Cote, D.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA.,

Plaintiff,

v.

APPLE, INC. *et al.*,

Defendants.

CIVIL ACTION NO.
1:12-CV-2826

STIPULATION AND ORDER

THE STATE OF TEXAS, *et al.*,

Plaintiffs,

v.

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

Defendants.

CIVIL ACTION NO.
1:12-CV-3394

STIPULATION AND ORDER MAKING CERTAIN CORRESPONDENCE PART OF THE RECORD FILE

The parties stipulate, as indicated by the signatures of their respective attorneys, to permit the following items, attached as exhibits hereto, to become part of this court's docket and file. The corrected record will be certified and forwarded to the Second Circuit Court of Appeals under Fed. R. App. P. 10(e).

1. Letter from Yehudah Buchweitz to Judge Cote, via email, dated August 27, 2013.
2. Letter from Shepard Goldfein to Judge Cote, via email, dated August 27, 2013.

So ordered.

10/29/13

Dated: October 28, 2013

By: _____

Lawrence E. Buterman
U.S. Department of Justice
Antitrust Division
450 Fifth Street, NW
Washington, DC 20530
(202) 532-4575
lawrence.buterman@usdoj.gov

On behalf of the United States

By: _____

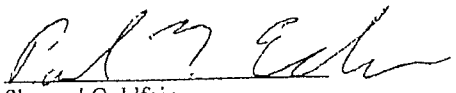
Gabriel Gervey
Rebecca Fisher
Eric Lipman
Assistant Attorneys General
Office of the Attorney General of Texas
P.O. Box 12548
Austin, TX 78711
(512) 463-2100
gabriel.gervey@texasattorneygeneral.gov
rebecca.fisher@texasattorneygeneral.gov
eric.lipman@texasattorneygeneral.gov

Liaison Counsel On Behalf of the Plaintiff States

By: _____

W. Joseph Nielsen
Gary M. Becker
Assistant Attorneys General
Office of the Attorney General of Connecticut
55 Elm Street
Hartford, CT 06106
(860) 808-5040
joseph.nielsen@ct.gov
gary.becker@ct.gov

Liaison Counsel On Behalf of the Plaintiff States

By: 

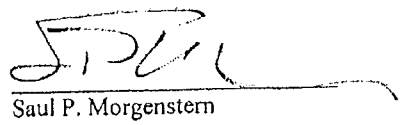
Shepard Goldfein
Clifford H. Aronson
Paul M. Eckles
Skadden, Arps, Slate, Meagher & Flom LLP
Four Times Square
New York, NY 10036
(212) 735-3000
shepard.goldfein@skadden.com
clifford.aronson@skadden.com

On behalf of Defendant HarperCollins Publishers L.L.C.

By: 

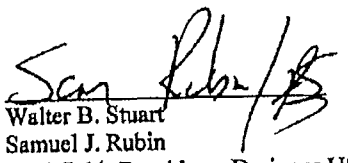
James W. Quinn
Yehudah L. Buchweitz
Weil, Gotshal & Manges LLP
767 Fifth Avenue
New York, NY 10153
(212) 310-8000
james.quinn@weil.com
yehudah.buchweitz@weil.com

On behalf of Defendants Simon & Schuster, Inc. and Simon & Schuster Digital Sales, Inc.

By: 

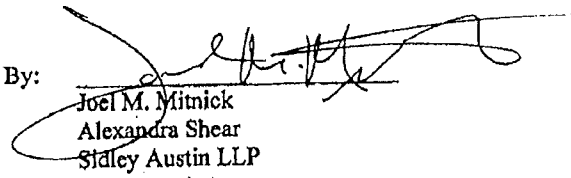
Saul P. Morgenstern
Kaye Scholer LLP
425 Park Avenue
New York, NY 10022
(212) 259-8000
smorgenstern@kayescholer.com

On behalf of Defendants Penguin Group (USA), Inc. and the Penguin Group

By: 

Walter B. Stuart
Samuel J. Rubin
Freshfields Bruckhaus Deringer US LLP
601 Lexington Avenue
New York, NY 10022
(212) 277-4000
walter.stuart@freshfields.com

On behalf of Defendants Hachette Book Group, Inc. and Hachette Digital, Inc.

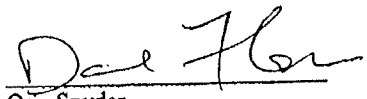
By: 

Joel M. Mitnick
Alexandra Shear
Sidley Austin LLP
787 Seventh Avenue
New York, NY 10019
(212) 839-5300
jmitnick@sidley.com
ashear@sidley.com

On behalf of Defendants Holtzbrinck Publishers, LLC d/b/a Macmillan and Verlagsgruppe Georg von Holtzbrinck GmbH

SO ORDERED:

U.S.D.J.

By: 

Orin Snyder
Gibson, Dunn & Crutcher, LLP
200 Park Ave.
New York, NY 10166
(212) 351-4000
osnyder@gibsondunn.com

Daniel S. Floyd
333 South Grand Avenue
Los Angeles, CA 90071
(213) 229-7000
dfloyd@gibsondunn.com

On behalf of Defendant Apple, Inc.

EXHIBIT 1

Weil, Gotshal & Manges LLP

767 Fifth Avenue
New York, NY 10153-0119
+1 212 310 8000 tel
+1 212 310 8007 fax

Yehudah L. Buchweitz
+1 (212) 310-8256
Yehudah.Buchweitz@weil.com

BY EMAIL

August 27, 2013

The Honorable Denise L. Cote
United States District Judge
Daniel P. Moynihan U.S. Courthouse
New York, NY 10007

Re: United States v. Apple, Inc., et al. (12-cv-2826)
***In re* Electronic Books Antitrust Litigation (11-md-2293)**

Dear Judge Cote:

On behalf of Simon & Schuster, Inc. ("S&S"), I write in response to Your Honor's invitation at the August 9th hearing for publisher defendants to be heard on the revised proposed injunctions submitted by the Department of Justice ("DOJ"), Plaintiff States, and Apple. Tr. 71:24-72:1. For the reasons outlined in the Settling Defendants' memorandum in opposition to the first proposed injunction against Apple (Dkt. No. 333), S&S continues to object to the revised proposals as a procedurally improper modification to the Final Judgment entered against S&S on September 7, 2012 in the DOJ action ("S&S Final Judgment").[1] The revised proposals would extend the extensively negotiated provisions of the S&S Final Judgment well beyond the two-year period that runs through September 7, 2014, during which S&S is prohibited from limiting its retailers from discounting the prices of e-books. *See* Final Judgment, Sec. V.A. (Dkt. No. 119).

The primary revision to the proposed injunctions, as they affect S&S, is that each now includes a staggered approach to the expiration of pricing restrictions as to each Publisher Defendant. *See* Section III.C of the DOJ Proposal and IV.B of the Apple Proposal. While S&S is mindful that the Court suggested a staggered approach, S&S respectfully objects. Plaintiffs' proposal would restrict S&S's agreements with Apple for 36 months after the effective date of the proposed final judgment, but would restrict Hachette and HarperCollins for 24 months and 30 months, respectively. Moreover, Penguin and Macmillan, which settled with DOJ eight and ten months later than S&S, respectively, would be restricted for additional six-month intervals after S&S.[2] Plaintiffs' only purported grounds for this ordering is that it "generally reflect[s] the sequence in which the Publisher Defendants settled with Plaintiffs." Pls. Mem. at 4 (Dkt. No. 361). But this is not correct with respect to S&S, Hachette and

[1] In addition, the Order & Stipulated Injunction ("OSI") entered against S&S as part of the Final Judgment in the Plaintiff States' action contains substantially similar provisions as the S&S Final Judgment in the DOJ action and also would be materially modified by the revised proposals.

[2] Apple's revised proposed injunction includes a similar staggered approach but would allow Apple to unilaterally choose the order. *See* Section IV.B of the Apple Proposal.

HarperCollins, which entered into the proposed settlement with DOJ at the same time, contemporaneously with the filing of the complaint.[3]

Applying uniform six-month intervals for all five publishers fails to take into account when each publisher became subject to a final judgment in the DOJ action. Because S&S has been subject to a "cooling-off period" with respect to Apple since September 14, 2012, if the DOJ's revised proposed injunction were adopted, S&S would be subject to a total "cooling-off period" of more than *four years*, which may end up being as long or longer than Penguin's and Macmillan's "cooling-off period."[4] Under the Apple proposal, the last publisher to renegotiate its agreement could be subject to a total "cooling-off period" of as long as *five years*. This result may be an unintended consequence of the use of uniform intervals and an arbitrary order of new negotiations for the first three settling publishers, but its effect is to deprive S&S of a key basis for its agreement to settle.

Any extension of the "cooling-off period," either directly or through implementation of a staggered negotiation schedule, is unnecessary to prevent collusion. The S&S Final Judgment and OSI include powerful remedies designed to prevent possible collusion throughout the entire five-year term of the settlements, through September 7, 2017. These include prohibitions on communications with competitors about competitively sensitive information, prohibitions on all collusive agreements, the quarterly submission of logs describing contacts with competitors, obligations to correct and self-report potential antitrust violations, annual legal audits and personnel training requirements, the Plaintiffs' right of access for investigation, and the threat of contempt for violations of any of these provisions. *See* Final Judgment, Secs. V, VII, VIII.

For all of the reasons above, while preserving its objection to any modification to its Final Judgment in these circumstances, S&S respectfully requests that, if the Court intends to approve a staggered approach, the time intervals for the first three settling defendants be limited to 30-60 days between each. This shorter time period takes into account the fact that S&S already has been subject to a "cooling-off period" for nearly a year, and positively recognizes it as an early settler, while still adopting the Court's suggestion of a staggered approach.

Sincerely,

Yehudah L. Buchweitz

cc: Designated Counsel of Record

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[3] S&S signed its memorandum of understanding of a proposed settlement with the Plaintiff States on May 10, 2012. This was a mere 29 days later than Hachette and HarperCollins, and because the Plaintiff States followed the DOJ for the injunctive component of their settlement, this additional period to work out other terms is immaterial for present purposes.

[4] Final judgments in the DOJ action were entered against Penguin on May 20, 2013 and against Macmillan on August 14, 2013, more than eight and eleven months after S&S, respectively.

EXHIBIT 2

SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
FOUR TIMES SQUARE
NEW YORK 10036-6522

TEL: (212) 735-3000
FAX: (212) 735-2000
www.skadden.com

FIRM/AFFILIATE OFFICES
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LONDON
MOSCOW
MUNICH
PARIS
SÃO PAULO
SHANGHAI
SINGAPORE
SYDNEY
TOKYO

DIRECT DIAL
(212) 735-3610
DIRECT FAX
(917) 777-3610
EMAIL ADDRESS
Shepard.Goldfein@Skadden.com

August 27, 2013

VIA E-MAIL

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

Re: *United States of America v. Apple, Inc., et al.*, Civil Action No. 1:12-CV-2826 and *The State of Texas, et al. v. Penguin Group (USA) Inc., et al.*, Civil Action No. 1:12-CV-3394

Dear Judge Cote:

HarperCollins Publishers L.L.C, Hachette Book Group, Inc., Simon & Schuster, Inc., Holtzbrinck Publishers, LLC d/b/a Macmillan and Verlagsgruppe Georg von Holtzbrinck GmbH and Penguin Random House LLC (successor to Penguin Group (USA), Inc.) maintain the objections that were raised in their brief filed on August 7, 2013 with respect to the Plaintiffs' revised proposed injunctive relief against Apple. The Publisher Defendants continue to believe that injunctive relief relating to Apple's contractual relationships that effectively amends the Consent Orders into which each Publisher Defendant entered is inappropriate absent compliance with the process for amending extant Consent Orders, particularly as each Publisher has negotiated a new contract with Apple in compliance with its Consent Order, and where the Court and the DOJ have recognized that the terms of the Consent Orders are sufficient to protect competition.

Respectfully submitted,

Shepard Goldfein /HJS

Shepard Goldfein

cc: Designated counsel of record