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Via ECF

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

Re: *In re: Electronic Books Antitrust Litig*., No. 11-md-02293 (DLC);
The State of Texas v. Penguin Group (USA), Inc., No. 12-cv- 3394 (DLC)

Dear Judge Cote:

Apple seeks to: (1) file sur-reply expert reports; (2) file a sur-reply brief to further oppose class certification; and (3) re-depose for four additional hours Dr. Noll, beyond the six hours the Court previously ordered. The Court's October 3, 2013, order sets the standard governing Apple's request for sur-reply expert reports. Apple is required to show for each opinion it will respond to in sur-reply, Dr. Noll offered "new opinions that could not have been anticipated by Apple's expert(s)." Within twenty-four hours of receiving Dr. Noll's reply report, Apple reflexively stated it intended to file a sur-reply and to re-depose Dr. Noll.[1] The speed with which Apple reached its conclusion belies serious consideration of the Court's standard and, in particular, whether Apple even had time for substantive discussions with Dr. Kalt or Mr. Orszag about what they (the experts, not Apple's lawyers) could or could not have anticipated in Dr. Noll's reply report. Notwithstanding, Plaintiffs asked Apple to provide specificity as to each opinion which it claims is "new" and describe why Apple's experts could not have anticipated Dr. Noll's response. Instead of providing the requested specificity, the Court will see Apple merely provided Plaintiffs with generalizations that would render this Court's standard, in effect, no standard at all. Apple simply claimed Dr. Noll's reply report is long (83 pages), Dr. Noll uses a super-computer to re-run his regression model at the transaction level in direct response to Apple's criticism of using four-week average e-book prices, and Apple's experts could not have "guessed" how Dr. Noll would critique their opinions.[2]

Apple's claim to this Court that Dr. Noll changed his methodologies to account for deficiencies in his original work is a remarkably inaccurate statement. First, Dr. Noll's use of four-week average prices for each title was not deficient, as Class Plaintiffs explained in their

[1] December 19-23, 2013, e-mail string between Apple's counsel and counsel for Class Plaintiffs and Plaintiff States re In re Electronic Books, Case No. 11-md-2293; State of Texas et al. v. Penguin Group (USA) Inc., Case No. 12-cv-3394, attached hereto as Exhibit 1.

[2] *Id*.

reply in support of class certification. Second, with respect to his damages model, Dr. Noll describes that he applied the ***same regression model*** detailed in his original report (and about which Apple deposed him), but he re-ran the model using a super-computer on one-week average prices and individual transactional prices, in response to Apple's attack.[3] While Apple trumpets the reduction in damages Plaintiffs volunteered – Apple offers no explanation why its own experts did not do the exact same thing as Dr. Noll or could not anticipate this as a highly likely candidate to respond to Dr. Kalt's criticisms, particularly in light of it being one of Apple's central arguments against class certification. Dr. Kalt repeatedly used (and manipulated) Dr. Noll's model to make arguments against class certification. It is telling Apple chose not to produce results using weekly averages or transactional data. Third, Dr. Noll explained during his deposition how his regression could be used to identify and calculate individual damages and that he had shown this by example.[4] But Apple now asserts that by Dr. Noll further demonstrating this very principle about which he testified using iBookstore data with customer identifier records, Dr. Noll has somehow offered a "new opinion." Once again, Apple had Dr. Noll's regression model and deposition answers but chose not to test Dr. Noll's statements and produce results. Indeed, Dr. Kalt used the very same transactional Apple data – with customer identifiers – for a different purpose to generate his Figure 8.[5] And, finally, Apple's only other justification for producing additional expert opinions, briefing, and re-deposing Dr. Noll, is that Apple's experts could not "guess" how Dr. Noll would critique them. Again, this is simply a blanket rejection of any boundaries placed on Apple by the standard the Court set forth on October 3rd.

Apple separately requests four additional hours to re-depose Dr. Noll. Apple already used all six hours of deposition time – and more – that this Court allowed Apple as a result of the October 24, 2013, telephonic hearing. Apple chose not to reserve any of its time, even though Class Plaintiffs previously put Apple on notice that it would not agree to additional time to re-depose Dr. Noll.[6] And Apple provided no justification to Plaintiffs for additional time other than it was entitled to "test" Dr. Noll's "new opinions." Again, there is no basis for Apple's demand and no limitations whatsoever on the scope (other than temporally) of Apple's request. If allowed, Apple's ten hours of record time with Dr. Noll would exceed all record time for each of the other nine economists deposed in this case. Finally, Apple requests the Court order Dr. Noll to be deposed on dates Dr. Noll is not available – despite Plaintiffs already informing Apple of this. We would of course meet and confer with Apple if the Court ordered a limited deposition.

At some point Federal Rule of Civil Procedure 1 dictates a limit. Respectfully, we believe it has been reached here.

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[3] *See* Reply Declaration of Roger G. Noll, December 18, 2013, at 16-17.

[4] Deposition of Roger G. Noll, Ph.D., taken on November 1, 2013, pp. 173-78, attached hereto as Exhibit 2.

[5] Declaration of Joseph P. Kalt, Ph.D. on Behalf of Apple Inc., November 15, 2013.

[6] *See* Letter from Steve W. Berman to the Honorable Denise L. Cote, October 23, 2013, ECF No. 431 at n.9.

Respectfully,

HAGENS BERMAN SOBOL SHAPIRO LLP

/s/ Steve W. Berman

Steve W. Berman