T 206.623.7292 F 206.623.0594

HAGENS BERMAN

Steve W. Berman
HAGENS BERMAN SOBOL SHAPIRO LLP
1301 SECOND AVENUE, SUITE 2000
SEATTLE, WA 98101
www.hbsslaw.com
Direct (206) 268-9320
steve@hbsslaw.com

July 12, 2021

VIA ECF

Honorable Debra C. Freeman
Magistrate Judge
United States District Court for the
Southern District of New York
Daniel Patrick Moynihan U.S. Courthouse
500 Pearl St.
New York, NY 10007-1312

Re: *In Re Amazon.com, Inc. eBook Antitrust Litigation*,
Case No. 21-cv-00351-GHW-DCF (S.D.N.Y.)

Dear Judge Freeman:

Plaintiffs submit this letter in response to the letter brief filed by Defendants[1] [ECF 83] to request a pre-motion conference concerning their motions to stay discovery. Plaintiffs respectfully submit that the proposed motion is without merit but have no objection to a hearing to discuss the matter.

It "is well established in this district that filing a dispositive motion does not automatically entitle a party to a stay of discovery."[2] "Had the Federal Rules contemplated that a motion to dismiss under Fed. R. Civ. P. 12(b)(6) would stay discovery, they would contain such a provision."[3] The primary factor the Court considers in evaluating a stay request is whether Defendants make "a strong showing" that they are "likely to succeed on the merits" of their

[1] Hachette Book Group, Inc.; HarperCollins Publishers L.L.C.; Macmillan Publishing Group, LLC; Penguin Random House LLC; and Simon & Schuster, Inc. (collectively the "Big Five" or "Publisher Defendants"); and Amazon.com, Inc.

[2] *Yang v. Bank of New York Mellon Corp.*, 2020 U.S. Dist. LEXIS 210109, at *3 (S.D.N.Y. Nov. 9, 2020).

[3] *Metzner v. Quinnipiac Univ.*, 2020 U.S. Dist. LEXIS 233842, at *4 (D. Conn. Nov. 12, 2020) (quotation omitted).

motion to dismiss.[4] For example, in *Lopez v. City of New York*, the court denied the defendants' stay request because, like the Defendants here, they had not yet briefed their motions to dismiss and the court could not determine whether the claim was "so clearly without merit that discovery should not be permitted."[5] In *Cambridge Capital LLC v. Ruby Has LLC*, the court likewise declined a stay because the parties had not fully briefed the motion and it was "not clear" without further "study and analysis" whether "the Defendant" was "correct" in its assessment of the law or the application of the law to the facts.[6] Similarly, the court in *Republic of Turkey v. Christie's, Inc*., also denied a motion to stay when the defendant failed to demonstrate that the plaintiffs' claims "on their face" were "utterly devoid of merit."[7] And in *Renois v. WVMF Funding, LLC*, the Court stayed discovery pending the outcome of a fully briefed motion to dismiss on jurisdictional grounds, which turned on a pure issue of law. But it declined to extend the stay until resolution of separate motions challenging the adequacy of the plaintiff's pleadings because "neither motion would be necessarily case-dispositive, if granted" because "any defects in these allegations may be capable of being remedied by amendment."[8]

For similar reasons, Defendants do not satisfy their burden here. They merely challenge the adequacy of the allegations without identifying any case law that affirmatively forecloses Plaintiffs' claims. On the contrary, Amazon's agreements with the Big Five are illegal for the very same reasons Judge Cote found them to be illegal in *United States v. Apple*—because they "removed the ability of retailers to set the prices of their e-books and compete with each other on price, relieved [Amazon] of the need to compete on price, and allowed the [Big Five] to raise the prices for their e-books, which they promptly did[.]"[9] Defendants' objections misread the complaint and the prevailing case law.

First, Defendants claim that the Consolidated Amended Complaint (CAC) "is devoid of any non-conclusory allegations that Defendants engaged in a horizontal or hub-and-spoke conspiracy." But Plaintiffs need only establish that horizontal competitors entered into "vertical agreements" with "knowledge that other market participants are bound by identical agreements" and that "their participation is contingent upon that knowledge."[10] Plaintiffs have alleged

---

[4] *Lopez v. City of New York*, 2021 U.S. Dist. LEXIS 123469, at *4-5 (S.D.N.Y. July 1, 2021) (brackets, quotation omitted).

[5] *Id.* at *4.

[6] 2021 U.S. Dist. LEXIS 110021, at *6-7 (S.D.N.Y. June 10, 2021).

[7] 316 F. Supp. 3d 675, 678 (S.D.N.Y. 2018).

[8] 2021 U.S. Dist. LEXIS 83397, at *5-6 (S.D.N.Y. April 30, 2021).

[9] *United States v. Apple Inc.*, 952 F. Supp. 2d 638, 694 (S.D.N.Y. 2013), *aff'd*, 791 F.3d 290 (2d Cir. 2015), *cert. denied*, 136 S. Ct. 1376, 194 L. Ed. 2d 360 (2016).

[10] *Barry's Cut Rate Stores, Inc. v. Visa, Inc.*, 2019 U.S. Dist. LEXIS 205335, at *183-84 (E.D.N.Y. Nov. 20, 2019).

essentially identical agreements between Amazon and each of the Big Five Defendants. These agreements include an agency provision that allows each Big Five Defendant to set its own eBook prices without retailer discounting and a most favored nations clause (MFN) that ensures Amazon faces no competition from retail sites offering lower prices. Plaintiffs further allege that each of the Big Five had knowledge that the agreements were the same, and that they had no incentive to enter into such agreements unless the other Big Five competitors were doing the same.[11]

Second, Defendants argue that it is not plausible that they would have conspired while under DOJ supervision. But "a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable[.]"[12] Plaintiffs satisfy the pleading requirements by alleging the same illegal arrangement found to violate the Sherman Act in *Apple*. Defendants further ignore the investigation by the European Union's Directorate of Competition, which found that Amazon and the Big Five evaded the Directorate's concurrent prohibition against the Big Five's use of MFNs in their eBooks agreements in Europe by employing notice provisions that functioned the same as the prohibited MFN.[13] Plaintiffs plausibly allege that Defendants evaded that restriction here in the United States through the same means.

Third, Defendants claim that the CAC lacks plus factors. But Plaintiffs need not establish plus factors to establish the existence of a conspiracy when they rely on an explicit agreement.[14] Contractual provisions—an agency model coupled with an MFN or the functional equivalents—that "specifically address the conduct the Plaintiffs argue is unlawful" satisfy the requirement of a "contract . . . in restraint of trade."[15] Further, Defendants disregard Plaintiffs' allegations of "anticompetitive coordination . . . arranged through public signals and public communications"[16]

---

[11] CAC, ¶¶ 62-73; 157; *see also Apple*, 791 F.3d at 317 ("By the very act of signing a Contract with Apple containing an MFN Clause, then, each of the Publisher Defendants signaled a clear commitment to move against" the industry practice of retail discounting, "thereby facilitating their collective action.").

[12] *Gelboim v. Bank of Am. Corp.*, 823 F.3d 759, 781 (2d Cir. 2016) (quotation omitted).

[13] CAC, ¶¶ 74-90.

[14] *Gelboim*, 823 F.3d at 781.

[15] *FTC v. Actavis, Inc.*, 2018 U.S. Dist. LEXIS 99716, at *35 (N.D. Ga. June 14, 2018); 15 U.S.C. § 1.

[16] *In re Delta/AirTran Baggage Fee Antitrust Litig.*, 733 F. Supp. 2d 1348, 1360 (N.D. Ga. 2010); CAC, ¶¶ 65-71; 159 and 162.

and "domestic and global [regulatory] actions" which are recognized plus factors in "support an inference of conspiracy."[17]

Finally, Defendants argue that Plaintiffs cannot consistently allege that Amazon monopolizes the eBook market and that the Big Five set their own eBook prices. But they cite no case authority and fail to distinguish *Apple Inc. v. Pepper*, where the Supreme Court found "no persuasive legal or economic basis" for the "blanket assertion" that "a monopolistic retailer who keeps a commission" but does not set the price for the product "does not ever cause the consumer to pay a higher-than-competitive price."[18]

Even if the Defendants' likelihood of prevailing on the merits were a close call (and it's not), their motion fails in consideration of "the prejudice that would result to the party opposing the stay."[19] Plaintiffs, who filed in January, allege contractual negotiations that occurred at least six years ago. The Court is not likely to decide Defendants' motion to dismiss until January of next year. Staying discovery until then creates "a risk of unfair prejudice" caused by "fading memories with the passage of time."[20]

As to "the breadth of discovery sought" and "the burden of responding to it,"[21] Plaintiffs have not served any discovery requests. Subjects of discovery identified in their 26(f) report include Defendants' contracts, documents they produced to governmental agencies that investigated the eBooks industry, and their eBooks sales data.[22] Defendants object only to the purported breadth and burden of producing documents previously provided to government entities. As the court in *Metzner v. Quinnipiac University*, recognized under like circumstances, "a wholesale stay of discovery is not the proper vehicle for resolving a premature claim of overbreadth or undue burden."[23] A protective order, a good faith meet and confer with Plaintiffs, or a discovery conference can resolve all other concerns Defendants raise, and Defendants' objections to privilege review is an ordinary, not an undue, burden.[24] Even assuming a limited

---

[17] *Barry's Cut Rate Stores*, 2019 U.S. Dist. LEXIS 205335, at *193; CAC, ¶¶ 74-94; 160.

[18] *Apple Inc. v. Pepper*, ___U.S.___ , ___, 139 S. Ct. 1514, 1523 (2019).

[19] *Renois*, 2021 U.S. Dist. LEXIS 83397, at *2 (quoting *Christie's, Inc*., 316 F. Supp. 3d at 677).

[20] *Yang*, 2020 U.S. Dist. LEXIS 210109, at *3-4.

[21] *Renois*, 2021 U.S. Dist. LEXIS 83397, at *2.

[22] Joint 26(f) Report and Discovery Plan [ECF 82] at 20.

[23] 2020 U.S. Dist. LEXIS 233842, at *20.

[24] *Medtronic Sofamor Danek, Inc. v. Sofamor Danek Holding, Inc.*, 2003 U.S. Dist. LEXIS 8587, at *27 (W.D. Tenn. May 13, 2003).

stay to production of these documents were warranted, Defendants provide no justification for staying other discovery Plaintiffs identified, *e.g.*, Defendants' contracts, pricing, and sales data.

In short, Defendants' proposed motion is without merit. If the Court would like additional information, however, Plaintiffs have no objection to a pre-motion hearing.

Sincerely,

HAGENS BERMAN SOBOL SHAPIRO LLP

Steve W. Berman