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Via E-Mail

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: *The State of Texas v. Penguin Group (USA), Inc.*, No. 12-cv- 3394 (DLC)

Dear Judge Cote:

On December 21, 2011, this Court appointed interim Class Counsel to represent eBook consumers in litigation against the Settling Defendants. In that capacity, Class Counsel has a fiduciary duty to protect eBook consumers' litigation interests, to identify issues affecting those interests, and to advise the Court on such issues. After reviewing the settlement, Class Plaintiffs do not oppose granting of the motion for preliminary approval given the low burden the States have.[1] However, Class Plaintiffs ask the Court to consider three points—none of which disrupt preliminary approval.

First, in the Proposed Order, the Plaintiff States and Settling Defendants request that the Court find "that the Attorneys General are the superior representatives of natural persons in the Plaintiff States." Proposed Order ¶ 3. This finding is not justified or explained—or even mentioned—in the motion for preliminary approval, nor is a similar finding requested in the proposed orders of final approval. Nor, most importantly, is it in any way required by 15 U.S.C. § 15c, which authorizes *parens patriae* suits and governs this Court's analysis of the proposed settlement. A superiority finding is entirely extraneous and not justified by the movants.

When approving a class action under Rule 23(b)(3), a court must find that a class action is superior to other methods of adjudication. However, no such finding is required in *parens patriae* suits brought under Section 15c. That section was passed specifically to "exempt[] [*parens patriae*] suits from the class-action requirements of Rule 23 . . . ." *Illinois v. Abbott & Assocs.*, 460 U.S. 557, 573 n.29 (1983).[2] Although fairness, adequacy, and reasonableness are requirements for the approval of a *parens patriae* settlement, *see, e.g.*, *In re Toys "R" Us Antitrust Litig.*, 191 F.R.D. 347, 351 (E.D.N.Y. 2000), the formulaic findings of Rule 23 are not necessarily part of such an inquiry. Accordingly, unless the appropriateness of state representation is contested, making such a finding is entirely superfluous in a Section 15c case.

[1] Class Plaintiffs reserve any objections that they may have to final approval of the settlement, and are continuing to review the terms of the settlement.

[2] *Accord, e.g.*, *N.Y. by Vacco v. Reebok Int'l*, 96 F.3d 44, 46 (2d Cir. 1996) (Section 15c passed "to circumvent the often onerous requirements of Rule 23 of the Federal Rules of Civil Procedure").

This issue is not mentioned in any of the supporting papers and such a finding is not requested in the proposed orders for *final* approval. Rather, it is included merely as an unexplained, unnecessary interim finding that serves no purpose.[3] Accordingly, it should be stricken from the Proposed Order.

Second, during the telephonic conference on Monday, September 10, the Court directed the Plaintiff States to include an estimate of the damages attributable to the three Settling Defendants in "The Settlements' Benefits" section of the proposed Detailed Notice. Class Plaintiffs support this change, and believe that consumers should be further informed that, as a result of a successful antitrust suit, any damages found by the Court or a jury would be trebled. This information is plainly relevant to consumers' analysis of the benefits of the suit and any consumer's decision whether or not to opt out of the settlement, and can be added to the Detailed Notice in a sentence or less. This also places in context for consumers whether they are receiving 50 percent of damages as the notice implies.

Third, the proposed settlements appear to call for distribution when they are finally approved (albeit they are not crystal clear on this point). However, the Plaintiff States envision additional distributions to the same consumers as damages are recovered from the remaining defendants. Each such distribution will cost money and reduce the amount received by consumers. Deferring distributions until the conclusion of district court proceedings would reduce the unnecessary expense of conducting multiple distributions, ensuring a larger percentage of the settlements go to the consumers rather than to settlement administration.

Deferring distribution would have no corresponding downside. The Settling Defendants pay into an interest-bearing escrow account within thirty days of preliminary approval, so the settlement amount will be preserved until distribution occurs. Any delay would be short, given the accelerated timetable for the remaining cases. And, importantly, the Settling Defendants will get the same finality they bargained for by resolving the settlements early, and pay the exact same amount of money. Distribution in multi-defendant conspiracy cases is commonly deferred until resolving the entire case, and should be deferred here.

Class Plaintiffs stand ready to discuss these issues and any other topics on which the Court requests Class Plaintiffs' input.

Respectfully,

HAGENS BERMAN SOBOL SHAPIRO LLP

Steve W. Berman

cc: All counsel of record (by e-mail)

[3] The sole purpose Class Plaintiffs can conceive for such a finding is to provide fodder to defendants in opposing Class Plaintiffs' upcoming motion for class certification. Whether this effect is intended is beside the point; what is important is that the issue not be prejudged before it has actually been met by the parties.