

GIBSON DUNN

MENT
 TRONICALLY

6/19/13

Gibson, Dunn & Crutcher LLP

200 Park Avenue
 New York, NY 10166-0193
 Tel 212.351.4000
 www.gibsondunn.com

Daniel G. Swanson
 Direct: +1 213.229.7430
 Fax: +1 213.229.6430
 DSwanson@gibsondunn.com

June 17, 2013

VIA ELECTRONIC MAIL

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

D&F
 6/19/13

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

Dear Judge Cote:

During proceedings on June 10, 2013, the Court instructed the parties to confer as to whether the following underscored sentence of Dr. Burtis's revised testimony constitutes a new opinion, not previously disclosed¹: "The average consumer price of eBooks in the alleged relevant market declined following Apple's entry. This was not the result of any pre-existing downward trend in prices, as the monthly data from my database demonstrate." Burtis Decl. ¶ 56 (emphasis added). Dr. Burtis's opinion regarding pricing trends over the wholesale period is part of her conclusion that "the average retail price of eBooks in the alleged relevant market was lower during the post-agency period than it was in the pre-agency period." Burtis Decl. ¶ 4. This opinion is reflected in several paragraphs of her proffered trial testimony, her expert reports, as well as in graphs that the Court has already received into evidence, and should not be stricken from Dr. Burtis's testimony.

Plaintiffs cannot complain of any surprise about Dr. Burtis's opinion regarding pre-agency pricing. As Dr. Burtis explains in her trial declaration, she "looked at the full range of transactional data produced in this litigation and compared *price and output trends* in the pre-agency period (from February 2008 through March 2010) with the post-agency period (from April 2010 through March 2012)." Burtis Decl. ¶ 16 (emphasis added); *see also id.* ¶ 13.

The fact that there was no "pre-existing downward trend in prices" over the wholesale period is simply a description of graphs included in Dr. Burtis's initial expert report and rebuttal

¹ Trial Tr. 1036:1-1037:3.

GIBSON DUNN

The Honorable Denise L. Cote

June 17, 2013

Page 2

report (DX-434 and DX-435). *See, e.g.*, Burtis Decl. ¶ 18; PX-831, pg. 11, 12; PX-832, pg. 14; *see also* DX-473 (showing no pre-agency downward trend in prices for non-major publishers). These two graphs—one of which featured prominently in Plaintiffs’ opening statement—have been received in evidence and show that average prices were higher in 2009 than in 2008.² The Plaintiff States’ expert, Dr. Ashenfelter, does not dispute this fact. This higher level of pricing in 2009 is at the same level as the average prices that prevailed for the first few months of agency. As Dr. Burtis explained in her initial report (PX-831 at ¶ 26), DX-434 (Initial Report Graph 1) and DX-435 (Initial Report Graph 2) demonstrate that the short-lived rise in average price during the first few months after agency took pricing to “a level that approximates the average pre-agency prices in 2009.” Trial Tr. 1510:25-1511:2.

Additionally, in her rebuttal report, Dr. Burtis addressed pre-agency price trends in connection with her criticism that the Plaintiffs’ experts made “statements about price trends without any accompanying support.” PX-832, ¶ 24; *see also* ¶ 24(b) (noting that Professor Gilbert does not analyze “whether the prices of eBooks to which consumers supposedly switched were the same or lower than prices before the agency agreements”) (emphasis added); ¶ 24(c) (citing to DX-435 and stating “Professor Baker claims that the average retail price of all eBooks increased [after agency]. He presents no empirical basis for this claim and, as shown in my initial report, the claim is not true.”).

Dr. Burtis’s opinion regarding pricing in the pre-agency period was properly disclosed. She should be permitted to testify on this issue which is relevant to trial testimony already submitted in this case.

Sincerely,



Daniel G. Swanson

DGS/lr

cc: All Counsel

² Higher average prices in 2009 were a result of Amazon’s reduction in discounting of new releases, as reported in Dr. Burtis’s rebuttal report. PX-832 fn. 48 (reporting that in 2008, 86% of the five major agency publishers’ hardcover new release eBook titles sold for \$9.99; in 2009, that percentage dropped to 57%). Macmillan’s CEO, John Sargent, testified to this increase in price in 2009. Trial Tr. 1091:8-1092:15.