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By ECF

July 6, 2021

Magistrate Judge Debra C. Freeman
United States District Court
Daniel Patrick Moynihan Courthouse
500 Pearl Street
New York, NY 10007

Re: *In Re Amazon.com, Inc. eBook Antitrust Litigation*, Case No. 21-cv-00351

Dear Magistrate Judge Debra Freeman:

Pursuant to Your Honor's Individual Practices, Defendants respectfully request a pre-motion conference regarding our contemplated motion to stay all discovery pending resolution of our forthcoming Motions to Dismiss. As indicated in the Rule 26(f) Reports, Plaintiffs seek discovery in this case, including documents produced previously to domestic and international competition agencies, certain eBook agreements, and sales data, and intend to serve initial document requests and interrogatories by July 30, 2021.

Defendants conferred in good faith with Plaintiffs' counsel regarding a stay of discovery pending resolution of their anticipated Motions to Dismiss. Plaintiffs reject a stay of discovery.

1. **Good Cause for Stay of Discovery Pending Resolution of the Motions to Dismiss**

District courts have discretion to stay discovery for "good cause." Fed. R. Civ. P. 26(c). "When a motion to dismiss is pending, courts typically consider several factors in determining whether to stay discovery; they include the following: (1) a strong showing, by the defendants, that the plaintiffs' claim(s) lacks merit; (2) the breadth of the discovery demanded and the burden of responding to it; and (3) the risk of unfair prejudice to the plaintiff." Order at 2, *In re Platinum & Palladium Antitrust Litig.*, No. 1:14-cv-09391-GHW (S.D.N.Y. Apr. 21, 2015), ECF No. 48 (quoting *Kassover v. UBS A.G.*, 2008 WL 5395942, at *4 (S.D.N.Y. Dec. 19, 2008)). Each of these factors weighs in favor of staying discovery in this case.

(a) *Defendants Have Substantial Grounds for Dismissal*

"[C]ourts in this district have held 'that a stay of discovery is appropriate pending resolution of a potentially dispositive motion where the motion appears to have substantial grounds or, stated another way, does not appear to be without foundation in law." *Johnson v.*

NYU Sch. of Educ., 205 F.R.D. 433, 434 (S.D.N.Y. 2002) (quoting *In re Currency Conversion Fee Antitrust Litig.*, 2002 WL 88278, at *1 (S.D.N.Y. Jan. 22, 2002)).

As their forthcoming Motions to Dismiss will demonstrate, Defendants have substantial grounds for dismissal of the Consolidated Amended Complaint (***CAC***). Critically, the CAC fails to allege plausibly that Defendants engaged in a horizontal conspiracy under Section 1 of the Sherman Act, a conspiracy to monopolize under Section 2 of the Sherman Act, or that Amazon unilaterally violated Section 2 of the Sherman Act.

First, the CAC is devoid of any non-conclusory allegations that Defendants engaged in a horizontal or hub-and-spoke conspiracy. The CAC alleges not a single communication between the Publishers, how an alleged agreement was entered into between the Publishers, or even a "specific time, place, or person" involved in any alleged horizontal conspiracy. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 565 n.10 (2007). Nor does the CAC allege facts to support any claim that Amazon organized or otherwise participated in an overarching conspiracy between and among the Publisher Defendants. That is not sufficient under *Twombly*. The only agreements specifically alleged in the CAC are independent *vertical* agreements between each Publisher and Amazon. That each agreement was negotiated within a roughly one-year period barely rises to the level of parallel conduct and is not even circumstantial evidence of a conspiracy in any event.

Second, the CAC contains no allegations that would place the Publishers' individual agency distribution agreements with Amazon in a context that would give rise to a plausible inference of a conspiracy. *See id*. at 556-57. Rather, the context surrounding the proposed inference makes the alleged conspiracy implausible. *See, e.g., In re Inclusive Access Course Materials Antitrust Litig.*, No. 20 MDL 2946 (DLC), 2021 WL 2419528, at *8 (S.D.N.Y. June 14, 2021) (dismissing complaint where allegations suggest "independent responses to common stimuli [that] do not support an inference" of agreement) (internal citations omitted). The CAC relies significantly on provisions contained in the Publishers' respective eBook agreements with Amazon that are alleged to have been entered into in 2014 and 2015. Yet:

- Each Publisher's eBook agreements with Amazon through September 2017 (including the 2014 and 2015 agreements) were produced to and reviewed by the US Department of Justice (***DOJ***), Final Judgment ¶ IV.D., *United States v. Apple, Inc.*, No. 1:12-cv-02826-DLC (S.D.N.Y. Sept. 6, 2012), and the State Attorneys General, Order & Stipulated Injunction ¶ IV.D., *In re Electronic Books Antitrust Litig.*, No. 1:12-cv-06625-DLC (S.D.N.Y. Feb. 8, 2013); and

- Through September 2017, each Publisher was required to produce – and did produce – a detailed log of every communication with any other Publisher to DOJ, Final Judgment ¶ VII.I, *United States v. Apple, Inc.*, No. 1:12-cv-02826-DLC (S.D.N.Y. Sept. 6, 2012), as well as to the State Attorneys General, Order & Stipulated Injunction ¶ VII.I., *In re Electronic Books Antitrust Litig.*, No. 1:12-cv-06625-DLC (S.D.N.Y. Feb. 8, 2013).

It is implausible that the Publishers would conspire to enter into anticompetitive agreements with Amazon while under the supervision of antitrust authorities and would use the same contracts that were subject to review by antitrust authorities to implement those agreements.

Third, the CAC fails to allege any plus factors that would enable this Court to infer a conspiracy. *See Apex Oil Co. v. DiMauro*, 822 F.2d 246, 253 (2d Cir. 1987) ("[A] plaintiff must show the existence of additional circumstances, often referred to as 'plus' factors, which, when viewed in conjunction with the parallel acts, can serve to allow a fact-finder to infer a conspiracy."). The CAC contains no factual allegations that the Publishers had a motive or intent to restrain trade or to confer a monopoly upon Amazon. It is implausible that the Publishers would conspire *with* Amazon to help it become a monopolist when just years before they were alleged to have conspired *against* Amazon to reduce its market share.

Instead, each Publisher had a strong independent economic incentive to enter into an agreement with Amazon. Each Publisher acted unilaterally and in its own self-interest to enter into an agreement with Amazon to sell eBooks in its popular store and to compete for deals with authors. Plaintiffs have neither plausibly alleged nor could they plausibly allege otherwise.

Finally, the CAC fails to plead facts that establish how Amazon could monopolize a market for eBooks when Amazon does not control prices under its agency agreements with the Publisher Defendants. Hornbook law provides that monopoly power is established where a defendant controls prices and output in the market; Amazon can control neither because it serves only as a sales agent for the Publisher Defendants. Plaintiffs have no claim for monopolization by Amazon under these circumstances. Defendants have more than "substantial grounds" for dismissal of the CAC.

For all of these reasons, Plaintiffs' failure to meet their burden under *Twombly* militates strongly against opening discovery. *See, e.g.*, *Ashcroft v. Iqbal*, 556 U.S. 662, 686 (2009) ("Because respondent's complaint is deficient under Rule 8, he is not entitled to discovery, cabined or otherwise."). As this Court has recognized, a plaintiff "may not use discovery to determine whether there is a cause of action." *Hughes v. LaSalle Bank, N.A.*, 2004 WL 414828, at *1 (S.D.N.Y. Mar. 4, 2004) (citing *Segan v. Dreyfus Corp.*, 513 F.2d 695 (2d Cir. 1975)). "The purpose of discovery is to find out additional facts about a well-pleaded claim, not to find out whether such a claim exists." *Id*. As Plaintiffs have not filed a well-pleaded complaint, they should not be entitled to discovery.

(b) *The Burden of Discovery Outweighs Any Prejudice*

Requiring Defendants to produce discovery at this stage would impose a significant burden that would outweigh any possible prejudice Plaintiffs may claim would arise from a stay.

(i) Discovery Would Impose a Substantial Burden on Defendants

Plaintiffs' proposed Discovery Plan sets out an ambitious timeline for Defendants to produce discovery while Defendants' motions to dismiss are pending. Joint Rule 26(f) Report & Discovery Plan, ECF No. 82. And to comply with Plaintiffs' demand that Defendants produce all "documents previously produced to government regulators," millions of documents would "need to be re-reviewed by defendants for different relevance, confidentiality, data privacy, and privilege considerations." Order at 2, *In re Platinum & Palladium Antitrust Litig.*, No. 1:14-cv-09391-GHW (S.D.N.Y. Apr. 21, 2015), ECF No. 48.

First, Defendants' previous productions are not all relevant to the allegations of the CAC. For example, the US Federal Trade Commission (***FTC***) investigation is not coextensive with Plaintiffs' CAC. In addition, Defendants' previous productions contain materials dating back to 2010 – years before the agreements that are the subject of the CAC. Producing only materials relevant to this case would require Defendants to re-review their previous productions to exclude materials that have no bearing on this case.

Second, three of the five Publishers are subsidiaries of foreign companies, and Amazon has substantial foreign operations. These companies' prior productions include documents and data originating outside the United States, the production of which would implicate the General Data Protection Regulation (***GDPR***) and other foreign privacy and data protection laws. These companies would need to consult with foreign counsel and review the previous productions to ensure they do not run afoul of foreign laws.

Third, Defendants will need to review their prior productions for potential confidentiality obligations vis-à-vis third parties – something that was not required when the documents were produced to the government. This may require Defendants to provide notice to each third party before producing any agreements or documents relating to those agreements.

For all of these reasons, even requiring Defendants to produce their prior productions would require Defendants to undertake costly and time-intensive re-reviews of their productions. This is not a "minimal" burden. It is substantial.

(ii) Plaintiffs Will Not Suffer Unfair Prejudice if Discovery is Stayed

Plaintiffs will not suffer any unfair prejudice if discovery is stayed pending resolution of the forthcoming Motions to Dismiss.[1] Each Defendant has the appropriate litigation document holds in place and will take the necessary steps to preserve relevant evidence. *See, e.g.,* Opinion at 8, *Spinelli v. Nat'l Football League*, No. 13-CV-7398-RWS (S.D.N.Y. Oct 21, 2013), ECF No. 145 ("At this stage of the litigation, with the viability of the new Complaint unresolved, a delay in discovery, without more, does not amount to unfair prejudice.").

[1] In the meantime, Defendants have offered to provide initial disclosures and requested that the Court set the deadline for the exchange of such disclosures to be September 7, 2021.

2. **Conclusion**

Defendants have substantial grounds for dismissal of Plaintiffs' claims. Requiring Defendants to comply with discovery requests would impose a significant burden that would outweigh any possible prejudice the Plaintiffs might claim from the issuance of a stay. As this Court has previously recognized, "allowing the plaintiff to conduct discovery in order to piece together a claim would undermine the purpose of Federal Rule of Civil Procedure 12(b)(6), which is to 'streamline litigation by dispensing with needless discovery and factfinding' where the plaintiff has failed to state a claim under the law." *KBL Corp. v. Arnouts*, 646 F. Supp. 335, 346 n.6 (S.D.N.Y. 2009) (quoting *Neitzke v. Williams*, 409 U.S. 319, 326-27 (1989)). This is exactly the case here: Plaintiffs should not be entitled to embark on a fishing expedition in the hopes of substantiating a complaint that fails to state a claim for relief. Defendants therefore respectfully request a pre-motion conference regarding our contemplated motion to stay all discovery pending resolution of our forthcoming Motions to Dismiss.

Respectfully submitted,

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cc: All Counsel of Record (via ECF)