Unites States of America v. Apple, Inc. et al Doc. 293

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The Honorable Denise L. Cote
U.S. District Judge, Southern District of New York
Daniel P. Moynihan U.S. Courthouse
500 Pearl Street
New York, NY 10007-1312

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

Dear Judge Cote:

We represent Google Inc., a non-party in these cases. Pursuant to the Court's direction this morning, the parties have advised Google of the trial exhibits containing highly confidential Google material that they plan actually to offer at trial. Unfortunately, Apple's counsel, having previously consented to in camera treatment of the Google information at issue, now say they want to splash some of the most confidential Google material onto the public record.

Clauses in issue. The documents in issue are the commission provisions only of Google's agency agreements with six publishers: DX-397 (Penguin); DX-399 (Simon & Schuster); DX-392 (HarperCollins); PX-499 (Hachette); PX-536 (Macmillan); and GOGEBKS-TT-0055313 to -332 (Random House). In short, just six numbers.

Apple's change of position. As the Court may recall, by letter dated May 8, 2013, Google advised the Court and the parties of the portions of the proposed trial exhibits for which Google believes in camera treatment is essential to protect its trade secret business information. This submission included Google's highlighted identification of the clauses in issue. Google's redaction requests were made consistent with the Second Circuit authority cited in our letter and cited by the Court during the telephonic hearing on May 8, 2013. They included the commission provisions in the agency agreements now in issue. As the Court may also recall, as specified both in my letter and during the telephonic hearing on May 8, Google's application for in camera treatment of these six commission numbers (as well as its other designated materials) was unopposed by Apple or any of the other parties. Apple reversed course, however, after a Google witness, Thomas Turvey, provided testimony that Apple apparently believes hurts its defense. It was only after Mr. Turvey's deposition that Apple advised Google that it would seek to place these numbers on the public record, rather than using them in camera as it had previously agreed.

We are advised that Plaintiffs continue to consent to in camera treatment of these six numbers. We also ask the Court to recall that, during the May 8 telephonic hearing, the Court expressed its preliminary view that none of the material designated for confidential treatment by Google was relevant or necessary to be considered as evidence at trial.

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Continued need for confidential treatment. The agency commission numbers in the six documents are all different. Those numbers reflect individualized bargaining and compromises on other parts of the various agreements. Because Google operates with many of its suppliers on a "revenue share" basis, the numbers, while negotiated in 2010, remain highly relevant to Google's business today because the commission amounts and revenue share percentages share the same key characteristics – one major difference being that, under revenue share, Google is the party that determines the retail price. Google's agency agreement with one of the publishers, moreover, is still in effect. Mr. Turvey's declaration, submitted with my May 8 letter, provides unrebutted testimony on how the disclosure of these numbers would cause Google severe competitive harm. Apple has offered no contrary evidence. It is important to recognize, moreover, that antitrust policy strongly discourages the exchange of current confidential price information such as this. *See, e.g., United States v. Container Corp.,* 393 U.S. 333 (1969).

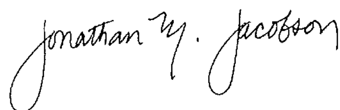
Our common sense, practical suggestion for handling. Google is not asking that the courtroom be closed, and emphatically does not want to intrude on the orderly progress of the trial. We suggest instead that, if the material in question really is relevant, that the numbers be referred to at trial in the abstract, with the specific numbers maintained in camera. This would allow Apple to establish in court, for example, that the commission amounts in each of the six agreements are in fact different – a point that does not require the specific numbers to be mentioned. Or if, as another example, Apple wanted to examine Mr. Turvey later this week on the commission amount in, say, the Hachette agreement, counsel could simply ask questions such as: "Why did you agree to that number? Why is that number different from the number in the XYZ agreement? Did you negotiate the commission amounts separately and individually with each of these publishers?" Following this procedure would allow Apple to make every point it needs to make without revealing the actual numbers.

This procedure is by no means new. It has been followed regularly in government antitrust cases, including the last major government antitrust case in this district – *United States v. Visa USA*, 98 Civ. 7076, tried in 2000 before Judge Barbara Jones.

Case law. Google is cognizant that, if presented and received at trial, these documents will be judicial documents, subject to the presumption of public access. The Court has cited several decisions in that regard, including *NYCLU v. NYC Transit Auth.*, 684 F.3d 286, 298 (2d Cir. 2012) and *Lugosch v. Pyramid Co.,* 435 F.3d 110 (2d Cir. 2006). But as this Court has also pointed out, that presumption can be overcome by what the Second Circuit has called "countervailing factors." *Id.* at 124. Those countervailing considerations become especially important where, as here, a non-party is involved. *Id.* at 120. *See, e.g., Gardner v. Newsday, Inc.*, 895 F.2d 74, 79-80 (2d Cir. 1990) (the "privacy interests of innocent third parties . . . should weigh heavily"); *United States v. Amodeo*, 71 F.3d 1044, 1051 (2d Cir. 1995). We believe that the simple procedure we request will serve to protect the public interest in public access while, at the same time, protecting Google – a very small rival in eBooks – from serious competitive harm.

The Court's consideration is appreciated.

Respectfully yours,



Jonathan M. Jacobson

cc: Counsel of Record