UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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

THE STATE OF TEXAS; THE STATE OF CONNECTICUT; et al., Plaintiffs, v. PENGUIN GROUP (USA) INC. et al., Defendants.	Civil Action No. 12-cv-03394 (DLC)

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION *IN LIMINE* TO EXCLUDE CERTAIN ANTICIPATED TESTIMONY REGARDING THE "APPROPRIATENESS" OF COMMUNICATIONS

Defendants' conduct in this case, which includes Penguin communicating with its competitors regarding e-book prices and future plans, and Apple acting as facilitator and go-between in order to allow Publisher Defendants to raise consumer e-book prices industry-wide, was inappropriate under any definition of the word. Indeed, several witnesses, including Apple's chief legal counsel responsible for drafting the Apple Agency Agreements and Apple's manager of the iBookstore, gave deposition testimony indicating they knew the conduct they (or their employers) were engaging in was improper.[1] In an effort to prevent the Court from considering these admissions, however, Defendants[2] seek a broad order excluding all "testimony regarding whether certain conduct is 'appropriate' or 'inappropriate.'" MIL at 1.

At trial, Plaintiffs intend to prove that Apple and Penguin engaged in a price-fixing conspiracy aimed at raising e-book prices and ending retail e-book price competition. Plaintiffs do not intend, and have never indicated that they intend, to try this case by proving that Defendants' conduct was "inappropriate." But to suggest, as Defendants do, that there is no

[1] For example, Robert McDonald, Apple's manager of the U.S. iBookstore (and an individual that Apple intends to have testify at trial), testified during his deposition that if a publisher asked "am I getting the same offer as these other guys," he "would not answer that question" because "[t]hat would reveal the nature, the specifics of my conversation with this publisher to that publisher." McDonald Dep. 137:23-138:8. Nonetheless, Apple has admitted that it "told each publisher that it was offering the same basic terms to every other publisher, and that it would open the iBookstore only if it could reach agreements with several of the publishers." Apple MOL at 31. Similarly, Apple's Associate General Counsel and drafter of the Apple Agency Agreements, Kevin Saul (whom Apple also intends to have testify at trial), testified during his deposition that if a publisher had informed him that it was interested in an agency model in order to fix Amazon's pricing, that would have been something that he likely would have viewed as improper and could have caused him not to proceed with the e-books deals. Saul Dep. 99:9-100:25, 103:17-105:13. Although Mr. Saul's own notes make clear that HarperCollins told Apple that it was interested in an agency model in order "to fix Amazon pricing," PX-0036, at APLEBOOK-01601745, Apple went ahead and entered into agency agreements with HarperCollins and the other Publisher Defendants.

[2] Though the motion is authored by Penguin, Plaintiffs understand from the meet and confer process that Apple has joined in the motion. Apple's participation in the motion is also confirmed by the fact that the motion seeks to preclude not just the Plaintiff States, but also the United States, from introducing the evidence in question.

possible way that Defendants' knowledge of their wrongdoing can be relevant to the factfinder, strains credulity. Defendants' knowledge of their wrongdoing, for example, sheds light on whether they knowingly conspired to violate the antitrust laws. And, even though Plaintiffs believe Defendants' actions constitute *per se* violations of Section 1 of the Sherman Act, within the context of a rule of reason analysis, "knowledge of intent may help the court to interpret facts and to predict consequences." *Board of Trade of City of Chicago v. United States*, 246 U.S. 231, 238 (1918). Furthermore, the willfulness of Defendants' conduct is an important factor for the Court to consider in fashioning the injunctive relief Plaintiffs seek and in determining penalties for several state law claims.

To the extent Defendants believe Plaintiffs' cross-examination questions call for inadmissible lay opinion or seek testimony that is inadmissible on relevancy grounds, Defendants can lodge objections at trial. To exclude—before trial—unspecified swaths of evidence where the words "appropriate," "inappropriate," and their synonyms are used would not promote efficiency and would unnecessarily cause confusion.

ARGUMENT

I. DEFENDANTS' MOTION IS HOPELESSLY VAGUE AND PROVIDES NO GUIDANCE AS TO THE SPECIFIC EVIDENCE THEY SEEK TO EXCLUDE

When a "motion *in limine* lacks the necessary specificity with respect to the evidence to be excluded" the Court should "reserve judgment on the motion until trial when admission of particular pieces of evidence is in an appropriate factual context." *Nat'l Union Fire Ins. Co. v. L.E. Myers Co. Grp.*, 937 F. Supp. 276, 287 (S.D.N.Y. 1996); *see also Wechsler v. Hunt Health Sys., Ltd.*, No. 94 Civ. 8294(PKL), 2003 WL 21998980, at *3 (S.D.N.Y. Aug. 22, 2003); *Baxter Diagnostics, Inc. v. Novatek Med., Inc.*, No. 94 Civ. 5520(AJP), 1998 WL 665138, at *3 (S.D.N.Y. Sept. 25, 1998) (denying motions *in limine* to exclude "all 'evidence of Baxter's

financial condition'" and "evidence on its punitive damages claim" because they "lack[ed] 'the necessary specificity'" (citation omitted)). In *National Union Fire Insurance*, the court rejected a party's attempt pre-trial to exclude "the testimony of various witnesses interpreting the purpose and/or meaning of certain policy provisions" because the party failed to specify "which evidence should be excluded or which parties intend to offer such evidence." 937 F. Supp. at 287. Similarly, in *Viada v. Osaka Health Spa, Inc.*, motions *in limine* seeking to preclude plaintiffs from offering "writings and testimony" that defendants alleged were the product of material stolen from a defendant were denied as vague because the motions did "not specify the writings or potential testimony that the movants believe should be excluded from the trial." No. 04 Civ. 2744 VMKNF, 2005 WL 3435111, at *1 (S.D.N.Y. Dec. 12, 2005). The Magistrate Judge in *Viada* noted that defendants' lack of specificity meant that "the Court is unable to determine . . . whether the writings and testimony sought to be excluded from the trial would be inadmissible under any of the provisions of the Federal Rules of Evidence." *Id.* As the court in *Wechsler* made clear, "[a] district court is well within its discretion to deny a motion *in limine* that fails to identify the evidence with particularity or to present arguments with specificity." 2003 WL 21998980, at *3 (quotation omitted).

Here, the vague nature of Defendants' motion mandates its denial. Defendants do not specify in any way the witnesses or testimony that they seek to exclude. Instead, Defendants present limited examples of *questions* from depositions they found objectionable, and from that seek a broad order with fuzzy parameters for purposes of trial. *See Sperberg v. Goodyear Tire & Rubber Co.*, 519 F.2d 708, 712 (6th Cir. 1975) ("Orders *in limine* which exclude broad categories of evidence should rarely be employed."). More troubling, despite fashioning the motion as one seeking to "exclude testimony regarding whether certain conduct is 'appropriate'

or 'inappropriate,'" MIL at 1, the examples contained in Defendants' Exhibit A show that Defendants are seeking to exclude a broader and undefined set of testimony that uses other words such as "improper," "uncomfortable," and "off limits." MIL at Exhibit A. Thus, there is no clear test for determining whether testimony would fit into the category Defendants seek to exclude. As a result, rather than promoting any efficiency, granting Defendants' motion *in limine* risks turning certain questioning in the upcoming trial into a version of the board game, Taboo.[3]

Accordingly, and given that Plaintiffs have no intention of making the inappropriate nature of Defendants' conduct a major part of the upcoming trial, Plaintiffs respectfully submit that the more prudent course of action is to deal with any objections relating to these issues on a case-by-case basis at trial.[4]

II. THE EVIDENCE IN QUESTION MAY PROVE RELEVANT AND THUS IS NOT AN APPROPRIATE SUBJECT FOR A MOTION *IN LIMINE*

Even assuming Defendants' motion had precisely defined the contours of the evidence they seek to exclude, a motion *in limine* under these circumstances would nonetheless be, to use Defendants' forbidden word, "inappropriate."

"The purpose of a motion *in limine* is to allow the trial court to rule in advance of trial on the admissibility and relevance of certain forecasted evidence." *United States v. Chan*, 184 F. Supp. 2d 337, 340 (S.D.N.Y. 2002) (citing *Luce v. United States*, 469 U.S. 38, 41 n.4 (1984)).

[3] Taboo is a word-guessing board game published by Hasbro in which the goal is for a player to have his/her partner(s) guess the word on his/her card without using the word itself or five additional words listed on the card.

[4] To the extent Defendants' motion seeks to exclude the particular deposition excerpts referenced in Defendants' motion, Plaintiffs note that, pursuant to the Court's instruction, all parties have provided the Court with their objections to all submitted deposition excerpts. Thus, there simply is no need for such a motion *in limine*.

"Evidence should be excluded on a motion *in limine* only when the evidence is clearly inadmissible on all potential grounds." *Wechsler v. Hunt Health Sys., Ltd.*, 381 F. Supp. 2d 135, 140 (S.D.N.Y. 2003) (quoting *Baxter Diagnostics*, 1998 WL 665138, at *3). In considering a motion *in limine*, courts may reserve judgment until trial, so that the motion is placed in the appropriate factual context. *See Nat'l Union Fire Ins. Co.*, 937 F. Supp. at 287 (citing *Hawthorne Partners v. AT&T Tech., Inc.*, 831 F. Supp. 1398, 1400 (N.D. Ill. 1993) (stating that a motion *in limine* to exclude evidence should be granted only "when evidence is clearly inadmissible on all potential grounds . . . [and] [u]nless evidence meets this high standard, evidentiary rulings should be deferred until trial")).

Defendants provide the Court with a false choice, arguing that the evidence they seek to exclude is either (1) inadmissible lay opinion testimony or (2) inadmissible testimony based on relevancy. Neither is true.

First, witnesses have not been asked to provide opinions of their conduct based on "social acceptability" or expert legal opinion. MIL at 3-4. Indeed, Plaintiffs clarified throughout that they were not seeking legal opinions when asking about the "appropriateness" of conduct.[5] Rather, to the extent witnesses were asked questions that elicited opinions regarding their conduct, the witnesses were instructed to testify based on what they *perceived* was appropriate in light of their business experience and any training they had been provided. As such, Defendants' reliance on *United States v. Tomasetta*, No. 10 Cr. 1205(PAC), 2012 WL 1080293, at *4 (S.D.N.Y. Mar. 30, 2012), where the court prohibited third-party analysts from testifying before a jury about how the company "should have" followed laws, is misplaced. *See* MIL at 4. In

[5] *See, e.g.*, Moerer Dep., 50:17-19 ("I'm asking the witness in his experience as a businessman, would that be an inappropriate conversation to have.").

other words, the testimony in question here meets the personal knowledge requirement of Fed. R. Evid. 602, and is permissible lay opinion testimony consistent with Fed. R. Evid. 701.

Second, the testimony at issue, which, *inter alia*, goes to show Defendants' knowledge and intent, is relevant for numerous purposes. For example, while not necessarily part of the *per se* case against Apple and Penguin, Defendants' intent is relevant when assessing liability under the rule of reason. As the Supreme Court stated in *Chicago Board of Trade*:

> The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.

246 U.S. at 238.

Similarly, with respect to many of the asserted state law claims, the subjective good faith of Defendants is a factor in determining whether a penalty should be assessed. For example, Connecticut alleges that the defendants' actions, in addition to violating the Connecticut Antitrust Act, also violate the Connecticut Unfair Trade Practices Act, Conn. Gen. Stat. § 42-110a et seq., which provides civil penalties for "willful" violations, defined as those where the defendant "knew or should have known that his conduct was a violation." *See* Conn. Gen. Stat. § 42-110o(b). Virginia law also allows that a civil penalty be assessed for each "willful or flagrant" violation of the Virginia Antitrust Act. Va. Code Ann. § 59.1-9.11.[6]

Whether Defendants' officers believed they were acting appropriately or not also is relevant to the Court's determination as to the size of a civil penalty to be assessed. *Cf. United States v. J. B. Williams Co.*, 498 F.2d 414, 438-39 (2d Cir. 1974) (finding, in the context of assessing civil penalties under 15 U.S.C. § 45(l) for violation of a "cease and desist" order under

[6] *See also* Illinois Antitrust Act, 740 Ill. Comp. Stat. 10/3 (Defendants acted "for the purpose or with the effect of fixing, controlling, or maintaining the price . . . .").

15 U.S.C. § 45(b), that "the size of the penalty should be based on a number of factors including *the good or bad faith of the defendants*, the injury to the public, and the defendants' ability to pay" (citations omitted) (emphasis added)). For example, assuming the Court finds that Apple and Penguin violated Texas antitrust law, the Court is statutorily required to assess a civil penalty against those companies. However, the Court is allowed to award a civil penalty in any amount up to $1 million. Tex. Bus. & Com. Code Ann. § 15.20(a). Whether Apple or Penguin witnesses believed their actions to be "inappropriate" is one factor relevant to the Court's determination as to where in this broad spectrum the civil penalty should be placed.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that Defendants' motion *in limine* be denied.

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Respectfully submitted,

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