



U.S. Department of Justice

Antitrust Division

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**MEMO ENDORSED**

May 13, 2013

BY E-MAIL

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

Re: United States v. Apple, Inc., et al., No. 12-cv-2826 (DLC)  
States of Texas v. Penguin Group (USA), Inc., No. 12-cv-3394 (DLC)

Dear Judge Cote:

We write in response to Apple's letter from earlier today. Based on that letter, and our recent conversations with third parties, we believe it likely that, within the next 24 hours, the parties will be in a position either: (1) to publicly file their pretrial documents without any redactions; or (2) to present the pretrial documents to the Court with limited proposed redactions that could be resolved quickly. Nonetheless, Apple requests that the Court issue an Order that would delay the pretrial documents from becoming public for several days while the parties address, and the Court rules on, confidentiality issues that do not affect the pretrial papers. We respectfully submit that the Court should deny Apple's request.

Pursuant to Your Honor's instruction, immediately following the Court's May 8 teleconference, the United States proposed to the parties a process that would allow for all parties' pretrial papers (*i.e.*, the joint pretrial order, the pretrial memoranda, the proposed findings of fact, the proposed conclusions of law, and the memoranda in support of the motions *in limine*) to be publicly filed early this week. That process involved providing, for all third parties that had not yet provided proposed redactions, the excerpts from the pretrial papers that reference their documents. The third parties were instructed to review those excerpts and indicate whether any of the excerpts raise confidentiality concerns. Third parties have been instructed that, if they plan on requesting redactions of excerpts from the pretrial papers, they should prepare short letters to the Court articulating the bases for their requests. At the same time, third parties also were requested to review the underlying documents implicated by the excerpts and propose redactions to those documents.

As of now, it appears that very few, if any, redactions will need to be made to the pretrial papers. Thus, it is very possible that by tomorrow morning, Plaintiffs (and, according to its letter, Apple) will be in a position to file their pretrial papers publicly on ECF or submit to the Court a very limited number of confidentiality issues to be decided. Nonetheless, Apple asserts that the parties should not do so. Rather, Apple proposes to interject days of delay before making these documents public, while the parties analyze and then the Court rules on redactions that do not affect the pretrial papers themselves. Specifically, Apple suggests that—even if a third party has no concern with the way its document is being referenced in the pretrial papers—if the third party has a separate confidentiality concern with the document itself, it must be addressed before the pretrial papers become public.<sup>1</sup> That seems inefficient and would unnecessarily delay the public filing of the parties' papers. To the extent any third parties request redactions to the pretrial pleadings, we submit that the Court can examine and rule on those limited proposed redactions without engaging in the more cumbersome process Apple is suggesting. And, of course, if third parties want to support their positions by submitting complete copies of the underlying documents, they certainly are free to do so.

Pursuant to Your Honor's instruction, the United States also has come up with a process for resolving all confidentiality issues relating to documents to be used at trial. Under that process, over the coming days the parties will review all proposed redactions by third parties to determine whether they impact relevant portions of documents to be submitted at trial. To the extent the proposed redactions do impact relevant portions of documents to be submitted at trial, the United States proposes that any unresolved issues be raised with the Court by no later than May 21.

Because Apple's proposed Order would result in an unnecessary delay in making the pretrial papers public, the United States respectfully requests that Apple's proposed Order be denied. Instead, the United States requests permission to identify to the Court within the next 24 hours any excerpts from its pretrial papers on which third parties are requesting redactions, or alternatively to inform the Court that no redactions are necessary and that the pretrial papers are ready to be filed publicly.

*Approved. All parties to the June  
3 trial shall follow this*

*proceeds.*

*Denise Cote  
May 13, 2013*

Respectfully Submitted,

/s/ Lawrence E. Buterman  
Lawrence E. Buterman

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<sup>1</sup> For example, the United States cited several third parties' agency agreements in its pretrial papers, often simply for the proposition that these third parties entered agreements on agency terms. Most third parties have agreed such references do not raise confidentiality concerns. However, some of the third parties may seek discrete redactions of terms within those agreements that they view as competitively sensitive. The United States respectfully submits that the Court should not have to resolve all those requests before the pretrial papers can be made public.