UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, Plaintiff, - against - 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.	Case No. 12-cv-2826 **ECF Case**

OPPOSITION OF HOLTZBRINCK PUBLISHERS, LLC D/B/A MACMILLAN TO THE PLAINTIFF UNITED STATES OF AMERICA'S MOTION FOR ENTRY OF FINAL JUDGMENT

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In this extraordinary Tunney Act proceeding, the government asks the Court to ratify an eBook pricing scheme even though the vast majority of public comments warn it is likely to reestablish an eBook monopoly. The government makes this request without offering a single economic study or analysis showing why its mandated pricing scheme is necessary to undo the effects of the alleged collusion, or why it is in "the public interest."[1] The public interest standard takes on heightened importance in this case because the monopolist in question would serve as "gatekeeper" over the dissemination of the ideas and information that are at the core of our free society. Defendant Holtzbrinck Publishers, LLP d/b/a/ Macmillan ("Macmillan") urges the Court either to find that the government has failed, on the record before it, to demonstrate that the proposed Final Judgment is in the public interest or else to defer its decision whether to enter the proposed Final Judgment until after the June 2013 trial on the merits of the government's case against the remaining defendants.

The Statutory Framework. In making its "public interest" determination under the Tunney Act, a court is required to consider: (1) "the impact" of the judgment on competition in the relevant market; (2) the impact on third-parties; and (3) "the public benefit, if any, to be derived from a determination of the issues at trial." 15 U.S.C. § 16(e)(1). "[T]he Tunney Act was designed to prevent 'judicial rubber stamping' of proposed Government consent decrees." *United States v. Morgan Stanley*, No. 11 Civ. 6875 (S.D.N.Y. Aug. 7, 2012) at 4, *quoting United States v. Alex. Brown & Sons* 963 F. Supp. 235, 238 (S.D.N.Y. 1997), *quoting United States v. Microsoft Corp.*, 56 F.3d 1448, 1460 (D.C. Cir. 1995)) (citation omitted).

[1] The proposed Final Judgment may be entered only upon an affirmative finding by the Court that the judgment is "in the public interest." 15 U.S.C. § 16(e)(1).

Background. This case has its roots in the aggressive below-cost eBook pricing policy Amazon introduced for certain eBooks in late 2007 when the eBook industry was still in its infancy. Whether characterized as "below cost," "predatory," or "loss leading," it is uncontested that Amazon's pricing foreclosed any practical challenge to its 90 percent market share. Moreover, as comment after comment makes clear, no other bookseller could profitably compete in the long-term against this strategy, *and indeed the government offers no study or analysis showing otherwise*. Predictably, as the eBook market[2] grew in relation to overall book sales, Amazon's pricing policy cemented its monopoly over eBook distribution in America.

The size of Amazon's market share is at the center of this proceeding regardless of whose narrative the Court accepts. The government's narrative, as told through its complaint and CIS, views Amazon's monopoly as having been achieved by superior competition. By contrast, the narrative of the overwhelming number of the Tunney Act comments focus on Amazon's below-cost pricing as a means by which Amazon "willfully maintained" its monopoly,[3] foreclosed competition with other potential distributors in the eBook market and hindered competition in the markets for related products and services. However, there is agreement that the Publisher Defendants' move to agency pricing[4] (whether in parallel or, as the government alleges, in concert) led almost immediately to an erosion of Amazon's 90 percent market share. While Amazon's current approximately 60 percent market share is still substantial by any measure, that

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[2] Market definition is contested in this litigation. For purposes of readability, however, Macmillan will assume in this memorandum only that the relevant market is eBooks and will not include the word "alleged" before each reference to the government's alleged market definition.

[3] The "willful maintenance" of monopoly power through exclusionary conduct is unlawful. *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966).

[4] The government does not, and could not, challenge the legality under the antitrust laws of the publishers' various agency agreements. The publishers also could have individually compelled Amazon under the wholesale model to adhere to publisher list prices. *Leegin v. Creative Leather Products v. PSKS, Inc.*, 551 U.S. 877 (2007).

market share has declined in favor of other competitors, including B&N, Apple, Kobo and independent booksellers.

On April 11, 2012, the government filed the instant case and published the Proposed Final Judgment for public comment. The centerpiece of the proposed Final Judgment is a requirement that functionally allows Amazon to discount as much or more than it actually discounted in its pre-agency monopolist days.[5] 868 members of the public submitted timely comments, an extraordinary number of public comments by any measure. Comments were submitted by individuals, organizations and commercial enterprises representing every level of the publishing ecosystem, including booksellers, authors, literary agents, publishing consultants and consumers. More than 90 percent, of the comments urged the Court not to enter the proposed Final Judgment.

ARGUMENT

The Government Has Failed to Consider the Negative Consequences of the Proposed Final Judgment. The government framed its complaint as a routine challenge to an allegedly collusive agreement. It accordingly framed the discounting provisions in the proposed Final Judgment as directed to the "tools" of the alleged collusion, namely a prohibition on "retail price restrictions." CIS at 12. The CIS states "[t]he United States negotiated these limited prohibitions as a means to ensure a cooling-off period and allow movement in the marketplace away from collusive conditions." *Id.* at 13. Other than to explain the government's *intention* in requiring such substantial limitations on price restrictions, the CIS offers ***no*** precedential or evidentiary support for why those limitations would be in the public interest, ***no*** analysis of the

[5] The proposed Final Judgment requires the Settling Defendants to offer its eBook distributors the choice to return to the wholesale model or to permit distributors to discount up to the full amount of their annual commissions (*i.e.*, the distributor's entire revenue). This would allow Amazon to discount the most popular e-books not just to $9.99 but indeed to $0.99 or *lower* if Amazon deemed it necessary to restore its monopoly.

market effect of such a prohibition and ***no*** analysis of the potential effect on third-parties of such a prohibition, even though the Tunney Act demands such an analysis. It is inconceivable how the government can argue that the proposed relief is in the pulic interest without having first considered whether that relief may cause more harm than it remedies. Indeed, the CIS acknowledges the lack of any determinative document, study or analysis relied on by the government in fashioning its proposed relief. *Id.* at 21. In other words, all that may be determined from the face of the CIS is that certain individual government staff attorneys and/or economists thought it *might* be a good idea to substantially limit price restrictions as so-called "fencing in" relief aimed at the alleged collusion, with no apparent thought to the potential consequences for helping to re-establish an impenetrable monopoly over the distribution of eBooks.[6] But, "the relevant inquiry is whether there is a factual foundation for the government's decisions such that its conclusions regarding the proposed settlement are reasonable." *United States v. Abitibi-Consol. Inc.*, 584 F. Supp. 2d 162, 165 (D.D.C. 2008). Here, the government's failure to provide any factual foundation or analysis with respect to possible competitive effects on the market or third-parties of Amazon's foreseeable reconstituted 90 percent monopoly alone requires denial of the government's motion.

The Government Mischaracterizes the Concern Expressed in Vast Bulk of Comments. Sweeping aside the substance of more than 90 percent of the Tunney Act comments as self-serving expressions of industry participants who would benefit from higher prices, the government entirely ignores the main point posed by the comments and the important public

[6] Contrast the government's failure even to consider the possible negative effects of a likely increase in Amazon's market share as a result of the Final Judgment with the government's own Merger Guidelines, which warn against the artificial creation of monopoly power. Horizontal Merger Guidelines (DOJ 2010). Were DOJ presented with a proposed merger between a company with a 60 percent market share and a substantial competitor, it would be compelled by the Guidelines to engage in extensive study and evidence gathering to assure that monopoly power would not result. Indeed, a transaction that would raise a firm's 60 percent market share by even 1 percent would be presumptively unlawful under the Guidelines.

policy issue inherent in Amazon's pre-agency market share: the commenters' concerns are not with lower prices *per se* but that Amazon will use the judicially granted freedom to discount to grow its 60 percent market share towards the 90 percent it had prior to the switch to agency.

The government dismisses the fear that Amazon will reclaim its stranglehold over eBook distribution as mere "speculation." (*See* Response at 22: "no objector ... has supplied evidence ....") However, the Tunney Act requires the government to show, and the Court to find if it is to approve the proposed settlement, that the settlement will not result in an Amazon market share that is contrary to the public interest. Based on the CIS, however, it is clear that the DOJ has engaged in no economic studies to satisfy itself or the Court that the settlement will not have the harmful results anticipated by so many with knowledge of the publishing industry. Absent such an analysis, however, DOJ's cavalier assumption that its settlement terms will not result in re-monopolization is also mere "speculation."[7]

Whether Amazon's Pre-Agency Below-Cost Pricing was "Predatory" Within the Meaning of the Antitrust Laws is Besides the Point. DOJ defends Amazon's pre-agency pricing as not meeting a technical legal standard for predatory pricing. While doubtful, the government's defense misses the point. The issue is whether, lawfully or otherwise, Amazon will be able to use the judicially compelled discounting to grow its market share to a level that is not in the public interest.

Conclusion. Based on the foregoing, Macmillan respectfully requests the Court to deny the government's motion or to defer ruling on it until after trial.

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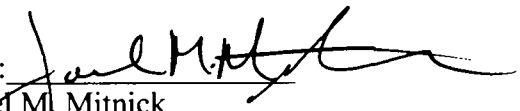
[7] Likewise, DOJ appears to have engaged in no economic studies to determine whether alternative approaches to settlement bearing less risk of monopoly would have satisfied its concern (itself unsupported by any evidence) that absent the 2-year discounting requirement the effects of the alleged collusion would have persisted once the settling defendants had terminated their agency agreements and negotiated new agreements. Ironically, DOJ peremptorily dismissed the idea of different forms of settlement with different publishers, including Macmillan, as unworkable.

Dated: New York, New York
August 15, 2012

SIDLEY AUSTIN LLP

By: 

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