



U.S. Department of Justice

Antitrust Division

4/15/13

Lawrence E. Buterman
 Direct Dial: (202) 532-4575
 Fax: (202) 616-8544
 e-mail: lawrence.buterman@usdoj.gov

Liberty Square Building
 450 5th Street, NW
 Suite 4000
 Washington, DC 20530

April 15, 2013

BY E-MAIL

The Honorable Denise L. Cote
 United States District Judge
 Daniel P. Moynihan U.S. Courthouse
 New York, NY 10007-1312

§ 27
 4/15/13

Re: United States v. Apple, Inc., et al., No. 12-cv-2826 (DLC)

Dear Judge Cote:

We write in response to Penguin's April 13 letter. The United States does not believe that Penguin's participation in the June 3 trial will lead to procedural problems or complicate proceedings. Whether Penguin is a defendant at the June 3 trial or not, as part of its case against Apple, the United States will be establishing, through documents and testimony, that Penguin and the other settling publisher defendants were engaged in an illegal conspiracy with Apple to raise e-book prices to consumers and eliminate retail price competition. The United States and Plaintiff States believe that the overwhelming majority of evidence needed to establish liability in our respective actions overlaps, and thus are working together to consolidate our April 26 pre-trial submissions where possible. This is being done purely to avoid unnecessary duplication for the Court, and we see no prejudice to Penguin in our doing so. Multi-defendant cases are, of course, quite common, and there is nothing peculiar here that would hinder the Court's ability to separately assess the evidence presented against each defendant.

With respect to footnote 1 of Penguin's letter, we believe the deposition being referred to is a limited 30(b)(6) deposition of Apple that was conducted this past Wednesday over video conference. That deposition was not a lengthy fact deposition aimed at obtaining evidence for use at the June 3 trial. Rather, it was a less-than-two-hour deposition of an Apple employee aimed at understanding the extent to which Apple had failed to preserve important phone records that had been repeatedly requested in this case—including the landline office phone records of Mr. Cue, Apple's chief negotiator of the agency agreements with the publisher defendants. That deposition confirmed that Apple did in fact fail to preserve any of its relevant landline phone records, and that its conduct likely amounts to spoliation of evidence. While Plaintiffs and Apple have served subpoenas on AT&T in attempts to obtain the records Apple failed to

preserve, as of the writing of this letter, we still have not received the above-mentioned records relating to Mr. Cue's office phone line. The United States currently is contemplating an appropriate *in limine* motion as part of our April 26 pre-trial submissions.

As for Penguin's assertion regarding the deposition, the notice for the 30(b)(6) deposition was sent to all counsel, including Mr. McInnis and several of his colleagues representing Penguin, on February 27, 2013. (A copy of the notice including transmittal e-mail is attached as Exhibit A.) At no time did Penguin ever respond to the notice or indicate any interest in attending the deposition. (This did not seem unusual to the United States, given both the nature of the deposition and the fact that Penguin has not attended several depositions in this case, including the March 26, 2013 deposition of Apple's economic expert, Dr. Klein, and last week's deposition of the United States' economic expert, Dr. Gilbert.) Due to a number of circumstances, the deposition did not proceed on the noticed date, but was postponed until this past Wednesday. The United States kept all Plaintiffs apprised of the schedule relating to the deposition, and assumed, consistent with the regular practice in this matter, that Apple was doing the same for all Defendants. No questions related to Penguin were asked during the short deposition, and no testimony related to Penguin was provided by the witness.¹ And, Penguin has not indicated (at any time) any interest in questioning this witness. Thus, we do not understand Penguin to have suffered any prejudice here. Nonetheless, we sincerely regret the apparent miscommunication and any confusion it may have caused.

Respectfully submitted,

/s/ Lawrence E. Buterman
Lawrence E. Buterman

Attachment

Copy: All counsel

¹ In fact, the name Penguin does not appear anywhere in the deposition transcript.

EXHIBIT A

Buterman, Lawrence

From: Mitchell-Tombras, Katharine S.
Sent: Wednesday, February 27, 2013 5:41 PM
To: 'Rubin, Lisa H.'
Cc: 'osnyder@gibsondunn.com'; 'afrackman@omm.com'; 'AKusnitz@proskauer.com'; 'ashear@sidley.com'; 'asheedy@AKINGUMP.com'; 'Bryan Bloom'; Buterman, Lawrence; 'Carolyn Perez'; 'caronson@skadden.com'; 'CRichman@gibsondunn.com'; 'david.ashton@texasattorneygeneral.gov'; 'DFloyd@gibsondunn.com'; 'dmcinnis@AKINGUMP.com'; 'DSwanson@gibsondunn.com'; 'eric.lipman@texasattorneygeneral.gov'; 'gabriel.gervery@texasattorneygeneral.gov'; 'Gary.Becker@ct.gov'; 'ggranitto@AKINGUMP.com'; 'giffordlaw@mac.com'; 'hiram.andrews@freshfields.com'; 'hjaffe@proskauer.com'; 'hlkim@gibsondunn.com'; 'james.quinn@weil.com'; 'jdubner@cohenmilstein.com'; 'Jeff.White@weil.com'; 'jefff@hbsslaw.com'; 'jlavelle@sidley.com'; 'JMitnick@Sidley.com'; 'Joseph.Nielsen@ct.gov'; 'JSrinivasan@gibsondunn.com'; 'kpierson@cohenmilstein.com'; 'Larry Tanenbaum'; 'paul.eckles@skadden.com'; 'paul.yde@freshfields.com'; 'richard.snyder@freshfields.com'; 'rparker@omm.com'; 'sabrina.mallard@texasattorneygeneral.gov'; 'samuel.rubin@freshfields.com'; 'Scott Lent'; 'shanas@hbsslaw.com'; 'shepard.goldfein@skadden.com'; 'Steve@hbsslaw.com'; 'timothy.harkness@freshfields.com'; 'walter.stuart@freshfields.com'; 'Yehudah.Buchweitz@weil.com'; McCuaig, Daniel
Subject: United States v. Apple
Attachments: United States v. Apple - Notice of Deposition.pdf

Lisa:

Following up on our conversation yesterday, please see the attached 30(b)(6) deposition notice for Apple. As discussed, we look forward to working with you regarding these topics, on which we are eager to reach closure. Please contact us if you have any questions or concerns.

Best regards,

Kate Mitchell-Tombras

Kate Mitchell-Tombras
Trial Attorney
U.S. Department of Justice
Antitrust Division, Litigation III
450 Fifth Street NW, Suite 4000
Washington, D.C. 20530
202.532.4923

**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK**

| | | |
|---------------------------|---|-----------------------------|
| UNITED STATES OF AMERICA, |) | |
| |) | |
| Plaintiff, |) | |
| |) | |
| v. |) | Civil Action No. 12-CV-2826 |
| |) | |
| APPLE, INC., et al. |) | |
| |) | |
| Defendants. |) | |
| |) | |

NOTICE OF DEPOSITION

Please take notice that, pursuant to Rule 30(b)(6) of the Federal Rules of Civil Procedure, Plaintiff United States of America will take the deposition of **Apple, Inc.** (“Apple”) on **March 14, 2013**, beginning at 9:00 a.m. at the U.S. Attorney's Office- San Jose, Heritage Bank Building, 150 Almaden Blvd. Suite 900, San Jose, CA 95113. Apple is required by Rule 30(b)(6) to designate one or more officers, directors, or managing agents to testify on the subjects identified in “Attachment A” regarding the information known or reasonably available to Apple, and to identify the subjects on which each person so designated will testify.

The deposition shall be conducted before a notary public or other officer who is authorized to administer oaths and shall be recorded by videographer and stenographic means.

Dated: February 27, 2013

FOR PLAINTIFF
UNITED STATES OF AMERICA

/s/
Lawrence E. Buterman
Katharine S. Mitchell-Tombras
U.S. Department of Justice
Antitrust Division

450 Fifth Street, N.W., Suite 4000
Washington, DC 20530
(202) 532-4575
*Counsel for Plaintiff United States
of America*

ATTACHMENT A

DEFINITIONS & INSTRUCTIONS

The Definitions and Instructions set forth in the Plaintiff United States' First Set of Document Requests from Apple dated May 21, 2012 are hereby incorporated by reference. As used in this Attachment, the following term shall have the meaning set forth below. The term defined below and used in each of the topics should be construed broadly to the fullest extent of its meaning in a good faith effort to comply with the Federal Rules of Civil Procedure.

1. "Landline phone records" means any landline phone record responsive to Request No. 5 of the United States' First Request for Production of Documents from Apple; Request No. 2 of the United States' Civil Investigative Demand No. 26186; or Request No. 5 or Request No. 8 of the State of Texas' Civil Investigative Demand issued to Apple on April 15, 2010.

SUBJECT MATTER OF TESTIMONY

Pursuant to Rule 30(b)(6) of the Federal Rules of Civil Procedure, please designate one or more officers, directors, or managing agents to testify on behalf of Apple on the following subjects, and identify the subjects on which each person so designated will testify:

1. Apple's communications and actions, internally and with regard to relevant third-party agents or vendors, to preserve and to produce landline phone records upon receiving (a) the State of Texas' Civil Investigative Demand issued on April 15, 2010, (b) the United States' Civil Investigative Demand issued on September 17, 2010, and (c) the United States' First Request for Production of Documents from Apple on May 21, 2012, including for (a), (b), and (c):

- (1) The date(s) a litigation hold or document preservation notice was sent and the substance of any notice(s);
- (2) The sender(s) and recipient(s) of any such notice(s);

(3) The procedure(s) for implementation and monitoring of any such notice(s);
and

(4) The process(es) undertaken to preserve, collect, and produce landline phone records pursuant to any such notice(s) or pursuant to Apple's discovery obligations in this matter.

2. The identity of the individuals involved in preserving, collecting, and producing Apple's landline phone records pursuant to Apple's discovery obligations in this matter.

3. The facts and circumstances concerning Apple's discovery that certain landline phone records had not been produced, including the date Apple made the discovery, and any measure(s) or action(s) taken by Apple (a) to produce such records and (b) to communicate the situation to other Parties to this action.

4. The facts and circumstances concerning Apple's loss of, destruction of, or failure to preserve certain landline phone records, including how and when such loss, destruction, or failure to preserve occurred and any measure(s) or action(s) taken by Apple (a) to re-obtain the landline phone records and (b) to communicate the situation to other Parties to this action.

5. The facts and circumstances concerning the preservation and production of landline phone records that reflect telephonic communications from one landline extension within Apple's offices or system to another landline extension within Apple's offices or system, including (a) whether such records ever existed, (b) whether Apple had the ability at any point in time to create such records, and (c) any efforts by Apple to communicate any preservation limitations to other Parties to this action.

6. The identity of the persons knowledgeable about the topics listed above.

