with several senior executives of Amazon. I understand that Apple is also challenging Amazon's claim of privilege as to this meeting. As with the January 24 meeting, to the extent business issues were discussed at this meeting, they are inextricable from the discussion regarding Amazon's legal rights and risks in responding to Macmillan's ultimatum; the demands by four other major publishers for agency terms; and the involvement of Apple in this shift, made all the more clear by Steve Jobs' public statements.

14. After the January 28 meeting, in response to Mr. Sargent's ultimatum, Amazon stopped selling all Macmillan books directly (although new and used physical books were still offered by third-party sellers on Amazon's website). On January 31, facing identical demands from Hachette, HarperCollins, Simon & Schuster and Penguin, Amazon capitulated and told Macmillan it would negotiate an agency contract. I understand that Amazon has produced non-privileged documents and that both Mr. Grandinetti and Mr. Naggar have testified about these events.

15. I do not recall any written analyses or presentations being prepared for or given at either of these meetings.

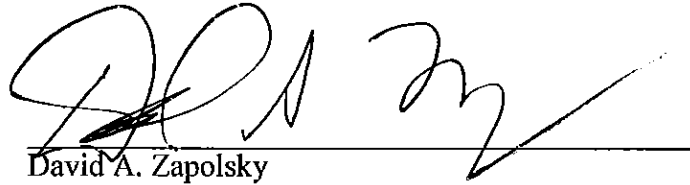
16. On February 1, 2010, I sent a "White Paper" to the Federal Trade Commission and the Department of Justice laying out in greater detail the background information discussed above and expressing Amazon's serious concerns that an illegal price-fixing conspiracy was behind the shift to the agency model.

17. I am certain that the Amazon executives I advised believed that discussions at the January 24<sup>th</sup> and 28<sup>th</sup> meetings were covered by the attorney-client privilege. I shared that belief at the time and still feel that way today.

18. In light of the risk of waiver, I am reluctant to go into any more detail in this Declaration regarding the specific legal questions we discussed at these meetings. However, if the Court requires such detail, I am willing to respond to questions *in camera*.

I declare under penalty of perjury that the foregoing is true and correct.

EXECUTED on February 19, 2013 at Seattle, Washington.



David A. Zapolsky