

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- X
UNITED STATES OF AMERICA,

Plaintiff,

v.

APPLE INC., *et al.*,

Defendants.
----- X

12 Civ. 2826 (DLC)

----- X
THE STATE OF TEXAS,
THE STATE OF CONNECTICUT, *et al.*,

Plaintiffs,

v.

PENGUIN GROUP (USA) INC., *et al.*,

Defendants.
----- X

12 Civ. 3394 (DLC)

APPLE INC.'S POST-TRIAL MEMORANDUM

Part 6 of 8



Testimony Of John Sargent

Q. So why don't you give me your explanation of why he writes this?

...

A. I believe this is in response to the first thing that was sent over, which we saw. There was a statement at the bottom saying that how we would put all resellers on it. Now, we cannot agree that we will force, is nothing to do with Apple's suggestion that we would force it. It's to suggest that we would not be – we did not want to force... They said all resellers on agency, we said no.

“All resellers to agency” idea abandoned and never negotiated

Apple sought MFN for same reason other retailers did:
To lower prices on its eBookstore

Publishers knew they could sign with Apple and remain on
wholesale terms with Amazon

JANUARY 18 – 26, 2010

Calendar

Day Week Month Year

December 2009

Today

Sun 29	Mon 30	Tue 1	Wed 2	Thu 3	Fri 4	Sat 5
6	7	8	9	10	11	12
			  			
13	14	 	 	17	18	19
		     				
20	 	21	22	23	24	25
	  					
27	28	29	30	31		

Calendar

Day Week Month Year

January 2010

Today

					Fri 1	Sat 2
3	 	4	 	5	6	7
	     					
10	 	11	12	13	14	15
	  	  				
17	18	19	20	21	22	23
			  			
			  			
24	25	26	27	28	29	30
						
31	1	2	3	4	5	6

Government's Opening Statement

The reality here, and it's important to understand, these negotiations were simply not taking place unilaterally, but, in essence, were collective.



Testimony Of Kevin Saul

- Q. Can you describe how much time was spent during these weeks negotiating these agreements in hours, approximately? Were you negotiating a couple hours a day? Give the Court a sense, please, of what the pace and structure of the negotiations was.
- A. Twelve hours a day negotiations, e-mails, exchanging drafts. It was a challenging, tiring, and difficult couple of weeks.



Testimony Of David Young

Q. And at this point in time, on **January 19**, had Hachette made a decision yet to enter into an agreement with Apple?

A. I don't recall. It was – It was a very busy time. I don't know whether we had actually decided on January 19 that we were going to do it, do so because there were **still issues in contention.**

Q. So when you say issues in contention, what do you mean?

A. Well, we weren't happy with prices. **We weren't happy with the MFN and so forth, and I think they were still being wrangled.**



Testimony Of Keith Moerer

Q. On January 21, did you and your colleagues have a belief as to whether or not Apple was going to be able to announce a bookstore on the 27th?

A. I was not at all sure we would launch a bookstore. We had no agreements signed at that point.

Q. And how, if at all, did that impact your state of mind as an executive and negotiator of this deal?

A. It made me very, very anxious, very concerned that we – we would not be able to do what we had been sent out to New York to do which is sign deals with publishers and enough publishers so that we could make that announcement.



Testimony Of Eddy Cue

- Q. Why did you send Mr. Jobs a summary of the status of negotiations with each publisher on January 21st?
- A. Well, I was supposed to be done and Steve was reminding me, as we were up – as I was updating him, and he had given me a drop-dead date of the 21st to complete the deals or he would not announce it the following week.



Testimony Of John Sargent

Q. And we've heard some about the difficult negotiations that took place between Apple and the publishers. Did you have – were the negotiations difficult for Macmillan?

A. Yeah, I would say the negotiations were quite intense, a lot of back and forth. They were never – As it says here, “they were never unreasonable or overly aggressive or anything like that, but they were serious, hard, contract negotiations.”



Declaration Of Brian Murray ¶24

In the meantime, Apple showed no signs of moving on any of the core terms of their agency proposal that concerned me. I kept trying to get a better deal for HarperCollins, but my negotiations with Apple just went in circles. By January 23 or 24, negotiations had essentially broken down.

DX-234: January 24, 2010 Email from Jobs to Murdoch

Subject: Fwd: HarperCollins
Date: Sun, 24 Jan 2010 22:31:31 -0800
From: "Steve Jobs" <sjobs@apple.com>
To: "Eddy Cue" <cue@apple.com>
Message-ID: <20AD9C93-7B76-4DA1-A6FA-FBD6F79D3F0D@apple.com>

Our proposal does set the upper limit for ebook retail pricing based on the hardcover price of each book. The reason we are doing this is that, with our experience selling a lot of content online, we simply don't think the ebook market can be successful with pricing higher than \$12.99 or \$14.99. Heck, Amazon is selling these books at \$9.99, and who knows, maybe they are right and we will fail even at \$12.99. But we're willing to try at the prices we've proposed. We are not willing to try at higher prices because we are pretty sure we'll all fail.

As I see it, HC has the following choices:

1. Throw in with Apple and see if we can all make a go of this to create a real mainstream ebooks market at \$12.99 and \$14.99.

Regards,
Steve

Confidential

USA v. Apple Inc., et al.
12-CV-02826-DLC
DX-234
APPLEBOOK-00013995

PX-37: January 21, 2010 Email From Cue To Sargent

Plaintiff Exhibit
US v Apple
1/21/2010
PX-0037

Subject: Re: iTunes
From: "Eddy Cue" <cue@apple.com>
To: "Sargent, John" <john.sargent@macmillan.com>
Cc: "Brian Napack" <brian.napack@macmillan.com>
Date: Thu, 21 Jan 2010 14:45:02 +0000

I understand. I don't believe we are asking you to do anything, you haven't told us you are doing. We are just trying to get a commitment. I think if we sit down with the agreement and talk through it hopefully we can agree.

Eddy

On Jan 21, 2010, at 6:55 AM, Sargent, John wrote:

I understand. I don't believe we are asking you to do anything, you haven't told us you are doing. We are just trying to get a commitment. I think if we sit down with the agreement and talk through it hopefully we can agree.

> for us that we may in fact give you a no later today. And only in
> working through the contract will we be sure we actually understand
> every aspect of your proposal.
> More a bit later...
>
> -----Original Message-----
> From: Eddy Cue [mailto:cue@apple.com]
> Sent: Wednesday, January 20, 2010 11:25 PM
> To: Sargent, John
> Subject: iTunes
>
>
> Thanks for dinner tonight! After all the business stuff, it's great to
> get to know each other better.
>
> I asked Kevin to send changes we discussed to Brian tonight. Please try
> to make your guys available tomorrow for Kevin as I think it will help a
> lot and we running out of time.
>
> Eddy

Exhibit 34
Cue
03/13/13
K. Schroeder
CSR, RPR, CCR

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APLEBOOK-01274492

Points Of Contention

	No Windowing	Price Tiers/Caps	MFN	"New Release" Definition	Apple's 30% Commission
 RANDOM HOUSE	 Did Not Reach Agreement				
 hachette <small>BOOK GROUP</small>	✓	✓	✓	✓	
 HarperCollins		✓	✓	✓	✓
 MACMILLAN		✓	✓	✓	✓
 penguin		✓			✓
 SIMON & SCHUSTER		✓	✓		✓

DX-213: January 21, 2010 Email From Saul To Solomon

Subject: Re: Apple Draft Agreement - Hachette Comments
Date: Thu, 21 Jan 2010 18:44:50 +0000
From: "Kevin Saul" <ksaul@apple.com>
To: "Ross, Carol" <carol.ross@hbgsusa.com>
CC: "Elise Solomon" <elise.solomon@hbgsusa.com>, "Neil DeYoe" <kmoerer@apple.com>
Message-ID: <AEE33F14-67D0-40D4-B...

Elise, I think this reflects most of what we want Orbit as a place holder. I need to get you will give you time to get me something ba

Hachette comments 1.20.10 - Without Prejudice

furthurance of Apple's appointment, including any payments required under collective bargaining agreements.

4. Agency Commission: Tax and Reporting

(a) For Sales of eBooks, Apple shall be entitled to a commission of thirty percent (30%) of the Customer Price payable by eBook purchasers net of

Author
Comment: We are not sure why Apple included a reference to the Content Usage Rules here.
Author
Deleted: and the Content Usage Rules, consistent with this Agreement.
Author
Deleted: s. "...), even if Apple is unable to collect from the purchaser. The "rate" of an eBook shall

[[APPLE: THIS IS A MUST.]]

Author

Deleted: If, for any particular New Release in hardcover format, the then-current Customer Price at any time is or becomes higher than a customer price offered by any other reseller ("Other Customer Price"), then Publisher shall designate a new, lower Customer Price to meet such lower Other Customer Price.

Author

Deleted: TAKING THIS OUT GUTS OUR ABILITY TO COMPETE. WE WILL DISC (... [3]

Confidential

APLEBOOK00430005

Government's Opening Statement

The evidence that we will present here, your Honor, will establish that through identical communications and identical term sheets and identical contracts and through constant reassurances that the publishers would all be moving together with identical terms such as price tiers and most favored nation clauses, Apple facilitated the publishers' collective abandoning of their existing wholesale model of sale in favor of a new agency method that would generate higher prices.



Testimony Of Kevin Saul

- Q. Can you please tell the Court, sir, why Apple made the decision on or around January 11 to send materially similar agency agreements to the major publishers at the same time?
- A. We wanted to treat everybody on a level playing field such that big publishers and eventually small publishers would be treated the same, so-called democratic way of doing things.
- Q. During your 17 years at Apple working with its various content stores, the iTunes store, the app store, is that level playing field democratic approach to content providers consistent across Apple's various content stores?
- A. Absolutely.