CT-2017-002

THE COMPETITION TRIBUNAL

IN THE MATTER OF the *Competition Act,* R.S.C. 1985, c.C-34, as amended;

IN THE MATTER OF an arrangement between HarperCollins Publishers L.L. C., Hachette Book Group Inc., Verlagsgruppe Georg von Holtzbrinck GMBH, Holtzbrinck Publishers, LLC d/b/a Macmillan, Simon & Schuster Inc. and Apple Inc.;

AND IN THE MATTER OF the application by the Commissioner of Competition pursuant to section 90.1 of the *Competition Act*.

BETWEEN:

THE COMMISSIONER OF COMPETITION

Applicant

- and -

HARPERCOLLINS PUBLISHERS L.L.C., and HARPERCOLLINS CANADA LIMITED

Respondents

AFFIDAVIT OF MARILYN NELSON
Sworn March 21, 2017

I, Marilyn Nelson, of the City of Barrie, County of Simcoe, in the Province of Ontario, swear that:

1. I am a legal administrative assistant in the Toronto litigation group of Stikeman Elliott LLP ("**Stikeman Elliott**"), lawyers for the Respondents HarperCollins Publishers L.L.C. ("**HarperCollins US**") and HarperCollins Canada Limited ("**HarperCollins Canada**") (together, "**HarperCollins**") in this proceeding.

2. I am the legal administrative assistant to Toronto litigation partner Danielle Royal and litigation associate Mark Walli, both of whom are involved in Stikeman Elliott's representation of HarperCollins in this matter. As such, I have personal knowledge of the matters deposed to herein.

3. I submit this affidavit in support of HarperCollins' motion for summary dismissal of the Application of the Commissioner against HarperCollins, dated January 19, 2017 (the "**Dismissal Motion**"). HarperCollins' Notice of Motion was filed on March 6, 2017.

4. Attached as exhibits to this Affidavit are copies of publicly available court documents which are referred to in HarperCollins' Notice of Motion, as follows:

(a) A copy of the Complaint of the Plaintiff United States of America against Apple Inc. ("**Apple**") et al., filed on April 11, 2012 in the United States District Court for the Southern District of New York (the "**SDNY Court**"), Civil Action No. 12 CV 2826 (the "**U.S. E-books Action**"), is attached hereto as Exhibit "**A**";

(b) A copy of the SDNY Court's Final Judgment as to Defendants HarperCollins US, Hachette and Simon & Schuster in the U.S. E-books Action, dated September 6, 2012, is attached hereto as Exhibit "**B**";

(c) A copy of the SDNY Court's Opinion and Order, dated September 6, 2012 in relation to the Final Judgment as to Defendants HarperCollins US, Hachette, and Simon & Schuster in the U.S. E-books Action, is attached hereto as Exhibit "**C**");

(d) A copy of the SDNY Court's Final Judgment as to Defendants The Penguin Group in the U.S. E-books Action, dated May 17, 2013, is attached hereto as Exhibit "**D**";

(e) A copy of the SDNY Court's Final Judgment as to Defendants Verlagsgruppe Georg von Holtzbrinck GMBH & Holtzbrinck Publishers d/b/a/ Macmillan in the U.S. E-books Action, dated August 12, 2013, is attached hereto as Exhibit "**E**"; and

(f) A copy of the SDNY Court's Final Judgment and Order Entering Permanent Injunction as to the Defendant Apple in the U.S. E-books Action, dated September 5, 2013, is attached hereto as Exhibit "**F**".

5. This Affidavit is filed in accordance with the Tribunal's Direction in this proceeding, dated March 17, 2017.

SWORN BEFORE ME at the City of Toronto, in the Province of Ontario, on March 21, 2017.

Commissioner for Taking Affidavits
#68386F

Marilyn Nelson

This is Exhibit "**A**" referred to in the
Affidavit of Marilyn Nelson
sworn before me, this 21st day of March, 2017

A Commissioner for Taking Affidavits

12 CV 2826

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

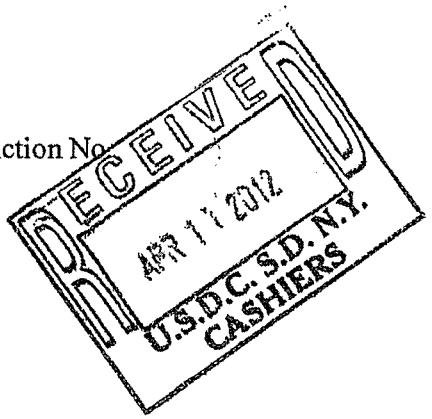
Plaintiff,

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.



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

[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.

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 e-mails 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" e-mail 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 e-mail 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 e-mail 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 e-mail, "[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 AM. At 11:01 AM, 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 e-mail 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 e-mailed 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 e-mail 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 e-mailed 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 e-mailed 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 e-mail 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 websites 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 website 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 e-mail to find out Apple's progress in agency negotiations with other publishers. Four minutes after that e-mail 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 e-mailed 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 e-mail 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 websites.

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:

SHARIS A. POZEN
Acting Assistant Attorney General for
Antitrust

JOSEPH F. WAYLAND
Deputy Assistant Attorney General

GENE KIMMELMAN
Chief Counsel for Competition Policy and
Intergovernmental Relations

PATRICIA A. BRINK
Director of Civil Enforcement
MARK W. RYAN
Director of Litigation
mark.w.ryan@usdoj.gov

JOHN R. READ
Chief
DAVID C. KULLY
Assistant Chief
Litigation III Section
david.kully@usdoj.gov

DANIEL MCCUAIG
NATHAN P. SUTTON
MARY BETH MCGEE
OWEN M. KENDLER
WILLIAM H. JONES II
STEPHEN T. FAIRCHILD
Attorneys for the United States
Litigation III Section
450 Fifth Street, N.W., Suite 4000
Washington, D.C. 20530
Telephone: (202) 307-0520
Facsimile: (202) 514-7308
daniel.mccuaig@usdoj.gov
nathan.sutton@usdoj.gov
mary.beth.mcgee@usdoj.gov
owen.kendler@usdoj.gov
bill.jones2@usdoj.gov
stephen.fairchild@usdoj.gov

This is Exhibit "**B**" referred to in the
Affidavit of Marilyn Nelson
sworn before me, this 21st day of March, 2017

A Commissioner for Taking Affidavits

Copy

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. 12-CV-2826 (DLC)

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 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: September 4, 2012

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

Denise Cote

Hon. Denise L. Cote
United States District Judge

This is Exhibit "C" referred to in the
Affidavit of Marilyn Nelson
sworn before me, this 21st day of March, 2017

A Commissioner for Taking Affidavits

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, Plaintiff, -v- APPLE, INC., et al., Defendants.	12 Civ. 2826 (DLC) OPINION & ORDER

APPEARANCES:

For plaintiff the United States:

Mark W. Ryan
Stephanie A. Fleming
Lawrence E. Buterman
Laura B. Collins
United States Department of Justice
Antitrust Division
450 Fifth Street, N.W., Suite 4000
Washington, DC 20530

For defendants Penguin Group (USA), Inc. and The Penguin Group:

Daniel F. McInnis
David A. Donohoe
Allison Sheedy
Akin Gump Strauss Hauer & Feld, LLP
1333 New Hampshire Ave., NW
Washington, DC 20036

For defendant Apple, Inc.:

Richard Parker
Omelveny & Myers LLP
1625 Eye Street
Washington, D.C. 20006

Andrew J. Frackman
Edward N. Moss
Omelveny & Myers LLP
7 Times Square New York, NY 10036

Daniel S. Floyd
Daniel G. Swanson
Gibson Dunn & Crutcher LLP
333 South Grand Ave.
Los Angeles California

For defendant Holtzbrinck Publishers, LLC d/b/a MacMillan:

Joel M. Mitnick
John J. Lavelle
Alexandra Shear
Sidley Austin LLP
787 Seventh Ave.
New York, NY 10019

For amici curiae American Booksellers Association and Barnes & Noble, Inc.:

David N. Wynn
Arent Fox LLP
1675 Broadway
New York, NY 10019

Deanne Ottaviano
Arent Fox LLP
1050 Connecticut Ave. NW
Washington, DC 20036

Stephen G. Larson
Arent Fox LLP
555 West Fifth St., 48th Floor
Los Angeles, CA

For amicus curiae The Authors Guild, Inc.:

Jan Friedman Levien
Paul D. Aiken
31 East 32nd Street, 7th Floor
New York, New York 10016-5509

For amicus curiae Bob Kohn:

Bob Kohn
140 E. 28th St.
New York, NY 10016

Steven Brower
Buchalter Nemer
18400 Von Karman Ave., Suite 800
Irvine, California 92612-0514

DENISE COTE, District Judge:

Plaintiff the United States of America (the "Government") 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"). The Government has moved for entry of a proposed Final Judgment with respect to defendants Hachette, HarperCollins, and Simon & Schuster (the "Settling Defendants"), pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)-(h) (the "APPA" or "Tunney Act"). For the following reasons, the motion for entry of Final Judgment is granted.

BACKGROUND

I. Factual Allegations

Unless otherwise noted, the facts and allegations recounted below are taken from the Government's complaint ("Complaint")

and Competitive Impact Statement ("CIS"). Defendant Apple engages in a number of businesses, but as relevant here it sells the iPad tablet device and distributes "e-books" through its "iBookstore." E-books are books that are sold to consumers in electronic form, and that can and must be read on an electronic device such as the iPad, the Barnes & Noble, Inc. ("Barnes & Noble") Nook, or the Amazon.com, Inc. ("Amazon") Kindle. Each of the other five defendants (the "Publisher Defendants") publishes both e-books and print books. They represent five of the six largest publishers of "trade" books in the United States.[1] Broadly speaking, the Complaint alleges that the defendants conspired to raise, fix, and stabilize the retail price for newly-released and bestselling trade e-books, to end retail price competition among trade e-books retailers, and to limit retail price competition among the Publisher Defendants in violation of Section 1 of the Sherman Antitrust Act. 15 U.S.C. § 1.

In 2007, Amazon launched its Kindle device and quickly became the market leader in the sale of e-books. Amazon utilized a discount pricing strategy whereby it charged $9.99 for newly released and bestselling e-books. Even though the

[1] Trade books consist of general interest fiction and non-fiction books. They are to be distinguished from "non-trade" books such as children's picture books, academic textbooks, reference materials, and other texts.

$9.99 retail price point was close to the wholesale price at which Amazon purchased many e-books, the Complaint alleges that Amazon's e-books business was "consistently profitable."[2] In order to compete with Amazon, other e-books retailers also adopted a $9.99 retail price for many titles.

The defendants' conspiracy to raise, fix, and stabilize e-books prices allegedly began no later than September 2008, when the Publisher Defendants' CEOs began to meet to discuss the growth of e-books and the role of Amazon in that growth. According to the Complaint, a central topic of discussion at these meetings was Amazon's discount pricing strategy, or what the CEOs termed "the $9.99 problem."

The Publisher Defendants feared that the $9.99 price point would have a number of pernicious effects on their short- and long-term profits. In the short-term, they believed the price point was eating into sales of hardcover print books, which were often priced at thirty dollars or higher. Over the long-term, they feared that consumers would grow accustomed to purchasing e-books at $9.99, that Amazon and other retailers would start to demand lower wholesale prices for e-books, that the $9.99 price point would erode hardcover book prices, that the rapid growth in e-books would threaten the survival of brick-and-mortar

[2] The non-settling defendants and a number of the public comments contend that the $9.99 price point was below the wholesale price Amazon paid for many e-books.

bookstores (the Publisher Defendants' preferred distributors), and that Amazon and other e-books retailers might enter the publishing industry and compete with the Publisher Defendants directly.[3] According to the Complaint, the Publisher Defendants determined that they needed to act collectively to force Amazon to abandon its discount pricing model.

In late 2009, the Publisher Defendants began discussions with Apple about the upcoming launch of Apple's iPad tablet device, scheduled to occur in January 2010, and whether Apple would sell e-books that could be read on the new device. Over the course of these discussions, the Publisher Defendants allegedly communicated competitively sensitive information to each other, and Apple allegedly helped transmit messages among them. According to the Government, the defendants soon realized that they shared an interest in limiting retail price competition for e-books. Apple did not want to compete with Amazon's $9.99 price point and the associated low margins on e-book sales; the Publisher Defendants did not want low e-books prices for the reasons addressed above. The defendants allegedly agreed, together, to switch to a new sales model for e-books known as the "agency model."

[3] In fact, Amazon announced in January 2010 that it would be entering the publishing industry.

Previously, the Publisher Defendants sold e-books using the "wholesale model," meaning they sold titles to retailers at a wholesale price or discount off the price listed on the physical edition of the book or "list price." Retailers were then free to sell titles to consumers at retail prices of their choosing. Under the agency model, by contrast, retailers never purchase titles from publishers; rather, publishers sell titles to consumers directly at prices set by the publishers with retailers serving as the publishers' "agents" and receiving a percentage of each sale as commission.

The Publisher Defendants signed functionally-identical agreements with Apple from January 24-26, 2010 (the "Agency Agreements"), just in time for Apple's January 27 media event announcing the iPad. The Agency Agreements shared three main features. Each agreement:

1. Established that the Publisher Defendant would sell e-books through Apple's iBookstore using the agency model, with Apple receiving a thirty percent commission on each sale;

2. Included a price-based "most-favored nation" ("MFN") clause, according to which the price for any e-book sold in Apple's iBookstore would be no higher than the price for that e-book at any other e-book retail store; if an e-book was sold for less at a competing store, the price at the iBookstore would drop automatically to match it; and

3. Established pricing tiers -- ostensibly price maximums but in reality actual prices -- that tied the price of newly released and bestselling e-books to the price of their corresponding hardcover print editions; these pricing tiers resulted in prices of $12.99 or $14.99 for most newly released and bestselling e-books.

According to the Complaint, the above features were intended to operate in tandem. Together, they ensured that the Publisher Defendants would sell their e-books exclusively through the agency model and that prices for their newly released and bestselling e-books would rise to the levels specified by the pricing tiers.[4] The Complaint further alleges that the Agency Agreements did not result from separate negotiations between Apple and each Publisher Defendant. Rather, the defendants agreed that each Publisher Defendant would sign an Agency Agreement with Apple only if a critical mass of other publishers did so.

By April 2010, when the iPad hit stores, the Publisher Defendants had reached agreements with all major e-books retailers to sell exclusively through the agency model. According to the Government, this effectively ended retail competition for the Publisher Defendants' e-books and resulted in higher prices: the average price for Publisher Defendants' e-books became fixed at the inflated levels specified in the Agency Agreements, and increased by over ten percent between the summer of 2009 and the summer of 2010.

The Government contends that the defendants' conspiracy and agreement constituted a per se violation of Section 1 of the

[4] Critics of the proposed Final Judgment contend that prices for many e-books actually went down under the agency model.

Sherman Act, 15 U.S.C. § 1, and that no allegations with respect to the relevant product market, geographic market, or market power are required. To the extent such allegations are necessary, however, the Complaint alleges that the relevant product market is trade e-books, the relevant geographic market is the United States, and the Publisher Defendants possess market power in the market for trade e-books.

II. The Proposed Final Judgment

The proposed Final Judgment imposes the following obligations on the Settling Defendants:

1. They must terminate their Agency Agreements with Apple within seven days after entry of the proposed Final Judgment. See Proposed Final Judgment § IV.A.

2. They must terminate those contracts with e-book retailers that contain either a) a restriction on the e-book retailer's ability to set the retail price of any e-book, or b) a "Price MFN," as defined in the proposed Final Judgment,[5] as soon as each contract permits starting thirty days after entry of the proposed Final Judgment. See id. at § IV.B.

3. For at least two years, they may not agree to any new contract with an e-book retailer that restricts the retailer's discretion over e-book pricing. See id. at § V.A-B.

4. For at least five years, they may not enter into an agreement with an e-book retailer that includes a Price MFN. See id. at § V.C.

[5] The proposed Final Judgment defines this term broadly so as to include not only MFNs related to retail price, as found in the Agency Agreements, but also MFNs related to wholesale prices and revenue shares or commissions. See id. at § II.M.

In addition, the proposed Final Judgment imposes prohibitions on retaliating against e-book retailers based on the retailer's e-book prices, see id. at § V.D., agreeing to raise or set e-book retail prices, see id. at § V.E, and conveying confidential or competitively sensitive information to other e-book publishers. See id. at § V.F. It also establishes notification and reporting requirements: each Settling Defendant must notify DOJ before forming or modifying a joint venture between it and another publisher related to e-books, see id. at § IV.C, must provide to DOJ each e-book agreement entered into with any e-book retailer on or after January 1, 2012, and must continue to provide those agreements to DOJ on a quarterly basis. See id. at § IV.D.

The proposed Final Judgment expressly permits certain activities. The Settling Defendants may compensate retailers for promotional services that they provide to publishers or consumers, see id. at § VI.A, and may enter into contracts with e-book retailers that prevent the retailer from selling a Settling Defendant's e-books at a cumulative loss over the course of one year. See id. at § VI.B. Finally, the proposed Final Judgment requires each Settling Defendant to appoint an Antitrust Compliance Officer who will engage in certain antitrust awareness, training, certification, auditing, remedial, and reporting functions. See id. at § VII.

III. Procedural History

The procedure governing acceptance of the proposed Final Judgment is set forth in Section 2(b) of the Tunney Act. 15 U.S.C. § 16(b)-(h). The Government and the Settling Defendants stipulated that the proposed Final Judgment may be entered after compliance with these Tunney Act requirements. Pursuant to this procedure, the Government filed the Complaint on April 11, 2012 and submitted the proposed Final Judgment and CIS, which invited public comment on the proposed Final Judgment, that same day. The Government published summaries of these documents and directions for submitting written comments in The New York Post and The Washington Post for seven days beginning on April 20. The Government also published these documents in the Federal Register on April 24, see United States v. Apple, et al., 77 Fed Reg. 24518, and on the Department of Justice Antitrust Division website, and furnished them to all persons requesting them.

The 60-day public comment period ended on June 25. 868 comments from the public were timely submitted. The Government filed its Response to the public comments (the "Response") on July 23, and moved for entry of the proposed Final Judgment on August 3. By Memorandum Opinion & Order of August 6, the Court permitted non-parties Barnes & Noble and the American Booksellers Association, Inc. ("ABA") to file a reply to the Government's Response as amici curiae. The motion for entry of

the proposed Final Judgment was fully submitted on August 22. By Order of August 28, the Court permitted non-parties the Authors Guild, Inc. (the "Authors Guild") and Bob Kohn ("Kohn") to file amicus briefs. The Authors Guild's submission was accepted on August 28; Kohn's submission was received on September 4. On September 5, the Court docketed and filed a supplemental letter from Simon Lipskar ("Lipskar"), which had been received on August 14. Pursuant to a June 25 Scheduling Order, a trial as to the non-settling defendants is to begin on June 3, 2013.

On August 29, 49 states and five territories submitted a motion for preliminary approval of settlements as to the Settling Defendants in a related parens patriae action for damages and injunctive relief on behalf of e-books consumers. The settlement in this related action would provide $70.28 million in compensation to consumers who purchased e-books from the Settling Defendants.

DISCUSSION

I. Standard of Review Under the Tunney Act

Prior to entry of a proposed final judgment brought by the Government in an antitrust case, the Tunney Act requires a court to determine that entry is "in the public interest." 15 U.S.C. § 16(e)(1); see also United States v. Int'l Bus. Mach. Corp.,

163 F.3d 737, 740 (2d Cir. 1998). Although the statute does not define the phrase "in the public interest," it directs courts to consider the following factors in making their public interest determination:

> (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). The Tunney Act allows, but does not require, the court to conduct an evidentiary hearing and to permit third parties to intervene. See 15 U.S.C. § 16(e)(2), (f).

Congress intended the Tunney Act to "prevent judicial rubber stamping of proposed Government consent decrees," but "the court's role in making the public interest determination is nonetheless limited." United States v. Keyspan Corp., 763 F. Supp. 2d 633, 637 (S.D.N.Y. 2011) (citation omitted); see also United States v. Microsoft Corp., 56 F.3d 1448, 1458, 1460 (D.C. Cir. 1995). When assessing a consent decree, a court should

consider the relationship between the complaint and the remedy secured, the decree's clarity, whether there are any foreseeable difficulties in implementation, and whether the decree might positively injure third parties. See Microsoft, 56 F.3d at 1458, 1461-62. The role of the court is not to determine whether the decree results in the array of rights and liabilities "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 (citation omitted). In making this determination, the court "is not permitted to reject the proposed remedies merely because the court believes other remedies are preferable." Id. Rather, the court should be "deferential to the government's predictions as to the effect of the proposed remedies." Microsoft, 56 F.3d at 1461. As such, the relevant inquiry is whether the Government has established an ample "factual foundation for [its] decisions such that its conclusions regarding the proposed settlement are reasonable." Keyspan, 763 F. Supp. 2d at 637-38 (citation omitted).

In most cases, the court is not permitted to "reach beyond the complaint to evaluate claims that the government did not make and to inquire as to why they were not made." Microsoft, 56 F.3d at 1459; see also United States v. BNS Inc., 858 F.2d 456, 462-63 (9th Cir. 1988) ("[T]he APPA does not authorize a

district court to base its public interest determination on antitrust concerns in markets other than those alleged in the government's complaint."). Pursuant to certain amendments to the Tunney Act enacted in 2004, however, a court may reject a decree due to antitrust matters outside the scope of the complaint if, and only if, the complaint underlying the decree is drafted so narrowly such that its entry would appear "to make a mockery of judicial power." United States v. SBC Commc'ns, Inc., 489 F. Supp. 2d 1, 14 (D.D.C. 2007); see also Microsoft, 56 F. 3d at 1462.[6] Regardless, the court must "give due respect to the government's perception of its case." Keyspan, 763 F. Supp. 2d at 638 (citation omitted); cf. BNS, 858 F.2d at 466

[6] The 2004 amendments to the Tunney Act substituted the word "shall" for "may" in instructing courts to consider the enumerated factors in making their public interest determinations, added and amended certain of these factors, and included a set of Congressional findings. See Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. No. 108-237, § 221(b)(2) (codified at 15 U.S.C. § 16). In its findings, Congress stated as follows:

> [T]he purpose of the Tunney Act was to ensure that the entry of antitrust consent judgments is in the public interest; and [] it would misconstrue the meaning and Congressional intent in enacting the Tunney Act to limit the discretion of district courts to review antitrust consent judgments solely to determining whether entry of those consent judgments would make a "mockery of the judicial function". [] The purpose of this section is to effectuate the original Congressional intent in enacting the Tunney Act and to ensure that United States settlements of civil antitrust suits are in the public interest.

Id. § 221(a)(1).

("[P]rosecutorial functions vested solely in the executive branch could be undermined by the improper use of the APPA as an antitrust oversight provision.").

Entry of the proposed Final Judgment is appropriate pursuant to the standard outlined above. The proposed judgment secures a remedy that is closely related to the violations alleged in the Complaint. Whereas the Complaint alleges unlawful communications and industry collusion that gave rise to a series of agreements designed to ensure defendants' use of agency pricing for e-books, the proposed Final Judgment disallows such communications and unravels both the Agency Agreements and agreements with other e-book retailers implementing the broader shift to agency pricing. By effectively disallowing the Settling Defendants from using the agency model for at least two years,[7] subject to limited exceptions, and from using Price MFNs for at least five, the proposed Final Judgment appears reasonably calculated to restore retail price competition to the market for trade e-books, to return prices to their competitive level, and to benefit e-books

[7] The Government and critics of the settlement dispute whether the decree effectively disallows agency pricing and therefore dictates a particular business model. The Court states no opinion on this issue as it is largely semantic and irrelevant to the disposition of this matter. The terms of the decree speak for themselves: they disallow restrictions on retail discounting for two years subject to certain limited exceptions.

consumers and the public generally, at least as to the competitive harms alleged in the Complaint.

The two year limitation on retail price restraints and the five year limitation on Price MFNs appear wholly appropriate given the Settling Defendants' alleged abuse of such provisions in the Agency Agreements, the Government's recognition that such terms are not intrinsically unlawful, and the nascent state of competition in the e-books industry. The Government reasonably describes these time-limited provisions as providing a "cooling-off period" for the e-books industry that will allow it to return to a competitive state free from the impact of defendants' collusive behavior. The time limits on these provisions suggest that they will not unduly dictate the ultimate contours of competition within the e-books industry as it develops over time.

The decree clearly outlines the parties' rights and obligations, and none of its terms are overly ambiguous or suggest any foreseeable difficulties in implementation. The decree contains appropriate enforcement provisions; it also directs the Court to retain jurisdiction over this action such that the parties may apply for modification of the decree if necessary or appropriate. Although the Government reports that it considered alternative remedies such as proceeding to trial or implementing proposals that would have provided less relief

than is contained in the proposed Final Judgment, the Government concluded, reasonably, that entry of the proposed Final Judgment would more quickly restore retail price competition to consumers than a trial.

The Complaint and CIS provide a sufficient factual foundation as to the existence of a conspiracy to raise, fix, and stabilize the retail price for newly-released and bestselling trade e-books, to end retail price competition among trade e-books retailers, and to limit retail price competition among the Publisher Defendants. Although the Government did not submit any economic studies to support its allegations, such studies are unnecessary. The Complaint alleges a straightforward, horizontal price-fixing conspiracy, which is per se unlawful under the Sherman Act. See Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 893 (2007). The Complaint also details the defendants' public statements, conversations, and meetings as evidence of the existence of the conspiracy. The decree is directed narrowly towards undoing the price-fixing conspiracy, ensuring that price-fixing does not immediately reemerge, and ensuring compliance. Based on the factual allegations in the Complaint and CIS, it is reasonable to conclude that these remedies will result in a return to the pre-conspiracy status quo. In this straightforward price-fixing case, no further showing is required.

It is not necessary to hold an evidentiary hearing before approving the decree. Given the voluminous submissions from the public and the non-settling parties, which describe and debate the nature of the alleged collusion and the wisdom and likely impact of settlement terms in great detail, as well as the detailed factual allegations in the Complaint, the Court is well-equipped to rule on these matters. A hearing would serve only to delay the proceedings unnecessarily.

II. The Public Comments and Opposition Briefs

The Public Comments on the proposed Final Judgment were both voluminous and overwhelmingly negative. More than 90 percent of the 868 comments opposed entry of the proposed Final Judgment. Some comments were filled with extreme statements, blaming every evil to befall publishing on Amazon's $9.99 price for newly released and bestselling e-books, and crediting every positive event -- including entry of new competitors in the market for e-readers -- on the advent of agency pricing. Other comments were very thoughtful. They do not condone collusive price-fixing but seek to predict whether the consumer will be harmed or benefited from a suspension of the agency model for a two year period.

Many comments were submitted by third parties alleging that they would suffer significant harm if the judgment is entered. Other comments caution that the decree will positively harm e-

books consumers, or damage the marketplace of ideas and information. Comments were received from a variety of interested individuals, companies, and industry groups, including booksellers, authors, literary agents, publishing consultants, a consumer activist group, and consumers themselves. In addition, defendants Penguin, MacMillan, and Apple, as well as non-parties Barnes & Noble, the ABA, the Authors Guild, and RoyaltyShare, Inc. Chairman and CEO Bob Kohn ("Kohn") submitted briefs in opposition to entry of the proposed Final Judgment after the close of the 60-day comment period.

In cases where third parties allege that they will suffer harm, at least one circuit has cautioned that a court "might well hesitate before assuming that the decree is appropriate." Microsoft, 56 F.3d at 1462. Given the sheer volume of comments opposing entry of the proposed Final Judgment and the significant harm that these comments fear may result, hesitation is clearly appropriate in this case. And there can be no denying the importance of books and authors in the quest for human knowledge and creative expression, and in supporting a free and prosperous society. To quote Emily Dickinson:

> There is no Frigate like a Book
> To take us Lands away,
> Nor any Coursers like a Page
> Of prancing Poetry --
> This Traverse may the poorest take
> Without oppress of Toll --
> How frugal is the Chariot

That bears a Human soul.

Emily Dickinson, "There is no Frigate like a Book (1263)," The Complete Poems of Emily Dickinson (Thomas H. Johnson ed., 1976), available at http://www.poets.org/viewmedia.php/prmMID/19730. Clearly, this is no ordinary Tunney Act proceeding. Congress's purpose in enacting the Tunney Act to "prevent judicial rubber stamping of proposed Government consent decrees" seems particularly apropos in these circumstances. Keyspan, 763 F. Supp. 2d at 637 (citation omitted).

It is not practical, however, to address every argument raised in the public comments and opposition briefs. Broadly speaking, the comments in favor of the decree mirrored arguments presented by the Government. They argued that the proposed Final Judgment will promote retail competition and benefit consumers by allowing for lower, competitive e-books prices. A number of comments further argued that the decree will benefit industry stakeholders, like authors, by increasing their royalty payments and facilitating self-publishing. Some comments claimed that the decree would be more effective if its time-limited provisions lasted longer, but nonetheless supported its entry.

Overall, the negative comments leveled four categories of criticism at the proposed Final Judgment. First, they expressed concern that the proposed Final Judgment would actively harm

third-party industry stakeholders, such as brick-and-mortar bookstores, e-book retailers, independent publishing houses, and authors. Second, they argued that the decree itself is unworkable, goes too far in disallowing practices held to be legal under the antitrust laws, and involves DOJ in "regulation" of the e-books market. Third, they questioned whether the Government has established a sufficient factual basis for its conclusions regarding the competitive impact of the decree. Fourth, they alleged that defendants' collusive behavior had substantial pro-competitive effects through, among other things, limiting the negative impact of Amazon's monopoly; these comments contend that the decree is not in the public interest because it will facilitate retrenchment of Amazon's monopoly practices. These four categories of criticism will be addressed in turn.

A. Harm to Third Parties

Many comments suggest that the proposed Final Judgment will enact substantial and irreversible harm on third-party industry stakeholders. For example, Barnes & Noble claims that the decree will declare "null and void" its agency contracts with the Settling Defendants and reduce its margins on e-books sales. The ABA similarly claims that the decree will harm ABA member booksellers by abrogating their e-books agency contracts, including those with Google, Inc. ("Google"), which were

negotiated after April 2012. Barnes & Noble, Books-a-Million, and the ABA, among others, fear that the decree will decimate brick-and-mortar and specialty bookstores by permitting Amazon to return to its discount pricing strategy. The broader fear is that a loss in diversity of physical bookstores will damage the entire "literary ecosystem," as the Authors Guild terms it, and decrease the diversity of titles and authors to which consumers are exposed.

Many comments further note that brick-and-mortar bookstores effectively provide free advertising or promotional services to online retailers like Amazon by serving as physical showrooms for books, and that Amazon often avoids paying state sales tax. The implication is that agency pricing provided brick-and-mortar bookstores with much-needed compensation for these services and is therefore justified.

To the extent harm to industry stakeholders like bookstores will result from the elimination of anticompetitive, collusive practices and a return to competition in the e-books retail market, this is not the type of harm that the Sherman Act is designed to prevent. "The purpose of the Sherman Act is not to protect businesses from the working of the market; it is to protect the public from the failure of the market." Int'l Bus. Machines, 163 F.3d at 741-42. If unfettered e-books retail competition will add substantially to the competitive pressures

on physical bookstores, or if smaller e-book retailers are unable to compete with Amazon on price, these are not reasons to decline to enter the proposed Final Judgment. The text of the Tunney Act directs courts to consider the impact of a consent decree "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"; it does not require the Court to protect special interests from the impact of the decree. 15 U.S.C. § 16(e)(1). In this case, the "individuals alleging specific injury from the violations set forth in the complaint" are e-books consumers, not third-party stakeholders like brick-and-mortar bookstores. And although the birth of a new industry is always unsettling, there is a limited ability for anyone to foresee how the market will evolve. What is clear, however, is the need for industry players to play by the antitrust rules when confronted with new market forces. It is not the place of the Court to protect these bookstores and other stakeholders from the vicissitudes of a competitive market.

Moreover, the consent decree does not declare "void" the Settling Defendants' contracts with Barnes & Noble, or ABA member booksellers' contracts with Google or anyone else. Rather, the decree requires the Setting Defendants to terminate contracts with e-book retailers that contain retail price

restrictions and Price MFNs according to the termination provisions of the relevant contracts themselves. See Proposed Final Judgment § IV.B. In short, the decree merely enjoins the Settling Defendants to act in accordance with their bargained-for contractual rights.[8] And the decree in no way impacts contracts between publishers and other e-book retailers besides the Settling Defendants, such as Google.

As to Amazon's alleged free-riding, the decree expressly permits the Settling Defendants to compensate brick-and-mortar bookstores directly for promotional services that they provide to publishers or consumers. See id. at § VI.A. The Settling Defendants should be willing to pay for these services if they truly value them. Regardless, Amazon's alleged free-riding in no way justifies subsidizing brick-and-mortar bookstores by virtue of an e-books price-fixing conspiracy. See United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 221-22 (1940) ("[Congress] has no more allowed genuine or fancied competitive abuses as a legal justification for [price-fixing] schemes than it has the good intentions of the members of the combination."). If such subsidies are critical to publishers, then it is up to them to provide the subsidies in a lawful manner. In the meantime, under the Sherman Act all industries are subject to "a

[8] This is not the case as to the Settling Defendants' Agency Agreements with Apple. Apple's contractual rights are discussed in detail below.

legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services." Nat'l Soc. of Prof'l Engineers v. U. S., 435 U.S. 679, 695 (1978).[9]

B. Breadth and Functionality of the Decree

Many comments suggest that the consent decree is overbroad and cannot be implemented effectively. The central objection is that the decree seeks not merely to redress the violations alleged in the Complaint, but to reshape the e-books market as a whole by restricting certain practices that are wholly legal and proper, and by improperly involving DOJ in the "regulation" of a new and growing industry. Barnes & Noble, for example, notes that a number of elements in the consent decree go beyond the remedies sought in the Complaint, and suggests that the decree should simply enjoin collusion and punish the alleged colluders rather than compelling the Settling Defendants to terminate their contracts with third-party retailers. Apple argues that the decree should do no more than preclude the Settling Defendants from coercing retailers to adopt the agency model, since this is what the Complaint alleges that the defendants did

[9] Moreover, none of the public comments explain why the evils of Amazon's alleged free-riding are limited to e-books. It appears that consumers can just as easily find a title through browsing in a bookstore and then buy a physical book online from Amazon as they can browse in a bookstore and then purchase an e-book from the Kindle Store. The same is true for the allegations as to sales tax avoidance.

as to Amazon. A variety of comments note that neither agency agreements nor vertical price restraints are necessarily disallowed under the antitrust laws.

On this latter point of law, at least, these comments are undoubtedly correct. See Leegin, 551 U.S. at 882 (holding vertical price restraints subject to the rule of reason); United States v. Gen. Elec. Co., 272 U.S. 476, 488 (1926) (genuine contracts of agency are not antitrust violations). But this is beside the point. The Complaint alleges not merely that the defendants signed contracts of agency and utilized Price MFNs, but that they used these tools together in furtherance of a horizontal price-fixing conspiracy.

Moreover, the Tunney Act does not require a one-to-one correspondence between the relief requested in the Complaint and the elements of a decree. A court "may not require that the remedies perfectly match the alleged violations." SBC Commc'ns, 489 F. Supp. 2d at 17. Although elements of a Sherman Act decree may "involve[] the judiciary so deeply in the daily operation of [a] nation-wide business and promise[] such dubious benefits that [they] should not be undertaken," United States v. Paramount Pictures, 334 U.S. 131, 162 (1948), a decree may nonetheless prohibit acts that are "entirely proper when viewed alone." United States v. U.S. Gypsum Co., 340 U.S. 76, 89 (1950). Relief "may range broadly through practices connected

with acts actually found to be illegal." Id.; see also Nat'l Soc. of Prof'l Engineers, 435 U.S. at 697 ("Having found the [defendant] guilty of a violation of the Sherman Act, the District Court was empowered to fashion appropriate restraints on the [defendant's] future activities both to avoid a recurrence of the violation and to eliminate its consequences."); Paramount Pictures, 334 U.S. at 149 (upholding dissolution of agreements used in collusion and injunction against future arrangements "of that character").[10]

Here, the Complaint makes out a conspiracy claim based on the combination of the defendants' collusive behavior, the use of Price MFNs, and the coordinated switch to the agency model. It does not attack any one of these elements in isolation. The consent decree therefore properly restricts defendants' activities with respect to each of these elements of the conspiracy, with an eye to ending the price-fixing and preventing its recurrence. See Gypsum, 340 U.S. at 89 ("The conspirators should, so far as practicable, be denied future

[10] Although U.S. Gypsum Co., Nat'l Soc. of Prof'l Engineers, and Paramount Pictures involve decrees entered after trial, a court generally has broader discretion to approve a proposed Final Judgment resulting from a settlement among the parties than it has in fashioning a remedy on its own. See United States v. Am. Tel. & Tel. Co., 552 F. Supp. 131, 151 (D.D.C. 1982) ("[A] proposed decree must be approved even if it falls short 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." (citation omitted)).

benefits from their forbidden conduct."). The decree is strictly limited in time (to two or five years for bans on retail discounting restrictions and Price MFNs, respectively) and by party (to the Settling Defendants).[11] It cannot be fairly characterized as either overbroad or over-"regulatory."[12]

A number of comments, such as Barnes & Nobles', Apple's, and the Independent Book Publishers', claim that section VI.B of the proposed Final Judgment is unenforceable. As discussed above, this provision permits the Settling Defendants to enter into contracts with e-book retailers that prevent the retailer from selling a Settling Defendant's e-books at a cumulative loss

[11] Despite the limited nature of the Government's requested relief, there can be no denying the true passion reflected in many of the public comments opposing the decree's two-year ban on retail discounting restrictions. It may be that unspoken by all parties, including the Government, is an acknowledgment that no single publisher will likely have either the will or the ability to maintain agency pricing absent a critical mass of other publishers doing the same. See In re Elec. Books Antitrust Litig., 11 MD 2293 DLC, 2012 WL 1946759, at *12 (S.D.N.Y. May 15, 2012) ("[F]rom the publishers' perspective, the switch to the agency model had the hallmarks of a classic collective action problem."). In other words, even through the relief in the decree is both well-tethered to the Complaint and narrow, it may nonetheless effectively end agency pricing for e-books.

[12] The National Association of College Stores ("NACS") expressed concern that, even though the Complaint defines the relevant market as "trade e-books," the decree does not limit its remedies to this subset of the e-books market. NACS postulates that the decree could therefore impact the market for "e-textbooks," and harm textbook publishers and retailers. As the Government points out, however, none of the Settling Defendants sell e-textbooks, and the Complaint itself makes it clear that the term "e-books" in the context of this case encompasses trade e-books only.

over the course of one year. See Proposed Final Judgment, at § VI.B. Apple further argues that the provision will unfairly benefit Amazon, because Amazon's larger annual sales means that it can engage in more discounting. Apple suggests that the decree should instead limit discounting on a per unit basis.

The Government notes that it included this section in the proposed Final Judgment at the behest of the Settling Defendants, who were concerned about Amazon's discounting practices. The provision is entirely voluntary. Accordingly, if any Settling Defendant wishes to take advantage of the provision it can do so by negotiating the requisite contractual terms with e-books retailers, including provisions for monitoring and enforcement. As such, this section provides no reason to deny entry of the decree.

C. Factual Basis for the Government's Conclusions

Many of the comments and briefs contend that the Government has not established a sufficient factual basis for its conclusions regarding the decree. Specifically, they note that the Government has not presented any data showing that the defendants' alleged conspiracy actually resulted in higher e-books prices. Some suggest that the Complaint and CIS obfuscate the distinction between prices for newly-released and bestselling e-books, and average prices for e-books as a whole. While the former may have increased due to adoption of the

agency model, so the argument goes, the latter might have stayed the same or decreased because Amazon charged more than $9.99 for many e-books under the wholesale model.

Barnes & Noble submits data that it claims show a decrease in its average e-books prices since adoption of the agency model. Lipskar, the President of Writers House LLC, a literary agency, tries to make a similar showing with respect to Amazon's average e-books using publicly available data. The ABA avers that independent booksellers reported a two- to five-dollar decrease in the average prices they paid per e-book unit following adoption of the agency model. Penguin submits data showing that Amazon priced many new release Penguin e-books well above $9.99 under the wholesale model, and the price ceilings in the Agency Agreements resulted in lower prices for many titles.[13] And a number of other booksellers, such Books-a-Million and the Harvard Bookstore, claim that their e-books prices have decreased since the advent of agency pricing.

[13] The Government argues that the data from Barnes & Noble and others is incomplete and, in any case, suggests either a decline in a broader trend towards decreasing prices since the introduction of agency pricing, or price increases. The Government also presents an analysis of Amazon's average retail price for all Penguin e-books and new release Penguin e-books in the months immediately before and after introduction of the agency model, weighted by units sold. The Government contends that this data shows an increase in Amazon's average price for Penguin e-books.

The above critiques misconstrue both what the Government has stated and what it is required to state. The Tunney Act requires that the Government provide the court with a CIS and proposed consent judgment, as well as "any other materials and documents which the United States considered determinative in formulating" the proposed decree. 15 U.S.C. § 16(b). The Second Circuit has clarified that this provision requires submission of only a "fairly narrow" subset of the documents considered by the Government:

> The use of the word "determinative" in Section 16(b) rules out the claim to all the investigation and settlement material, and confines § 16(b) at the most to documents that are either "smoking guns" or the exculpatory opposite. Indeed, were the law otherwise, "determinative" would come to mean "relevant."

United States v. Bleznak, 153 F.3d 16, 20 (2d Cir. 1998) (citation omitted). In evaluating the sufficiency of the Government's submissions, it is necessary only that the submissions provide an ample "factual foundation for the government's decisions such that its conclusions regarding the proposed settlement are reasonable." Keyspan, 763 F. Supp. 2d at 637-38 (citation omitted).

The Government has more than met this minimal standard. First, the Government has put forward detailed allegations as to the existence of a conspiracy to counter Amazon's discount pricing strategy, or "the $9.99 problem." Second, it has

described the contents of the Agency Agreements, which are not in dispute, explained how the pricing tiers in these agreements determined actual prices for many newly-released and bestselling e-books, and demonstrated how the agreements' pricing tiers and MFN provisions forced a broader switch to agency pricing. Third, regardless of what happened to average e-books prices, it is undisputed that the Agency Agreements disallowed retail price discounting. After defendants' coordinated switch to agency pricing, a consumer could not find Publisher Defendants' newly-released and bestselling e-books for $9.99 at any retailer. Fourth and finally, the Government has further explained how the proposed Final Judgment will end price-fixing and prevent its recurrence by limiting the Settling Defendants' ability to collude, share information, and use retail price restrictions and Price MFNs in contracts with e-books retailers. Overall, these detailed allegations and explanations provide ample factual foundation for the Government's decisions regarding the proposed Final Judgment.

D. Competitive Effects of Defendants' Alleged Collusion

Perhaps the most forceful species of criticism leveled at the decree is that it will have manifestly anticompetitive effects. The comments make a variety of arguments along these lines; the gist of their critique, however, is that Amazon was a monopolist engaged in predatory pricing and other

anticompetitive practices, defendants' use of the agency model reduced Amazon's market share and capacity to engage in these practices, and the consent decree will encourage a return to the anticompetitive status quo.

The comments claim that Amazon was pricing e-books below cost in order to cement its monopoly, and would eventually seek to reap the rewards of this monopoly by inflating prices and retarding innovation. MacMillan, for one, claims that Amazon's below-cost pricing foreclosed any practical challenge to its 90 percent monopoly, and constituted the "willful maintenance" of a monopoly in violation of the Sherman Act. See United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966) ("The offense of monopoly under § 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident."). Apple further claims that Amazon retaliates against publishers that try to take advantage of Apple's more advanced e-books platform. And the Authors Guild contends that Amazon often removes the online "buy" buttons for titles from publishers that do not agree to Amazon's preconceived contract terms. A number of comments complain about Amazon's exclusive distribution agreements with authors and broad contractual MFN clauses.

The comments further contend that agency pricing in the e-books industry is pro-competitive. Because the publishing industry is less concentrated than the e-books retail industry, situating price-setting authority with the publishers supposedly encourages competition. Nothing in the Agency Agreements prevents the Publisher Defendants from competing with each other on price and, according to a number of comments, the evidence suggests that the Publisher Defendants did in fact engage in rigorous price competition after switching to the agency model.

Moreover, it is undisputed that Amazon's market share in e-books decreased from 90 to 60 percent in the two years following the introduction of agency pricing. The comments variously argue that during this period the availability and quality of e-books increased, retail and wholesale e-books prices decreased, and a number of new competitors, including industry giants like Apple, Google, and Barnes & Noble, as well as hundreds of independent bookstores, either entered the e-books market or were able to compete more effectively. The CEO of e-books start-up Zola Books, for example, argues that the adoption of agency pricing allowed him to create his new company. "[W]hen retailers could no longer lose money on every single e-book sold in order to gain market share," he writes, "we believed a new retailer could get a foothold in the market based on the quality of its product." Many comments contend that the past two years

have seen unprecedented innovation in the market for e-readers and tablets, resulting in rapidly improving devices and rapidly decreasing prices. In short, the comments contend that competition in the e-books industry is alive and well, in no small part due to the defendants' allegedly illegal cartel. Even if such a cartel existed, its main accomplishment was to allow industry participants to compete on a level playing field.

In one of the more detailed public comments, Kohn offers some economic theory in support of the above arguments and observations. Kohn contends that the Government has defined the relevant market improperly. Unlike physical books, e-books cannot be utilized absent additional components like an e-reader and an internet-based platform for purchasing and downloading titles. It therefore makes no sense to define the market as simply "trade e-books." E-books are inextricably linked to e-readers and internet-based distribution platforms; the market must therefore encompass the entire "e-books system."

According to Kohn, the "e-books system" market, like the markets for many emerging technologies, is characterized by network externalities. This means to him that each additional user of a given e-books system confers benefits on existing users of that system. The more users of a system, the more each user can be assured that the system will continue to support a large number of programs or "apps" and a large variety of e-book

titles. Markets characterized by network externalities tend to tip towards a single, dominant firm, resulting in monopoly. And once a monopolist establishes itself in such a market, such as Microsoft in the computer operating systems market and Apple in the digital music market, the result is inflated prices and retarded innovation.

Kohn further argues that because it is costly to switch from one e-books system to another, consumers expectations about the future of a given e-books system will tend to drive purchasing decisions. For example, the owner of a Kindle is unable simply to purchase e-books through the iBookstore if prices at the iBookstore are lower; to do so she must first purchase an iPad. Before investing in a given e-books system, then, consumers will try to anticipate the likely future success of the system vis-à-vis its competitors. This dynamic means that it may be difficult to displace a dominant firm in the e-books system market once it establishes a monopoly.

The upshot of all of this is that Kohn's theory suggests Amazon had enormous incentives to try to achieve a monopoly as the e-books market emerged in the late 2000s; below cost, predatory pricing was supposedly one of its more effective strategies.[14] The Agency Agreements prevented Amazon from taking

[14] Kohn also argues that Amazon exercised "monopsony" power as the dominant wholesale purchaser of e-books, and did or would

advantage of this critical anticompetitive tool, and returning discounting authority to Amazon will help it to reestablish its monopoly power. Kohn cites Broadcast Music, Inc. v. Columbia Broadcasting, 441 U.S. 1 (1979), for the proposition that horizontal price-fixing is lawful if it has a "redeeming virtue." Id. at 9.

In response to these arguments by Kohn and others, DOJ describes as "speculative" the fear that Amazon might use its monopoly power to raise prices in the future. DOJ claims that it closely examined allegations that Amazon engaged in predatory pricing, and found persuasive evidence lacking. It further notes that Barnes & Noble and Google had either entered or planned to enter the e-books market well before the Agency Agreements were signed. Similarly, Barnes & Noble was able to attract a $300 million investment from Microsoft in order to compete with Amazon even after the filing of the proposed Final Judgment shed doubt on the future of e-books agency pricing, and Google recently announced a new investment in a tablet computer intended to promote its e-book sales.

The core of the Government's claim is that it is impossible to draw a causal connection between investments by technology giants like Apple, Microsoft, Google, and Sony in the e-books

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have used this power to demand below-market prices, and that supply and demand do not function normally in the e-books market because of illegal downloading.

and e-reader markets and the introduction of the agency model. These investments, which are the true cause of the decline in Amazon's market share, would almost certainly have happened regardless. What cannot be disputed is that the Agency Agreements ended retail price discounting and eliminated potential pricing innovations, such as "all-you-can-read" subscription services, book club pricing specials, and rewards programs.

The comments from Kohn and others are insufficient to compel denial of entry of the proposed Final Judgment. Firstly, Broadcast Music merely held that the issuance of certain "blanket licenses" of copyrighted material in the recorded music industry did not constitute "price fixing" under the Sherman Act, and was therefore not per se unlawful, in part due to the "unique market conditions for performance rights to recorded music." Broadcast Music, 441 U.S. at 15 (citation omitted). It did not provide a blanket exception to the per se rule against horizontal price fixing. See id. at 8 (noting that "certain agreements or practices are so plainly anticompetitive and so often lack any redeeming virtue that they are conclusively presumed illegal" (citation omitted)).

Second, the Complaint asserts that Amazon's e-books business was "consistently profitable." Moreover, to hold a competitor liable for predatory pricing under the Sherman Act,

one must prove more than simply pricing "below an appropriate measure of . . . costs." Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 222 (1993). There must also be a "dangerous probability" that the alleged predator will "recoup[] its investment in below-cost prices" in the future. Id. at 224. None of the comments demonstrate that either condition for predatory pricing by Amazon existed or will likely exist. Indeed, while the comments complain that Amazon's $9.99 price for newly-released and bestselling e-books was "predatory," none of them attempts to show that Amazon's e-book prices as a whole were below its marginal costs. See Ne. Tel. Co. v. Am. Tel. & Tel. Co., 651 F.2d 76, 88 (2d Cir. 1981) ("[P]rices below reasonably anticipated marginal cost will be presumed predatory.").

Third, even if Amazon was engaged in predatory pricing, this is no excuse for unlawful price-fixing. Congress "has not permitted the age-old cry of ruinous competition and competitive evils to be a defense to price-fixing conspiracies." Socony-Vacuum Oil Co., 310 U.S. at 221. The familiar mantra regarding "two wrongs" would seem to offer guidance in these circumstances.

Fourth, the Government chose to address its Complaint to the trade e-books market, not the e-reader market or the "e-books system" market. In light of the enormous economic

complexities involved, this choice appears eminently reasonable. As Writers House President Lipskar points out, "Ultimately . . . we can't possibly know what would have happened had agency not been implemented. We can conjecture. We can disagree." Although Lipskar argues that this lack of certainty disfavors entry of the decree, in fact it indicates the soundness of DOJ's decision to target a more comprehensible market.

Lastly, the Complaint is not drafted so narrowly such that entry of the decree would appear "to make a mockery of judicial power." SBC Commc'ns, Inc., 489 F. Supp. 2d at 14. The Court will therefore limit itself to addressing antitrust matters within the scope of the Complaint, which in this case means an inquiry into the impact of the proposed Final Judgment on the market for trade e-books only. The additional antitrust concerns raised in the comments are simply not susceptible to judicial review under the Tunney Act. And within this more limited market, the Government has more than established a "factual basis" for its decisions and judgment that the decree will enhance competition.

III. Apple's Submissions

Apple makes two unique arguments that merit additional attention. First, Apple claims that the decree unfairly singles out Apple by requiring termination of the Settling Defendants' Agency Agreements within seven days. Apple notes that the

Settling Defendants' agency contracts with other e-book retailers must only be terminated as soon as each contract permits, starting thirty days after entry of the proposed Final Judgment. See Proposed Final Judgment, at § IV.B. Apple points out that it has admitted no wrongdoing, and contends that due process requires it to be treated the same as its competitors. Apple cites to Local No. 93, Int'l Ass'n of Firefighters, AFL-CIO C.L.C. v. City of Cleveland, 478 U.S. 501 (1986), for the familiar proposition that "a court may not enter a consent decree that imposes obligations on a party that did not consent to the decree." Id. at 529.

This argument is without merit. The Government "need not prove its underlying allegations in a Tunney Act proceeding." SBC Commc'ns, 489 F. Supp. 2d at 20. And the decree imposes no obligations on Apple. Rather, the decree compels the Settling Defendants to terminate their Agency Agreements with Apple. Cf. Local No. 93, Int'l Ass'n of Firefighters, 478 U.S. at 529-30 (intervenor may not prevent entry of decree that "does not bind [it] to do or not to do anything").

In addition, it is commonsensical that the decree would single out the Agency Agreements for early termination. The Complaint alleges that these agreements with Apple were critical to initiating the Publisher Defendants' broader switch to agency pricing. The Government's theory is that the Agency Agreements

ensured that the Publisher Defendants' subsequent contracts with all e-books retailers would embrace the agency model. Without prior termination of the Agency Agreements, then, renegotiation of these subsequent contracts would be fruitless.

Lastly, Apple does not dispute that the relevant Agency Agreements allow for termination by the Settling Defendants after thirty days notice. Accordingly, the sum total of Apple's complaint is that it bargained for twenty-three days more notice of termination than what is provided by the decree. In the meantime, the consent decree was first filed with the Court on April 11, 2012, and the Government's motion for entry of the proposed Final Judgment was brought on August 3. Apple has therefore already had roughly five months' or more than one months' notice of the Settling Defendants' intention to terminate the Agency Agreements. Accordingly, any imposition on Apple's contractual rights is de minimis and provides no reason to deny entry of the decree. Cf. United States v. Graftech Int'l Ltd., No. 1: 10-cv-02039, 2011 WL 1566781, at *1 (D.D.C. Mar. 24, 2011) (entering consent decree that requires modification of contract with a non-party to the decree).

Apple's second argument, which is echoed by MacMillan, is that the Court should wait to enter the decree until after the June 2013 trial resolves the relevant factual issues. Apple notes that it agreed to an accelerated discovery schedule and

early trial date, and argues that this delay would therefore not represent a significant imposition on the Settling Defendant or the Government.

Because the decree does not apply to all the defendants, the proposed Final Judgment may be entered before trial "only if the court expressly determines that there is no just reason for delay" pursuant to Fed. R. Civ. P. 54(b). This determination is left "to the sound discretion of the district court," taking into account "judicial administrative interests as well as the equities involved." Curtiss-Wright Corp. v. Gen. Elec. Co., 446 U.S. 1, 8 (1980). The Court should act to assure that application of the rule "preserves the historic federal policy against piecemeal appeals." Id. (citation omitted).

Apple claims that it will appeal any opinion entering the decree, and that entry would therefore result in unwarranted "piecemeal appeals." Apple further claims that it will have standing to appeal because it will suffer "formal legal prejudice" as a result of entry of the decree. See Zupnick v. Fogel, 989 F.2d 93, 98 (2d Cir. 1993) (citation omitted).

Even if Apple has standing to pursue an appeal, an issue which this Opinion does not decide, the interests of judicial administration and the equities involved weigh heavily in favor of immediate entry of judgment. The Settling Defendants have elected to settle this dispute and save themselves the expense

of engaging in discovery. They are entitled to the benefits of that choice and the certainty of a final judgment. Moreover, the orderly, efficient management of discovery requires that the Settling Defendants have a defined role in the ongoing litigation. Apple's proposal would leave them in a state of legal limbo, forced to participate in discovery and defend this action at trial for fear that their settlement may be thrown out. Most importantly, the Government alleges substantial ongoing harm as a result of the Settling Defendants' illegal activity. E-books consumers should not be forced to wait until after the June 2013 trial to experience the significant anticipated benefits of the decree.

CONCLUSION

The Government's August 3, 2012 motion for entry of the proposed Final Judgment is granted.

SO ORDERED:

Dated: New York, New York
September 5, 2012

DENISE COTE
United States District Judge

This is Exhibit "D" referred to in the
Affidavit of Marilyn Nelson
sworn before me, this 21st day of March, 2017

A Commissioner for Taking Affidavits

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, Plaintiff, v. APPLE, INC., *et al.*, Defendants.	Civil Action No. 1:12-CV-2826 (DLC) ECF Case

~~PROPOSED~~ FINAL JUDGMENT AS TO DEFENDANTS THE PENGUIN GROUP, A DIVISION OF PEARSON PLC, AND PENGUIN GROUP (USA), INC.

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 Penguin, 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 Penguin 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, Penguin agrees to be bound by the provisions of this Final Judgment pending its approval by the Court;

AND WHEREAS, Plaintiff requires Penguin 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, Penguin has represented to the United States that the actions and conduct restrictions can and will be undertaken and that it 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 Penguin, it is ORDERED, ADJUDGED, AND DECREED:

I. JURISDICTION

This Court has jurisdiction over the subject matter of this action and over Penguin. The Complaint states a claim upon which relief may be granted against Penguin 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 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; (2) The Penguin Group, a division of U.K. corporation Pearson plc with its principal place of business in London, England; (3) The Penguin Publishing Company Ltd, a company registered in England and Wales with its principal place of business in London, England; and (4) Dorling Kindersley Holdings Limited, a company registered in England and Wales with its principal place of business in London, England; and each of their respective successors and assigns (expressly including Penguin Random House and any similar joint venture between Penguin and Random House Inc.); each of their respective subsidiaries, divisions, groups, partnerships; and each of their respective directors, officers, managers, agents,

and employees. Where Section IV.A, IV.B, IV.D, or VII imposes an obligation on Penguin to engage in certain conduct by either a date certain or by a specified day after entry of this Final Judgment, any successor or assign whose acquisition of or combination or other relationship with Penguin is consummated after entry of this Final Judgment shall meet each such obligation within thirty days after consummation. The prohibitions of Section V.A of this Final Judgment shall expire for any successor or assign of Penguin on the dates on which such prohibitions would have expired for Penguin had the acquisition, combination, or other relationship not occurred. Where the Final Judgment imposes an obligation on Penguin to engage in or refrain from engaging in certain conduct, that obligation shall apply to Penguin and to any joint venture or other business arrangement established by Penguin and one or more Publisher Defendants.

L. "Penguin Random House" means the joint venture entities, which will operate under the name "Penguin Random House," that will be formed pursuant to the Contribution Agreement, dated October 29, 2012, by and between Pearson plc and Bertelsmann SE & Co. KGaA.

M. "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.

N. "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 Penguin 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 Penguin to meet all requests by the E-book Retailer for more favorable pricing within the terms of the agreement.

O. "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.

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

Q. "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.

R. "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.

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 Penguin and all other Persons in active concert or participation with Penguin 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, Penguin shall terminate any agreement with Apple relating to the Sale of E-books that was executed prior to Penguin's stipulation to the entry of this Final Judgment.

B. For each agreement between Penguin 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, Penguin shall notify the E-book Retailer, by January 8, 2013, 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 ten days after entry of this Final Judgment, Penguin 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. Penguin 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 Penguin 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 Penguin 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, Penguin 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 Penguin 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) Penguin 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) Penguin 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) Penguin distributing E-books published by another E-book Publisher (not a Publisher Defendant). The notification requirements of this Section IV.C shall also not apply to the formation of Penguin Random House, review of which is pending before the Department of Justice.

D. Penguin shall furnish to the Department of Justice (1) by January 8, 2013, one complete copy of each agreement, executed, renewed, or extended on or after January 1, 2012, between Penguin 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 Penguin's previous submission of agreements to the Department of Justice.

V. PROHIBITED CONDUCT

A. For two years, Penguin 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 Penguin's option, from either:

1. the termination of an agreement between Penguin 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 Penguin notifies the E-book Retailer in writing that Penguin 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.

Penguin 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 Penguin's stipulation to the entry of this Final Judgment, Penguin 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. Penguin shall not enter into any agreement with an E-book Retailer relating to the Sale of E-books that contains a Price MFN.

D. Penguin 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 Penguin is 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 Penguin 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 Penguin's E-books or from offering price discounts or any other form of promotions to encourage consumers to Purchase any of Penguin's E-books.

E. Penguin 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 Penguin 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. Penguin (including each officer of each parent of Penguin who exercises direct control over Penguin'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 Penguin 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 Penguin 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 Penguin 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, Penguin 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 Penguin's E-books (as opposed to advertising or promotions engaged in by the E-book Retailer not specifically tied or directed to Penguin'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 Penguin's E-books by an aggregate amount equal to the total commissions Penguin pays to the E-book Retailer, over a period of at least one year, in connection with the Sale of Penguin's E-books to consumers; (2) Penguin 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, Penguin 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 Penguin'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 Penguin's officers and directors, and to each of Penguin'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 Penguin'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 Penguin'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 Penguin's 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 Penguin's officers, directors, or employees involved in the development of Penguin'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, Penguin 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 Penguin'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 Penguin, be permitted:

1. access during Penguin's office hours to inspect and copy, or at the option of the United States, to require Penguin 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 Penguin, relating to any matters contained in this Final Judgment; and

2. to interview, either informally or on the record, Penguin's 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 Penguin.

B. Upon the written request of an authorized representative of the Assistant Attorney General in charge of the Antitrust Division, Penguin 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 Penguin 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 Penguin to the United States, Penguin 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 Penguin 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 Penguin 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 Penguin.

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: May 17, 2013

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

United States District Judge

United States District Court
Southern District of New York
Office of the Clerk
U.S. Courthouse
500 Pearl Street, New York, N.Y. 10007-1213

Date:

In Re:

-v-

Case #: ( )

Dear Litigant,

Enclosed is a copy of the judgment entered in your case.

Your attention is directed to Rule 4(a)(1) of the Federal Rules of Appellate Procedure, which requires that if you wish to appeal the judgment in your case, you must file a notice of appeal within 30 days of the date of entry of the judgment (60 days if the United States or an officer or agency of the United States is a party).

If you wish to appeal the judgment but for any reason you are unable to file your notice of appeal within the required time, you may make a motion for an extension of time in accordance with the provision of Fed. R. App. P. 4(a)(5). That rule requires you to show "excusable neglect" or "good cause" for your failure to file your notice of appeal within the time allowed. Any such motion must first be served upon the other parties and then filed with the Pro Se Office no later than 60 days from the date of entry of the judgment (90 days if the United States or an officer or agency of the United States is a party).

The enclosed Forms 1, 2 and 3 cover some common situations, and you may choose to use one of them if appropriate to your circumstances.

The Filing fee for a notice of appeal is $5.00 and the appellate docketing fee is $450.00 payable to the "Clerk of the Court, USDC, SDNY" by certified check, money order or cash. **No personal checks are accepted.**

Ruby J. Krajick, Clerk of Court

by: _____
, Deputy Clerk

United States District Court
Southern District of New York
Office of the Clerk
U.S. Courthouse
500 Pearl Street, New York, N.Y. 10007-1213

_____X

-V-

NOTICE OF APPEAL

civ. ( )

_____X

Notice is hereby given that _____
(party)
hereby appeals to the United States Court of Appeals for the Second Circuit from the Judgment [describe it]

entered in this action on the _____ day of _____, _____.
(day) (month) (year)

_____
(Signature)

_____
(Address)

_____
(City, State and Zip Code)

Date: _____ ( ) _____ - _____
(Telephone Number)

Note: You may use this form to take an appeal provided that it is received by the office of the Clerk of the District Court within 30 days of the date on which the judgment was entered (60 days if the United States or an officer or agency of the United States is a party).

FORM 1

United States District Court
Southern District of New York
Office of the Clerk
U.S. Courthouse
500 Pearl Street, New York, N.Y. 10007-1213

---X

-V-

MOTION FOR EXTENSION OF TIME TO FILE A NOTICE OF APPEAL

civ. ( )

---X

Pursuant to Fed. R. App. P. 4(a)(5), _____ respectfully
(party)

requests leave to file the within notice of appeal out of time.

_____
(party)

desires to appeal the judgment in this action entered on _____ but failed to file a
(day)

notice of appeal within the required number of days because:

[Explain here the "excusable neglect" or "good cause" which led to your failure to file a notice of appeal within the required number of days.]

_____
(Signature)

_____
(Address)

_____
(City, State and Zip Code)

Date: _____ ( ) _____ - _____
(Telephone Number)

Note: You may use this form, together with a copy of Form 1, if you are seeking to appeal a judgment and did not file a copy of Form 1 within the required time. If you follow this procedure, these forms must be received in the office of the Clerk of the District Court no later than 60 days of the date which the judgment was entered (90 days if the United States or an officer or agency of the United States is a party).

District Court will receive it within the 30 days of the date on which the judgment was entered (60 days if ~~the United States or an officer or agency of the United States is a party~~).

FORM 3

United States District Court
Southern District of New York
Office of the Clerk
U.S. Courthouse
500 Pearl Street, New York, N.Y. 10007-1213

_____X

AFFIRMATION OF SERVICE

-V-

civ. ( )

_____X

I, _____, declare under penalty of perjury that I have served a copy of the attached _____

_____

upon _____

_____

whose address is: _____

_____

Date: _____
New York, New York

_____
(Signature)

_____
(Address)

_____
(City, State and Zip Code)

FORM 4

APPEAL FORMS

FORM 2

United States District Court
Southern District of New York
Office of the Clerk
U.S. Courthouse
500 Pearl Street, New York, N.Y. 10007-1213

_____X

-V-

NOTICE OF APPEAL
AND
MOTION FOR EXTENSION OF TIME

civ. ( )

_____X

1. Notice is hereby given that _____ hereby appeals to
(party)
the United States Court of Appeals for the Second Circuit from the judgment entered on _____.
[Give a description of the judgment]

2. In the event that this form was not received in the Clerk's office within the required time
_____ respectfully requests the court to grant an extension of time in
(party)
accordance with Fed. R. App. P. 4(a)(5).

a. In support of this request, _____ states that
(party)
this Court's judgment was received on _____ and that this form was mailed to the
(date)
court on _____.
(date)

_____
(Signature)

_____
(Address)

_____
(City, State and Zip Code)

Date: _____ ( ) _____ - _____
(Telephone Number)

Note: You may use this form if you are mailing your notice of appeal and are not sure the Clerk of the

This is Exhibit "E" referred to in the
Affidavit of Marilyn Nelson
sworn before me, this 21st day of March, 2017

A Commissioner for Taking Affidavits

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, Plaintiff, v. APPLE, INC., *et al.*, Defendants.	Civil Action No. 12-CV-2826 (DLC) ECF Case

~~[PROPOSED]~~ FINAL JUDGMENT AS TO DEFENDANTS VERLAGSGRUPPE GEORG VON HOLTZBRINCK GMBH & HOLTZBRINCK PUBLISHERS, LLC D/B/A MACMILLAN

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 Macmillan, 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 Macmillan 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, Macmillan agrees to be bound by the provisions of this Final Judgment pending its approval by the Court;

AND WHEREAS, Plaintiff requires Macmillan 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, Macmillan has represented to the United States that the actions and conduct restrictions can and will be undertaken and that it 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 Macmillan, it is ORDERED, ADJUDGED, AND DECREED:

I. JURISDICTION

This Court has jurisdiction over the subject matter of this action and over Macmillan. The Complaint states a claim upon which relief may be granted against Macmillan 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 through a dedicated E-book reading device; (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; or (4) the electronically formatted version of a book marketed solely for use in connection with academic coursework.

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 ("Holtzbrinck"), its successors and assigns, and its subsidiaries, divisions, groups, and partnerships, and their directors, officers, managers, agents, and employees; and (2) Verlagsgruppe Georg von Holtzbrinck GmbH, a German corporation with its principal place of business in Stuttgart, Germany ("VGvH"), its successors and assigns, and its divisions, groups, and partnerships, and their directors, officers, managers, agents, and employees. Where the Final Judgment imposes an obligation on Macmillan to engage in or refrain from engaging in certain conduct, that obligation shall apply to Macmillan and to any joint venture or other business arrangement established by Macmillan and one or more Publisher Defendants.

K. "Penguin" means (1) Penguin Group (USA), Inc., a Delaware corporation with its principal place of business in New York, New York; (2) The Penguin Group, a division of U.K. corporation Pearson plc with its principal place of business in London, England; (3) The Penguin

Publishing Company Ltd, a company registered in England and Wales with its principal place of business in London, England; and (4) Dorling Kindersley Holdings Limited, a company registered in England and Wales with its principal place of business in London, England; and each of their respective successors and assigns (expressly including Penguin Random House, a joint venture by and between Pearson plc and Bertelsmann SE & Co. KGaA, and any similar joint venture between Penguin and Random House Inc.); each of their respective subsidiaries, divisions, groups, and partnerships; and each of their respective 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 Macmillan 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 Macmillan 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. "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.

S. "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 Holtzbrinck and VGvH, acting individually or in concert, and all other Persons in active concert or participation with Holtzbrinck or VGvH who receive actual notice of this Final Judgment by personal service or otherwise.

IV. REQUIRED CONDUCT

A. Within three business days after Macmillan's stipulation to the entry of this Final Judgment, Macmillan shall notify each E-book Retailer with which Holtzbrinck has an agreement relating to the Sale of E-books that Holtzbrinck will no longer enforce any term or terms in any

such agreement that restrict, limit, or impede 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, except to the extent consistent with Section VI.B of this Final Judgment.

B. For each agreement between Holtzbrinck and an E-book Retailer that contains a Price MFN, Holtzbrinck shall notify the E-book Retailer within three business days after Macmillan's stipulation to the entry of this Final Judgment 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 ten days after entry of this Final Judgment, Holtzbrinck 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. Holtzbrinck 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 Holtzbrinck 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 Holtzbrinck 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,

Holtzbrinck 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 Holtzbrinck 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) Holtzbrinck 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) Holtzbrinck 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) Holtzbrinck distributing E-books published by another E-book Publisher (not a Publisher Defendant).

D. Macmillan shall furnish to the Department of Justice (1) by February 15, 2013, one complete copy of each agreement, executed, renewed, or extended on or after January 1, 2012, between Holtzbrinck 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 Macmillan's previous submission of agreements to the Department of Justice.

V. PROHIBITED CONDUCT

A. Until December 18, 2014, Holtzbrinck 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.

B. Until December 18, 2014, Holtzbrinck 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. Holtzbrinck shall not enter into any agreement with an E-book Retailer relating to the Sale of E-books that contains a Price MFN.

D. Macmillan 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 Holtzbrinck is 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 Holtzbrinck 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 Holtzbrinck's E-books or from offering price discounts or any other form of promotions to encourage consumers to Purchase any of Holtzbrinck's E-books.

E. Holtzbrinck 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 Holtzbrinck 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. Holtzbrinck (and each officer of VGvH who exercises direct control over Holtzbrinck'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 Holtzbrinck 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 Holtzbrinck 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 Macmillan 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, Holtzbrinck 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 Holtzbrinck's E-books (as opposed to advertising or promotions engaged in by the E-book Retailer not specifically tied or directed to Holtzbrinck'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 Holtzbrinck's E-books by an aggregate amount equal to the total commissions Holtzbrinck pays to the E-book Retailer, over a period of at least one year, in connection with the Sale of Holtzbrinck's E-books to consumers; (2) Holtzbrinck 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, Macmillan shall designate Holtzbrinck's 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 Macmillan'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 Holtzbrinck's officers and directors, to each of Holtzbrinck's employees engaged, in whole or in part, in the distribution or Sale of E-books, and to each of VGvH's officers, directors, or employees involved in the development of Holtzbrinck's plans or strategies relating to 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 Holtzbrinck's employees and to all VGvH employees identified in Sections VII.A and VII.B of this Final Judgment 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 Macmillan'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 Macmillan's 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 Macmillan's officers, directors, or employees involved in the development of Holtzbrinck'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, Macmillan 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 Macmillan'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 Macmillan, be permitted:

1. access during Macmillan's office hours to inspect and copy, or at the option of the United States, to require Macmillan 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 Macmillan, relating to any matters contained in this Final Judgment; and

2. to interview, either informally or on the record, Macmillan's 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 Macmillan.

B. Upon the written request of an authorized representative of the Assistant Attorney General in charge of the Antitrust Division, Macmillan 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 Macmillan 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 Macmillan to the United States, Macmillan 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 Macmillan 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 Macmillan 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 Macmillan.

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: August 12, 2013

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

United States District Judge

United States District Court
Southern District of New York
Office of the Clerk
U.S. Courthouse
500 Pearl Street, New York, N.Y. 10007-1213

Date:

In Re:

-v-

Case #: ( )

Dear Litigant,

Enclosed is a copy of the judgment entered in your case.

Your attention is directed to Rule 4(a)(1) of the Federal Rules of Appellate Procedure, which requires that if you wish to appeal the judgment in your case, you must file a notice of appeal within 30 days of the date of entry of the judgment (60 days if the United States or an officer or agency of the United States is a party).

If you wish to appeal the judgment but for any reason you are unable to file your notice of appeal within the required time, you may make a motion for an extension of time in accordance with the provision of Fed. R. App. P. 4(a)(5). That rule requires you to show "excusable neglect" or "good cause" for your failure to file your notice of appeal within the time allowed. Any such motion must first be served upon the other parties and then filed with the Pro Se Office no later than 60 days from the date of entry of the judgment (90 days if the United States or an officer or agency of the United States is a party).

The enclosed Forms 1, 2 and 3 cover some common situations, and you may choose to use one of them if appropriate to your circumstances.

The Filing fee for a notice of appeal is $5.00 and the appellate docketing fee is $450.00 payable to the "Clerk of the Court, USDC, SDNY" by certified check, money order or cash. **No personal checks are accepted.**

Ruby J. Krajick, Clerk of Court

by: _____

, Deputy Clerk

United States District Court
Southern District of New York
Office of the Clerk
U.S. Courthouse
500 Pearl Street, New York, N.Y. 10007-1213

----------X

-V-

NOTICE OF APPEAL

civ. ( )

----------X

Notice is hereby given that _____
(party)
hereby appeals to the United States Court of Appeals for the Second Circuit from the Judgment [describe it]

entered in this action on the _____ (day) day of _____ (month), _____ (year).

_____
(Signature)

_____
(Address)

_____
(City, State and Zip Code)

Date: _____ ( ) _____ - _____
(Telephone Number)

Note: You may use this form to take an appeal provided that it is received by the office of the Clerk of the District Court within 30 days of the date on which the judgment was entered (60 days if the United States or an officer or agency of the United States is a party).

FORM 1

United States District Court
Southern District of New York
Office of the Clerk
U.S. Courthouse
500 Pearl Street, New York, N.Y. 10007-1213

----------X

-V-

MOTION FOR EXTENSION OF TIME TO FILE A NOTICE OF APPEAL

civ. ( )

----------X

Pursuant to Fed. R. App. P. 4(a)(5), _____ respectfully
(party)
requests leave to file the within notice of appeal out of time.

_____
(party)
desires to appeal the judgment in this action entered on _____ but failed to file a
(day)
notice of appeal within the required number of days because:

[Explain here the "excusable neglect" or "good cause" which led to your failure to file a notice of appeal within the required number of days.]

_____
(Signature)

_____
(Address)

_____
(City, State and Zip Code)

Date: _____ ( ) _____ - _____
(Telephone Number)

Note: You may use this form, together with a copy of Form 1, if you are seeking to appeal a judgment and did not file a copy of Form 1 within the required time. If you follow this procedure, these forms must be received in the office of the Clerk of the District Court no later than 60 days of the date which the judgment was entered (90 days if the United States or an officer or agency of the United States is a party).

District Court will receive it within the 30 days of the date on which the judgment was entered (60 days if the United States or an officer or agency of the United States is a party).

FORM 3

United States District Court
Southern District of New York
Office of the Clerk
U.S. Courthouse
500 Pearl Street, New York, N.Y. 10007-1213

_____X

AFFIRMATION OF SERVICE

-V-

civ. ( )

_____X

I, _____, declare under penalty of perjury that I have served a copy of the attached _____

_____

upon _____

_____

whose address is: _____

_____

Date: _____
New York, New York

_____
(Signature)

_____
(Address)

_____
(City, State and Zip Code)

FORM 4

APPEAL FORMS

FORM 2

United States District Court
Southern District of New York
Office of the Clerk
U.S. Courthouse
500 Pearl Street, New York, N.Y. 10007-1213

----------X

-V-

NOTICE OF APPEAL
AND
MOTION FOR EXTENSION OF TIME

civ. ( )

----------X

1. Notice is hereby given that _____ hereby appeals to
(party)
the United States Court of Appeals for the Second Circuit from the judgment entered on _____.
[Give a description of the judgment]

2. In the event that this form was not received in the Clerk's office within the required time

_____ respectfully requests the court to grant an extension of time in
(party)
accordance with Fed. R. App. P. 4(a)(5).

a. In support of this request, _____ states that
(party)
this Court's judgment was received on _____ and that this form was mailed to the
(date)
court on _____.
(date)

_____
(Signature)

_____
(Address)

_____
(City, State and Zip Code)

Date: _____ ( ) _____ - _____
(Telephone Number)

Note: You may use this form if you are mailing your notice of appeal and are not sure the Clerk of the

This is Exhibit "**F**" referred to in the
Affidavit of Marilyn Nelson
sworn before me, this 21st day of March, 2017

A Commissioner for Taking Affidavits

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, Plaintiff, v. APPLE, INC., *et al.*, Defendants.	Civil Action No. 1:12-CV-2826 **PLAINTIFF UNITED STATES' FINAL JUDGMENT** and **PLAINTIFF STATES' ORDER ENTERING PERMANENT INJUNCTION**
THE STATE OF TEXAS, *et al.*, Plaintiffs, v. PENGUIN GROUP (USA) INC., *et al.*, Defendants.	Civil Action No. 1:12-CV-3394[1]

DENISE COTE,
UNITED STATES DISTRICT JUDGE

I. DEFINITIONS

As used in this Final Judgment and Order Entering Permanent Injunction:

A. "Agency Agreement" means an agreement between an E-book Publisher and an E-book Retailer under which the Retailer acts as an agent of the Publisher and is paid a

[1] Pursuant to the agreement of the parties and Court order, the proceedings in *Texas et al. v. Penguin Group (USA) Inc. et al.*, Civ. A. No. 1:12-CV-3394, have been bifurcated. Issues related to non-injunctive relief, including damages and civil penalties, will be addressed in subsequent proceedings.

commission (or a portion of the Retail Price) in connection with the sale of one or more of the Publisher's E-books.

B. "Apple" means Apple, Inc.

C. "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.

D. "E-book App" means a software application sold or distributed through Apple's "App Store" relating to the reading, browsing, purchase, sale, recommendation, selection, or cataloging of any book or E-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. Apple is an E-book Retailer. For purposes of this Final Judgment, Publisher Defendants and all other Persons whose primary business is book publishing are not E-book Retailers.

G. "Effective Date" means the date, under Section VIII.A of this Final Judgment, on which this Final Judgment takes effect.

H. "External Compliance Monitor" means the person appointed by the Court to perform the duties described in Section VI of this Final Judgment.

I. "Final Judgment" means this document: the Final Judgment in *United States v. Apple, Inc., et al.*, Civil Action No. 1:12-CV-2826, and the Order Entering Permanent Injunction in *The State of Texas, et al. v. Penguin Group (USA) Inc., et al.*, Civil Action No. 1:12-CV-3394.

J. "Hachette" means Hachette Book Group, Inc.

K. "HarperCollins" means HarperCollins Publishers L.L.C.

L. "Macmillan" means Holtzbrinck Publishers, LLC d/b/a Macmillan and Verlagsgruppe Georg von Holtzbrinck GmbH.

M. "Penguin" means Penguin Group (USA), Inc., The Penguin Group, a division of U.K. corporation Pearson plc, The Penguin Publishing Company Ltd, Dorling Kindersley Holdings Limited, and Penguin Random House, a joint venture by and between Pearson plc and Bertelsmann SE & Co. KGaA, and any similar joint venture between Penguin and Random House Inc.

N. "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.

O. "Plaintiff States" means the States and Commonwealths of Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Maryland, Massachusetts, Michigan, Missouri, Nebraska, New Mexico, New York, North Dakota, Ohio, Pennsylvania, Puerto Rico, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, West Virginia, and Wisconsin and the District of Columbia.

P. "Publisher Defendants" means Hachette, HarperCollins, Macmillan, Penguin, and Simon & Schuster.

Q. "Representative Plaintiff States" means, as of the Effective Date of this Final Judgment, the States of Texas and Connecticut. The Plaintiff States may designate a different Plaintiff State as a substitute Representative Plaintiff State at any time by communicating the change in writing to Apple and the United States.

R. "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.

S. "Retail Price MFN" means a term in an agreement between an E-book Publisher and an E-book Retailer under which 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.

T. "Simon & Schuster" means Simon & Schuster, Inc.

II. APPLICABILITY

This Final Judgment applies to Apple and each of its affiliates, subsidiaries, officers, directors, agents, employees, successors, and assigns, to any successor to any substantial part of the business, and to all other Persons acting in concert with Apple and having actual notice of this Final Judgment.

III. PROHIBITED CONDUCT

A. Apple shall not enforce any Retail Price MFN in any agreement with an E-book Publisher relating to the sale of E-books.

B. Apple shall not enter into any agreement with an E-book Publisher relating to the sale of E-books that contains a Retail Price MFN.

C. Apple shall not enter into or maintain any agreement with a Publisher Defendant that restricts, limits, or impedes Apple'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. The prohibitions in this Section III.C shall expire, for agreements between Apple and a Publisher Defendant, on the following dates:

1. For agreements between Apple and Hachette: 24 months after the Effective Date of this Final Judgment;

2. For agreements between Apple and Harper Collins: 30 months after the Effective Date of this Final Judgment;

3. For agreements between Apple and Simon & Schuster: 36 months after the Effective Date of this Final Judgment;

4. For agreements between Apple and Penguin: 42 months after the Effective Date of this Final Judgment; and

5. For agreements between Apple and Macmillan: 48 months after the Effective Date of this Final Judgment.

D. Apple shall not (1) retaliate against or punish, (2) threaten to retaliate against or punish, or (3) urge another Person to retaliate against or punish any E-book Publisher for refusing

to enter into an agreement with Apple relating to the sale of E-books or for the terms on which the E-book Publisher sells E-books through any other E-book Retailer. This provision does not require Apple to enter into an agreement with an E-book Publisher or E-book Retailer, or seek to prevent Apple from negotiating terms of agreement in good faith.

E. Apple shall not communicate, directly or indirectly, to any E-book Publisher (1) the status of its contractual negotiations with any other E-book Publisher; (2) the actual or proposed contractual terms or business plans or arrangements it has with any other E-book Publisher, or (3) any non-public competitively sensitive information it learns from any other E-book Publisher, including, but not limited to:

a. the E-book Publisher's business plans or strategies;

b. the E-book Publisher's past, present, or future pricing strategies or wholesale prices for E-books or audio books;

c, the E-book Publisher's future retail prices for E-books or audio books;

d. any terms in the E-book Publisher's agreement(s) with any retailer of books licensed or sold in any format; or

e. any terms in the E-book Publisher's agreement(s) with any author.

Nothing in this Section III.E prohibits Apple from developing and offering to E-book Publishers a standard form contract containing the terms on which Apple would agree to sell the E-book Publishers' E-books, and so informing an E-book Publisher that it is a standard from; nor shall this prohibit Apple from publicly communicating the retail price of E-books available on the iBookstore.

F. Apple shall not enter into or maintain any agreement with an E-book Publisher where such agreement likely will increase, fix, or set the price at which other E-book Retailers can acquire or sell E-books.

Nothing in this Section III.F prohibits Apple from entering into or maintaining an agreement with an E-book Publisher merely specifying prices that Apple must pay for the E-book Publisher's E-books.

G. Apple shall not enter into or maintain any agreement with any other E-book Retailer where such agreement likely will increase, fix, stabilize, or set the prices or establish other terms on which Apple or the other E-book Retailer sells E-books to consumers.

IV. REQUIRED CONDUCT

A. On or before the Effective Date of this Final Judgment, Apple shall either modify any Agency Agreement with a Publisher Defendant to comply with Section III.C of this Final Judgment or terminate any Agency Agreement with a Publisher Defendant that does not comply with Section III.C of this Final Judgment.

B. Apple shall apply the same terms and conditions to the sale or distribution of an E-book App through Apple's App Store as Apple applies to all other apps sold or distributed through Apple's App Store.

This provision does not prevent Apple from introducing new categories of apps with different terms and conditions or from changing its App Store terms and conditions and applying them in a reasonable manner so long as Apple does not discriminate against E-book Apps.

C. Apple shall furnish to the United States and the Representative Plaintiff States, within ten business days of receiving such information, any information that reasonably suggests

to Apple that any E-book Publisher has impermissibly coordinated or is impermissibly coordinating the terms on which it supplies or offers its E-books to Apple or to any other Person.

V. ANTITRUST COMPLIANCE

To ensure its compliance with this Final Judgment and the antitrust laws, Apple shall perform the activities enumerated below in Sections V.A through V.J of this Final Judgment. Within thirty days after the Effective Date of this Final Judgment, Apple's Audit Committee, or another committee comprised entirely of outside directors (*i.e.*, directors not also employed by Apple), shall designate a person not employed by Apple as of the Effective Date of the Final Judgment to serve as Antitrust Compliance Officer, who shall report to the Audit Committee or equivalent committee of Apple's Board of Directors and shall be responsible, on a full-time basis until the expiration of this Final Judgment, for supervising Apple's antitrust compliance efforts and performance of the following:

A. furnishing a copy of this Final Judgment, within thirty days of its Effective Date, to each member of Apple's Board of Directors, to its Chief Executive Officer, to each of its Senior Vice-Presidents, and to each of Apple's employees engaged, in whole or in part, in activities relating to Apple's iBookstore;

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 V.A of this Final Judgment;

C. ensuring that each person identified in Sections V.A and V.B of this Final Judgment, and appropriate employees in Apple iTunes and App Store businesses, receives comprehensive and effective 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 the Effective Date of this Final Judgment and on each anniversary of the Effective Date of this Final Judgment, from each person identified in Sections V.A and V.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, in consultation with the External Compliance Monitor, an annual antitrust compliance audit covering each person identified in Sections V.A and V.B of this Final Judgment, and maintaining all records pertaining to such audits;

F. communicating annually to Apple'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 Apple's conduct to assure compliance with this Final Judgment; and, within seven days of discovering or receiving such information, providing to the United States and the Representative Plaintiff States a description of the actual or potential violation of this Final Judgment and the corrective actions taken;

H. furnishing to the United States and the Representative Plaintiff States on a quarterly basis electronic copies of any non-privileged communications with any Person containing

allegations of Apple's noncompliance with any provisions of this Final Judgment or violations of the antitrust laws;

I. maintaining, and furnishing to the United States, the Representative Plaintiff States, and the External Compliance Monitor on a quarterly basis, a log of all oral and written communications, excluding privileged or public communications, between or among any person identified in Sections V.A or V.B of this Final Judgment and

1. any person employed by or associated with another E-book Retailer, relating, in whole or in part, to E-books or devices for reading E-books, but excluding any communications primarily involving the App Store; or

2. employees or representatives of two or more E-book Publishers, relating, in whole or in part, to E-books, devices for reading E-books, or E-book Apps,

including, but not limited to, 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; and

J. providing to the United States and the Representative Plaintiff States annually, on or before the anniversary of the Effective Date of this Final Judgment, a written statement as to the fact and manner of Apple's compliance with Sections III, IV, and V of this Final Judgment.

VI. EXTERNAL COMPLIANCE MONITOR

A. The Court shall appoint an External Compliance Monitor to undertake the responsibilities and duties described in this Section VI. The appointment shall be for a period of two years, provided that the appointment does not expire before Apple has completed two years of

the annual training required by Section V.C, and provided that the Court may *sua sponte* or on application of the United States or any Plaintiff State extend the appointment by one or more one-year periods. Promptly upon entry of this Final Judgment, but before its Effective Date, the United States and the Representative Plaintiff States will meet and confer with Apple to determine if the parties can agree on a recommended External Compliance Monitor. Apple may at any time suggest to the United States and the Representative Plaintiff States candidates for the position of External Compliance Monitor. On or before the Effective Date of this Final Judgment, the United States and the Representative Plaintiff States jointly shall recommend to the Court one or more persons to serve as External Compliance Monitor. Apple will have five days to object to the Court by letter to the recommended appointment. Apple is responsible for the reasonable expenses incurred by candidates for appointment as External Compliance Monitor in connection with any travel undertaken for interviews of the candidates by the United States or the Court.

B. The External Compliance Monitor shall have the power and authority to review and evaluate Apple's existing internal antitrust compliance policies and procedures and the training program required by Section V.C of this Final Judgment, and to recommend to Apple changes to address any perceived deficiencies in those policies, procedures, and training.

C. The External Compliance Monitor shall conduct a review to assess whether Apple's internal antitrust compliance policies and procedures, as they exist 90 days after his or her appointment, are reasonably designed to detect and prevent violations of the antitrust laws. The External Compliance Monitor shall also conduct a review to assess whether Apple's training program, required by Section V.C of this Final Judgment, as it exists 90 days after his or her appointment, is sufficiently comprehensive and effective. Within 180 days of his or her

appointment by the Court, and at six month intervals thereafter throughout the appointment, the External Compliance Monitor shall provide a written report to Apple, the United States, the Representative Plaintiff States, and the Court setting forth his or her assessment of Apple's internal antitrust compliance policies, procedures, and training and, if appropriate, making recommendations reasonably designed to improve Apple's policies, procedures, and training for ensuring antitrust compliance.

D. The External Compliance Monitor may, at any time prior to the expiration of this Final Judgment, provide one or more additional written reports to Apple, the United States, the Representative Plaintiff States, and the Court setting forth additional recommendations reasonably designed to improve Apple's policies, procedures, and training for ensuring antitrust compliance. The External Compliance Monitor may provide such additional reports on his or her own initiative or at the request of the Court, the United States, or the Representative Plaintiff States.

E. If Apple objects to any recommendation, it shall propose in writing to the External Compliance Monitor, the United States, and the Representative Plaintiff States, within 30 days after it receives the report, an alternative policy, procedure, or system designed to achieve the same objective or purpose. If Apple and the External Compliance Monitor fail, after good faith discussions, to agree on an alternative policy or procedure within 30 days of Apple's objections to a recommendation, Apple shall, after consultation with the United States and the Representative Plaintiff States, apply to this Court within 14 days for relief.

F. If the External Compliance Monitor in the exercise of his or her responsibilities under this Section VI discovers or receives evidence that suggests to the External Compliance Monitor that Apple is violating or has violated this Final Judgment or the antitrust laws, the

External Compliance Monitor shall promptly provide that information to the United States and the Representative Plaintiff States. The External Compliance Monitor shall take no further action, including seeking information from Apple pursuant to Section VI.G of this Final Judgment, to investigate any such potential violation of the Final Judgment or the antitrust laws.

G. Apple shall assist the External Compliance Monitor in performance of the responsibilities set forth in this Section VI. Apple shall take no action to interfere with or to impede the External Compliance Monitor's accomplishment of its responsibilities. The External Compliance Monitor may, in connection with the exercise of his or her responsibilities under this Section VI, and on reasonable notice to Apple:

1. interview, either informally or on the record, any Apple personnel, who may have counsel present; any such interview to be subject to the reasonable convenience of such personnel and without restraint or interference by Apple;

2. inspect and copy any documents in the possession, custody, or control of Apple; and

3. require Apple to provide compilations of documents, data, or other information, and to submit reports to the External Compliance Monitor containing such material, in such form as the External Compliance Monitor may reasonably direct.

H. Any objections by Apple to actions by the External Compliance Monitor in fulfillment of the External Compliance Monitor's responsibilities must be conveyed in writing to the United States and the Representative Plaintiff States within ten calendar days after the action giving rise to the objection.

I. The External Compliance Monitor may hire, subject to the approval of the United States, after consultation with the Representative Plaintiff States, any persons reasonably necessary to fulfilling the External Compliance Monitor's responsibilities. The External Compliance Monitor and any persons hired to assist the External Compliance Monitor shall serve at the cost and expense of Apple, on such terms and conditions as the United States, after consultation with the Representative Plaintiff States, approves, including, but not limited to, the execution of customary confidentiality agreements. The compensation of the External Compliance Monitor and any persons hired to assist the External Compliance Monitor shall be on reasonable and customary terms commensurate with the individuals' experience and responsibilities and consistent with reasonable expense guidelines. The External Compliance Monitor shall submit a quarterly expense report to the United States and the Representative Plaintiff States.

J. If the United States, after consultation with the Representative Plaintiff States, or Apple determines that the External Compliance Monitor has ceased to act or failed to act diligently or in a cost-effective manner, it may recommend that the Court appoint a substitute External Compliance Monitor.

VII. PLAINTIFFS' ACCESS

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 United States Department of Justice Antitrust Division or the Representative Plaintiff States, including, but not limited to, consultants and other persons retained by the United States or the Representative

Plaintiff States, shall, upon written request of an authorized representative of the Assistant Attorney General in charge of the Antitrust Division or a joint written request by authorized representatives of each Representative Plaintiff State, and on reasonable notice to Apple, be permitted:

1. access during regular business hours to inspect and copy, or at the option of the United States or the Representative Plaintiff States, to require Apple to provide to the United States and the Representative Plaintiff States hard copy or electronic copies of all books, ledgers, accounts, records, data, and documents in the possession, custody, or control of Apple, relating to any matters contained in this Final Judgment; and

2. to interview, either informally or on the record, Apple's 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 Apple.

B. Upon the written request of an authorized representative of the Assistant Attorney General in charge of the Antitrust Division or a joint written request by authorized representatives of each Representative Plaintiff State, Apple shall submit written reports or respond to written interrogatories, under oath, relating to any of the matters contained in this Final Judgment. Written reports authorized under this paragraph may require Apple to conduct, at its 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 or any Plaintiff State to any person other than an authorized representative of the executive branch of the United States, the Attorney General's Office of any Plaintiff State, or the External Compliance Monitor, except in the course of legal proceedings to which the United States or the relevant Plaintiff State(s) is a party (including, but not limited to, 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 Apple to the United States and the Representative Plaintiff States, Apple 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 Apple 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 and the Representative Plaintiff States shall give Apple ten calendar days notice prior to divulging such material in any civil or administrative proceeding.

VIII. ADDITIONAL PROVISIONS

A. This Final Judgment shall take effect 30 days after the date on which it is entered. If the Final Judgment is stayed, all time periods in the Final Judgment will be tolled during the stay.

B. This Court retains jurisdiction to enable the United States, the Representative Plaintiff States, any other Plaintiff State (after consultation with the United States and the Representative Plaintiff States), or Apple to apply to this Court at any time for, or to act *sua sponte* to issue, 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.

C. This Final Judgment shall expire by its own terms and without further action of this Court five years after its Effective Date, provided that, at any time prior to its expiration, the Court may *sua sponte* or on the application of the United States or any Plaintiff State extend the Final Judgment by one or more one-year periods, if necessary to ensure effective relief.

SO ORDERED:

DENISE COTE
UNITED STATES DISTRICT JUDGE

Dated: September 5, 2013