GIBSON DUNN

Gibson, Dunn & Crutcher LLP
333 South Grand Avenue
Los Angeles, CA 90071-3197
Tel 213.229.7000
www.gibsondunn.com

Daniel Floyd
Direct: +1 213.229.7148
Fax: +1 213.229.6148
DFloyd@gibsondunn.com

D 2 F
6/20/12

June 19, 2012

VIA COURIER

The Honorable Denise Cote
United States District Judge
Southern District of New York
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street, Room 1610
New York, NY 10007-1312

Re: United States v. Apple et al., 12-CV-2826; In re Electronic Books Antitrust Litig., 11-MD-02293; The State of Texas et al v. Penguin Group (USA) Inc. et al., 12-cv-03394

Dear Judge Cote:

We write this letter to set forth Apple Inc.'s position on the remaining disputes among the parties related to the Joint Initial Report, filed with the Court on June 15, 2012 (12-CV-2826, Dkt. #64).

Trial Date

At the April 18th hearing, Apple stated an unequivocal position: it believes it has done absolutely nothing wrong and seeks a speedy resolution of the Department of Justice's ("DOJ") lawsuit on the merits. When asked by the Court whether this meant Apple was willing to commit to complete discovery by the end of 2012, counsel responded affirmatively. Apple has proposed a discovery and trial schedule consistent with that answer – it provides for fact discovery to be completed by December 7, 2012, expert discovery completed by January 18, 2013, with a trial ready date of March 26, 2013. This proposal is consistent with (indeed effectively mandated by) 15 U.S.C. § 4, which provides that the DOJ's request for injunctive relief "shall" be determined "as soon as may be." While certainly all parties, particularly defendants (who did not have the benefit of the DOJ's 18-month one-sided investigation), require meaningful discovery, Apple also proposes deposition limits and written discovery provisions intended to balance appropriately that need for discovery with the mandate that the important public issues in this case be resolved "as soon as may be."[1]

[1] The Plaintiffs seek up to 60 party depositions and 40 non-party depositions per side, notwithstanding that only six investigative depositions were taken. Apple proposes 25 party depositions and 20 non-party depositions. Apple's proposed limits will require discovery to be prompt, focused, and strategic; the

At the April 18th hearing, the DOJ essentially agreed with Apple's position. During that hearing, counsel for the DOJ noted that the Sherman Act directs the Court "to proceed with all due speed with respect to claims brought by the government." Apr. 18, 2012 Hearing Transcript ("Transcript") at 12; *see also* 15 U.S.C. § 4. Counsel also cited a law which specifically exempts antitrust actions brought by the United States from the MDL statute, 28 U.S.C. § 1407(g) ("Nothing in this section shall apply to any action in which the United States is a complainant arising under the antitrust laws."). The DOJ noted (correctly) that this statutory provision, when considered in light of its legislative history, mandates that the DOJ's case "[c]an't be slowed down by the kinds of thing[s] happening in the MDL, like class certification and damages issues."[2] Transcript 12-13.

The DOJ (joined by the States and the putative class) now takes a very different position and seeks significant delay. Specifically, the DOJ suggests that fact discovery in all three cases be conducted simultaneously, proposes significantly larger numbers of party and non-party depositions (but additional limitations on written discovery), and proposes an extended schedule leading to a trial ready date of September 20, 2013. The DOJ's position ignores that the States and class counsel disagree as to who will ultimately represent the individuals seeking monetary relief and until the States settlement is finally approved or disapproved, the scope of those claims remains unresolved. The uncertain process and timing to sort out the procedural issues associated with the damage claims will necessarily delay the progress of the DOJ case, and therefore combining the actions is directly inconsistent with the statutory provisions cited above and the DOJ's position at the April 18th hearing. By its own account, the DOJ has already concluded an "extensive investigation" spanning over 18 months that included over a dozen subpoenas for documents, depositions, numerous interviews, and

---

Plaintiffs' proposal will needlessly bog the parties down in the type of massive discovery now common in complex litigation. Apple also proposes that the parties each have the 25 interrogatories and 50 Requests for Admission provided for in the Rules, and, given the relatively short time for discovery, without limitations on type or timing of service. This will force all parties to use written discovery to focus and narrow issues, and direct their party and non-party depositions effectively. The Court's role in resolving discovery disputes should provide an appropriate deterrent to any abusive tactics in that regard.

[2] The legislative history of 1407(g) explains that "[t]his limitation was requested by the Department of Justice . . . on the basis that consolidation might induce private plaintiffs to file actions merely to ride along on the government's cases. Government suits would then almost certainly be delayed . . . ." H.R.Rep. No. 90–1130, at 5, reprinted in 1968 U.S.C.C.A.N. at 1902–03. It further observes that decoupling DOJ lawsuits from those brought by other litigants is necessary because "the purpose of the governmental suit normally differs from that of a private suit; the Government seeks to protect the public from competitive injury, while private parties are primarily interested in re-covering damages for injuries already suffered." H.R.Rep. No. 90–1130, at 8, reprinted in 1968 U.S.C.C.A.N. at 1905 (letter of Deputy Attorney General Ramsey Clark, incorporated into the Report).

meetings with over a dozen Amazon employees. Transcript at 15.[3] Even though it is operating on an uneven playing field, Apple is committed to preparing its case for summary judgment and trial on an expedited basis.

Apple's proposed approach is thus the only one consistent with the statutory direction from Congress. It delinks the DOJ case from the Class and State cases (while coordinating them as much as reasonable), reflecting the special urgency of resolving the DOJ's case, which implicates important public interests, as well as Apple's own interest in vindicating its conduct. It is also a reality that the mere existence of litigation of this type creates marketplace uncertainties, which impact competitive conditions and the public interest. Apple believes strongly that the case should be decided on the merits, and not by the effect of extended litigation itself. For these reasons, Apple asks the Court to enter an order adopting its proposed schedule which prioritizes discovery and proceedings relevant to the DOJ case above the Class and State lawsuits. Discovery that is unique to the States or the Class (e.g., class certification and damages discovery) should be postponed until after a DOJ trial. Staggering the cases will not result in any prejudice to the States or the Class or create inefficiencies. Congress has directly addressed this issue by providing for use of the Court's findings in a subsequent private suit. *See* 15 U.S.C. § 16(a).[4]

Sincerely,

Daniel Floyd /jla/

Daniel Floyd

DSF/jla

cc: All Counsel of Record

---

[3] Apple requested production of the DOJ's investigative file immediately after the complaint was filed (and repeatedly followed up), but only received the vast bulk of the investigative file in the past few days and, as of this writing, the DOJ's production is not complete.

[4] Apple notes that its co-defendants agree with Apple's position that the DOJ case should proceed first, but request a more extended schedule. While Apple cannot speak for them, Apple believes that a primary concern is Defendants' ability to complete in a timely manner the substantial additional document discovery that will likely be requested by the Plaintiffs. While Apple acknowledges that some further document production will be required, it respectfully suggests that the Court can and should take a clear position that, particularly given the lengthy investigation, that further document discovery of the parties be appropriately focused so it can be completed promptly.