Akin Gump
STRAUSS HAUER & FELD LLP

DANIEL F. MCINNIS
+1 202.887.4359/fax: +1 202.887.4288
dmcinnis@akingump.com

April 13, 2013

VIA E-MAIL

D 24
4/15/13

The Honorable Denise L. Cote
United States District Judge
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street, Room 1610
New York, NY 10007-1312

Re: State of Texas v. Penguin Group (USA), Inc., No. 12-cv-3394

Dear Judge Cote:

We write on behalf of Penguin Group (USA), Inc. in the above-referenced matter in support of, and joining, Apple's letter to the Court, dated April 12, 2013, regarding the potentially inappropriate use of inadmissible non-party materials by the plaintiffs.

We would also like to reiterate a point Apple makes that touches upon these evidentiary issues and the use of potential evidence against parties. As noted by Apple, the Federal Rules of Civil Procedure and the Federal Rules of Evidence treat parties differently from non-parties. But we are not a party to the DOJ case anymore. Our posture is as a non-party in the DOJ case, but a party in the States' case. As such, it is quickly becoming apparent that Penguin's participation in the June trial despite its settlement with the DOJ will lead to a host of procedural problems that will needlessly complicate trial proceedings as well as potentially cause Penguin significant prejudice.

For example, the plans for trial revealed during the course of our meet-and-confer discussions with the Department of Justice and the Plaintiff States regarding the preparation of the Joint Pretrial Order demonstrate that Penguin's dual party/non-party posture will complicate matters and pose a dilemma for everyone. That is because DOJ and the States intend to, as part of their pretrial submissions, put on joint trial witnesses, introduce joint exhibits, submit joint deposition designations, potentially propose joint motions in limine, and present a joint memorandum of law, with the States potentially submitting a supplemental memorandum. But the DOJ case and the States' case involve different complaints, different theories, different parties, and different experts. Requiring Penguin to respond to these joint motions and submissions will cause significant prejudice by requiring Penguin to "defend" against *both* cases (and two sets of experts, etc.), even though it is only a party to one of them.

We therefore object to joint Plaintiff submissions with respect to motions and evidence directed to Penguin. Having settled with the DOJ, Penguin cannot be forced to defend against the DOJ's motions, evidence, witnesses, and experts, but instead should only have to respond to and defend against the *States'* motions, the *States'* evidence, the *States'* witnesses, and the *States'* experts. Although the States may wish to work jointly with the DOJ in submitting evidence and filing motions against Apple (the only remaining defendant in both actions),[1] the States should have to file their own motions and submit their own evidence against Penguin.

Penguin respectfully asks the Court to clarify these matters as we all diligently work at preparing our mutual cases for trial, assuming Penguin will be a defendant at a June 3 DOJ trial.

Respectfully submitted,

Daniel McInnis /as

Daniel F. McInnis

cc: All counsel of record via electronic email

[1] Indeed, the DOJ and States conducted a deposition this past week for purposes of the DOJ case (apparently) without providing any notice to Penguin or the opportunity to attend. (Penguin requested DOJ and the States to provide the written notice after receiving a transcript of the deposition; neither responded.) A deposition for which Penguin had no notice or opportunity to attend is inadmissible in any case involving Penguin, another example of the procedural problems resulting from the current trial structure.