Robert J. LaRocca
Joanne Zack, JZ 6432
Michael J. Boni
Neil L. Glazer, NG 7584
KOHN, SWIFT & GRAF, P.C.
One South Broad Street
Suite 2 100
Philadelphia, PA 19 107
(215) 238-1700

Attorneys for Defendants

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RANDOM HOUSE, INC., . .

Plaintiff, . . 01 Civ. 1728 (SHS)

v. . . .

ROSETTA BOOKS LLC . .
and ARTHUR M. KLEBANOFF, in his individual .
capacity and as principal of ROSETTA BOOKS LLC.,

Defendants. .

DECLARATION OF_____Donald Maass_____

1. I am president of the Association of Authors' Representatives, Inc., the national trade association of literary agents. Additionally, I am president of the Donald Maass Literary Agency, 160 West 95th Street, Suite 1 B, New York, NY 10025, which currently represents more than 150 authors, many of whom are writers of science fiction.

2 . I have worked in the field of book publishing in the United States for 23 years. In 1977-78 I was employed in the positions of Editorial Assistant and Assistant Managing Editor at Dell Publishing, which is today a division of Random House. In 1978-79 I was employed as Agent at the Scott Meredith Literary Agency, which is today

owned by Arthur M. Klebanoff, the owner of Rosetta Books. I established the Donald Maass Literary Agency in 1980 and since that time have worked exclusively as agent, novelist and author of books for writers *(The Career Novelist*, 1996, and *Writing the Breakout Novel, 200* 1).

3. During this time I have negotiated hundreds of book publishing contracts. I have personal knowledge of the meaning of words used in the book publishing trade in the United States, and the process by which authors convey licenses to publishers.

4. I have been shown the following documents and asked to comment on them:

* a contract dated April 10, 196 1 between Random House and William Styron and an amendment dated June 3, 1965 concerning "The Confessions of Nat Turner";
* a contract apparently dated 1977 between Random House and William Styron and an amendment dated November 13, 1990 concerning "Sophie's Choice" and three other works;
* a contract dated March 7, 1965 between Delacorte Press and Kurt Vonnegut for three untitled novels;
* a contract dated November 20, 1970 between Delacorte Press and Kurt Vonnegut concerning four titles, the first of which is "The Sirens of Titan";
* a contract dated February 4, 1982 between Delacorte Press and Robert Parker concerning four books, the first of which is "The Godwulf Manuscript";

5. I have also read the following:

* an affidavit by Edward A. Miller dated February 23,200 1

* an affidavit of Ashbel Green dated February 26, 2001

6. I am aware that the Vonnegut, Styron, and Parker contracts, and the Miller and Green affidavits, are part of a current legal proceeding in which Random House has sued Rosetta Books over the issue of electronic publishing rights.

7. As a young editor at Dell Publishing in 1977-78, and as a young agent at the Scott Meredith Literary Agency in 1978-79, I was taught and clearly understood that the phrase "print, publish and sell the work in book form" conveyed to a publisher the right to produce the physical object that is commonly understood as a book; i.e., a work printed on paper and bound between covers. In 1977-79 the phrase had no broader meaning than that in the book publishing trade, and still does not today.

8. Further, the assertion by Mssrs. Miller and Green that the phrase "print, publish and sell the work in book form" is intended to convey to the publisher the "electronic rights" to the author's work is in error. The words "print, publish and sell the work in book form do not convey electronic rights, and never have.

9. When additional rights beyond the right to print, publish and sell a printed book are sought by publishers, those additional rights are individually and separately negotiated. While some such as second serials rights, book club rights, rights of abridgement-digest-condensation and the like, are very often granted to publishers, such rights are nevertheless distinct from book rights. They are clearly separated from book rights in the grant language of publishing agreements. In my experience, other rights—such as British and Commonwealth publishing, translation, audio recording, movie/TV,

merchandising rights and the like---&e granted less often. When granted these, too, are separated from book rights in publishing agreements. In all the foregoing instances publishing contracts always include separate royalty schedules and/or varying splits of revenues to be paid to authors for the exploitation of each right. These separate grants and considerations paid to authors by publishers hold true even when the resulting products present the identical text found in a book; as, for example, in the printing of an excerpt from a book in a magazine in advance of book publication, or the serialization of the full or partial text of a book in installment form in a magazine in advance of book publication ("first serial rights"), or the abridged or unabridged audio recording of a book ("audio rights").

10. Even the right to "reprint" an author's book (i.e., to produce an inexpensive paperback edition) is not immediately encompassed in the grant to "print, publish and sell the work in book form? Rather, reprint rights normally involve separate negotiation, separate consideration, and separate contractual language. Indeed, reprint rights can be, and sometimes are, reserved to the author.

11. Distributing books on computer disks was a possibility first discussed in the early- to mid-1980's, when IBM personal computers began to appear in offices and to be used by some authors. Such a means of distribution was never a practical reality. In the 1990's the possibility of creating enhanced books on CD-ROM arose, as well as the less exciting possibility of delivering to consumers the straight text of books by electronic means. The control of rights to these hypothetical new products became the subject of intense debate between agents and publishers. I participated in that debate, especially in the course of contract negotiations with Random House and other publishers. It is my

clear memory that it was never understood, or even suggested by any party at the time, that such rights were already encompassed in the right to the work "in book form." Such businesses were new, such products were different, and such rights and their grant to publishers (or not, as it evolved in the failed business of enhanced books on CD-ROM) was an altogether separate contract matter.

12. The potential of the inter-net as a medium for creative expression was not known to me until 1984, when the science fiction novel *Neuromancer* by William Gibson was published. This novel introduced the term "cyberspace", and hypothesized an internet so elaborate that individuals could experience it as a virtual realty. Thus, it was the imaginative speculation of a visionary novelist that opened to me the possibilities of wholly electronic publishing, enhancement and distribution of texts. To my knowledge, such possibilities were not conceived or discussed by anyone in the publishing industry before that time.

13. In 1993 or 1994 Random House announced to the trade that it was amending its Standard Trade Publishing Agreement to include a new clause licensing "electronic rights" from authors. The new Random House provision licensing electronic rights is attached to this declaration, and reads as follows:

> x. to prepare, reproduce, publish and sell, to distribute, transmit, download or otherwise transfer copies of, and, with the Author's consent, which consent shall not unreasonably be withheld or delayed, to license the foregoing rights in, electronic versions of the work (referred to as Electronic Versions). As used herein, Electronic Versions shall mean versions that include the text of the work and any illustrations contained in the work (in complete, condensed, adapted or abridged versions, and in compilations) for performance and display (i) in any manner intended to make such Electronic Versions of the work available in visual form for reading (whether sequentially or non-sequentially, and together with accompanying sounds and images, if any and (ii) by any electronic means, method, device, process or medium) referred to as Electronic Device or Medium. For the purpose of this subparagraph, Electronic Device or Medium shall include,

but not be limited to, electronic, magnetic, digital, optical and laser-based information storage and retrieval systems, floppy diskette-based software, CD Rom, interactive software and compact discs, floptical disks, ROM card, silicon chip, on-line electronic or satellite-based data transmission and other such systems, and any other device or medium for electronic reproduction, publication, distribution or transmission, whether now or hereafter known or developed. Notwithstanding the foregoing, the rights to publish or license Electronic Versions pursuant to this subparagraph shall be revocable by the Author upon giving written notice to the Publisher with respect to any particular Electronic Device or Medium for which the Publisher has not published or licensed publication, transmission or distribution of any Electronic Version within five (5) years after first publication of the work in book form in the United States or after first development of such Electronic Device or Medium in commercially viable form whichever is later.

14. I understand from Mr. Miller's and Mr. Green's affidavits that Random House imagines that the Mssrs. Vonnegut's, Styron's and Parker's grants to Random House in the 1960's and 1970's of a license to "print, publish and sell" their works "in book form" conveyed to Random House the same "electronic publishing" rights that Random House's new "electronic publishing" clause conveyed only in 1994 and afterwards. Clearly, electronic rights were not granted in those earlier agreements. Based upon my handling of contracts with various divisions of Random House over the last seven or eight years, it is obvious to me that Random House's current position is contrary to the position Random House itself has taken from 1993 or 1994 until now. Not only was Random House's introduction of electronic publishing rights new and extra in 1993 or 1994, from that time until the present Random House has also considered the grant to "print, publish and sell the work in book form" to be separate from the grant of electronic rights.

15. Mr. Green's affidavit states:

When the parties used the standard language ['print, publish and sell the work in book form'] in these contracts, as identified above, they clearly contemplated that

> the publisher was being granted a broad grant of rights to distribute the full content of the work in a linear text fashion-as opposed to as an audio recording, motion picture or multimedia presentation. Whether a work is read on printed paper, on a computer screen or on a handheld e Book reading device, it is the same book with the same linear text delivered to the reader and provides the same reading experience.

16. This statement is contrary to decades of trade usage. In my many years of work in this industry, I have never heard the phrase "distribute the full content of the work in a linear text fashion" prior to reading the Green and Miller affidavits. To my knowledge, no one in the industry has ever used that phrase, and that phrase has never appeared in any author's contract of which I am aware.

17. Contrary to Mr. Green's assertion, the print and electronic versions of a work do not present "the same reading experience." While in the early 1990's it was imagined that text-only displays of works in electronic form might become popular, and while print books and e-books may still today contain identical texts, experience increasingly suggests that the functionality and uses of print books and e-books by consumers-their "reading experience"-are different. Indeed, they are as different as are consumers' uses of print and audio versions. The printed book is read. The audio version is listened to. Identical text, different uses.

The use of e-books is different yet again. E-books are experienced primarily via computer screens or via handheld electronic devices, a few of which are for the sole purpose of reading but most of which are interactive, multi-purpose tools. The novelty and consumer appeal of e-books very likely lies not in their delivery of otherwise-available text, but rather in their full search capabilities, miniscule storage requirements, text enhancements, bookmarking-notetaking-editing capabilities, audio-and-graphic potential, copy-protection (i.e., the fact that e-book texts cannot easily, if at all, be copied

from the owner) and the like.

Identical text, different uses.

Since Random House acknowledges that audio rights are not encompassed by the right to publish a work "in book form", it should follow that such right also does not extend to a different product ("platform") which, while it may deliver identical text, does so through devices of different functionality and for different consumer uses.

18. Random House's stated motive in its suit against Rosetta Books is, to this eye, suspect. Far from needing relief, the largest publisher in America—with, it is thought, a 35% or better share of the trade book market-seems rather to be asking the court to hand down a decision which will in future allow Random House to avoid negotiation for the rights to exploit authors' works via new technologies, merely by citing the court's interpretation of past contract ambiguities in its own favor. An affirmative decision for Random House from the court will dangerously weaken firmly-established authors' rights and undermine long-held understandings in the book publishing industry.

19. Mr. Green asserts in his affidavit that the "non-compete" clause in the disputed contracts ought to prevent the publication of e-book versions of the disputed works by publishers other than Random House. I disagree. Some anecdotal evidence suggests that e-books sales of backlist titles may actually boost, not hurt, print book sales of the same titles. Since it is, as yet, unlikely that Random House can convincingly demonstrate significant lost print sales, equal weight ought to be given by the court to the possibility that in the future print and electronic sales will be complementary. I believe that it is only fair to allow that interpretation in an emerging business in which so much

remains unknown.

20. If Random House is unable in contract language to describe a right, or to say how an author will be compensated for its use, it is difficult for this agent to see why Random House ought to be given the ability to exploit such a right. Far from encouraging exactitude and fairness in contracts, Random Houses's claims, if sustained, will encourage Random House to imprecision in its grant language and make fair contracts more difficult for authors and their agents to obtain.

I state under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief. Executed on this 4th day of April, 200 1.