

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



Testimony Of Russell Grandinetti

Q. At the bottom of the first page you say – this is an e-mail from you to David Young, right? “Hi, David.” And you say, “We are making good progress with everyone else, and we’d love to do the same with Hachette.”

And what you were referring to by “good progress with everyone else” was the progress, the positive progress that Amazon was making in its negotiation with the other publishers with which you were negotiating at the same time, right, Mr. Grandinetti?

A. Yes.



Testimony Of Thomas Turvey

Q. And there's nothing wrong with Google approaching the six largest U.S. trade publishers at or around the same time in 2010 as Google was contemplating opening up a bookstore, correct?

A. **Nothing wrong with that.**

Negotiations were contentious, challenging, and serious

Publishers opposed the very deal terms claimed to facilitate the alleged conspiracy

Apple's negotiation conduct was perfectly legitimate, independent, and corroborated by other retailers

Amazon's Decision To Move To Agency

DX-170: January 15, 2010 Email From Lynch To Horner

From: Steve Riggio
Sent: Friday, January 15, 2010 3:46:14 PM
To: William Lynch
Subject: RE: The next big thing

Great news. This business could get very interesting at 25%-30% GM.

I don't think Amazon will concede price leadership. Their move might be to institute some type of rebate - the more eBooks you buy, the more cash back you get.

This is great progress!

From: William J. Lynch
Sent: Friday, January 15, 2010 2:11 PM

I just came from lunch with Brian Napack, President [of] Macmillan. After we exchanged pleasantries the first thing out of his mouth was, "John (CEO) and I are interested in hearing your position on considering an agency model. I told him his timing was good and that we'd have a revised agreement outlining an agency-like relationship for him to consider in 2 weeks. They are VERY excited.

Please read below. Careful to taking note about positions relating to the above re: agency model. There are several other parties involved. Cader about our interest in this model.

T.

From: Joseph Gonnella
Sent: Friday, January 15, 2010 10:26 AM
To: Theresa Homer
Cc: Jaime Carey; Mary Ellen Keating
Subject: FW: The next big thing

I have not answered this e-mail.

Do you know what he is referring to, Theresa?

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USA v. Apple Inc., et al.
12-cv-02826-DLC
DX-170

BN00783125

DX-243: January 24, 2010 Email From Lynch To Sargent

From: William J. Lynch
Sent: Sunday, January 24, 2010 8:31 AM
To: John Sargent (john.sargent@dnr.state.nh.gov); Brian Sargent (brian.sargent@dnr.state.nh.gov)
Cc: Theresa Hepler
Subject: Our Meeting

In advance of our meeting tomorrow, and as a follow-up to my lunch with Brian, I've attached an executive summary of agency relationship terms B&N would support. This document represents B&N's current thinking about how we might structure an agency partnership and is meant to stimulate discussion.

Publisher Option to Provide Content on Agency or Resale Basis

Agency or Resale Model. For each item of eContent provided, Publisher shall have the option to provide content to Barnes & Noble on an agency or a resale basis.

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Termination of Agency Relationship. The agency relationship shall terminate if Publisher provides eContent to any other party without the consent of Barnes & Noble.

Comment. This is only an agency basis for resale.

Agency Commission. ("Agency Commission") for each item of eContent provided by Barnes & Noble to Publisher shall be:

- $\frac{1}{3}$ % of the net sales price through any conversion service;
- $\frac{1}{3}$ % of the net sales price through an agency conversion service;
- $\frac{1}{3}$ % of the net sales price through an eContent service; and
- $\frac{1}{3}$ % of the net sales price through an eContent service.

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Executive Summary

Publisher Option to Provide Content on Agency or Resale Basis

Agency or Resale Model. For each item of eContent provided, Publisher shall have the option to provide content to Barnes & Noble on an agency or a resale basis.

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Retail prices for each item of eContent provided by Publisher to Barnes & Noble as its sales agent shall be set by Publisher.

With respect to any item of eContent provided to Barnes & Noble for resale, Barnes & Noble shall have the sole and complete discretion to set the retail price.



Testimony Of Theresa Horner

Q. Now, to the best of your knowledge during your negotiations with the publishers, did any publisher ever tell Barnes & Noble in words or substance that it needed to move to an agency agreement with Barnes & Noble because of its agency agreement with Apple?

A. No.

DX-184: January 18, 2010 Email From Naggar To Porco And Grandinetti

From: Porco, Laura
Sent: Monday, January 18, 2010 8:05 PM
To: Naggar, David
Cc: Grandinetti, Russell
Subject: RE: Publisher in Talks With Apple Over Tablet - WSJ.com
Sure.

According to Madeline tonight. She is concerned that Harper, Simon and Hachette are going to do a deal with Apple that allows the pubs to control price and that the pubs will release titles on Apple only

Subject: Publisher in Talks With Apple Over Tablet - WSJ.com

<http://online.wsj.com/article/SB10001424052748704541004575011092145509872.html?mod=djemalertNEWS>

7/17/2010

USA v. Apple Inc., et al.
12-CV-02826-DLC
DX-184

AMZN-TXCID-0008923

DX-217: January 20, 2010 Email From Porco To Leslie, et al.

From: Grandinetti, Russell
Sent: Thursday, January 21, 2010 6:28 AM
To: Naggar, David; Porco, Laura; Leslie, Tim; Zapolsky, David; Kessel, Steven
Subject: RE: privileged: mtg with Hachette Maja Thomas 1/20/2009

From: Naggar, David
Sent: Wednesday, January 20, 2010 8:53 PM
To: Porco, Laura; Leslie, Tim; Zapolsky, David; Kessel, Steven; Grandinetti, Russell
Subject: RE: privileged: mtg with Hachette Maja Thomas 1/20/2009

Breakfast with Maja. Gave her the new dtp terms. Said I had read about the speculation about publishers moving to "agency" terms in the trade press. Asked her if they were considering and what the details were - at no time did I say anything for or against agency terms or intimate Amazon's point of view on them. Below are notes from the conversation:

Breakfast with Maja. Gave her the new dtp terms. Said I had read about the speculation about publishers moving to "agency" terms in the trade press. Asked her if they were considering and what the details were - at no time did I say anything for or against agency terms or intimate Amazon's point of view on them. Below are notes from the conversation:

- Approached by partners to establish agency terms which would give consumer pricing control to the publisher
- Partners don't like current TOS economics so they asked them to establish agency terms promising publishers control of pricing.
- They are considering whether they build them or not
- Partners aren't interested in competing with Amazon on consumer price and current economics
- Their counsel has told them that they can't offer books under two different sets of terms - TOS & Agency
- They haven't discussed with us because they believe they understand what we would say - no
- They would keep all current titles at current terms and they would sell new books under agency terms which they believe means amzn wouldn't carry them.
- Maja thinks not selling through amzn (because they assume we wouldn't accept agency terms) is a mistake for Hachette but she isn't the one in the end making the decision
- Because some at Hachette are looking for a white knight to save the publishers from a world of devalued content, they are considering risks they wouldn't normally. Some at Hachette think Apple and Google are "whit knights."
- She asked me if our \$9.99 pricing would ever change because that would change the discussion internally.
- I told her I couldn't discuss consumer pricing with her.

1

USA v. Apple Inc., et al.
12-cv-02826-DLC
DX-217

AMZN-MDL-0160741
HIGHLY CONFIDENTIAL

Apple

Agency

Color iPad

All the books

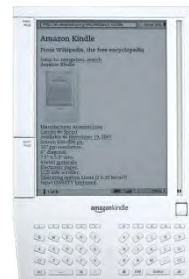


Amazon

Wholesale with
windowing

OR

Agency with
all the books



Barnes & Noble

Agency

All the books



DX-281: January 31, 2010 Email From McIntosh To Dohle, et al.

From: Weber, Andrew
To: McIntosh, Madeline; Dohle, Markus; Sarnoff, Richard; Von Moltke, Nina; Close, Amanda; Updike, Jaci; Martin, Matthew; Shatz, Matt; Malaviya, Nihar; Demayo, Joan
Sent: 2/1/2010 2:22:07 AM
Subject: RE: privileged & confidential: spoke to David

Quite a surprising outcome.

We still need to be mindful of a potentially bad outcome: we move to agency, get lower wholesale prices while consumer prices move up from where they are today, and demand falls as

Sent: Sunday, January 31, 2010 5:58 PM

3. They want to sit down with us (starting tomorrow) to figure out how best to work out the agency model between us. We clearly are in a good position to negotiate this while also retaining leverage in our physical terms. We can end up getting agency without having to give anything up.

4. DN pointed out we should then be in a great position to require the same set of agency terms of Apple. (Translation: get the commission rate we want, not the one offered.) Apple will need us. Otherwise Amazon will have a great marketing ploy available to them (envision full page NYT ads pointing out the books on Kindle that aren't on Apple.)

To: Dohle, Markus; Sarnoff, Richard; Weber, Andrew; Von Moltke, Nina; Close, Amanda; Updike, Jaci; Martin, Matthew
Subject: FW: [read20-1] amzn folds

Certainly a lively weekend.

-----Original Message-----

From: read20-l@lists.panix.com [mailto:read20-l@lists.panix.com] On Behalf Of Peter Brantley
Sent: Sunday, January 31, 2010 5:35 PM
To: Read20 List
Subject: [read20-1] amzn folds

Amazon apparently is capitulating to Macmillan - no confirmation yet from other channels.

http://www.amazon.com/tag/kindle/forum/ref=cm_cd_tfp_ef_tft_tp?encoding=UTF8&cdForum=Fx1D7SY3BVSESG&cdThread=Tx2MEGQWTNGIMHV&displayType=tagsDetail

Dear Customers:

Macmillan, one of the "big six" publishers, has clearly communicated to us that, regardless of our viewpoint, they are committed to switching to an agency model and charging \$12.99 to \$14.99 for e-book

USA v. Apple Inc., et al.
12-CV-02828-DLC
DX-281

Random House Confidential Business Information

RH-USDOJ-00003100



Testimony Of Keith Moerer

Q. And how did you find out, for example, that Amazon moved to agency?

A. The morning of April 3, which was the launch of the iBookstore, I went to Amazon's website and I looked at New York Times bestsellers and new releases and I noticed that for some of the publishers, the first five publishers we signed, that there was a line on the product detail page that said "this price set by publisher." And my assumption was that those publishers had signed agency deals.

Amazon's decision to move to an agency model was a result of the same market forces facing Apple and Barnes & Noble

Apple had virtually no contact with the publishers after the Apple agency agreements were signed

The Law Limits Inferences

The *Monsanto* Standard

“There must be evidence that *tends to exclude the possibility* that [the defendants] were acting independently.”

Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 764 (1984) (emphasis added).

475 U.S. 89 (1986)
Matsushita



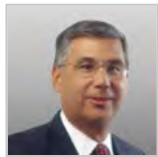
But antitrust law limits the range of permissible inferences from ambiguous evidence in a § 1 case. Thus, in *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 104 S.Ct. 1464, 79 L.Ed.2d 775 (1984), we held that conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy.

Apple's Independent Business Interest

The Train Is Leaving The Station = Apple's Independent Business Interest



Kevin Saul: Was a “[v]ery effective negotiating strategy” that let publishers know “the train is leaving the station” and a tactic Saul has “often” used before. Tr. 292:7-25.



David Shanks: Sought info re status of other publishers to ensure enough selection in Apple's bookstore. Tr. 435:4-22.



Russell Grandinetti: Amazon referred to status of other publishers during negotiations. Tr. 691:4-692:14 (citing DX-312).



David Nagggar: Amazon has shared information with one publisher about negotiations with other publishers and regarded it as a proper negotiating device. Tr. 802:24-803:18.



Eddy Cue: Used same negotiation tactic with iTunes Radio. Tr. 1777:2-8.