

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

v.

APPLE, INC. et al.,

Defendants.

Civil Action No. 12-cv-2826 (DLC)

THE STATE OF TEXAS;
THE STATE OF CONNECTICUT; et al.,

Plaintiffs,

v.

PENGUIN GROUP (USA) INC. et al.,

Defendants.

Civil Action No. 12-cv-03394 (DLC)

DIRECT TESTIMONY OF THOMAS TURVEY (GOOGLE)

Thomas Turvey, first being duly sworn, declares as follows:

1. I am a Director of Strategic Partnerships at Google Inc. Among other things, Google operates as a retailer that provides various Internet-related products and services, including the sale of electronic books (“ebooks”) to customers. The facts stated below are made on the basis of my personal knowledge and belief. If called as a witness to testify at trial, I could and would testify competently on the matters below.

2. In February 2004, I joined Google as a Strategic Partner, Development Manager. I was promoted to my current position, Director of Strategic Partnerships, in 2009. As Director of Strategic Partnerships, I am and have been responsible for managing content licensing arrangements with print and electronic media companies across books, magazines, newspapers, and journals. In addition, I maintain Google’s partnerships with these publishers.

3. Google began to plan its entry into the ebooks business in 2007. Prior to 2010, Google made significant preparations to enter the market, including discussing its plans with various publishers. In January 2010, representatives of five of the six largest U.S. trade publishers, Hachette, HarperCollins, Macmillan, Simon & Schuster, and Penguin, advised me that they were switching from a wholesale to an agency model. *See, e.g.*, GOGEBKS-RL-0004740. Up to that point, Google understood that these publishers would follow the buy-sell or wholesale model. Under the agency model, publishers retained the ability to set ebook prices, and retailers became agents who received commissions on sales. In addition, around that same time, each of these publishers either advised me directly or strongly implied that their agreements with Apple - whose iBookstore was being launched contemporaneously with the introduction of the first iPad - did not allow them to continue offering their books under wholesale terms. Pursuant to these agreements, Google was advised, none of these publishers’ books could be sold at retail for a price lower than the price available at the

iBookstore. The publishers indicated that, as a result of their agreements with Apple, they were unwilling to enter into non-agency agreements with Google.

4. It was and is Google's preference to obtain ebook titles from publishers under the wholesale model. *See, e.g.*, GOGEBKS-TT-0049314. In fact, Google has successfully pursued non-agency contracts with the vast majority of publishers with whom it deals. This structure, unlike the agency model, allows Google to set ebook prices and offer discounts. Before the introduction of the agency model, Google was prepared to determine and offer competitive pricing across the titles it offered.

5. Although Google would prefer to obtain ebooks from publishers under the wholesale model, it accepted agency terms from the largest trade publishers because these publishers produce works that account for a significant percentage of the most popular new books in the U.S. book trade (including a large percentage of titles from the New York Times Bestseller List), representing a large percentage of a retailer's revenue. *See, e.g.*, GOGEBKS-TT-0045749. In order to provide an offering competitive with other ebook retailers and operate a successful bookstore, Google needed access to these popular titles.

6. The implementation of the agency model created challenges for Google. *See, e.g.*, GOGEBKS-TT-0066719. Under agency contracts, Google was required to seek permission from publishers to offer price promotions on agency titles. Publishers were generally reluctant to agree to these promotions. *See, e.g.*, GOGEBKS-TT-0005923. Under the agency model that the five publishers were seeking to implement at that time, the publisher was to be the vendor of record. Under the non-agency model, in contrast, the retailer (Google) is generally the vendor of record. As a result of this change for the agency publishers, Google's engineers needed to account for multiple methods of tax collection when designing the infrastructure of Google's eBookstore. At this time,

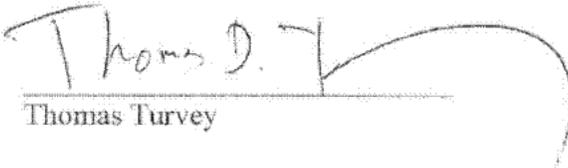
Google also was developing relationships with a number of online retailer book resellers, and this reseller program further complicated the tax issue. Determining the tax nexus associated with agency sales from independent physical bookstores was quite difficult. Agency publishers initially resisted Google's standard return policy due to their status as merchant of record. Although they ultimately agreed, this was the subject of protracted negotiation.

7. The agency model also had an impact on Google's merchandising practices. Merchandising refers to how ebooks are promoted within a retailer's store. Under non-agency contracts, Google is typically free to establish merchandising plans. Under some agency contracts, however, Google needed publisher approval of merchandising plans, or in some cases these plans were conflated with marketing plans that were subject to publisher approval. Relative to books sold under the wholesale model, Google was unable to freely promote agency titles.

8. [REDACTED]
[REDACTED]
[REDACTED]

Pursuant to 28 U.S.C. § 1746, I hereby declare under penalty of perjury under the laws of the United States this 23 day of April 2013, that the foregoing is true and correct to the best of my knowledge and belief.

Respectfully submitted,



Thomas Turvey