

16-305-cv

Abbey House Media, Inc. v. Simon &amp; Schuster, Inc. et al.

In the  
United States Court of Appeals  
for the  
Second Circuit

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August Term, 2016

Argued: February 23, 2017

Decided: July 17, 2017

Docket No. 16-305-cv

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ABBEE HOUSE MEDIA, INC., DBA BooksOnBoard,

*Plaintiff-Counter-  
Defendant-Appellant,*

v.

SIMON & SCHUSTER, INC., PENGUIN GROUP (USA) LLC, the successor to  
the named Defendant The Penguin Group,

*Defendants-Counter-  
Claimants-Appellees,*

HACHETTE BOOK GROUP, INC., HARPERCOLLINS\* PUBLISHERS, L.L.C.,  
VERLAGSGRUPPE GEORG VON HOLTZBRINCK GMBH, HOLTZBRINCK  
PUBLISHERS, L.L.C., DBA Macmillan, THE PENGUIN GROUP, a division  
of Pearson PLC,

*Defendants-Appellees,*

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\* The Clerk is respectfully directed to amend the caption to reflect the styling "HarperCollins," which appears throughout the district court docket and on the notice of appeal.

16-305-cv

Abbey House Media, Inc. v. Simon & Schuster, Inc. et al.

APPLE INC.,

*Defendant.*

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Before:

KEARSE, HALL, CHIN, *Circuit Judges.*

Appeal from a judgment of the United States District Court for the Southern District of New York (Cote, *J.*) granting summary judgment in favor of the Appellees on the issues of antitrust injury and causation. There is no material fact in dispute underlying the conclusion that, as a matter of law, the Appellant suffered no antitrust injury caused by the unlawful antitrust conspiracy. Based on the well-reasoned decision of the district court, *see Abbey House Media, Inc. v. Apple Inc. et al.*, \_\_\_ F.Supp.3d \_\_\_, 2016 WL 297720 (S.D.N.Y. Jan. 22, 2016), which we hereby adopt, the judgment of the district court is AFFIRMED.

MAXWELL M. BLECHER (Harold R. Collins, Donald R. Pepperman, and Taylor C. Wagniere, *on the brief*), Blecher Collins & Pepperman, P.C., Los Angeles, California, *for Plaintiff-Counter-Defendant-Appellant.*

GREGORY SILBERT (James W. Quinn and Yehudah L. Buchweitz, *on the brief*), Weil, Gotshal & Manges LLP, New York, New York, *for Defendant-Counter-Claimant-Appellee Simon & Schuster, Inc.*

Saul P. Morgenstern, Margaret A. Rogers, and Alice C.C. Huling, Arnold & Porter Kaye Scholer LLP, New York, New York, *for Defendant-Counter-Claimant-Appellee Penguin Group (USA) LLC.*

Linda H. Martin and Samuel J. Rubin, Freshfields Bruckhaus Deringer US LLP,

16-305-cv

Abbey House Media, Inc. v. Simon & Schuster, Inc. et al.

New York, New York, *for Defendant-Appellee Hachette Book Group, Inc.*

C. Scott Lent, Arnold & Porter Kaye Scholer LLP, New York, New York, *for Defendant-Appellee HarperCollins Publishers, L.L.C.*

Joel M. Mitnick, John J. Lavelle, and Bianca Cadena, Sidley Austin LLP, New York, New York, *for Defendants-Appellees Holtzbrinck Publishers, LLC, DBA Macmillan and Verlagsgruppe Georg Von Holtzbrinck GMBH.*

PER CURIAM:

Abbey House Media, Inc., doing business as BooksOnBoard, brought this civil antitrust action for business injuries it alleges arose from an unlawful conspiracy in restraint of trade between Apple, Inc. and five major publishing companies, who are the Defendants. We have ruled that the publisher Defendants and Apple did indeed conspire unlawfully to restrain trade in violation of the Sherman Act. *See United States et al. v. Apple, Inc. et al.*, 791 F.3d 290 (2d Cir. 2015). The unlawful conspiracy was effected by the publishers simultaneously changing their business practices to abandon the wholesale business model in favor of the agency pricing model. Under the former wholesale business model, the publishers would sell ebooks to retailers and suggest a retail price, but retailers retained discretion to sell at prices higher or lower than the publisher's suggested price. Under the new agency pricing model the publisher required the retailer to sell the ebook at a retail price of the publisher's choosing, and the publisher paid the retailer a commission for each sale.

BooksOnBoard was an independent ebook retailer that went out of business after the switch to agency pricing, and it claimed that the switch to agency pricing was the cause of its decline. The district court (Cote, J.) granted summary judgment in favor of the publisher Defendants, determining that the record left no genuine issue of material fact as to antitrust injury or causation. *See Abbey House*

16-305-cv

Abbey House Media, Inc. v. Simon & Schuster, Inc. et al.

*Media, Inc. v. Apple Inc. et al.*, \_\_\_ F.Supp.3d \_\_\_, 2016 WL 297720 (S.D.N.Y. Jan. 22, 2016). Based on the undisputed facts in the record, the district court determined that BooksOnBoard faced strong competition from large retailers, that it contemporaneously viewed the adoption of agency pricing as a boon, and that its subsequent demise was not attributable to the unlawful conspiracy. *See id. at* \_\_\_, 2016 WL 297720 at \*12. This timely appeal followed.

“We review *de novo* the district court’s grant of summary judgment, construing the evidence in the light most favorable to the non-moving party and drawing all reasonable inferences in her favor.” *Mihalik v. Credit Agricole Cheuvreux N. Am., Inc.*, 715 F.3d 102, 108 (2d Cir. 2013). Summary judgment is appropriate when “there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a).

We have carefully reviewed the summary judgment record, and we agree with the district court’s determination that the record permits no genuine dispute as to any material fact underlying the conclusion that, as a matter of law, the Appellant suffered no antitrust injury caused by the unlawful antitrust conspiracy.

We affirm for the reasons set forth in the district court’s thorough and well-reasoned written decision, which we hereby adopt. *See* \_\_\_ F.Supp.3d \_\_\_, 2016 WL 297720.