please see the paragraph above entitled **FOR FURTHER INFORMATION CONTACT**.

Statutory Background

For more than two centuries, the Federal Government has recognized Indian tribes as domestic sovereigns that have unique government-to-government relationships with the United States. Congress has broad authority to legislate with respect to Indian tribes, however, and has exercised this authority to establish a complex jurisdictional scheme for the prosecution of crimes committed in Indian country. (The term ''Indian country'' is defined in 18 U.S.C. 1151.) Criminal jurisdiction in Indian country typically depends on several factors, including the nature of the crime; whether the alleged offender, the victim, or both are Indian; and whether a treaty, Federal statute, executive order, or judicial decision has conferred jurisdiction on a particular government.

The Tribal Law and Order Act (TLOA) was enacted on July 29, 2010, as Title II of Public Law 111–211. The purpose of the TLOA is to help the Federal Government and tribal governments better address the unique public-safety challenges that confront tribal communities. Section 221(b) of the new law, now codified at 18 U.S.C. 1162(d), permits an Indian tribe with Indian country subject to State criminal jurisdiction under Public Law 280, P.L. 83–280, 67 Stat. 588 (1953) to request that the United States accept concurrent jurisdiction to prosecute violations of the General Crimes Act and the Major Crimes Act within that tribe's Indian country.

Department of Justice Regulation Implementing 18 U.S.C. 1162(d)

On December 6, 2011, 76 FR 76037 the Department published final regulations that established the framework and procedures for a mandatory Public Law 280 tribe to request the assumption of concurrent Federal criminal jurisdiction within the Indian country of the tribe that is subject to Public Law 280. 28 CFR 50.25. Among other provisions, the regulations provide that upon receipt of a tribal request the Office of Tribal Justice shall publish a notice in the **Federal Register** seeking comments from the general public.

Request by the Hoopa Valley Tribe

By a request dated January 17, 2012, the Hoopa Valley Tribe located in the State of California requested the United States to assume concurrent Federal jurisdiction to prosecute violations of 18 U.S.C. 1152 (the General Crimes, or Indian Country Crimes, Act) and 18 U.S.C. 1153 (the Major Crimes Act) within the Indian country of the tribe. This would allow the United States to assume concurrent criminal jurisdiction over offenses within the Indian country of the tribe without eliminating or affecting the State's existing criminal jurisdiction.

Solicitation of Comments

This notice solicits public comments on the above request.

Dated: April 17, 2012.

Tracy Toulou,

Director, Office of Tribal Justice.

[FR Doc. 2012–9731 Filed 4–23–12; 8:45 am]

BILLING CODE 4410–07–P

DEPARTMENT OF JUSTICE

Antitrust Division

United States v. Apple, Inc., Hachette Book Group, Inc., HarperCollins Publishers L.L.C., Verlagsgruppe Georg Von Holtzbrinck Gmbh, Holtzbrinck Publishers, LLC D/B/A Macmillan, The Penguin Group, a Division of Pearson PLC, Penguin Group (USA), Inc., and Simon & Schuster, Inc.; Proposed Final Judgment and Competitive Impact Statement

Notice is hereby given pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(b)–(h), that a proposed Final Judgment, Stipulation and Competitive Impact Statement have been filed with the United States District Court for the Southern District of New York in *United States of America* v. *Apple, Inc. et al.,* Civil Action No. 12–CIV–2826. On April 11, 2012, the United States filed a Complaint alleging that the defendants agreed to raise the retail price of e-books, in violation of Section 1 of the Sherman Act, 15 U.S.C. 1. The proposed Final Judgment, submitted at the same time as the Complaint, requires the settling defendants—Hachette Book Group, Inc., HarperCollins Publishers L.L.C., and Simon & Schuster, Inc.—to return pricing discretion to e-book retailers and comply with other obligations designed to end the anticompetitive effects of the conspiracy.

Copies of the Complaint, proposed Final Judgment and Competitive Impact Statement are available for inspection at the Department of Justice, Antitrust Division, Antitrust Documents Group, 450 Fifth Street NW., DC 20530, Suite 1010 (telephone: 202–514–2481), on the Department of Justice's Web site at *http://www.justice.gov/atr,* and at the Office of the Clerk of the United States District Court for the Southern District of New York. Copies of these materials may be obtained from the Antitrust Division upon request and payment of the copying fee set by Department of Justice regulations.

Public comment is invited within 60 days of the date of this notice. Such comments, and responses thereto, will be published in the **Federal Register** and filed with the Court. Comments should be directed to John R. Read, Chief, Litigation III Section, Antitrust Division, Department of Justice, Washington, DC 20530 (telephone: 202–307–0468).

Patricia A. Brink,

Director of Civil Enforcement.

United States District Court for the Southern District of New York

United States of America, Plaintiff, v. *Apple, Inc., Hachette Book Group, Inc., Harpercollins Publishers L.L.C., Verlagsgruppe Georg Von Holtzbrinck GMBH, Holtzbrinck Publishers, LLC D/B/A Macmillan, The Penguin Group, A Division of Pearson PLC, Penguin Group (USA), Inc., and Simon & Schuster, Inc.,* Defendants.

Civil Action No. 1:12–cv–02826
Judge: Cote, Denise
Date Filed: 04/11/2012
Description: Antitrust

Complaint

The United States of America, acting under the direction of the Attorney General of the United States, brings this civil antitrust action against Defendants Apple, Inc. (''Apple''); Hachette Book Group, Inc. (''Hachette''); HarperCollins Publishers L.L.C. (''HarperCollins''); Verlagsgruppe Georg von Holtzbrinck GmbH and Holtzbrinck Publishers, LLC d/b/a Macmillan (collectively, ''Macmillan''); The Penguin Group, a division of Pearson plc and Penguin Group (USA), Inc. (collectively, ''Penguin''); and Simon & Schuster, Inc. (''Simon & Schuster''; collectively with Hachette, HarperCollins, Macmillan, and Penguin, ''Publisher Defendants'') to obtain equitable relief to prevent and remedy violations of Section 1 of the Sherman Act, 15 U.S.C. 1.

Plaintiff alleges:

I. Introduction

1. Technology has brought revolutionary change to the business of publishing and selling books, including the dramatic explosion in sales of ''e-books''—that is, books sold to consumers in electronic form and read on a variety of electronic devices, including dedicated e-readers (such as the Kindle or the Nook), multipurpose tablets, smartphones and personal

computers. Consumers reap a variety of benefits from e-books, including 24-hour access to product with near-instant delivery, easier portability and storage, and adjustable font size. E-books also are considerably cheaper to produce and distribute than physical (or ''print'') books.

2. E-book sales have been increasing rapidly ever since Amazon released its first Kindle device in November of 2007. In developing and then mass marketing its Kindle e-reader and associated e-book content, Amazon substantially increased the retail market for e-books. One of Amazon's most successful marketing strategies was to lower substantially the price of newly released and bestselling e-books to $9.99.

3. Publishers saw the rise in e-books, and particularly Amazon's price discounting, as a substantial challenge to their traditional business model. The Publisher Defendants feared that lower retail prices for e-books might lead eventually to lower wholesale prices for e-books, lower prices for print books, or other consequences the publishers hoped to avoid. Each Publisher Defendant desired higher retail e-book prices across the industry before ''$9.99'' became an entrenched consumer expectation. By the end of 2009, however, the Publisher Defendants had concluded that unilateral efforts to move Amazon away from its practice of offering low retail prices would not work, and they thereafter conspired to raise retail e-book prices and to otherwise limit competition in the sale of e-books. To effectuate their conspiracy, the Publisher Defendants teamed up with Defendant Apple, which shared the same goal of restraining retail price competition in the sale of e-books.

4. The Defendants' conspiracy to limit e-book price competition came together as the Publisher Defendants were jointly devising schemes to limit Amazon's ability to discount e-books and Defendant Apple was preparing to launch its electronic tablet, the iPad, and considering whether it should sell e-books that could be read on the new device. Apple had long believed it would be able to ''trounce Amazon by opening up [its] own ebook store,'' but the intense price competition that prevailed among e-book retailers in late 2009 had driven the retail price of popular e-books to $9.99 and had reduced retailer margins on e-books to levels that Apple found unattractive. As a result of discussions with the Publisher Defendants, Apple learned that the Publisher Defendants shared a common objective with Apple to limit e-book retail price competition, and that the Publisher Defendants also desired to have popular e-book retail prices stabilize at levels significantly higher than $9.99. Together, Apple and the Publisher Defendants reached an agreement whereby retail price competition would cease (which all the conspirators desired), retail e-book prices would increase significantly (which the Publisher Defendants desired), and Apple would be guaranteed a 30 percent ''commission'' on each e-book it sold (which Apple desired).

5. To accomplish the goal of raising e-book prices and otherwise limiting retail competition for e-books, Apple and the Publisher Defendants jointly agreed to alter the business model governing the relationship between publishers and retailers. Prior to the conspiracy, both print books and e-books were sold under the longstanding ''wholesale model.'' Under this model, publishers sold books to retailers, and retailers, as the owners of the books, had the freedom to establish retail prices. Defendants were determined to end the robust retail price competition in e-books that prevailed, to the benefit of consumers, under the wholesale model. They therefore agreed jointly to replace the wholesale model for selling e-books with an ''agency model.'' Under the agency model, publishers would take control of retail pricing by appointing retailers as ''agents'' who would have no power to alter the retail prices set by the publishers. As a result, the publishers could end price competition among retailers and raise the prices consumers pay for e-books through the adoption of identical pricing tiers. This change in business model would not have occurred without the conspiracy among the Defendants.

6. Apple facilitated the Publisher Defendants' collective effort to end retail price competition by coordinating their transition to an agency model across all retailers. Apple clearly understood that its participation in this scheme would result in higher prices to consumers. As Apple CEO Steve Jobs described his company's strategy for negotiating with the Publisher Defendants, ''We'll go to [an] agency model, where you set the price, and we get our 30%, and yes, the customer pays a little more, but that's what you want anyway.'' Apple was perfectly willing to help the Publisher Defendants obtain their objective of higher prices for consumers by ending Amazon's ''$9.99'' price program as long as Apple was guaranteed its 30 percent margin and could avoid retail price competition from Amazon.

7. The plan—what Apple proudly described as an ''aikido move''—worked. Over three days in January 2010, each Publisher Defendant entered into a functionally identical agency contract with Apple that would go into effect simultaneously in April 2010 and ''chang[e] the industry permanently.'' These ''Apple Agency Agreements'' conferred on the Publisher Defendants the power to set Apple's retail prices for e-books, while granting Apple the assurance that the Publisher Defendants would raise retail e-book prices at all other e-book outlets, too. Instead of $9.99, electronic versions of bestsellers and newly released titles would be priced according to a set of price tiers contained in each of the Apple Agency Agreements that determined de facto retail e-book prices as a function of the title's hardcover list price. All bestselling and newly released titles bearing a hardcover list price between $25.01 and $35.00, for example, would be priced at $12.99, $14.99, or $16.99, with the retail e-book price increasing in relation to the hardcover list price.

8. After executing the Apple Agency Agreements, the Publisher Defendants all then quickly acted to complete the scheme by imposing agency agreements on all their other retailers. As a direct result, those retailers lost their ability to compete on price, including their ability to sell the most popular e-books for $9.99 or for other low prices. Once in control of retail prices, the Publisher Defendants limited retail price competition among themselves. Millions of e-books that would have sold at retail for $9.99 or for other low prices instead sold for the prices indicated by the price schedules included in the Apple Agency Agreements—generally, $12.99 or $14.99. Other price and non-price competition among e-book publishers and among e-book retailers also was unlawfully eliminated to the detriment of U.S. consumers.

9. The purpose of this lawsuit is to enjoin the Publisher Defendants and Apple from further violations of the nation's antitrust laws and to restore the competition that has been lost due to the Publisher Defendants' and Apple's illegal acts.

10. Defendants' ongoing conspiracy and agreement have caused e-book consumers to pay tens of millions of dollars more for e-books than they otherwise would have paid.

11. The United States, through this suit, asks this Court to declare Defendants' conduct illegal and to enter injunctive relief to prevent further injury to consumers in the United States.

II. Defendants

12. Apple, Inc. has its principal place of business at 1 Infinite Loop, Cupertino, CA 95014. Among many other businesses, Apple, Inc. distributes e-books through its iBookstore.

13. Hachette Book Group, Inc. has its principal place of business at 237 Park Avenue, New York, NY 10017. It publishes e-books and print books through publishers such as Little, Brown, and Company and Grand Central Publishing.

14. HarperCollins Publishers L.L.C. has its principal place of business at 10 E. 53rd Street, New York, NY 10022. It publishes e-books and print books through publishers such as Harper and William Morrow.

15. Holtzbrinck Publishers, LLC d/b/a Macmillan has its principal place of business at 175 Fifth Avenue, New York, NY 10010. It publishes e-books and print books through publishers such as Farrar, Straus and Giroux and St. Martin's Press. Verlagsgruppe Georg von Holtzbrinck GmbH owns Holtzbrinck Publishers, LLC d/b/a Macmillan and has its principal place of business at Gänsheidestraße 26, Stuttgart 70184, Germany.

16. Penguin Group (USA), Inc. has its principal place of business at 375 Hudson Street, New York, NY 10014. It publishes e-books and print books through publishers such as The Viking Press and Gotham Books. Penguin Group (USA), Inc. is the United States affiliate of The Penguin Group, a division of Pearson plc, which has its principal place of business at 80 Strand, London WC2R 0RL, United Kingdom.

17. Simon & Schuster, Inc. has its principal place of business at 1230 Avenue of the Americas, New York, NY 10020. It publishes e-books and print books through publishers such as Free Press and Touchstone.

III. Jurisdiction, Venue, and Interstate Commerce

18. Plaintiff United States of America brings this action pursuant to Section 4 of the Sherman Act, 15 U.S.C. 4, to obtain equitable relief and other relief to prevent and restrain Defendants' violations of Section 1 of the Sherman Act, 15 U.S.C 1.

19. This Court has subject matter jurisdiction over this action under Section 4 of the Sherman Act, 15 U.S.C. 4, and 28 U.S.C. 1331, 1337(a), and 1345.

20. This Court has personal jurisdiction over each Defendant and venue is proper in the Southern District of New York under Section 12 of the Clayton Act, 15 U.S.C. 22, and 28 U.S.C. 1391, because each Defendant transacts business and is found within the Southern District of New York. The U.S. component of each Publisher Defendant is headquartered in the Southern District of New York, and acts in furtherance of the conspiracy occurred in this District. Many thousands of the Publisher Defendants' e-books are and have been sold in this District, including through Defendant Apple's iBookstore.

21. Defendants are engaged in, and their activities substantially affect, interstate trade and commerce. The Publisher Defendants sell e-books throughout the United States. Their e-books represent a substantial amount of interstate commerce. In 2010, United States consumers paid more than $300 million for the Publisher Defendants' e-books, including more than $40 million for e-books licensed through Defendant Apple's iBookstore.

IV. Co-Conspirators

22. Various persons, who are known and unknown to Plaintiff, and not named as defendants in this action, including senior executives of the Publisher Defendants and Apple, have participated as co-conspirators with Defendants in the offense alleged and have performed acts and made statements in furtherance of the conspiracy.

V. The Publishing Industry and Background of the Conspiracy

A. Print Books

23. Authors submit books to publishers in manuscript form. Publishers edit manuscripts, print and bind books, provide advertising and related marketing services, decide when a book should be released for sale, and distribute books to wholesalers and retailers. Publishers also determine the cover price or ''list price'' of a book, and typically that price appears on the book's cover.

24. Retailers purchase print books directly from publishers, or through wholesale distributors, and resell them to consumers. Retailers typically purchase print books under the ''wholesale model.'' Under that model, retailers pay publishers approximately one-half of the list price of books, take ownership of the books, then resell them to consumers at prices of the retailer's choice. Publishers have sold print books to retailers through the wholesale model for over 100 years and continue to do so today.

B. E-books

25. E-books are books published in electronic formats. E-book publishers avoid some of the expenses incurred in producing and distributing print books, including most manufacturing expenses, warehousing expenses, distribution expenses, and costs of dealing with unsold stock.

26. Consumers purchase e-books through Web sites of e-book retailers or through applications loaded onto their reading devices. Such electronic distribution allows e-book retailers to avoid certain expenses they incur when they sell print books, including most warehousing expenses and distribution expenses.

27. From its very small base in 2007 at the time of Amazon's Kindle launch, the e-book market has exploded, registering triple-digit sales growth each year. E-books now constitute at least ten percent of general interest fiction and non-fiction books (commonly known as ''trade'' books [1]) sold in the United States and are widely predicted to reach at least 25 percent of U.S. trade books sales within two to three years.

D. Publisher Defendants and ''The $9.99 Problem''

28. The Publisher Defendants compete against each other for sales of trade e-books to consumers. Publishers bid against one another for print- and electronic-publishing rights to content that they expect will be most successful in the market. They also compete against each other in bringing those books to market. For example, in addition to price-setting, they create cover art and other on-book sales inducements, and also engage in advertising campaigns for some titles.

29. The Publisher Defendants are five of the six largest publishers of trade books in the United States. They publish the vast majority of their newly released titles as both print books and e-books. Publisher Defendants compete against each other in the sales of both trade print books and trade e-books.

30. When Amazon launched its Kindle device, it offered newly released and bestselling e-books to consumers for $9.99. At that time, Publisher Defendants routinely wholesaled those e-books for about that same price, which typically was less than the wholesale price of the hardcover versions of the same titles, reflecting publisher cost savings associated with the electronic format. From the time of its launch, Amazon's e-book distribution business

[1] Non-trade e-books include electronic versions of children's picture books and academic textbooks, reference materials, and other specialized texts that typically are published by separate imprints from trade books, often are sold through separate channels, and are not reasonably substitutable for trade e-books.

has been consistently profitable, even when substantially discounting some newly released and bestselling titles.

31. To compete with Amazon, other e-book retailers often matched or approached Amazon's $9.99-or-less prices for e-book versions of new releases and *New York Times* bestsellers. As a result of that competition, consumers benefited from Amazon's $9.99-or-less e-book prices even if they purchased e-books from competing e-book retailers.

32. The Publisher Defendants feared that $9.99 would become the standard price for newly released and bestselling e-books. For example, one Publisher Defendant's CEO bemoaned the ''wretched $9.99 price point'' and Penguin USA CEO David Shanks worried that e-book pricing ''can't be $9.99 for hardcovers.''

33. The Publisher Defendants believed the low prices for newly released and bestselling e-books were disrupting the industry. The Amazon-led $9.99 retail price point for the most popular e-books troubled the Publisher Defendants because, at $9.99, most of these e-book titles were priced substantially lower than hardcover versions of the same title. The Publisher Defendants were concerned these lower e-book prices would lead to the ''deflation'' of hardcover book prices, with accompanying declining revenues for publishers. The Publisher Defendants also worried that if $9.99 solidified as the consumers' expected retail price for e-books, Amazon and other retailers would demand that publishers lower their wholesale prices, further compressing publisher profit margins.

34. The Publisher Defendants also feared that the $9.99 price point would make e-books so popular that digital publishers could achieve sufficient scale to challenge the major incumbent publishers' basic business model. The Publisher Defendants were especially concerned that Amazon was well positioned to enter the digital publishing business and thereby supplant publishers as intermediaries between authors and consumers. Amazon had, in fact, taken steps to do so, contracting directly with authors to publish their works as e-books—at a higher royalty rate than the Publisher Defendants offered. Amazon's move threatened the Publisher Defendants' traditional positions as the gate-keepers of the publishing world. The Publisher Defendants also feared that other competitive advantages they held as a result of years of investments in their print book businesses would erode and, eventually, become irrelevant, as e-book sales continued to grow.

E. Publisher Defendants Recognize They Cannot Solve ''The $9.99 Problem'' Alone

35. Each Publisher Defendant knew that, acting alone, it could not compel Amazon to raise e-book prices and that it was not in its economic self-interest to attempt unilaterally to raise retail e-book prices. Each Publisher Defendant relied on Amazon to market and distribute its e-books, and each Publisher Defendant believed Amazon would leverage its position as a large retailer to preserve its ability to compete and would resist any individual publisher's attempt to raise the prices at which Amazon sold that publisher's e-books. As one Publisher Defendant executive acknowledged Amazon's bargaining strength, ''we've always known that unless other publishers follow us, there's no chance of success in getting Amazon to change its pricing practices.'' In the same email, the executive wrote, ''without a critical mass behind us Amazon won't 'negotiate,' so we need to be more confident of how our fellow publishers will react. * * *''

36. Each Publisher Defendant also recognized that it would lose sales if retail prices increased for only its e-books while the other Publisher Defendants' e-books remained competitively priced. In addition, higher prices for just one publisher's e-books would not change consumer perceptions enough to slow the erosion of consumer-perceived value of books that all the Publisher Defendants feared would result from Amazon's $9.99 pricing policy.

VI. Defendants' Unlawful Activities

37. Beginning no later than September 2008, the Publisher Defendants' senior executives engaged in a series of meetings, telephone conversations and other communications in which they jointly acknowledged to each other the threat posed by Amazon's pricing strategy and the need to work collectively to end that strategy. By the end of the summer of 2009, the Publisher Defendants had agreed to act collectively to force up Amazon's retail prices and thereafter considered and implemented various means to accomplish that goal, including moving under the guise of a joint venture. Ultimately, in late 2009, Apple and the Publisher Defendants settled on the strategy that worked—replacing the wholesale model with an agency model that gave the Publisher Defendants the power to raise retail e-book prices themselves.

38. The evidence showing conspiracy is substantial and includes:

• *Practices facilitating a horizontal conspiracy.* The Publisher Defendants regularly communicated with each other in private conversations, both in person and on the telephone, and in emails to each other to exchange sensitive information and assurances of solidarity to advance the ends of the conspiracy.

• *Direct evidence of a conspiracy.* The Publisher Defendants directly discussed, agreed to, and encouraged each other to collective action to force Amazon to raise its retail e-book prices.

• *Recognition of illicit nature of communications.* Publisher Defendants took steps to conceal their communications with one another, including instructions to ''double delete'' email and taking other measures to avoid leaving a paper trail.

• *Acts contrary to economic interests.* It would have been contrary to the economic interests of any Publisher Defendant acting alone to attempt to impose agency on all of its retailers and then raise its retail e-book prices. For example, Penguin Group CEO John Makinson reported to his parent company board of directors that ''the industry needs to develop a common strategy'' to address the threat ''from digital companies whose objective may be to disintermediate traditional publishers altogether'' because it ''will not be possible for any individual publisher to mount an effective response,'' and Penguin later admitted that it would have been economically disadvantaged if it ''was the only publisher dealing with Apple under the new business model.''

• *Motive to enter the conspiracy, including knowledge or assurances that competitors also will enter.* The Publisher Defendants were motivated by a desire to maintain both the perceived value of their books and their own position in the industry. They received assurances from both each other and Apple that they all would move together to raise retail e-book prices. Apple was motivated to ensure that it would not face competition from Amazon's low-price retail strategy.

• *Abrupt, contemporaneous shift from past behavior.* Prior to January 23, 2010, all Publisher Defendants sold their e-books under the traditional wholesale model; by January 25, 2010, all Publisher Defendants had irrevocably committed to transition all of their retailers to the agency model (and Apple had committed to sell e-books on a model inconsistent with the way it sells the vast bulk of the digital media it offers in its iTunes store). On April 3, 2010, as soon as the Apple Agency Agreements simultaneously became effective, all Publisher Defendants immediately used their new retail pricing authority to raise the retail prices of their newly released and bestselling e-books to the common ostensible maximum prices contained in their Apple Agency Agreements.

A. The Publisher Defendants Recognize a Common Threat

39. Starting no later than September of 2008 and continuing for at least one year, the Publisher Defendants' CEOs (at times joined by one non-defendant publisher's CEO) met privately as a group approximately once per quarter. These meetings took place in private dining rooms of upscale Manhattan restaurants and were used to discuss confidential business and competitive matters, including Amazon's e-book retailing practices. No legal counsel was present at any of these meetings.

40. In September 2008, Penguin Group CEO John Makinson was joined by Macmillan CEO John Sargent and the CEOs of the other four large publishers at a dinner meeting in ''The Chef's Wine Cellar,'' a private room at Picholene. One of the CEOs reported that business matters were discussed.

41. In January 2009, the CEO of one Publisher Defendant, a United States subsidiary of a European corporation, promised his corporate superior, the CEO of the parent company, that he would raise the future of e-books and Amazon's potential role in that future at an upcoming meeting of publisher CEOs. Later that month, at a dinner meeting hosted by Penguin Group CEO John Makinson, again in ''The Chef's Wine Cellar'' at Picholene, the same group of publisher CEOs met once more.

42. On or about June 16, 2009, Mr. Makinson again met privately with other Publisher Defendant CEOs and discussed, *inter alia,* the growth of e-books and Amazon's role in that growth.

43. On or about September 10, 2009, Mr. Makinson once again met privately with other Publisher Defendant CEOs and the CEO of one non-defendant publisher in a private room of a different Manhattan restaurant, Alto. They discussed the growth of e-books and complained about Amazon's role in that growth.

44. In addition to the CEO dinner meetings, Publisher Defendants' CEOs and other executives met in-person, one-on-one to communicate about e-books multiple times over the course of 2009 and into 2010. Similar meetings took place in Europe, including meetings in the fall of 2009 between executives of Macmillan parent company Verlagsgruppe Georg von Holtzbrinck GmbH and executives of another Publisher Defendant's parent company. Macmillan CEO John Sargent joined at least one of these parent company meetings.

45. These private meetings provided the Publisher Defendants' CEOs the opportunity to discuss how they collectively could solve ''the $9.99 problem.''

B. Publisher Defendants Conspire To Raise Retail E-Book Prices Under the Guise of Joint Venture Discussions

46. While each Publisher Defendant recognized that it could not solve ''the $9.99 problem'' by itself, collectively the Publisher Defendants accounted for nearly half of Amazon's e-book revenues, and by refusing to compete with one another for Amazon's business, the Publisher Defendants could force Amazon to accept the Publisher Defendants' new contract terms and to change its pricing practices.

47. The Publisher Defendants thus conspired to act collectively, initially in the guise of joint ventures. These ostensible joint ventures were not meant to enhance competition by bringing to market products or services that the publishers could not offer unilaterally, but rather were designed as anticompetitive measures to raise prices.

48. All five Publisher Defendants agreed in 2009 at the latest to act collectively to raise retail prices for the most popular e-books above $9.99. One CEO of a Publisher Defendant's parent company explained to his corporate superior in a July 29, 2009 email message that ''[i]n the USA and the UK, but also in Spain and France to a lesser degree, the 'top publishers' are in discussions to create an alternative platform to Amazon for e-books. The goal is less to compete with Amazon as to force it to accept a price level higher than 9.99 . * * * I am in NY this week to promote these ideas and the movement is positive with [the other four Publisher Defendants].'' (Translated from French).

49. Less than a week later, in an August 4, 2009 strategy memo for the board of directors of Penguin's ultimate parent company, Penguin Group CEO John Makinson conveyed the same message:

> Competition for the attention of readers will be most intense from digital companies whose objective may be to disintermediate traditional publishers altogether. This is not a new threat but we do appear to be on a collision course with Amazon, and possibly Google as well. It will not be possible for any individual publisher to mount an effective response, because of both the resources necessary and the risk of retribution, so the industry needs to develop a common strategy. This is the context for the development of the Project Z initiatives [joint ventures] in London and New York.

C. Defendants Agree To Increase and Stabilize Retail E-Book Prices by Collectively Adopting an Agency Model

50. To raise e-book prices, the Publisher Defendants also began to consider in late 2009 selling e-books under an ''agency model'' that would take away Amazon's ability to set low retail prices. As one CEO of a Publisher Defendant's parent company explained in a December 6, 2009 email message, ''[o]ur goal is to force Amazon to return to acceptable sales prices through the establishment of agency contracts in the USA * * *. To succeed our colleagues must know that we entered the fray and follow us.'' (Translated from French).

51. Apple's entry into the e-book business provided a perfect opportunity for collective action to implement the agency model and use it to raise retail e-book prices. Apple was in the process of developing a strategy to sell e-books on its new iPad device. Apple initially contemplated selling e-books through the existing wholesale model, which was similar to the manner in which Apple sold the vast majority of the digital media it offered in its iTunes store. On February 19, 2009, Apple Vice President of Internet Services Eddy Cue explained to Apple CEO Steve Jobs in an email, ''[a]t this point, it would be very easy for us to compete and I think trounce Amazon by opening up our own ebook store.'' In addition to considering competitive entry at that time, though, Apple also contemplated illegally dividing the digital content world with Amazon, allowing each to ''own the category'' of its choice—audio/video to Apple and e-books to Amazon.

52. Apple soon concluded, though, that competition from other retailers—especially Amazon—would prevent Apple from earning its desired 30 percent margins on e-book sales. Ultimately, Apple, together with the Publisher Defendants, set in motion a plan that would compel all non-Apple e-book retailers also to sign onto agency or else, as Apple's CEO put it, the Publisher Defendants all would say, ''we're not going to give you the books.''

53. The executive in charge of Apple's inchoate e-books business, Eddy Cue, telephoned each Publisher Defendant and Random House on or around December 8, 2009 to schedule exploratory meetings in New York City on December 15 and December 16.

Hachette and HarperCollins took the lead in working with Apple to capitalize on this golden opportunity for the Publisher Defendants to achieve their goal of raising and stabilizing retail e-book prices above $9.99 by collectively imposing the agency model on the industry.

54. It appears that Hachette and HarperCollins communicated with each other about moving to an agency model during the brief window between Mr. Cue's first telephone calls to the Publisher Defendants and his visit to meet with their CEOs. On the morning of December 10, 2009, a HarperCollins executive added to his calendar an appointment to call a Hachette executive at 10:50 a.m. At 11:01 a.m., the Hachette executive returned the phone call, and the two spoke for six minutes. Then, less than a week later in New York, both Hachette and HarperCollins executives told Mr. Cue in their initial meetings with him that they wanted to sell e-books under an agency model, a dramatic departure from the way books had been sold for over a century.

55. The other Publisher Defendants also made clear to Apple that they ''certainly'' did not want to continue ''the existing way that they were doing business,'' *i.e.,* with Amazon promoting their most popular e-books for $9.99 under a wholesale model.

56. Apple saw a way to turn the agency scheme into a highly profitable model for itself. Apple determined to give the Publisher Defendants what they wanted while shielding itself from retail price competition and realizing margins far in excess of what e-book retailers then averaged on each newly released or bestselling e-book sold. Apple realized that, as a result of the scheme, ''the customer'' would ''pay[] a little more.''

57. On December 16, 2009, the day after both companies' initial meetings with Apple, Penguin Group CEO John Makinson had a breakfast meeting at a London hotel with the CEO of another Publisher Defendant's parent company. Consistent with the Publisher Defendants' other efforts to conceal their activities, Mr. Makinson's breakfast companion wrote to his U.S. subordinate that he would recount portions of his discussion with Mr. Makinson only by telephone.

58. By the time Apple arrived for a second round of meetings during the week of December 21, 2009, the agency model had become the focus of its discussions with all of the Publisher Defendants. In these discussions, Apple proposed that the Publisher Defendants require *all* retailers of their e-books to accept the agency model. Apple thereby sought to ensure that it would not have to compete on retail prices. The proposal appealed to the Publisher Defendants because wresting pricing control from Amazon and other e-book retailers would advance their collusive plan to raise retail e-book prices.

59. The Publisher Defendants acknowledged to Apple their common objective to end Amazon's $9.99 pricing. As Mr. Cue reported in an email message to Apple's CEO Steve Jobs, the three publishers with whom he had met saw the ''plus'' of Apple's position as ''solv[ing the] Amazon problem.'' The ''negative'' was that Apple's proposed retail prices—topping out at $12.99 for newly released and bestselling e-books—were a ''little less than [the publishers] would like.'' Likewise, Mr. Jobs later informed an executive of one of the Publisher Defendant's corporate parents that ''[a]ll major publishers'' had told Apple that ''Amazon's $9.99 price for new releases is eroding the value perception of their products in customer's minds, and they do not want this practice to continue for new releases.''

60. As perhaps the only company that could facilitate their goal of raising retail e-book prices across the industry, Apple knew that it had significant leverage in negotiations with Publisher Defendants. Apple exercised this leverage to demand a thirty percent commission—a margin significantly above the prevailing competitive margins for e-book retailers. The Publisher Defendants worried that the combination of paying Apple a higher commission than they would have liked and pricing their e-books lower than they wanted might be too much to bear in exchange for Apple's facilitation of their agreement to raise retail e-book prices. Ultimately, though, they convinced Apple to allow them to raise prices high enough to make the deal palatable to them.

61. As it negotiated with the Publisher Defendants in December 2009 and January 2010, Apple kept each Publisher Defendant informed of the status of its negotiations with the other Publisher Defendants. Apple also assured the Publisher Defendants that its proposals were the same to each and that no deal Apple agreed to with one publisher would be materially different from any deal it agreed to with another publisher. Apple thus knowingly served as a critical conspiracy participant by allowing the Publisher Defendants to signal to one another both (a) which agency terms would comprise an acceptable means of achieving their ultimate goal of raising and stabilizing retail e-book prices, and (b) that they could lock themselves into this particular means of collectively achieving that goal by all signing their Apple Agency Agreement.

62. Apple's Mr. Cue emailed each Publisher Defendant between January 4, 2010, and January 6, 2010 an outline of what he tabbed ''the best approach for e-books.'' He reassured Penguin USA CEO David Shanks and other Publisher Defendant CEOs that Apple adopted the approach ''[a]fter talking to all the other publishers.'' Mr. Cue sent substantively identical email messages and proposals to each Publisher Defendant.

63. The outlined proposal that Apple circulated after consulting with each Publisher Defendant contained several key features. First, as Hachette and HarperCollins had initially suggested to Apple, the publisher would be the principal and Apple would be the agent for e-book sales. Consumer pricing authority would be transferred from retailers to publishers. Second, Apple's proposal mandated that every other retailer of each publisher's e-books—Apple's direct competitors—be forced to accept the agency model as well. As Mr. Cue wrote, ''all resellers of new titles need to be in agency model.'' Third, Apple would receive a 30 percent commission for each e-book sale. And fourth, each Publisher Defendant would have identical pricing tiers for e-books sold through Apple's iBookstore.

64. On January 11, 2010, Apple emailed its proposed e-book distribution agreement to all the Publisher Defendants. As with the outlined proposals Apple sent earlier in January, the proposed e-book distribution agreements were substantially the same. Also on January 11, 2010, Apple separately emailed to Penguin and two other Publisher Defendants charts showing how the Publisher Defendant's bestselling e-books would be priced at $12.99—the ostensibly maximum price under Apple's then-current price tier proposal—in the iBookstore.

65. The proposed e-book distribution agreement mainly incorporated the principles Apple set out in its email messages of January 4 through January 6, with two notable changes. First, Apple demanded that the Publisher Defendants provide Apple their complete e-book catalogs and that they not delay the electronic release of any title behind its print release. Second, and more important, Apple replaced the express requirement that each publisher adopt the agency model with each of its retailers with an unusual most favored nation (''MFN'') pricing provision. That provision was not structured like a standard MFN in favor of a retailer, ensuring Apple that it would receive the

best available wholesale price. Nor did the MFN ensure Apple that the Publisher Defendants would not set a higher retail price on the iBookstore than they set on other Web sites where they controlled retail prices. Instead, the MFN here required each publisher to guarantee that it would lower the retail price of each e-book in Apple's iBookstore to match the lowest price offered by any other retailer, even if the Publisher Defendant did not control that other retailer's ultimate consumer price. That is, instead of an MFN designed to protect Apple's ability to compete, this MFN was designed to protect Apple from having to compete on price at all, while still maintaining Apple's 30 percent margin.

66. The purpose of these provisions was to work in concert to enforce the Defendants' agreement to raise and stabilize retail e-book prices. Apple and the Publisher Defendants recognized that coupling Apple's right to all of their e-books with its right to demand that those e-books not be priced higher on the iBookstore than on any other Web site effectively required that each Publisher Defendant take away retail pricing control from all other e-book retailers, including stripping them of any ability to discount or otherwise price promote e-books out of the retailer's own margins. Otherwise, the retail price MFN would cause Apple's iBookstore prices to drop to match the best available retail price of each e-book, and the Publisher Defendants would receive only 70 percent of those reduced retail prices. Price competition by other retailers, if allowed to continue, thus likely would reduce e-book revenues to levels the Publisher Defendants could not control or predict.

67. In negotiating the retail price MFN with Apple, ''some of [the Publisher Defendants]'' asserted that Apple did not need the provision ''because they would be moving to an agency model with [the other e-book retailers,]'' regardless. Ultimately, though, all Defendants agreed to include the MFN commitment mechanism.

68. On January 16, 2010, Apple, via Mr. Cue, offered revised terms to the Publisher Defendants that again were identical in substance. Apple modified its earlier proposal in two significant ways. First, in response to publisher requests, it added new maximum pricing tiers that increased permissible e-book prices to $16.99 or $19.99, depending on the book's hardcover list price. Second, Apple's new proposal mitigated these price increases somewhat by adding special pricing tiers for e-book versions of books on the New York Times fiction and non-fiction bestseller lists. For e-book versions of bestsellers bearing list prices of $30 or less, Publisher Defendants could set a price up to $12.99; for bestsellers bearing list prices between $30 and $35, the e-book price cap would be $14.99. In conjunction with the revised proposal, Mr. Cue set up meetings for the next week to finalize agreements with the Publisher Defendants.

69. Each Publisher Defendant required assurances that it would not be the only publisher to sign an agreement with Apple that would compel it either to take pricing authority from Amazon or to pull its e-books from Amazon. The Publisher Defendants continued to fear that Amazon would act to protect its ability to price e-books at $9.99 or less if any one of them acted alone. Individual Publisher Defendants also feared punishment in the marketplace if only its e-books suddenly became more expensive at retail while other publishers continued to allow retailers to compete on price. As Mr. Cue noted, ''all of them were very concerned about being the only ones to sign a deal with us.'' Penguin explicitly communicated to Apple that it would sign an e-book distribution agreement with Apple only if at least three of the other ''major[]'' publishers did as well. Apple supplied the needed assurances.

70. While the Publisher Defendants were discussing e-book distribution terms with Apple during the week of January 18, 2010, Amazon met in New York City with a number of prominent authors and agents to unveil a new program under which copyright holders could take their e-books directly to Amazon—cutting out the publisher—and Amazon would pay royalties of up to 70 percent, far in excess of what publishers offered. This announcement further highlighted the direct competitive threat Amazon posed to the Publisher Defendants' business model. The Publisher Defendants reacted immediately. For example, Penguin USA CEO David Shanks reported being ''really angry'' after ''hav[ing] read [Amazon's] announcement.'' After thinking about it for a day, Mr. Shanks concluded, ''[o]n Apple I am now more convinced that we need a viable alternative to Amazon or this nonsense will continue and get much worse.'' Another decisionmaker stated he was ''p****d'' at Amazon for starting to compete directly against the publishers and expressed his desire ''to screw Amazon.''

71. To persuade one of the Publisher Defendants to stay with the others and sign an agreement, Apple CEO Steve Jobs wrote to an executive of the Publisher Defendant's corporate parent that the publisher had only two choices apart from signing the Apple Agency Agreement: (i) Accept the status quo (''Keep going with Amazon at $9.99''); or (ii) continue with a losing policy of delaying the release of electronic versions of new titles (''Hold back your books from Amazon''). According to Jobs, the Apple deal offered the Publisher Defendants a superior alternative path to the higher retail e-book prices they sought: ''Throw in with Apple and see if we can all make a go of this to create a real mainstream e-books market at $12.99 and $14.99.''

72. In addition to passing information through Apple and during their private dinners and other in-person meetings, the Publisher Defendants frequently communicated by telephone to exchange assurances of common action in attempting to raise the retail price of e-books. These telephone communications increased significantly during the two-month period in which the Publisher Defendants considered and entered the Apple Agency Agreements. During December 2009 and January 2010, the Publisher Defendants' U.S. CEOs placed at least 56 phone calls to one another. Each CEO, including Penguin's Shanks and Macmillan's Sargent, placed at least seven such phone calls.

73. The timing, frequency, duration, and content of the Publisher Defendant CEOs' phone calls demonstrate that the Publisher Defendants used them to seek and exchange assurances of common strategies and business plans regarding the Apple Agency Agreements. For example, in addition to the telephone calls already described in this complaint:

- Near the time Apple first presented the agency model, one Publisher Defendant's CEO used a telephone call—ostensibly made to discuss a marketing joint venture—to tell Penguin USA CEO David Shanks that ''everyone is in the same place with Apple.''
- After receiving Apple's January 16, 2010 revised proposal, executives of several Publisher Defendants responded to the revised proposal and meetings by, again, seeking and exchanging confidential information. For example, on Sunday, January 17, one Publisher Defendant's CEO used his mobile phone to call another Publisher Defendant's CEO and talk for approximately ten minutes. And on the morning of January 19, Penguin USA CEO David Shanks had an extended telephone conversation with the CEO of another Publisher Defendant.
- On January 21, 2010, the CEO of one Publisher Defendant's parent company instructed his U.S.

subordinate via email to find out Apple's progress in agency negotiations with other publishers. Four minutes after that email was sent, the U.S. executive called another Publisher Defendant's CEO, and the two spoke for over eleven minutes.

• On January 22, 2010, at 9:30 a.m., Apple's Cue met with one Publisher Defendant's CEO to make what Cue hoped would be a ''final go/no-go decision'' about whether the Publisher Defendant would sign an agreement with Apple. Less than an hour later, the Publisher Defendant's CEO made phone calls, two minutes apart, to two other Publisher Defendants' CEOs, including Macmillan's Sargent. The CEO who placed the calls admitted under oath to placing them specifically to learn if the other two Publisher Defendants would sign with Apple prior to Apple's iPad launch.

• On the evening of Saturday, January 23, 2010, Apple's Cue emailed his boss, Steve Jobs, and noted that Penguin USA CEO David Shanks ''want[ed] an assurance that he is 1 of 4 before signing.'' The following Monday morning, at 9:46 a.m., Mr. Shanks called another Publisher Defendant's CEO and the two talked for approximately four minutes. Both Penguin and the other Publisher Defendant signed their Apple Agency Agreements later that day.

74. On January 24, 2010, Hachette signed an e-book distribution agreement with Apple. Over the next two days, Simon & Schuster, Macmillan, Penguin, and HarperCollins all followed suit and signed e-book distribution agreements with Apple. Within these three days, the Publisher Defendants agreed with Apple to abandon the longstanding wholesale model for selling e-books. The Apple Agency Agreements took effect simultaneously on April 3, 2010 with the release of Apple's new iPad.

75. The final version of the pricing tiers in the Apple Agency Agreements contained the $12.99 and $14.99 price points for bestsellers, discussed earlier, and also established prices for all other newly released titles based on the hardcover list price of the same title. Although couched as maximum retail prices, the price tiers in fact established the retail e-book prices to be charged by Publisher Defendants.

76. By entering the Apple Agency Agreements, each Publisher Defendant effectively agreed to require all of their e-book retailers to accept the agency model. Both Apple and the Publisher Defendants understood the Agreements would compel the Publisher Defendants to take pricing authority from all non-Apple e-book retailers. A February 10, 2010 presentation by one Publisher Defendant applauded this result (emphasis in original): ''The Apple agency model deal means that we will have to shift to an agency model with Amazon which [will] strengthen our control over pricing.''

77. Apple understood that the final Apple Agency Agreements ensured that the Publisher Defendants would raise their retail e-book prices to the ostensible limits set by the Apple price tiers not only in Apple's forthcoming iBookstore, but on Amazon.com and all other consumer sites as well. When asked by a *Wall Street Journal* reporter at the January 27, 2010 iPad unveiling event, ''Why should she buy a book for * * * $14.99 from your device when she could buy one for $9.99 from Amazon on the Kindle or from Barnes & Noble on the Nook?'' Apple CEO Steve Jobs responded, ''that won't be the case * * *. the prices will be the same.''

78. Apple understood that the retail price MFN was the key commitment mechanism to keep the Publisher Defendants advancing their conspiracy in lockstep. Regarding the effect of the MFN, Apple executive Pete Alcorn remarked in the context of the European roll-out of the agency model in the spring of 2010:

> I told [Apple executive Keith Moerer] that I think he and Eddy [Cue] made it at least halfway to changing the industry permanently, and we should keep the pads on and keep fighting for it. I might regret that later, but right now I feel like it's a giant win to keep pushing the MFN and forcing people off the [A]mazon model and onto ours. If anything, the place to give is the pricing—long run, the mfn is more important. The interesting insight in the meeting was Eddy's explanation that it doesn't have to be that broad—any decent MFN forces the model.

79. Within the four months following the signing of the Apple Agency Agreements, and over Amazon's objections, each Publisher Defendant had transformed its business relationship with all of the major e-book retailers from a wholesale model to an agency model and imposed flat prohibitions against e-book discounting or other price competition on all non-Apple e-book retailers.

80. For example, after it signed its Apple Agency Agreement, Macmillan presented Amazon a choice: adopt the agency model or lose the ability to sell e-book versions of new hardcover titles for the first seven months of their release. Amazon rejected Macmillan's ultimatum and sought to preserve its ability to sell e-book versions of newly released hardcover titles for $9.99. To resist Macmillan's efforts to force it to accept either the agency model or delayed electronic availability, Amazon effectively stopped selling Macmillan's print books and e-books.

81. When Amazon stopped selling Macmillan titles, other Publisher Defendants did not view the situation as an opportunity to gain market share from a weakened competitor. Instead, they rallied to support Macmillan. For example, the CEO of one Publisher Defendant's parent company instructed the Publisher Defendant's CEO that ''[Macmillan CEO] John Sargent needs our help!'' The parent company CEO explained, ''M[acm]illan have been brave, but they are small. We need to move the lines. And I am thrilled to know how A[mazon] will react against 3 or 4 of the big guys.''

82. The CEO of one Publisher Defendant's parent company assured Macmillan CEO John Sargent of his company's support in a January 31, 2010 email: ''I can ensure you that you are not going to find your company alone in the battle.'' The same parent company CEO also assured the head of Macmillan's corporate parent in a February 1 email that ''others will enter the battle field!'' Overall, Macmillan received ''hugely supportive'' correspondence from the publishing industry during Macmillan's effort to force Amazon to accept the agency model.

83. As its battle with Amazon continued, Macmillan knew that, because the other Publisher Defendants, via the Apple Agency Agreements, had locked themselves into forcing agency on Amazon to advance their conspiratorial goals, Amazon soon would face similar edicts from a united front of Publisher Defendants. And Amazon could not delist the books of all five Publisher Defendants because they together accounted for nearly half of Amazon's e-book business. Macmillan CEO John Sargent explained the company's reasoning: ''we believed whatever was happening, whatever Amazon was doing here, they were going to face—they're going to have more of the same in the future one way or another.'' Another Publisher Defendant similarly recognized that Macmillan was not acting unilaterally but rather was ''leading the charge on moving Amazon to the agency model.''

84. Amazon quickly came to fully appreciate that not just Macmillan but all five Publisher Defendants had irrevocably committed themselves to the agency model across all retailers, including taking control of retail pricing and thereby stripping away any opportunity for e-book retailers to compete on price. Just two days after it stopped selling Macmillan titles, Amazon capitulated and publicly

announced that it had no choice but to accept the agency model, and it soon resumed selling Macmillan's e-book and print book titles.

D. Defendants Further the Conspiracy by Pressuring Another Publisher To Adopt the Agency Model

85. When a company takes a pro-competitive action by introducing a new product, lowering its prices, or even adopting a new business model that helps it sell more product at better prices, it typically does not want its competitors to copy its action, but prefers to maintain a first-mover or competitive advantage. In contrast, when companies jointly take collusive action, such as instituting a coordinated price increase, they typically want the rest of their competitors to join them in that action. Because collusive actions are not pro-competitive or consumer friendly, any competitor that does not go along with the conspirators can take more consumer friendly actions and see its market share rise at the expense of the conspirators. Here, the Defendants acted consistently with a collusive arrangement, and inconsistently with a pro-competitive arrangement, as they sought to pressure another publisher (whose market share was growing at the Publisher Defendants' expense after the Apple Agency Contracts became effective) to join them.

86. Penguin appears to have taken the lead in these efforts. Its U.S. CEO, David Shanks, twice directly told the executives of the holdout major publisher about his displeasure with their decision to continue selling e-books on the wholesale model. Mr. Shanks tried to justify the actions of the conspiracy as an effort to save brick-and-mortar bookstores and criticized the other publisher for ''not helping'' the group. The executives of the other publisher responded to Mr. Shanks's complaints by explaining their objections to the agency model.

87. Mr. Shanks also encouraged a large print book and e-book retailer to punish the other publisher for not joining Defendants' conspiracy. In March 2010, Mr. Shanks sent an email message to an executive of the retailer complaining that the publisher ''has chosen to stay on their current model and will allow retailers to sell at whatever price they wish.'' Mr. Shanks argued that ''[s]ince Penguin is looking out for [your] welfare at what appears to be great costs to us, I would hope that [you] would be equally brutal to Publishers who have thrown in with your competition with obvious disdain for your welfare * * *. I hope you make [the publisher] hurt like Amazon is doing to [the Publisher Defendants].''

88. When the third-party retailer continued to promote the non-defendant publisher's books, Mr. Shanks applied more pressure. In a June 22, 2010 email to the retailer's CEO, Mr. Shanks claimed to be ''baffled'' as to why the retailer would promote that publisher's books instead of just those published by ''people who stood up for you.''

89. Throughout the summer of 2010, Apple also cajoled the holdout publisher to adopt agency terms in line with those of the Publisher Defendants, including on a phone call between Apple CEO Steve Jobs and the holdout publisher's CEO. Apple flatly refused to sell the holdout publisher's e-books unless and until it agreed to an agency relationship substantially similar to the arrangement between Apple and the Publisher Defendants defined by the Apple Agency Agreements.

E. Conspiracy Succeeds at Raising and Stabilizing Consumer E-book Prices

90. The ostensible maximum prices included in the Apple Agency Agreements' price schedule represent, in practice, actual e-book prices. Indeed, at the time the Publisher Defendants snatched retail pricing authority away from Amazon and other e-book retailers, not one of them had built an internal retail pricing apparatus sufficient to do anything other than set retail prices at the Apple Agency Agreements' ostensible caps. Once their agency agreements took effect, the Publisher Defendants raised e-book prices at all retail outlets to the maximum price level within each tier. Even today, two years after the Publisher Defendants began setting e-book retail prices according to the Apple price tiers, they still set the retail prices for the electronic versions of all or nearly all of their bestselling hardcover titles at the ostensible maximum price allowed by those price tiers.

91. The Publisher Defendants' collective adoption of the Apple Agency Agreements allowed them (facilitated by Apple) to raise, fix, and stabilize retail e-book prices in three steps: (a) They took away retail pricing authority from retailers; (b) they then set retail e-book prices according to the Apple price tiers; and (c) they then exported the agency model and higher retail prices to the rest of the industry, in part to comply with the retail price MFN included in each Apple Agency Agreement.

92. Defendants' conspiracy and agreement to raise and stabilize retail e-book prices by collectively adopting the agency model and Apple price tiers led to an increase in the retail prices of newly released and bestselling e-books. Prior to the Defendants' conspiracy, consumers benefited from price competition that led to $9.99 prices for newly released and bestselling e-books. Almost immediately after Apple launched its iBookstore in April 2010 and the Publisher Defendants imposed agency model pricing on all retailers, the Publisher Defendants' e-book prices for most newly released and bestselling e-books rose to either $12.99 or $14.99.

93. Defendants' conspiracy and agreement to raise and stabilize retail e-book prices by collectively adopting the agency model and Apple price tiers for their newly released and bestselling e-books also led to an increase in average retail prices of the balance of Publisher Defendants' e-book catalogs, their so-called ''backlists.'' Now that the Publisher Defendants control the retail prices of e-books—but Amazon maintains control of its print book retail prices—Publisher Defendants' e-book prices sometimes are higher than Amazon's prices for print versions of the same titles.

VII. Violation Alleged

94. Beginning no later than 2009, and continuing to date, Defendants and their co-conspirators have engaged in a conspiracy and agreement in unreasonable restraint of interstate trade and commerce, constituting a violation of Section 1 of the Sherman Act, 15 U.S.C. 1. This offense is likely to continue and recur unless the relief requested is granted.

95. The conspiracy and agreement consists of an understanding and concert of action among Defendants and their co-conspirators to raise, fix, and stabilize retail e-book prices, to end price competition among e-book retailers, and to limit retail price competition among the Publisher Defendants, ultimately effectuated by collectively adopting and adhering to functionally identical methods of selling e-books and price schedules.

96. For the purpose of forming and effectuating this agreement and conspiracy, some or all Defendants did the following things, among others:

a. Shared their business information, plans, and strategies in order to formulate ways to raise retail e-book prices;

b. Assured each other of support in attempting to raise retail e-book prices;

c. Employed ostensible joint venture meetings to disguise their attempts to raise retail e-book prices;

d. Fixed the method of and formulas for setting retail e-book prices;

e. Fixed tiers for retail e-book prices;

f. Eliminated the ability of e-book retailers to fund retail e-book price decreases out of their own margins; and

g. Raised the retail prices of their newly released and bestselling e-books to the agreed prices—the ostensible price caps—contained in the pricing schedule of their Apple Agency Agreements.

97. Defendants' conspiracy and agreement, in which the Publisher Defendants and Apple agreed to raise, fix, and stabilize retail e-book prices, to end price competition among e-book retailers, and to limit retail price competition among the Publisher Defendants by fixing retail e-book prices, constitutes a *per se* violation of Section 1 of the Sherman Act, 15 U.S.C. 1.

98. Moreover, Defendants' conspiracy and agreement has resulted in obvious and demonstrable anticompetitive effects on consumers in the trade e-books market by depriving consumers of the benefits of competition among e-book retailers as to both retail prices and retail innovations (such as e-book clubs and subscription plans), such that it constitutes an unreasonable restraint on trade in violation of Section 1 of the Sherman Act, 15 U.S.C. 1.

99. Where, as here, defendants have engaged in a *per se* violation of Section 1 of the Sherman Act, no allegations with respect to the relevant product market, geographic market, or market power are required. To the extent such allegations may otherwise be necessary, the relevant product market for the purposes of this action is trade e-books. The anticompetitive acts at issue in this case directly affect the sale of trade e-books to consumers. No reasonable substitute exists for e-books. There are no technological alternatives to e-books, thousands of which can be stored on a single small device. E-books can be stored and read on electronic devices, while print books cannot. E-books can be located, purchased, and downloaded anywhere a customer has an internet connection, while print books cannot. Industry firms also view e-books as a separate market segment from print books, and the Publisher Defendants were able to impose and sustain a significant retail price increase for their trade e-books.

100. The relevant geographic market is the United States. The rights to license e-books are granted on territorial bases, with the United States typically forming its own territory. E-book retailers typically present a unique storefront to U.S. consumers, often with e-books bearing different retail prices than the same titles would command on the same retailer's foreign Web sites.

101. The Publisher Defendants possess market power in the market for trade e-books. The Publisher Defendants successfully imposed and sustained a significant retail price increase for their trade e-books. Collectively, they create and distribute a wide variety of popular e-books, regularly comprising over half of the *New York Times* fiction and non-fiction bestseller lists. Collectively, they provide a critical input to any firm selling trade e-books to consumers. Any retailer selling trade e-books to consumers would not be able to forgo profitably the sale of the Publisher Defendants' e-books.

102. Defendants' agreement and conspiracy has had and will continue to have anticompetitive effects, including:

a. Increasing the retail prices of trade e-books;

b. Eliminating competition on price among e-book retailers;

c. Restraining competition on retail price among the Publisher Defendants;

d. Restraining competition among the Publisher Defendants for favorable relationships with e-book retailers;

e. Constraining innovation among e-book retailers;

f. Entrenching incumbent publishers' favorable position in the sale and distribution of print books by slowing the migration from print books to e-books;

g. Making more likely express or tacit collusion among publishers; and

h. Reducing competitive pressure on print book prices.

103. Defendants' agreement and conspiracy is not reasonably necessary to accomplish any procompetitive objective, or, alternatively, its scope is broader than necessary to accomplish any such objective.

VIII. Request For Relief

104. To remedy these illegal acts, the United States requests that the Court:

a. Adjudge and decree that Defendants entered into an unlawful contract, combination, or conspiracy in unreasonable restraint of interstate trade and commerce in violation of Section 1 of the Sherman Act, 15 U.S.C. 1;

b. Enjoin the Defendants, their officers, agents, servants, employees and attorneys and their successors and all other persons acting or claiming to act in active concert or participation with one or more of them, from continuing, maintaining, or renewing in any manner, directly or indirectly, the conduct alleged herein or from engaging in any other conduct, combination, conspiracy, agreement, understanding, plan, program, or other arrangement having the same effect as the alleged violation or that otherwise violates Section 1 of the Sherman Act, 15 U.S.C. 1, through fixing the method and manner in which they sell e-books, or otherwise agreeing to set the price or release date for e-books, or collective negotiation of e-book agreements, or otherwise collectively restraining retail price competition for e-books;

c. Prohibit the collusive setting of price tiers that can de facto fix prices;

d. Declare null and void the Apple Agency Agreements and any agreement between a Publisher Defendant and an e-book retailer that restricts, limits, or impedes the e-book retailer's ability to set, alter, or reduce the retail price of any e-book or to offer price or other promotions to encourage consumers to purchase any e-book, or contains a retail price MFN;

e. Reform the agreements between Apple and Publisher Defendants to strike the retail price MFN clauses as void and unenforceable; and

f. Award to Plaintiff its costs of this action and such other and further relief as may be appropriate and as the Court may deem just and proper.

Dated: April 11, 2012
For Plaintiff
United States of America:

__/s/Sharis A. Pozen______
Sharis A. Pozen,
Acting Assistant Attorney General for Antitrust.

__/s/Joseph F. Wayland______
Joseph F. Wayland,
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__/s/Gene Kimmelman______
Gene Kimmelman,
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United States District Court for the Southern District of New York

United States of America, Plaintiff, v. *Apple, Inc., Hachette Book Group, Inc., Harpercollins Publishers L.L.C., Verlagsgruppe Georg Von Holtzbrinck GMBH, Holtzbrinck Publishers, LLC, d/b/a Macmillan, The Penguin Group, A Division of Pearson PLC, Penguin Group (USA), Inc., and Simon & Schuster, Inc.,* Defendants.

Civil Action No. 1:12-cv-02826
Judge: Cote, Denise
Date Filed: 04/11/2012
Description: Antitrust

Competitive Impact Statement

Pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act (''APPA'' or ''Tunney Act''), 15 U.S.C. 16(b)–(h), Plaintiff United States of America (''United States'') files this Competitive Impact Statement relating to the proposed Final Judgment against Defendants Hachette Book Group, Inc. (''Hachette''), HarperCollins Publishers L.L.C. (''HarperCollins''), and Simon & Schuster, Inc. (''Simon & Schuster''; collectively with Hachette and HarperCollins, ''Settling Defendants''), submitted on April 11, 2012, for entry in this antitrust proceeding.

I. Nature and Purpose of the Proceeding

On April 11, 2012, the United States filed a civil antitrust Complaint alleging that Apple, Inc. (''Apple'') and five of the six largest publishers in the United States (''Publisher Defendants'') restrained competition in the sale of electronic books (''e-books''), in violation of Section 1 of the Sherman Act, 15 U.S.C. 1.

Shortly after filing the Complaint, the United States filed a proposed Final Judgment with respect to Settling Defendants. The proposed Final Judgment is described in more detail in Section III below. The United States and Settling Defendants have stipulated that the proposed Final Judgment may be entered after compliance with the APPA, unless the United States withdraws its consent. Entry of the proposed Final Judgment would terminate this action as to Settling Defendants, except that this Court would retain jurisdiction to construe, modify, and enforce the proposed Final Judgment and to punish violations thereof.[2]

The Complaint alleges that Publisher Defendants, concerned by Amazon.com, Inc. (''Amazon'')'s pricing of newly released and bestselling e-books at $9.99 or less, agreed among themselves and with Apple to raise the retail prices of e-books by taking control of e-book pricing from retailers. The effect of Defendants' agreement has been to increase the price consumers pay for e-books, end price competition among e-book retailers, constrain innovation among e-book retailers, and entrench incumbent publishers' favorable position in the sale and distribution of print books by slowing the migration from print books to e-books. The Complaint seeks injunctive relief to enjoin continuance and prevent recurrence of the violation.

II. Description of the Events Giving Rise to the Alleged Violation of the Antitrust Laws

A. The E-Books Market

Technological advances have enabled the production, storage, distribution, and consumption of books in electronic format, lowering significantly the marginal costs to publishers of offering books for sale. E-books can be read on a variety of electronic devices, including dedicated devices (''e-readers'') such as Amazon's Kindle or Barnes & Noble, Inc.'s Nook, tablet computers such as Apple's iPad, desktop or laptop computers, and smartphones. E-book sales are growing, and e-books are increasingly popular with American consumers. E-books conservatively now constitute ten percent of general interest fiction and non-fiction books (commonly known as ''trade'' books) sold in the United States and are widely predicted to reach at least 25 percent of U.S. trade books sales within two to three years.

Until Defendants' agreement took effect, publishers sold e-books under a wholesale model that had prevailed for decades in the sale of print books. Under this wholesale model, publishers typically sold copies of each title to retailers for a discount (usually around 50%) off the price printed on the physical edition of the book (the ''list price''). Retailers, as owners of the books, were then free to determine the prices at which the books would be sold to consumers. Thus, while publishers might recommend prices, retailers could and frequently did compete for sales at prices significantly below list prices, to the benefit of consumers.

In 2007, Amazon became the first company to offer a significant selection of e-books to consumers when it launched its Kindle e-reader device. From the time of its Kindle launch, Amazon offered a portion of its e-books catalogue, primarily its newly released and *New York Times*-bestselling e-books, to consumers for $9.99. To compete with Amazon, other e-book retailers often matched or at least approached Amazon's $9.99-or-less prices for e-book versions of many new releases and *New York Times* bestsellers. As a result of that competition, consumers benefited from Amazon's $9.99-or-less e-book prices even when they purchased e-books from competing e-book retailers.

B. Illegal Agreement To Raise E-Book Prices

Publisher Defendants, however, feared that the Amazon-led $9.99 price for e-books would significantly threaten their long-term profits. Publisher Defendants feared $9.99 e-book prices would lead to the erosion over time of hardcover book prices and an accompanying decline in revenue. They also worried that if $9.99 solidified as consumers' expected retail price for e-books, Amazon and other retailers would demand that publishers lower their wholesale prices, again compressing their profit margins. Publisher Defendants also feared that the $9.99 price would drive e-book popularity to such a degree that digital publishers could achieve sufficient scale to challenge the Publisher Defendants' basic business model.

In private meetings among their executives, Publisher Defendants complained about the ''$9.99 problem'' and the threat they perceived it posed to the publishing industry.[3] Through these communications, each Publisher Defendant gained assurance that its competitors shared concern about Amazon's $9.99 e-book pricing policy.

At the same time, each Publisher Defendant feared that if it attempted unilaterally to impose measures that would force Amazon to raise retail e-book prices, Amazon would resist. And each Publisher Defendant recognized that, even if it succeeded in raising retail prices for its e-books, if its competitor publishers' e-books remained at the lower, competitive level, it would lose sales to other Publisher Defendants. Accordingly, Publisher Defendants agreed to act collectively to raise retail e-book prices.

To effectuate their agreement, Publisher Defendants considered a

[2] The case against the remaining Defendants will continue. Those Defendants are Apple, Verlagsgruppe Georg von Holtzbrinck GmbH and Holtzbrinck Publishers, LLC d/b/a Macmillan (collectively, ''Macmillan''), and The Penguin Group, a division of Pearson plc and Penguin Group (USA), Inc. (collectively, ''Penguin'').

[3] Prior to the formation of and throughout Publisher Defendants' agreement, their CEOs and other high-level executives frequently communicated with each other in both formal and informal settings. From these communications emerged a pattern of Publisher Defendants improperly exchanging confidential, competitively sensitive information.

number of coordinated methods to force Amazon to raise e-book retail prices. For example, they explored creating purported joint ventures, with exclusive access to certain e-book titles. These joint ventures were intended not to compete with Amazon, but to convince it to raise its price above $9.99. Publisher Defendants intended these strategies to cause Amazon to capitulate on its $9.99 pricing practice. None of these strategies, though, ultimately proved successful in raising retail e-book prices.

It was Apple's entry into the e-book business, however, that provided a perfect opportunity collectively to raise e-book prices. In December 2009, Apple approached each Publisher Defendant with news that it intended to sell e-books through its new iBookstore in conjunction with its forthcoming iPad device. Publisher Defendants and Apple soon recognized that they could work together to counter the Amazon-led $9.99 price.

In its initial discussions with Publisher Defendants, Apple assumed that it would enter as an e-book retailer under the wholesale model. At the suggestion of two Publisher Defendants, however, Apple began to consider selling e-books under the ''agency model,'' whereby the publishers would set the prices of e-books sold and Apple would take a 30% commission as the selling agent. In January 2010, Apple sent to each Publisher Defendant substantively identical term sheets that would form the basis of the nearly identical agency agreements that each Publisher Defendant would sign with Apple (''Apple Agency Agreements''). Apple informed the publishers that it had devised these term sheets after ''talking to all the publishers.''

The volume of Publisher Defendants' communications among themselves intensified during the ensuing negotiation of the Apple Agency Agreements. Through frequent in-person meetings, phone calls, and electronic communications, Publisher Defendants, facilitated by Apple, assured each other of their mutual intent to reach agreement with Apple. After each round of negotiations with Apple over the terms of their agency agreements, Publisher Defendants' CEOs immediately contacted each other to discuss strategy and verify where each stood with Apple. They also used Apple to verify their position vis-à-vis other Publisher Defendants. Penguin, for example, sought Apple's assurance that it was ''1 of 4 before signing''—an assurance that Apple provided. Two days later, Penguin and two other Publisher Defendants signed Apple Agency Agreements.

To the extent Publisher Defendants expressed doubts during the negotiations about whether to sign the Apple Agency Agreements, Apple persuaded the Publisher Defendants to stay with the others and sign up. For example, Apple CEO Steve Jobs wrote to an executive of one Publisher Defendant's corporate parent that the publisher had only two choices apart from signing the Apple Agency Agreement: (i) Accept the status quo (''Keep going with Amazon at $9.99''); or (ii) continue with the losing windowing policy (''Hold back your books from Amazon''). According to Jobs, the Apple deal offered the Publisher Defendants a superior alternative path to the higher retail e-book prices they sought: ''Throw in with Apple and see if we can all make a go of this to create a real mainstream e-books market at $12.99 and $14.99.''

The Apple Agency Agreements contained two primary features that assured Publisher Defendants of their ability to wrest pricing control from retailers and raise e-book retail prices above $9.99. First, Apple insisted on including a Most Favored Nation clause (''MFN'' or ''Price MFN'') that required each publisher to guarantee that no other retailer could set prices lower than what the Publisher Defendant set for Apple, even if the Publisher Defendant did not control that other retailer's ultimate consumer price. The effect of this MFN was twofold: it not only protected Apple from having to compete on retail price, but also dictated that to protect themselves from the MFN's provisions, Publisher Defendants needed to remove from all other e-book retailers the ability to control retail price, including the ability to fund discounts or promotions out of the retailer's own margins.[4] Thus, the agreement eliminated retail price competition across all retailers selling Publisher Defendants' e-books.

Second, the Apple Agency Agreements contained pricing tiers (ostensibly setting maximum prices) for e-books—virtually identical across the Publisher Defendants' agreements—based on the list price of each e-book's hardcover edition. Defendants understood that by using the price tiers, they were actually fixing the de facto prices for e-books. In fact, once the Apple Agency Agreements took effect, Publisher Defendants almost uniformly set e-book prices to maximum price levels allowed by each tier. Apple and Publisher Defendants were well aware that the impact of their agreement was to force other retailers off the wholesale model, eliminate retail price competition for e-books, allow publishers to raise e-book prices, and permanently to change the terms and pricing on which the e-book industry operated.

The negotiations between Apple and Publisher Defendants culminated in all five Publisher Defendants signing the Apple Agency Agreements within a three-day span, with the last Publisher Defendant signing on January 26, 2010. The next day, Apple announced the iPad at a launch event. At that event, then-Apple CEO Steve Jobs, responding to a reporter's question about why customers should pay $14.99 for an iPad e-book when they could purchase that e-book for $9.99 from Amazon or Barnes & Noble, replied that ''that won't be the case. * * * The prices will be the same.'' Jobs later confirmed his understanding that the Apple Agency Agreements fulfilled the publishers' desire to increase prices for consumers. He explained that, under the agreements, Apple would ''go to [an] agency model, where [publishers] set the price, and we get our 30%, and yes, the customer pays a little more, but that's what [publishers] want anyway.''

Starting the day after the iPad launch, Publisher Defendants, beginning with Macmillan, quickly acted to complete their scheme by imposing agency agreements on all of their other retailers. Initially, Amazon attempted to resist Macmillan's efforts to force it to accept either the agency model or windowing of its e-books by refusing to sell Macmillan's titles. Other Publisher Defendants, continuing their practice of communicating with each other, offered Macmillan's CEO messages of encouragement and assurances of solidarity. For example, one Settling Defendant's CEO emailed Macmillan's CEO to tell him, ''I can ensure you that you are not going to find your company alone in the battle.'' Quickly, Amazon came to realize that all Publisher Defendants had committed themselves to take away any e-book retailer's ability to compete on price. Just two days after it stopped selling Macmillan titles, Amazon capitulated and publicly announced that it had no choice but to accept the agency model.

After Amazon acquiesced to the agency model, all of Publisher Defendants' major retailers quickly transitioned to the agency model for e-

[4] Otherwise, the retail price MFN would cause Apple's iBookstore prices to drop to match the best available retail price of each e-book, reducing the revenues to each Publisher Defendant and, indeed, defeating the very purpose of agreeing to the agency model: raising retail prices across all e-book retailers.

book sales. Retail price competition on e-books had been eliminated and the retail price of e-books had increased.

C. Effects of the Illegal Agreement

As a result of Defendants' illegal agreement, consumers have paid higher prices for e-books than they would have paid in a market free of collusion. For example, the average price for Publisher Defendants' e-books increased by over ten percent between the summer of 2009 and the summer of 2010. On many adult trade e-books, consumers have witnessed an increase in retail prices between 30 and 50 percent. In some cases, the agency model dictates that the price of an e-book is higher than its corresponding trade paperback edition, despite the significant savings in printing and distributing costs offered by e-books.

Beyond this monetary harm to consumers, Defendants' agreement has prevented e-book retailers from experimenting with innovative pricing strategies that could efficiently respond to consumer demand. Because retailer discounting is prohibited by the agency agreements, retailers have been prevented from introducing innovative sales models or promotions with respect to Publisher Defendants' e-books, such as offering e-books under an ''all-you-can-read'' subscription model where consumers would pay a flat monthly fee.

III. Explanation of the Proposed Final Judgment

The relief contained in the proposed Final Judgment is intended to provide prompt, certain and effective remedies that will begin to restore competition to the marketplace. The requirements and prohibitions will eliminate the Settling Defendants' illegal conduct, prevent recurrence of the same or similar conduct, and establish robust antitrust compliance programs.

A. Required Conduct (Section IV) [5]

1. Sections IV.A and IV.B

To begin to restore competition to the e-books marketplace, the proposed Final Judgment requires the Settling Defendants to terminate immediately the Apple Agency Agreements that they used to collusively raise and stabilize e-book prices across the industry. Section IV.A of the proposed Final Judgment orders the Settling Defendants to terminate those contracts within seven days after this Court's entry of the proposed Final Judgment. This requirement will permit the contractual relationships between Apple and the Settling Defendants to be reset subject to competitive constraints.

The Apple Agency Agreements included MFN clauses that ensured Publisher Defendants would take away retail pricing control from all other e-book retailers. Accordingly, Section IV.B requires the termination of those contracts between a Settling Defendant and an e-book retailer that contain either (a) a restriction on an e-book retailer's ability to set the retail price of any e-book, or (b) a Price MFN. Under the proposed Final Judgment, termination will occur as soon as each contract permits, starting 30 days after the Court enters the proposed Final Judgment.[6] All of Settling Defendants' contracts with major e-book retailers contain one of these provisions and would be terminated. Section IV.B also allows any retailer with such a contract the option to terminate its contract with the Settling Defendant on just 30 days notice. These provisions will ensure that most of Settling Defendants' contracts that restrict the retailer from competing on price will be terminated within a short period.

E-book retailers, including Apple, will be able to negotiate new contracts with any Settling Defendant. But, as set forth in provisions described below, the proposed Final Judgment will ensure that the new contracts will not be set under the collusive conditions that produced the Apple Agency Agreements. Sections V.A–B of the proposed Final Judgment prohibit Settling Defendants, for at least two years, from including prohibitions on retailer discounting in new agreements with retailers. Additionally, a retailer can stagger the termination dates of its contracts to ensure that it is negotiating with only one Settling Defendant at a time to avoid joint conduct that could lead to a return to the collusively established previous outcome.

2. Section IV.C

As part of their conspiracy to raise and stabilize e-book prices, the Publisher Defendants discussed forming joint ventures, the purpose of which was, as Publisher Defendants' executives described it, ''less to compete with Amazon as to force it to accept a price level higher than 9.99,'' and to ''defend against further price erosion.'' To reduce the risk that future joint ventures involving Settling Defendants could eliminate competition among them, Section IV.C of the proposed Final Judgment requires a Settling Defendant to notify the Department of Justice before forming or modifying a joint venture between it and another publisher related to e-books. That provision sets forth a procedure for the Department of Justice to evaluate the potential anticompetitive effects of joint activity among Publisher Defendants at a sufficiently early stage to prevent harm to competition.

3. Section IV.D

To ensure Settling Defendants' compliance with the proposed Final Judgment, Section IV.D requires Settling Defendants to provide to the United States each e-book agreement entered into with any e-book retailer on or after January 1, 2012, and to continue to provide those agreements to the United States on a quarterly basis.

B. Prohibited Conduct (Section V)

1. Sections V.A, V.B, and V.C

Sections V.A and V.B ensure that e-book retailers can compete on the price of e-books sold to consumers. Specifically, the proposed Final Judgment prohibits Settling Defendants from enforcing existing agreements with or entering new agreements containing two components of the Apple Agency Agreements that served as linchpins to their conspiracy—the ban on retailer discounting (eliminating all price competition among retailers) and the retail price-matching MFNs that ensured agency terms were exported to all e-book retailers.

Sections V.A and V.B of the proposed Final Judgment prohibit Settling Defendants, for two years after the filing of the Complaint, from entering new agreements with e-book retailers that restrict the retailers' discretion over e-book pricing, including offering discounts, promotions, or other price reductions. These provisions do not dictate a particular business model, such as agency or wholesale, but prohibit Settling Defendants from forbidding a retailer from competing on price and using some of its commission to offer consumers a better value, either through a promotion or a discount. Under Section V.A, a Settling Defendant also must grant each e-book retailer with which it currently has an agreement the freedom to offer discounts or other e-book promotions for two years. With these provisions, most retailers will soon be able to discount e-books in order to compete for market share.

[5] Sections I–III of the proposed Final Judgment contain a statement acknowledging the Court's jurisdiction, definitions, and a statement of the scope of the proposed Final Judgment's applicability.

[6] The proposed Final Judgment defines a ''Price MFN'' to include most favored nation clauses related to retail prices, wholesale prices, or commissions.

These measures prohibit Settling Defendants, for a two-year period, from completely removing e-book retailers' discretion over retail prices. In light of current industry dynamics, including rapid innovation, a two-year period, in which Settling Defendants must provide pricing discretion to retailers, is sufficient to allow competition to return to the market.

Section V.C prohibits Settling Defendants, for five years, from entering into an agreement with an e-book retailer that contains a Price MFN. Defendants knew that the inclusion of the Price MFN in the Apple Agency Agreements would lead to the adoption of the agency model by all of Publisher Defendants' e-book retailers. The proposed Final Judgment therefore broadly defines banned ''Price MFNs'' to include not only MFNs requiring publishers to match retail e-book prices across e-book retailers (the MFNs in the Apple Agency Agreements), but also MFNs requiring publishers to match the wholesale prices at which e-books are sold to e-book retailers, and MFNs requiring publishers to match the revenue share or commission given to other e-book retailers. Prohibiting these particular Price MFNs serves an important function to prevent Settling Defendants from using MFNs to achieve substantially the same result they effected here through their collusive agreements.

2. Section V.D

Section V.D prohibits Settling Defendants from retaliating against an e-book retailer based on the retailer's e-book prices. Specifically, this Section prohibits a Settling Defendant from punishing an e-book retailer because the Settling Defendant disapproves of the retailer discounting or promoting e-books. This Section also prohibits a Settling Defendant from urging any other e-book publisher or e-book retailer to retaliate against an e-book retailer, as Penguin did. However, Section V.D expressly recognizes that, after the expiration of the two-year period described in Sections V.A and V.B, the anti-retaliation provision does not prohibit Settling Defendants from unilaterally entering into and enforcing agency agreements with e-book retailers that restrict a retailer's ability to set or reduce e-book prices or offer promotions.

3. Sections V.E and V.F

Section V.E of the proposed Final Judgment broadly prohibits Settling Defendants from agreeing with each other or another e-book publisher to raise or set e-book retail prices or coordinate terms relating to the licensing, distribution, or sale of e-books. This Section bans the kind of agreements among Publisher Defendants that led to the anticompetitive increase in e-book prices.

Section V.F likewise prohibits Settling Defendants from directly or indirectly conveying confidential or competitively sensitive information to any other e-book publisher. Such information includes, but is not limited to, business plans and strategies, pricing strategies for books, terms in retailer agreements, or terms in author agreements. Banning such communications is critical here, where communications among publishing competitors were condoned by and carried out as common practice at the highest levels of the companies and led directly to the collusive agreement alleged in the Complaint. Because these communications occurred among some of the parent companies of the Publishing Defendants, Section V.F also applies to those parent company officers who directly control Settling Defendants' business decisions. Settling Defendants are not prohibited from informing the buying public of the list prices of their books or engaging in ongoing legitimate distribution relationships with other publishers.

C. Permitted Conduct (Section VI)

Section VI.A of the proposed Final Judgment expressly permits Settling Defendants to compensate e-book retailers for services that they provide to publishers or consumers and help promote or sell more books. Section VI.A, for example, allows Settling Defendants to support brick-and-mortar retailers by directly paying for promotion or marketing efforts in those retailers' stores.

Section VI.B permits a Settling Defendant to negotiate a commitment from an e-book retailer that a retailer's aggregate expenditure on discounts and promotions of the Settling Defendant's e-books will not exceed the retailer's aggregate commission under an agency agreement in which the publisher sets the e-book price and the retailer is compensated through a commission. In particular, Section VI.B grants Settling Defendants the right to enter one-year agency agreements that also prevent e-book retailers from cumulatively selling that Settling Defendant's e-books at a loss over the period of the contract. An e-book retailer that enters an agency agreement with a Settling Defendant under Section VI.B would be permitted to discount that Settling Defendant's individual e-book titles by varying amounts (for example, some could be ''buy one get one free,'' some could be half off, and others could have no discount), as long as the total dollar amount spent on discounts or other promotions did not exceed in the aggregate the retailer's full commission from the Settling Defendant over a one-year period. This provision, which works with Sections V.A and V.B (which enhance retailers' ability to set e-book prices), allows a Settling Defendant to prevent a retailer selling its entire catalogue at a sustained loss. Absent the collusion here, the antitrust laws would normally permit a publisher unilaterally to negotiate for such protections.

D. Antitrust Compliance (Section VII)

As outlined in Section VII, as part of the compliance program, each Settling Defendant must designate an Antitrust Compliance Officer. The Antitrust Compliance Officer must distribute a copy of the proposed Final Judgment to the Settling Defendant's officers, directors, and employees (and their successors) who engage in the licensing, distribution, or sale of e-books. The proposed Final Judgment further requires the Antitrust Compliance Officer to ensure that each such person receives training related to the proposed Final Judgment and the antitrust laws; to ensure certification by each such person of compliance with the terms of the proposed Final Judgment; to conduct an annual antitrust compliance audit; to be available to receive information concerning violations of the proposed Final Judgment and to take appropriate action to remedy any violations of the proposed Final Judgment; and to maintain a log of communications between officers and directors of Settling Defendants, involved in the development of strategies related to e-books, and any person associated with another Publisher Defendant, where that communication relates to the selling of books in any format in the United States.

Appointment of an Antitrust Compliance Officer is necessary in this case given the extensive communication among competitors' CEOs that facilitated Defendants' agreement, among other things. The United States has required the submission of Settling Defendants' e-book agreements to facilitate the monitoring of the e-book industry and to ensure compliance with the proposed Final Judgment.

To facilitate monitoring compliance with the proposed Final Judgment, Settling Defendants must make available, upon written request, records and documents in their possession, custody, or control relating to any matters contained in the proposed Final Judgment. Settling Defendants must also make available their personnel for interviews regarding such matters. In addition, Settling Defendants must, upon written request, prepare written reports relating to any of the matters contained in the proposed Final Judgment.

IV. Alternatives to the Proposed Final Judgment

At several points during its investigation, the United States received from some Publisher Defendants proposals or suggestions that would have provided less relief than is contained in the proposed Final Judgment. These proposals and suggestions were rejected.

The United States considered, as an alternative to the proposed Final Judgment, a full trial on the merits against Settling Defendants. The United States believes that the relief contained in the proposed Final Judgment will more quickly restore retail price competition to consumers.

V. Remedies Available to Private Litigants

Section 4 of the Clayton Act, 15 U.S.C. 15, provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages the person has suffered, as well as costs and reasonable attorneys' fees. Entry of the proposed Final Judgment will neither impair nor assist the bringing of any private antitrust damage action. Under the provisions of Section 5(a) of the Clayton Act, 15 U.S.C. 16(a), the proposed Final Judgment has no *prima facie* effect in any subsequent private lawsuit that may be brought against Publisher Defendants or Apple.

VI. Procedures Available for Modification of the Proposed Final Judgment

The United States and Settling Defendants have stipulated that the proposed Final Judgment may be entered by this Court after compliance with the provisions of the APPA, provided that the United States has not withdrawn its consent. The APPA conditions entry of the decree upon this Court's determination that the proposed Final Judgment is in the public interest.

The APPA provides a period of at least sixty (60) days preceding the effective date of the proposed Final Judgment within which any person may submit to the United States written comments regarding the proposed Final Judgment. Any person who wishes to comment should do so within sixty (60) days of publication of this Competitive Impact Statement in the **Federal Register**, or the last date of publication in a newspaper of the summary of this Competitive Impact Statement, whichever is later.

All comments received during this period will be considered by the United States Department of Justice, which remains free to withdraw its consent to the proposed Final Judgment at any time prior to the Court's entry of judgment. The comments and the responses of the United States will be filed with the Court and published in the **Federal Register**.

Written comments should be submitted to: John Read, Chief, Litigation III Section, Antitrust Division, U.S. Department of Justice, 450 5th Street NW., Suite 4000, Washington, DC 20530.

The proposed Final Judgment provides that the Court retains jurisdiction over this action, and the parties may apply to the Court for any order necessary or appropriate for modification, interpretation, or enforcement of the Final Judgment.

VII. Standard of Review Under the APPA for the Proposed Final Judgment

The Clayton Act, as amended by the APPA, requires that proposed consent judgments in antitrust cases brought by the United States be subject to a sixty-day comment period, after which the court shall determine whether entry of the proposed Final Judgment ''is in the public interest.'' 15 U.S.C. 16(e)(1). In making that determination, the court is directed to consider:

> (A) The competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and
>
> (B) the impact of entry of such judgment upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. 16(e)(1)(A) & (B); *see generally United States* v. *KeySpan Corp.,* 763 F. Supp. 2d 633, 637–38 (S.D.N.Y. 2011) (WHP) (discussing Tunney Act standards); *United States* v. *SBC Commc'ns, Inc.,* 489 F. Supp. 2d 1 (D.D.C. 2007) (assessing standards for public interest determination). In considering these statutory factors, the court's inquiry is necessarily a limited one as the United States is entitled to ''broad discretion to settle with the Defendant within the reaches of the public interest.'' *United States* v. *Microsoft Corp.,* 56 F.3d 1448, 1461 (D.C. Cir. 1995).

Under the APPA a court considers, among other things, the relationship between the remedy secured and the specific allegations set forth in the United States' complaint, whether the decree is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree may positively harm third parties. *See Microsoft,* 56 F.3d at 1458–62. With respect to the adequacy of the relief secured by the decree, the court's function is ''not to determine whether the proposed [d]ecree results in the balance of rights and liabilities that is the one that will best serve society, but only to ensure that the resulting settlement is within the *reaches* of the public interest.'' *KeySpan,* 763 F. Supp. 2d at 637 (quoting *United States* v. *Alex Brown & Sons, Inc.,* 963 F. Supp. 235, 238 (S.D.N.Y. 1997)) (internal quotations omitted). In making this determination, ''[t]he [c]ourt is not permitted to reject the proposed remedies merely because the court believes other remedies are preferable. [Rather], the relevant inquiry is whether there is a factual foundation for the government's decision such that its conclusions regarding the proposed settlement are reasonable.'' *Id.* at 637–38 (quoting *United States* v. *Abitibi–Consolidated Inc.,* 584 F. Supp. 2d 162, 165 (D.D.C. 2008).[7] The government's predictions about the efficacy of its remedies are entitled to deference.[8]

Courts have greater flexibility in approving proposed consent decrees than in crafting their own decrees following a finding of liability in a litigated matter. ''[A] proposed decree must be approved even if it falls short

[7] *United States* v. *Bechtel Corp.,* 648 F.2d 660, 666 (9th Cir. 1981) (''The balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General.''). *See generally Microsoft,* 56 F.3d at 1461 (discussing whether ''the remedies [obtained in the decree are] so inconsonant with the allegations charged as to fall outside of the 'reaches of the public interest''').

[8] *Microsoft,* 56 F.3d at 1461 (noting the need for courts to be ''deferential to the government's predictions as to the effect of the proposed remedies''); *United States* v. *Archer-Daniels-Midland Co.,* 272 F. Supp. 2d 1, 6 (D.D.C. 2003) (noting that the court should grant due respect to the United States' prediction as to the effect of proposed remedies, its perception of the market structure, and its views of the nature of the case).

of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is 'within the reaches of public interest.' '' *United States* v. *Am. Tel. & Tel. Co.,* 552 F. Supp. 131, 151 (D.D.C. 1982) (citations omitted) (quoting *United States* v. *Gillette Co.,* 406 F. Supp. 713, 716 (D. Mass. 1975)), *aff'd sub nom. Maryland* v. *United States,* 460 U.S. 1001 (1983); *see also United States* v. *Alcan Aluminum Ltd.,* 605 F. Supp. 619, 622 (W.D. Ky. 1985) (approving the consent decree even though the court would have imposed a greater remedy). To meet this standard, the United States ''need only provide a factual basis for concluding that the settlements are reasonably adequate remedies for the alleged harms.'' *SBC Commc'ns,* 489 F. Supp. 2d at 17.

Moreover, the court's role under the APPA is limited to reviewing the remedy in relationship to the violations that the United States has alleged in its Complaint, and does not authorize the court to ''construct [its] own hypothetical case and then evaluate the decree against that case.'' *Microsoft,* 56 F.3d at 1459; *KeySpan,* 763 F. Supp. 2d at 638 (''A court must limit its review to the issues in the complaint * * *.''). Because the ''court's authority to review the decree depends entirely on the government's exercising its prosecutorial discretion by bringing a case in the first place,'' it follows that ''the court is only authorized to review the decree itself,'' and not to ''effectively redraft the complaint'' to inquire into other matters that the United States did not pursue. *Microsoft,* 56 F.3d at 1459–60.

In its 2004 amendments, Congress made clear its intent to preserve the practical benefits of utilizing consent decrees in antitrust enforcement, adding the unambiguous instruction that ''[n]othing in this section shall be construed to require the court to conduct an evidentiary hearing or to require the court to permit anyone to intervene.'' 15 U.S.C. 16(e)(2). This language effectuates what Congress intended when it enacted the Tunney Act in 1974, as Senator Tunney explained: ''[t]he court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process.'' 119 Cong. Rec. 24,598 (1973) (statement of Senator Tunney). Rather, the procedure for the public interest determination is left to the discretion of the court, with the recognition that the court's ''scope of review remains sharply proscribed by precedent and the nature of Tunney Act proceedings.'' *SBC Commc'ns,* 489 F. Supp. 2d at 11.[9]

VIII. Determinative Documents

There are no determinative materials or documents within the meaning of the APPA that were considered by the United States in formulating the proposed Final Judgment.

Dated: April 11, 2012

Respectfully submitted,
For Plaintiff
The United States of America
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United States District Court for the Southern District of New York

United States of America, Plaintiff, v. *Apple, Inc., Hachette Book Group, Inc., Harpercollins Publishers L.L.C., Verlagsgruppe Georg Von Holtzbrinck GMBH, Holtzbrinck Publishers, LLC* d/b/a *Macmillan, The Penguin Group, A Division of Pearson PLC, Penguin Group (USA), Inc.,* and *Simon & Schuster, Inc.,* Defendants.

Civil Action No. 1:12–cv–02826
Judge: Cote, Denise
Date Filed: 04/11/2012
Description: Antitrust.

[Proposed] Final Judgment as to Defendants

Hachette, Harpercollins, and Simon & Schuster

Whereas, Plaintiff, the United States of America filed its Complaint on April 11, 2012, alleging that Defendants conspired to raise retail prices of E-books in violation of Section 1 of the Sherman Act, as amended, 15 U.S.C. 1, and Plaintiff and Settling Defendants, by their respective attorneys, have consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law;

And whereas, this Final Judgment does not constitute any admission by Settling Defendants that the law has been violated or of any issue of fact or law, other than that the jurisdictional facts as alleged in the Complaint are true;

And whereas, Settling Defendants agree to be bound by the provisions of this Final Judgment pending its approval by the Court;

And whereas, Plaintiff requires Settling Defendants to agree to undertake certain actions and refrain from certain conduct for the purpose of remedying the loss of competition alleged in the Complaint;

And whereas, Settling Defendants have represented to the United States that the actions and conduct restrictions can and will be undertaken and that they will later raise no claim of hardship or difficulty as grounds for asking the Court to modify any of the provisions contained below;

Now therefore, before any testimony is taken, without trial or adjudication of any issue of fact or law, and upon consent of Settling Defendants, it is *ordered, adjudged, and decreed:*

I. Jurisdiction

This Court has jurisdiction over the subject matter of this action and over the Settling Defendants. The Complaint states a claim upon which relief may be granted against Settling Defendants under Section 1 of the Sherman Act, as amended, 15 U.S.C. 1.

II. Definitions

As used in this Final Judgment:

A. ''Agency Agreement'' means an agreement between an E-book Publisher and an E-book Retailer under which the E-book Publisher Sells E-books to consumers through the E-book Retailer, which under the agreement acts as an agent of the E-book Publisher and is paid a commission in connection with the Sale of one or more of the E-book Publisher's E-books.

B. ''Apple'' means Apple, Inc., a California corporation with its principal place of business in Cupertino, California, its successors and assigns, and its parents, subsidiaries, divisions, groups, affiliates, partnerships, and joint ventures, and their directors, officers, managers, agents, and employees.

C. ''Department of Justice'' means the Antitrust Division of the United States Department of Justice.

D. ''E-book'' means an electronically formatted book designed to be read on a computer, a handheld device, or other electronic devices capable of visually displaying E-books. For purposes of this Final Judgment, the term E-book does not include (1) an audio book, even if delivered and stored digitally; (2) a standalone specialized software application or ''app'' sold through an ''app store'' rather than through an e-book store (*e.g.,* through Apple's ''App Store'' rather than through its ''iBookstore'' or ''iTunes'') and not designed to be executed or read by or

[9] *See United States* v. *Enova Corp.,* 107 F. Supp. 2d 10, 17 (D.D.C. 2000) (noting that the ''Tunney Act expressly allows the court to make its public interest determination on the basis of the competitive impact statement and response to comments alone'').

through a dedicated E-book reading device; or (3) a media file containing an electronically formatted book for which most of the value to consumers is derived from audio or video content contained in the file that is not included in the print version of the book.

E. ''E-book Publisher'' means any Person that, by virtue of a contract or other relationship with an E-book's author or other rights holder, owns or controls the necessary copyright or other authority (or asserts such ownership or control) over any E-book sufficient to distribute the E-book within the United States to E-book Retailers and to permit such E-book Retailers to Sell the E-book to consumers in the United States. Publisher Defendants are E-book Publishers. For purposes of this Final Judgment, E-book Retailers are not E-book Publishers.

F. ''E-book Retailer'' means any Person that lawfully Sells (or seeks to lawfully Sell) E-books to consumers in the United States, or through which a Publisher Defendant, under an Agency Agreement, Sells E-books to consumers. For purposes of this Final Judgment, Publisher Defendants and all other Persons whose primary business is book publishing are not E-book Retailers.

G. ''Hachette'' means Hachette Book Group, Inc., a Delaware corporation with its principal place of business in New York, New York, its successors and assigns, and its subsidiaries, divisions, groups, and partnerships, and their directors, officers, managers, agents, and employees.

H. ''HarperCollins'' means HarperCollins Publishers L.L.C., a Delaware limited liability company with its principal place of business in New York, New York, its successors and assigns, and its subsidiaries, divisions, groups, and partnerships, and their directors, officers, managers, agents, and employees.

I. ''Including'' means including, but not limited to.

J. ''Macmillan'' means (1) Holtzbrinck Publishers, LLC d/b/a Macmillan, a New York limited liability company with its principal place of business in New York, New York; and (2) Verlagsgruppe Georg von Holtzbrinck GmbH, a German corporation with its principal place of business in Stuttgart, Germany, their successors and assigns, and their parents, subsidiaries, divisions, groups, affiliates, and partnerships, and their directors, officers, managers, agents, and employees.

K. ''Penguin'' means (1) Penguin Group (USA), Inc., a Delaware corporation with its principal place of business in New York, New York, and (2) The Penguin Group, a division of U.K. corporation Pearson PLC with its principal place of business in London, England, their successors and assigns, and their parents, subsidiaries, divisions, groups, affiliates, and partnerships, and their directors, officers, managers, agents, and employees.

L. ''Person'' means any natural person, corporation, company, partnership, joint venture, firm, association, proprietorship, agency, board, authority, commission, office, or other business or legal entity, whether private or governmental.

M. ''Price MFN'' means a term in an agreement between an E-book Publisher and an E-book Retailer under which

1. The Retail Price at which an E-book Retailer or, under an Agency Agreement, an E-book Publisher Sells one or more E-books to consumers depends in any way on the Retail Price, or discounts from the Retail Price, at which any other E-book Retailer or the E-book Publisher, under an Agency Agreement, through any other E-book Retailer Sells the same E-book(s) to consumers.

2. The Wholesale Price at which the E-book Publisher Sells one or more E-books to that E-book Retailer for Sale to consumers depends in any way on the Wholesale Price at which the E-book Publisher Sells the same E-book(s) to any other E-book Retailer for Sale to consumers; or

3. The revenue share or commission that E-book Retailer receives from the E-book Publisher in connection with the Sale of one or more E-books to consumers depends in any way on the revenue share or commission that (a) any other E-book Retailer receives from the E-book Publisher in connection with the Sale of the same E-book(s) to consumers, or (b) that E-book Retailer receives from any other E-book Publisher in connection with the Sale of one or more of the other E-book Publisher's E-books.

For purposes of this Final Judgment, it will not constitute a Price MFN under subsection 3 of this definition if a Settling Defendant agrees, at the request of an E-book Retailer, to meet more favorable pricing, discounts, or allowances offered to the E-book Retailer by another E-book Publisher for the period during which the other E-book Publisher provides that additional compensation, so long as that agreement is not or does not result from a pre-existing agreement that requires the Settling Defendant to meet all requests by the E-book Retailer for more favorable pricing within the terms of the agreement.

N. ''Publisher Defendants'' means Hachette, HarperCollins, Macmillan, Penguin, and Simon & Schuster. Where this Final Judgment imposes an obligation on Publisher Defendants to engage in or refrain from engaging in certain conduct, that obligation shall apply to each Publisher Defendant individually and to any joint venture or other business arrangement established by any two or more Publisher Defendants.

O. ''Purchase'' means a consumer's acquisition of one or more E-books as a result of a Sale.

P. ''Retail Price'' means the price at which an E-book Retailer or, under an Agency Agreement, an E-book Publisher Sells an E-book to a consumer.

Q. ''Sale'' means delivery of access to a consumer to read one or more E-books (purchased alone, or in combination with other goods or services) in exchange for payment; ''Sell'' or ''Sold'' means to make or to have made a Sale of an E-book to a consumer.

R. ''Settling Defendants'' means Hachette, HarperCollins, and Simon & Schuster. Where the Final Judgment imposes an obligation on Settling Defendants to engage in or refrain from engaging in certain conduct, that obligation shall apply to each Settling Defendant individually and to any joint venture other business arrangement established by a Settling Defendant and one or more Publisher Defendants.

S. ''Simon & Schuster'' means Simon & Schuster, Inc., a New York corporation with its principal place of business in New York, New York, its successors and assigns, and its subsidiaries, divisions, groups, and partnerships, and their directors, officers, managers, agents, and employees.

T. ''Wholesale Price'' means (1) the net amount, after any discounts or other adjustments (not including promotional allowances subject to Section 2(d) of the Robinson-Patman Act, 15 U.S.C. 13(d)), that an E-book Retailer pays to an E-book Publisher for an E-book that the E-book Retailer Sells to consumers; or (2) the Retail Price at which an E-book Publisher, under an Agency Agreement, Sells an E-book to consumers through an E-book Retailer minus the commission or other payment that E-book Publisher pays to the E-book Retailer in connection with or that is reasonably allocated to that Sale.

III. Applicability

This Final Judgment applies to Settling Defendants and all other Persons in active concert or participation with any of them who receive actual notice of this Final

Judgment by personal service or otherwise.

IV. Required Conduct

A. Within seven days after entry of this Final Judgment, each Settling Defendant shall terminate any agreement with Apple relating to the Sale of E-books that was executed prior to the filing of the Complaint.

B. For each agreement between a Settling Defendant and an E-book Retailer other than Apple that (1) restricts, limits, or impedes the E-book Retailer's ability to set, alter, or reduce the Retail Price of any E-book or to offer price discounts or any other form of promotions to encourage consumers to Purchase one or more E-books; or (2) contains a Price MFN, the Settling Defendant shall notify the E-book Retailer, within ten days of the filing of the Complaint, that the E-book Retailer may terminate the agreement with thirty-days notice and shall, thirty days after the E-book Retailer provides such notice, release the E-book Retailer from the agreement. For each such agreement that the E-book Retailer has not terminated within thirty days after entry of this Final Judgment, each Settling Defendant shall, as soon as permitted under the agreement, take each step required under the agreement to cause the agreement to be terminated and not renewed or extended.

C. Settling Defendants shall notify the Department of Justice in writing at least sixty days in advance of the formation or material modification of any joint venture or other business arrangement relating to the Sale, development, or promotion of E-books in the United States in which a Settling Defendant and at least one other E-book Publisher (including another Publisher Defendant) are participants or partial or complete owners. Such notice shall describe the joint venture or other business arrangement, identify all E-book Publishers that are parties to it, and attach the most recent version or draft of the agreement, contract, or other document(s) formalizing the joint venture or other business arrangement. Within thirty days after a Settling Defendant provides notification of the joint venture or business arrangement, the Department of Justice may make a written request for additional information. If the Department of Justice makes such a request, the Settling Defendant shall not proceed with the planned formation or material modification of the joint venture or business arrangement until thirty days after substantially complying with such additional request(s) for information. The failure of the Department of Justice to request additional information or to bring an action under the antitrust laws to challenge the formation or material modification of the joint venture shall neither give rise to any inference of lawfulness nor limit in any way the right of the United States to investigate the formation, material modification, or any other aspects or activities of the joint venture or business arrangement and to bring actions to prevent or restrain violations of the antitrust laws.

The notification requirements of this Section IV.C shall not apply to ordinary course business arrangements between a Publisher Defendant and another E-book Publisher (not a Publisher Defendant) that do not relate to the Sale of E-books to consumers, or to business arrangements the primary or predominant purpose or focus of which involves: (i) E-book Publishers co-publishing one or more specifically identified E-book titles or a particular author's E-books; (ii) a Settling Defendant licensing to or from another E-book Publisher the publishing rights to one or more specifically identified E-book titles or a particular author's E-books; (iii) a Settling Defendant providing technology services to or receiving technology services from another E-book Publisher (not a Publisher Defendant) or licensing rights in technology to or from another E-book Publisher; or (iv) a Settling Defendant distributing E-books published by another E-book Publisher (not a Publisher Defendant).

D. Each Settling Defendant shall furnish to the Department of Justice (1) within seven days after entry of this Final Judgment, one complete copy of each agreement, executed, renewed, or extended on or after January 1, 2012, between the Settling Defendant and any E-book Retailer relating to the Sale of E-books, and, (2) thereafter, on a quarterly basis, each such agreement executed, renewed, or extended since the Settling Defendant's previous submission of agreements to the Department of Justice.

V. Prohibited Conduct

A. For two years, Settling Defendants shall not restrict, limit, or impede an E-book Retailer's ability to set, alter, or reduce the Retail Price of any E-book or to offer price discounts or any other form of promotions to encourage consumers to Purchase one or more E-books, such two-year period to run separately for each E-book Retailer, at the option of the Settling Defendant, from either:

1. The termination of an agreement between the Settling Defendant and the E-book Retailer that restricts, limits, or impedes the E-book Retailer's ability to set, alter, or reduce the Retail Price of any E-book or to offer price discounts or any other form of promotions to encourage consumers to Purchase one or more E-books; or

2. The date on which the Settling Defendant notifies the E-book Retailer in writing that the Settling Defendant will not enforce any term(s) in its agreement with the E-book Retailer that restrict, limit, or impede the E-book Retailer from setting, altering, or reducing the Retail Price of one or more E-books, or from offering price discounts or any other form of promotions to encourage consumers to Purchase one or more E-books.

Each Settling Defendant shall notify the Department of Justice of the option it selects for each E-book Retailer within seven days of making its selection.

B. For two years after the filing of the Complaint, Settling Defendants shall not enter into any agreement with any E-book Retailer that restricts, limits, or impedes the E-book Retailer from setting, altering, or reducing the Retail Price of one or more E-books, or from offering price discounts or any other form of promotions to encourage consumers to Purchase one or more E-books.

C. Settling Defendants shall not enter into any agreement with an E-book Retailer relating to the Sale of E-books that contains a Price MFN.

D. Settling Defendants shall not retaliate against, or urge any other E-book Publisher or E-book Retailer to retaliate against, an E-book Retailer for engaging in any activity that the Settling Defendants are prohibited by Sections V.A, V.B, and VI.B.2 of this Final Judgment from restricting, limiting, or impeding in any agreement with an E-book Retailer. After the expiration of prohibitions in Sections V.A and V.B of this Final Judgment, this Section V.D shall not prohibit any Settling Defendant from unilaterally entering into or enforcing any agreement with an E-book Retailer that restricts, limits, or impedes the E-book Retailer from setting, altering, or reducing the Retail Price of any of the Settling Defendant's E-books or from offering price discounts or any other form of promotions to encourage consumers to Purchase any of the Settling Defendant's E-books.

E. Settling Defendants shall not enter into or enforce any agreement, arrangement, understanding, plan, program, combination, or conspiracy with any E-book Publisher (including another Publisher Defendant) to raise, stabilize, fix, set, or coordinate the Retail Price or Wholesale Price of any E-book or fix, set, or coordinate any term or condition relating to the Sale of E-books.

This Section V.E shall not prohibit a Settling Defendant from entering into and enforcing agreements relating to the distribution of another E-book Publisher's E-books (not including the E-books of another Publisher Defendant) or to the co-publication with another E-book Publisher of specifically identified E-book titles or a particular author's E-books, or from participating in output-enhancing industry standard-setting activities relating to E-book security or technology.

F. A Settling Defendant (including each officer of each parent of the Settling Defendant who exercises direct control over the Settling Defendant's business decisions or strategies) shall not convey or otherwise communicate, directly or indirectly (including by communicating indirectly through an E-book Retailer with the intent that the E-book Retailer convey information from the communication to another E-book Publisher or knowledge that it is likely to do so), to any other E-book Publisher (including to an officer of a parent of a Publisher Defendant) any competitively sensitive information, including:

1. Its business plans or strategies;

2. Its past, present, or future wholesale or retail prices or pricing strategies for books sold in any format (*e.g.,* print books, E-books, or audio books);

3. Any terms in its agreement(s) with any retailer of books Sold in any format; or

4. Any terms in its agreement(s) with any author.

This Section V.F shall not prohibit a Settling Defendant from communicating (a) in a manner and through media consistent with common and reasonable industry practice, the cover prices or wholesale or retail prices of books sold in any format to potential purchasers of those books; or (b) information the Settling Defendant needs to communicate in connection with (i) its enforcement or assignment of its intellectual property or contract rights, (ii) a contemplated merger, acquisition, or purchase or sale of assets, (iii) its distribution of another E-book Publisher's E-books, or (iv) a business arrangement under which E-book Publishers agree to co-publish, or an E-book Publisher agrees to license to another E-book Publisher the publishing rights to, one or more specifically identified E-book titles or a particular author's E-books.

VI. Permitted Conduct

A. Nothing in this Final Judgment shall prohibit a Settling Defendant unilaterally from compensating a retailer, including an E-book Retailer, for valuable marketing or other promotional services rendered.

B. Notwithstanding Sections V.A and V.B of this Final Judgment, a Settling Defendant may enter into Agency Agreements with E-book Retailers under which the aggregate dollar value of the price discounts or any other form of promotions to encourage consumers to Purchase one or more of the Settling Defendant's E-books (as opposed to advertising or promotions engaged in by the E-book Retailer not specifically tied or directed to the Settling Defendant's E-books) is restricted; *provided that* (1) such agreed restriction shall not interfere with the E-book Retailer's ability to reduce the final price paid by consumers to purchase the Settling Defendant's E-books by an aggregate amount equal to the total commissions the Settling Defendant pays to the E-book Retailer, over a period of at least one year, in connection with the Sale of the Settling Defendant's E-books to consumers; (2) the Settling Defendant shall not restrict, limit, or impede the E-book Retailer's use of the agreed funds to offer price discounts or any other form of promotions to encourage consumers to Purchase one or more E-books; and (3) the method of accounting for the E-book Retailer's promotional activity does not restrict, limit, or impede the E-book Retailer from engaging in any form of retail activity or promotion.

VII. Antitrust Compliance

Within thirty days after entry of this Final Judgment, each Settling Defendant shall designate its general counsel or chief legal officer, or an employee reporting directly to its general counsel or chief legal officer, as Antitrust Compliance Officer with responsibility for ensuring the Settling Defendant's compliance with this Final Judgment. The Antitrust Compliance Officer shall be responsible for the following:

A. Furnishing a copy of this Final Judgment, within thirty days of its entry, to each of the Settling Defendant's officers and directors, and to each of the Settling Defendant's employees engaged, in whole or in part, in the distribution or Sale of E-books;

B. Furnishing a copy of this Final Judgment in a timely manner to each officer, director, or employee who succeeds to any position identified in Section VII.A of this Final Judgment;

C. Ensuring that each person identified in Sections VII.A and VII.B of this Final Judgment receives at least four hours of training annually on the meaning and requirements of this Final Judgment and the antitrust laws, such training to be delivered by an attorney with relevant experience in the field of antitrust law;

D. Obtaining, within sixty days after entry of this Final Judgment and on each anniversary of the entry of this Final Judgment, from each person identified in Sections VII.A and VII.B of this Final Judgment, and thereafter maintaining, a certification that each such person (a) has read, understands, and agrees to abide by the terms of this Final Judgment; and (b) is not aware of any violation of this Final Judgment or the antitrust laws or has reported any potential violation to the Antitrust Compliance Officer;

E. Conducting an annual antitrust compliance audit covering each person identified in Sections VII.A and VII.B of this Final Judgment, and maintaining all records pertaining to such audits;

F. Communicating annually to the Settling Defendant's employees that they may disclose to the Antitrust Compliance Officer, without reprisal, information concerning any potential violation of this Final Judgment or the antitrust laws;

G. Taking appropriate action, within three business days of discovering or receiving credible information concerning an actual or potential violation of this Final Judgment, to terminate or modify the Settling Defendant's conduct to assure compliance with this Final Judgment; and, within seven days of taking such corrective actions, providing to the Department of Justice a description of the actual or potential violation of this Final Judgment and the corrective actions taken;

H. Furnishing to the Department of Justice on a quarterly basis electronic copies of any non-privileged communications with any Person containing allegations of Settling Defendants' noncompliance with any provisions of this Final Judgment;

I. Maintaining, and furnishing to the Department of Justice on a quarterly basis, a log of all oral and written communications, excluding privileged or public communications, between or among (1) any of the Settling Defendant's officers, directors, or employees involved in the development of the Settling Defendant's plans or strategies relating to E-books, and (2) any person employed by or associated with another Publisher Defendant, relating, in whole or in part, to the distribution or sale in the United States of books sold in any format, including an identification (by name, employer, and job title) of the author and recipients of and all participants in the communication, the date, time, and duration of the communication, the medium of the communication, and a description of the subject matter of the communication (for a collection of communications solely concerning a single business arrangement that is specifically exempted from the reporting requirements of Section IV.C of this Final Judgment, the Settling Defendant may provide a summary of the communications rather than logging each communication individually); and

J. Providing to the Department of Justice annually, on or before the anniversary of the entry of this Final Judgment, a written statement as to the fact and manner of the Settling Defendant's compliance with Sections IV, V, and VII of this Final Judgment.

VIII. Compliance Inspection

A. For purposes of determining or securing compliance with this Final Judgment, or of determining whether the Final Judgment should be modified or vacated, and subject to any legally recognized privilege, from time to time duly authorized representatives of the Department of Justice, including consultants and other persons retained by the Department of Justice, shall, upon written request of an authorized representative of the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to Settling Defendants, be permitted:

1. Access during the Settling Defendants' office hours to inspect and copy, or at the option of the United States, to require Settling Defendants to provide to the United States hard copy or electronic copies of all books, ledgers, accounts, records, data, and documents in the possession, custody, or control of Settling Defendants, relating to any matters contained in this Final Judgment; and

2. To interview, either informally or on the record, the Settling Defendants' officers, employees, or agents, who may have their individual counsel present, regarding such matters. The interviews shall be subject to the reasonable convenience of the interviewee and without restraint or interference by Settling Defendants.

B. Upon the written request of an authorized representative of the Assistant Attorney General in charge of the Antitrust Division, Settling Defendants shall submit written reports or respond to written interrogatories, under oath if requested, relating to any of the matters contained in this Final Judgment as may be requested. Written reports authorized under this paragraph may, in the sole discretion of the United States, require Settling Defendants to conduct, at their cost, an independent audit or analysis relating to any of the matters contained in this Final Judgment.

C. No information or documents obtained by the means provided in this Section shall be divulged by the United States to any person other than an authorized representative of the executive branch of the United States, except in the course of legal proceedings to which the United States is a party (including grand jury proceedings), or for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.

D. If at the time information or documents are furnished by a Settling Defendant to the United States, the Settling Defendant represents and identifies in writing the material in any such information or documents to which a claim of protection may be asserted under Rule 26(c)(1)(G) of the Federal Rules of Civil Procedure, and the Settling Defendant marks each pertinent page of such material, ''Subject to claim of protection under Rule 26(c)(1)(G) of the Federal Rules of Civil Procedure,'' then the United States shall give the Settling Defendant ten calendar days notice prior to divulging such material in any civil or administrative proceeding.

IX. Retention of Jurisdiction

This Court retains jurisdiction to enable any party to apply to this Court at any time for further orders and directions as may be necessary or appropriate to carry out or construe this Final Judgment, to modify any of its provisions, to enforce compliance, and to punish violations of its provisions.

X. No Limitation on Government Rights

Nothing in this Final Judgment shall limit the right of the United States to investigate and bring actions to prevent or restrain violations of the antitrust laws concerning any past, present, or future conduct, policy, or practice of the Settling Defendants.

XI. Expiration of Final Judgment

Unless this Court grants an extension, this Final Judgment shall expire five years from the date of its entry.

XII. Public Interest Determination

Entry of this Final Judgment is in the public interest. The parties have complied with the requirements of the Antitrust Procedures and Penalties Act, 15 U.S.C. 16, including making copies available to the public of this Final Judgment, the Competitive Impact Statement, and any comments thereon and the United States' responses to comments. Based upon the record before the Court, which includes the Competitive Impact Statement and any comments and response to comments filed with the Court, entry of this Final Judgment is in the public interest.

Date: ____________________

Court approval subject to procedures set forth in the Antitrust Procedures and Penalties Act, 15 U.S.C. 16

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United States District Judge

[FR Doc. 2012–9831 Filed 4–23–12; 8:45 am]

BILLING CODE P

DEPARTMENT OF JUSTICE

Office of Justice Programs

[OJP (NIJ) Docket No. 1589]

Draft Standards and Best Practices for Interaction Between Medical Examiner/Coroner and Organ and Tissue Procurement Organizations

AGENCY: National Institute of Justice, DOJ.

ACTION: Notice and request for comments.

SUMMARY: In an effort to obtain comments from interested parties, the U.S. Department of Justice, Office of Justice Programs, National Institute of Justice, Scientific Working Group for Medicolegal Death Investigation will make available to the general public a document entitled, ''Organ and Tissue Procurement Committee Standards and Best Practices for Interaction Between Medical Examiner/Coroner Offices and Organ Tissue Procurement Organizations''. The opportunity to provide comments on this document is open to coroner/medical examiner office representatives, law enforcement agencies, organizations, and all other stakeholders and interested parties. Those individuals wishing to obtain and provide comments on the draft document under consideration are directed to the following Web site: *http://www.swgmdi.org.*

DATES: Comments must be received on or before May 12, 2012.

FOR FURTHER INFORMATION CONTACT: Patricia Kashtan, by telephone at 202–353–1856 [**Note:** this is not a toll-free telephone number], or by email at *Patricia.Kashtan@usdoj.gov.*

John H. Laub,

Director, National Institute of Justice.

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