ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 20, 2012

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

Via Hand Delivery

Re: ***The State of Texas et al. v. Penguin Group (USA) Inc. et al.*, No. 12-cv-03394 (DLC); *United States v. Apple, Inc., et al.*, 12-cv-2826 (DLC); *In re Electronic Books Antitrust Litig.*, No. 11-md-02293(DLC)**

Dear Judge Cote:

We write on behalf of the Plaintiff States to address the primary dispute between the parties related to the Joint Initial Report in the above-referenced consolidated actions, which was filed with the Court on Friday, June 15, 2012, namely the schedule on which these cases will proceed.

The Plaintiff States respectfully submit that fact discovery in these actions should be coordinated, and should proceed simultaneously and at a reasonable pace. Proceeding simultaneously on the schedule jointly proposed by the Plaintiff States, the United States Department of Justice ("DOJ") and the Class Plaintiffs will not only allow the cases to proceed "with all due speed," but will also promote judicial economy and minimize the potential burden of duplicative discovery on all parties. Additionally, this schedule will allow for the common issues in these cases to be determined based on all relevant evidence.

The Plaintiffs' proposal paves the way for the consolidated actions to proceed to resolution in a single trial, encompassing all matters relating to liability, appropriate injunctive relief and damages. Apple's proposed schedule is premised on the notion that the discovery required for the respective actions is vastly different, and that proceeding on the schedule proposed by Plaintiffs would entail an unnecessary delay in the DOJ's case, merely because the DOJ seeks only injunctive relief. All plaintiffs, however – including the DOJ – recognize the efficiency gains that will be achieved by coordination in these cases. Plaintiffs' proposed schedule sets fact discovery to be completed by March 22, 2013 and a trial ready date of September 30, 2013. This schedule is very aggressive for an antitrust case of this magnitude – more aggressive even than Penguin's and Macmillan's proposed scheduled.[1]

[1] To the extent Penguin's and Macmillan's proposal requires the DOJ action to proceed on a schedule different from the State and Class actions, Plaintiffs are similarly opposed.

POST OFFICE BOX 12548, AUSTIN, TEXAS 78711-2548 TEL: (512)463-2100
WEB:WWW.OAG.STATE.TX.US

Plaintiffs' proposed schedule provides for fact discovery to include issues relating to class certification and damages on an accelerated timeline, with all class certification briefing to be completed prior to the end of fact discovery. Coordinated discovery and a single trial would necessarily reduce the burden on party and non-party witnesses, some of whom likely reside in foreign countries and, under Defendants' proposals, might be required to sit for multiple depositions and to testify at multiple trials. Plaintiffs' proposal contemplates that all parties meet near the conclusion of fact discovery to discuss whether some obstacle or unforeseen circumstance merits divergent schedules going forward from that point, but Defendants' proposals essentially make duplication and wasted resources a foregone conclusion.

Defendants' proposals assume that a preliminary trial of the DOJ action alone would resolve all issues related to liability and appropriate injunctive relief in this matter. This is not necessarily the case. Carving out certain issues in advance creates an artificial divide between the actions, and effectively eliminates even the potential for the gains in judicial economy and reduced burden on parties that the Plaintiffs' proposal embraces. The Plaintiff States and Class Plaintiffs could be required to litigate issues of liability against one or more Defendants in a second trial. Moreover, the Plaintiff States' action is a governmental antitrust enforcement action seeking both injunctive relief and monetary relief as *parens patriae* on behalf of consumers, not simply a dispute between private litigants. The Plaintiff States may seek injunctive relief more extensive than that sought by DOJ. See generally, *Cal. v. Am. Stores Co.*, 495 U.S. 271 (1990). It is simply incorrect to assume that all issues except those relating to damages and class certification would be resolved by a DOJ-only trial.

While the Sherman Act directs the Court to resolve the DOJ's claims "as soon as may be," it does not suggest that the Court ignore the consolidated nature of these actions and the fact that the vast majority of issues relevant to their disposition are common. Apple's proposed schedule serves only to unnecessarily truncate discovery and increases the risk that these actions will be resolved based on a less than complete presentation of the relevant evidence. Proceeding according to this schedule will also increase the likelihood that the parties will require the Court's assistance in resolving discovery disputes, as there will necessarily be a limited timeframe to meet and confer in hopes of coming to an agreement.

For the foregoing reasons, the Plaintiff States respectfully request that the Court adopt the Plaintiffs' proposed schedule.

Respectfully,

Gabriel R. Gervey
Assistant Attorney General
Consumer Protection Division
Antitrust Section
Texas Attorney General
P.O. Box 12548
Austin, Texas 78711-2548
(512) 463-1262 direct line
(512) 320-0975 facsimile
gabriel.gervey@texasattorneygeneral.gov

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

On Behalf of the Plaintiff States

cc: Counsel for Plaintiff States
Counsel for Defendants
Counsel for Plaintiff United States
Counsel for Class Plaintiffs