Unites States of America v. Apple, Inc. et al Doc. 291

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VIA ELECTRONIC MAIL

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The Honorable Denise L. Cote
United States District Court for the Southern District of New York
500 Pearl Street, Room 1610
New York, New York 10007-1312

Re: Re: *United States v. Apple*, 12 Civ. 2826 (DLC), *Texas v. Penguin Group (USA) Inc.*, 12 Civ. 3394 (DLC)

Dear Judge Cote:

We write to address the states' requested relief in this case. The Court has ruled that the current bench trial "would address issues of liability and injunctive relief" only, and "clarified on two occasions that there would be a *separate trial* to determine any damages amount." Opinion and Order at 11, *In re Elec. Books Antitrust Litig.*, No. 1:11-md-2293 (DLC) (S.D.N.Y. Apr. 24, 2013), ECF No. 313 (emphasis added).[1]

During last Monday's proceedings, however, the states argued in their opening statement that the "state law claims that [they] are pursuing are in no way redundant of the claims in the United States or of the state claims under Section 4(c) of the Clayton Act." Trial Tr. 73:8-11, June 3, 2013. The states asserted that, "*at the appropriate time* [they] will ask that the Court impose meaningful civil penalties under each plaintiff's state law" and that "one of the key factors that courts consider is the nature of the defendant's conduct." *Id.* at 73:19-21; 74:4-6 (emphasis added). Apple is not certain what the vague reference to "the appropriate time" means. If the states are asserting that "the appropriate time" is this trial, Apple, in an abundance of caution, respectfully requests a ruling from the Court that any request for civil penalties or other non-injunctive relief is not at issue in this trial.

The states' requests for civil penalties and other monetary relief are simply premature and not a part of this bench trial, and Apple wishes to ensure that its arguments and objections regarding these issues are properly preserved. Where liability and damages are to be tried separately, courts have held that the proper preservation of specific issues depends on the stage of proceedings in which those issues are to be tried. *See, e.g.*, *Nilson-Newey & Co. v.*

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[1] *See also id.* at 12 ("distinguish[ing] the liability and injunctive relief portions of the DOJ and State Actions as those issues to be tried at the June Bench Trial"); *id.* at 9 (observing that at the October 26, 2012 teleconference attended by all parties, "the Court aimed to 'make sure that we understand what is happening at the June trial *as opposed to any damages trial that might be held later*'" (emphasis added)); *id.* at 18 (noting that the states "memorialized" their "request to have a non-jury determination of the *liability and injunctive portions* of its claims at the June Bench Trial" (emphasis added)).

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Ballou, 839 F.2d 1171, 1175 (6th Cir. 1988); *BIC Leisure Prods., Inc. v. Windsurfing Int'l, Inc.*, 774 F. Supp. 832, 834 (S.D.N.Y. 1991); *see also Williams v. Jader Fuel Co., Inc.*, 944 F.2d 1388, 1402 (7th Cir. 1991). Based on the Court's prior statements in this case, it remains Apple's position and understanding that all issues pertaining to the states' requested non-injunctive relief "are to be addressed in the later, damages proceedings of this litigation"—not now—and that Apple has not "waived or conceded any arguments regarding these issues." Apple Inc.'s Opp. Pl. States' Supp. Mem. Law on State Law Claims 3 n.1. As Apple previously explained, "the parties have not yet had the opportunity to brief the various complex issues surrounding the states' requested relief, including (but not limited to) any overlap in the states' claims, the need to avoid double recovery, potential election-of-remedies concerns, the propriety of seeking civil penalties and other forms of relief in this action, and still others." *Id.*

To the extent the states' position is that the civil penalties they seek are encompassed within the injunctive relief sought by the Department of Justice at trial, they are incorrect. *See Tull v. United States*, 481 U.S. 412, 422 (1987) ("A civil penalty was a type of remedy at common law that could only be enforced in courts of law."); *SEC v. Lipson*, 278 F.3d 656, 662 (7th Cir. 2002) (noting that civil penalties are not equitable in nature). Further, civil penalties present distinct and heretofore unaddressed burdens of proof. Even if the award of civil penalties were appropriate and permissible under the jurisdiction of this Court, it would still have to apply the various civil penalty provisions of each state and consider, among other things, factors such as "the degree of culpability, any history of prior such conduct, ability to pay, effect on ability to continue to do business . . . such other matters as justice may require" (*Commonwealth v. AmCan Enters., Inc.*, 47 Mass. App. Ct. 330, 339 (App. Ct. 1999)), or whether a "willful" violation occurred (*see, e.g.*, Conn. Gen. Stat. § 42-110o).

Apple therefore respectfully requests that the Court issue a ruling making clear that any issues pertaining to non-injunctive relief sought by the states, including the availability of any such relief at any time, is wholly outside the scope of the ongoing bench trial.

Respectfully submitted,

Daniel G. Swanson

DGS
Cc: All counsel