

Exhibit C

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1 UNITED STATES DISTRICT COURT
1 SOUTHERN DISTRICT OF NEW YORK

2 -----x

2
3 IN RE: ELECTRONIC BOOKS
3 ANTITRUST LITIGATION,

5 11 MD 2293 (DLC)

5 -----x

6 UNITED STATES OF AMERICA,

7 Plaintiff,

8 v.

12 CV 2826 (DLC)

9 APPLE, INC., et al.,

10 Defendants.

11 -----x

12 THE STATE OF TEXAS, et al.,

13 Plaintiffs,

14 v.

12 CV 3394 (DLC)

15 PENGUIN GROUP (USA) INC., et
15 al.,

16 Defendants.

17 -----x

18 IN RE AMAZON.COM
19 Regarding subpoena directed
19 to Amazon.com

12 MC351 (DLC)

20 -----x

21 New York, N.Y.
21 October 26, 2012
22 11:13 a.m.

23 Before:

24 HON. DENISE COTE,

25 District Judge

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1 the rule of reason test will be whether the agency agreements
2 here promoted competition or suppressed it. And that will be
3 in the context of this specific industry and including an
4 understanding of the devices that existed or came to exist
5 within our period of time. It will involve us looking at this
6 industry, the e-books market, before the agency agreements were
7 entered into and after they were entered into and the effect of
8 the agency agreements on the e-books market.

9 It will also permit us to explore the reason the
10 defendants adopted agency agreements. But as the Chicago Board
11 of Trade decision makes clear, even good intentions will not
12 save an illegal restraint, but an understanding of the
13 defendants' motivation may help me in interpreting the factual
14 context of these other pieces of evidence with which I'll be
15 presented.

16 I do not understand that the subjective intent of
17 third parties and competitors is really relevant. What they
18 were doing in the marketplace would have a profound effect on
19 the rule of reason analysis. What the defendants believed
20 their competitors were doing in the marketplace would be, I
21 think, highly relevant in understanding their motive in the way
22 I've just outlined. But the subjective intent, thus the
23 planning and the strategy of a competitor that is not publicly
24 disclosed, I don't think is relevant, at least not sufficiently
25 relevant when we're talking about third-party discovery here of

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I 1 a key competitor.

2 And I can't put aside the fact, even though we have
3 confidentiality agreements, that highly sensitive information
4 could be misused despite the best intent of one and all
5 involved in the litigation. Therefore, I do think that there
6 is a necessity for me to consider whether a sufficient reason
7 has been shown for production of this material.

8 Now, in Apple's rule of reason argument in March, it
9 didn't talk much about the things that we're discussing today.
10 It talked about looking at the increasing demand for e-books,
11 Apple's standard practices with respect to commissions, Apple's
12 share of the e-book market, the price and output of e-books
13 rising together, whether or not \$9.99 is below wholesale price,
14 whether there were entry barriers to the e-book market, whether
15 the agency agreements enabled entry into the e-books market and
16 increased sales of e-books or triggered competition in the
17 device market.

18 The only part of that argument that I think
19 overlaps -- that is, the argument made in March by Apple --
20 with what's been argued today is the following: That is, that
21 Apple contended that it was Amazon's plan to recoup any losses
22 it sustained in its e-book business by, down the road,
23 super-competitive pricing once it had maintained and
24 established a monopoly.

I 25 So, again, I don't think Amazon's internal planning is

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I 1 very relevant here to whether or not the defendants violated
2 the antitrust laws. While the defendants' anticipation of what
3 Amazon was going to do might be highly relevant, what Amazon
4 internally planned to do I don't think is that relevant. What
5 Amazon actually did do or didn't do is very relevant, and I
6 think we need to make sure we have a good handle on that. And
7 I understand that the documents that are going to be produced
8 are going to give people that handle on what actually happened
9 in the market before and after the agency agreements were
10 adopted.

11 With respect to these four document requests, again --
12 and I may have led us down an unhelpful road here. I don't
13 think that, number one, the strategic plans, et cetera, is
14 appropriate for discovery.

15 Number two, which is the Amazon-- Amazon's involvement
16 in regulatory investigations. I believe, if I remember
17 correctly, that Amazon has agreed to provide that material with
18 respect to the investigations related to this litigation, the
19 antitrust investigation of the e-books market which has led to
20 lawsuits against the defendants who appear before me.

21 Am I right with respect to that, Mr. Kipling?

22 MR. KIPLING: You are, your Honor.

23 THE COURT: And I think that should be sufficient with
24 respect to that point.

25 With respect to number three, as I understand it,

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