

December 23, 2013

VIA ECF FILING

The Honorable Denise Cote
United States District Judge, Southern District for New York

Re: State of Texas, et al. v. Penguin Group (USA) Inc., et al., 12-CV-3394 (DLC);
In re Electronic Books Antitrust Litig., 11-MD-2293 (DLC)

Dear Judge Cote:

Pursuant to the Court's October 3, 2013 order, on December 18, Plaintiffs submitted a new 83-page expert report by Prof. Roger Noll. Prof. Noll's report seeks to rebut the reports of Apple's experts and contains new and supplemental opinions and analyses, including the results of "two additional regressions" undertaken "since the *Noll Report* was submitted." Noll Reply Rep. at 5. Plaintiffs rely on this new expert report in support of class certification, to oppose Apple's Daubert motion regarding Prof. Noll, to support their own Daubert motions to exclude Apple's experts and as proof at trial of alleged damages. Apple seeks leave (1) to depose Prof. Noll about his new report for up to 4 hours on January 2, 3, or 4, 2014, (2) to file responsive reports by Apple's experts, Prof. Kalt and Mr. Orszag, and (3) to file a sur-reply brief on January 21, 2014 regarding class certification.¹ See Dkt. 473 (order extending expert discovery until January 31, 2014 and setting due dates).

Apple is entitled to depose Prof. Noll in his capacity as a rebuttal expert to discover the bases for the opinions in his reply report. See Fed. R. Civ. Pro. 26(b)(4)(A) ("A party may depose any person who has been identified as an expert whose opinions may be presented at trial," and "the deposition may be conducted only after the report is provided."). That Prof. Noll has previously been deposed on his initial report does not justify barring a deposition on his subsequently-disclosed rebuttal opinions. See *In re DRAM Antitrust Litig.*, 2006 WL 3462580 (N.D. Cal. 2006) (permitting second deposition of expert after submittal of rebuttal report); *In re Derailment Cases*, 2004 WL 5518068 (D. Neb. 2004) (permitting second deposition of expert "on the bases for his 'rebuttal' opinions."); see also *Ice Corp. v. Hamilton Sundstrand Corp.*, 2007 WL 1590845 (D. Kan. 2007) (second deposition on expert's sur-rebuttal report permissible under Rule 30(a)(2)).

Moreover, it would be "fundamentally unfair and unduly prejudicial" to prevent Apple from deposing Prof. Noll on his new opinions, calculations and analyses. *Hidalgo v. Cooley*

¹ Plaintiffs have not consented to Apple's request. Instead, despite the compressed timeframe given the holidays and overall schedule, they ignored it for over three days and, after prodding, attempted to unnecessarily prolong the dispute without any evident intention of accommodating Apple's request.

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Goodward, 2004 WL 936859, at *2 (N.D. Tex. 2004); *see also Medallie Art Co. v. Novus Marketing*, 2003 WL 22053139 (S.D.N.Y. 2003) (permitting defendant to re-depose plaintiff's expert who offered supplemental report "[t]o avoid any conceivable prejudice to the Defendants."). While a "rebuttal report is not the time to change methodologies to account for noted deficiencies," that is precisely what Prof. Noll has done here. *Bowman v. Int'l Bus. Machine Corp.*, 2013 WL 1857192, at *7 (S.D. Ind. 2013). At his first deposition, Prof. Noll admitted he had not "run regressions on individual transactions data," Ex. 1, Noll Dep. 157:2-3, and yet his new report claims to have done so, slicing \$27 million from his damage estimate. Noll Reply Rep. 5-6. Prof. Noll has also undertaken a new "test of the commonality of injury" by examining individual iBook Store purchases. *Id.* at 39-40. Plaintiffs do not, and cannot, explain why these and other new analyses were not undertaken and presented in Prof. Noll's initial report, especially given that Plaintiffs bear the burden of demonstrating class-wide impact and injury through common proof.² *See Ebbert v. Nassau County*, 2008 WL 4443238, at *14 (E.D.N.Y. 2008) ("no justification" provided "for [the expert's] omission of these opinions in his Initial Report, as required by Rule 26(a)(2)(B)."); *see also STS Software Sys. Ltd. v. Witness Sys., Inc.*, 2008 WL 660325 (N.D. Ga. 2008); *Baldwin Graphic Sys., Inc. v. Siebert, Inc.*, 2005 WL 1300763 (N.D. Ill. 2005). At a minimum, Apple is entitled to explore these new analyses with Prof. Noll. *See Granci v. U.S. Limousine Service, Ltd.*, 2011 WL 4407461, at *2 (E.D.N.Y. 2011) ("the Court 'must grant leave [for a second deposition] to the extent consistent with Rule 26(b)(2)'").

The Court has already held that Apple is entitled to file sur-reply reports to address unanticipated "new opinions" in Plaintiffs' rebuttal report (Dkt. 414). Consistent with the Court's October 3, 2013 order, leave should thus be granted to allow Apple's experts to file sur-reply reports to address Prof. Noll's rebuttal opinions and other new analyses.³ Moreover, Plaintiffs rely on Prof. Noll's new opinions in their reply brief in support of their class certification motion. *See, e.g.*, Pls. Reply Br. at 7 (discussing Prof. Noll's new regression analyses); *id.* at 1 (discussing Prof. Noll's analysis of iBook Store data). Accordingly, a sur-reply brief is warranted.

² With respect to Prof. Noll's new analysis of iBook Store data, Plaintiffs refer to "recently produced individual customer identification records" (Pls. Reply Br. 1), but this information was produced by Apple to Plaintiffs on November 15, 2012 and March 27, 2013 and therefore was available well before Prof. Noll's first report.

³ Of course, leave of Court is not required for experts to submit declarations to clarify their opinions in response to Plaintiffs' *Daubert* motions. *See, e.g., Aviva Sports, Inc. v. Fingerhut Direct Mktg., Inc.*, 829 F. Supp. 2d 802, 820-21 (D. Minn. 2011); *Fosmire v. Progressive Max Ins. Co.*, 277 F.R.D. 625, 628 n.2 (W.D. Wash. 2011); *Stephenson v. Honeywell Int'l Inc.*, 703 F. Supp. 2d 1250, 1256 n.5 (D. Kan. 2010). In any event, Apple will make its experts available for deposition on any new declarations on the same basis that it seeks Prof. Noll's deposition here.

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Sincerely,

/s Daniel G. Swanson

Daniel G. Swanson

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