IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

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

PUBLIC COMMENTS SUBMITTED TO THE UNITED STATES BY STEERADS INC. CONCERNING A PROPOSED FINAL JUDGMENT AND SUPPORTING STIPULATION AND COMPETITIVE IMPACT STATEMENT AS TO DEFENDANT THE PENGUIN GROUP IN THE ABOVE-CAPTIONED MATTER

PRELIMINARY STATEMENT

On December 31, 2012, Plaintiff, United States, gave notice in the Federal Register, 77 Fed. Reg. 77,094, pursuant to the Antitrust Procedures and Penalties Act 15 U.S.C. § 16 (b) - (h) ("APPA"). The notice informed the public that the United States had filed a proposed Final Judgment as well as supporting Stipulation and Competitive Impact Statement in the United States District Court for the Southern District of New York. The proposed Final Judgment is a settlement agreement as to Defendant, The Penguin Group ("Defendant"), in the above-captioned matter. The notice issued in the Federal Register invited public comments. Steerads, hereby, files public comments for the consideration of the Assistant Attorney General, Department of Justice / Antitrust Division ("AAG").

On April 11, 2012 the United States filed a civil antitrust action against Apple Inc. ("Apple") and five publishers of print and e-books[1] ("Publisher Defendants"), in the above

[1]Hachette Book Group, Inc., HarperCollins Publishers L.L.C., Holtzbrinck Publisher, LLC, Penguin Group (USA), Inc., and Simon & Schuster, Inc. Complaint, ¶¶ 12-17.

captioned matter. The Complaint charged that Publisher Defendants infringed Section 1 of the Sherman Act (15 U.S.C. § 1) by conspiring to fix prices for trade e-books in the United States. Complaint, ¶¶ 99-100. In a public notice issued on April 24, 2012, the United States announced a settlement with defendants Hachette Group Book, Inc., HarperCollins Publishers L.L.C., and Simon & Schuster, Inc. 77 Fed. Reg. 24,518 (April 24, 2012). The Court entered the proposed consent judgment against settling defendants ("Original Judgment"). Competitive Impact Statement, Section I. On December 31, 2012 the United States published another public notice, this time announcing a settlement with Defendant, in the above-captioned matter ("Penguin Final Judgment" or "PFJ"). Ibid.

In summary, terms and conditions imposed on Defendant in PFJ are clear, thus enforceable. Relief sought is inadequate, however, for "[u]nder the provisions of section 5 (a) of the Clayton Act, 15 U.S.C. 16 (a), the Penguin Final Judgment has no prima facie effect in any subsequent private lawsuit that may be brought against the Defendants" (italics omitted). Competitive Impact Statement, Section V. We respectfully submit that consent to PFJ should be withdrawn, unless Defendant agrees on a compensatory provision, or "asphalt clause". We proposed the same remedial provision as to the Original Judgment.[2]

For the record, Steerads is a corporation governed by the laws of the Province of Québec, Canada, having its principal place of business at 3535 Queen Mary Street, Suite 200, Montréal, Québec, H3V 1H8, Canada, and an office in the United States, at 461 22nd Street West, Suite E, New

[2] Similarly, we propose an "asphalt clause" as to PFJ, since "Penguin has now agreed to settle on substantially the same terms as those contained in the Original Judgment. ... The language and relief contained in the Penguin Final Judgment is largely identical to the terms included in the Original Judgment". Competitive Impact Statement, Sections I and III.

York City, New York 10111, USA. The solutions developed by Steerads improve online advertisers' return on investment by optimizing user-specific advertisements bids. www.steerads.com. Steerads is privately owned by residents of the Province of Québec; no shares of the company are publicly traded. Daniel Martin Bellemare, Avocat (Québec Bar)/ Attorney at Law (Vermont Bar), has prepared public comments on behalf of Steerads, pro bono.

COMMENTS

We respectfully submit that consent to PFJ should be withdrawn, unless Defendant agrees on a remedial provision, or "asphalt clause". An "asphalt clause" is tantamount to a waiver of the statutory limitation in the APPA depriving consent judgment of prima facie effect. An "asphalt clause" is warranted, considering: (i) The standard of review governing entry of consent judgment under the APPA, as set forth in *United States v. Microsoft Corp.,* 56 F.3d 1448 (1995) (Silberman, C.J.); (ii) the gravity of the antitrust offense, a per se offense under Section 1 of the Sherman Act; and (iii) the strength of the case against Publisher Defendants.

We have proposed identical relief as to the Original Judgment. At this stage, we submit that PFJ should incorporate an "asphalt clause", also. An "asphalt clause" is appropriate in this case, despite the response filed by the United States in the U.S. District Court for the Southern District of New York on July 23, 2012, in opposition thereto. Like the Original Judgment, PFJ, as it stands, provides inadequate relief; it lacks relief that would facilitate recovery of damages by persons injured in their business or property. The prospect of a substantial damage award is an effective deterrent against future antitrust violations. Deterrence can be achieved by way of consent judgment, but only to the extent it provides adequate relief.

I. LEGAL STANDARD

The United States may seek entry of consent judgment in district court; the court enters the consent judgment after a determination that it is in the public interest. 15 U.S.C.§ 16 (e) (1). An interpretation of the APPA must be consistent with the doctrine of separation of powers, in particular the Executive Branch's constitutional responsibility to "take Care that the Laws be faithfully executed". U.S. Const. art. II, § 3. See *Microsoft Corp.,* 56 F.3d, at 1462. ("A decree, even entered as a pretrial settlement, is a judicial act, and therefore the district judge is not obliged to accept one that, on its face and even after government explanation, appears to make a mockery of judicial power. Short of that eventuality, the Tunney Act cannot be interpreted as an authorization for a district judge to assure the role of Attorney General").

The AAG has broad prosecutorial discretion regarding the advisability to settle a case as well as to terms and conditions of settlement. The same is true of conduct of litigation: the AAG is sole responsible for drafting a complaint or indictment, and for deciding how a particular matter should be prosecuted. *Microsoft Corp.,* 56 F.3d, at 1459 ("[S]ection 16 (e) (1)'s reference to the alleged violations suggests that Congress did not mean for a district judge to construct his own hypothetical case and then evaluate the decree against that case").[3]

A higher level of deference is warranted when a proposed consent judgment is submitted for entry to a district court pre-trial, *Microsoft Corp.,* 56 F.3d, at 1460-61; post-trial, a district judge may engage in more thorough review. *United States v. E.I. du Pont de Nemours & Co.*, 366 U.S. 316

[3]See also Merger Enforcement Guidelines, § 1 (August 19, 2010). ("These Guidelines are not intended to describe how the Agencies will conduct the litigation of cases they decide to bring. Although relevant in context, these Guidelines neither dictate nor exhaust the range of evidence the Agencies may introduce in litigation").

(1961). Relief is of the essence in antitrust litigation. *California v. American Stores Co.*, 495 U.S. 271, 295 (1990) (Kennedy, J.) (divestiture order available to private plaintiff in suit under Clayton Act Section 16 subject to traditional equitable defenses). The executive and judicial branches have respective constitutional mandates in a proceeding initiated in district court for entry of a proposed consent judgment; however, the judiciary remains the ultimate authority over whether entry of a proposed judgment is in the public interest.

A district court must determine whether a proposed consent judgment is adequate. 15 U.S.C. § 16 (e) (1) (A). Such a mandate calls for meaningful review, within the limits imposed by the Constitution. Judicial review of proposed consent judgment entails neither a "wide-ranging inquiry", *Microsoft Corp.,* 56 F.3d, at 1459, nor an "unrestricted evaluation of what relief would best serve the public". *United States v. Bechtel Corp*., 648 F.2d 660, 666 (9th Cir.), cert. denied, 454 U.S. 1083, 102 S.Ct. 638, 70 L.Ed. 2d 617 (1981) cited in *Microsoft Corp.,* 56 F.3d, at 1458. Nevertheless, relief must be adequate: allegations in a complaint and relief sought in proposed final judgment must be symmetrical. *Microsoft Corp.,* 56 F.3d, 1461. Otherwise, a proposed consent judgment "[falls] outside the reaches of the public interest". *Microsoft Corp.,* 56 F.3d, at 1461.

II. ANALYSIS

Terms and conditions incorporated in PFJ are clear and enforceable; so are compliance mechanisms. The AAG conducted a good faith investigation, and uncovered that Publisher Defendants conspired in violation of Section 1 of the Sherman Act. A detailed Complaint setting out Publisher Defendant's illegal activities was filed in district court, thereafter. Despite a good faith effort to prevent Defendant from further participating in an illegal cartel, an important issue remains: whether relief sought in PFJ fits the gravity of those claims alleged in the complaint. This

issue is central to the judicial inquiry the district court must conduct under the authority of the APPA.

Unfortunately, there is no symmetry between relief sought in PFJ and the antitrust case stated in the Complaint. Accordingly, we submit that consent to entry of PFJ should be withdrawn, unless it contains an "asphalt clause". Given the strength of the case stated in the Complaint and the gravity of antitrust violation alleged therein — a nation wide price fixing conspiracy — PFJ should provide relief commensurate therewith.

A.

Judging by the claims in the Complaint, the AAG has conducted an in-depth investigation. We assume from the claims and relief sought in the Complaint that there is compelling evidence of a serious antitrust offense. Evidence of an agreement is paramount to prove a violation of Section 1 of the Sherman Act. *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 763 (1984) (Powell, J.) ("On a claim of concerted price-fixing, the antitrust plaintiff must present evidence sufficient to carry its burden of proving that there was such an agreement"). See also *Matsushita v. Zenith Ratio Corp.*, 475 U.S. 574, 593 (1986) (Powell, J.). Proving the existence of an agreement in violation of Section 1 of the Sherman Act may be an unsurmountable obstacle to prosecution.

But in this case, arguendo, there is substantial evidence of collusion in furtherance of a vast price-fixing conspiracy. In fact, the Complaint points toward direct evidence of a conspiracy. Complaint, ¶ 38. Solid evidence of a conspiracy to fix prices for e-books is supported, allegedly, by conversations intercepted during meetings, phone calls, and lunches; besides, evidence is to be found in emails and memoranda. Complaint, ¶¶ 37-40, 42-44, 49-51, 53-54, 57-58, 62-64, 69-73, 82, 87. The evidence above indicates, also, that those who participated in the illegal cartel had

"knowledge of the anticipated consequences" that would flow from their course of action. *United States v. United States Gypsum Co.,* 438 U.S. 422, 446 (1978) (Powell, J.). See also *In Re: Electronic Books Antitrust Litigation 859* F.Supp. 2d 671, 683 (2012) *stay denied* 2012 U.S. Dist. LEXIS 90190 (S.D.N.Y., June 27, 2012).

Publisher Defendants have agreed to fix retail prices in the relevant market, out of fear 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". Complaint, ¶ 3. The agreement is horizontal, quintessentially: an agreement among competitors to preserve the wholesale price structure for print and e-books, by setting retail prices for the latter. See *United States v. Sealy, Inc.* 388 U.S. 350, 353-54 (1967) (Fortas, J.); *United States v. Topco Associates, Inc.* 405 U.S. 596, 608-609 (1972) (Marshall, J.). See also *In Re: Electronic Books Antitrust Litigation* 859 F.Supp. 2d, at 685.

In order to maintain the price structure for print and e-books at the wholesale level, Publisher Defendants agreed on a scheme to control trade e-books' retail prices in the United States, using hardcover book list prices as a benchmark. Complaint, ¶ 68. To that end, "Publisher Defendants teamed up with Defendant Apple". Complaint, ¶ 3. The agreement between Publisher Defendants was reached and implemented at retail "with no purpose except stifling of competition". *White Motor Co. v. United States,* 372 U.S. 253, 263 (1963) (Douglas, J.). Thus, we are in presence of "a classic conspiracy in restraint of trade". *United States v. General Motors, Corp.,* 384 U.S. 127, 140 (1966) (Fortas, J.).

The agreement detailed in the Complaint is a naked horizontal price agreement, a per se offense under Section 1 of the Sherman Act. Complaint, ¶ 99. Direct and indirect price fixing alike fall under the per se standard. See *United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927) (fixing price certain for commodity); *United States v. Socony-Vaccum Oil Co.,* 310 U.S. 150 (1940) (agreement among oil refiners to purchase surpluses on spot market to prevent price fall); *Catalano, Inc. v. Target Sales, Inc.,* 446 U.S. 643 (1980) (agreement to fix credit terms); *Arizona v. Maricopa County Med. Soc'y* 457 U.S. 332 (1982) (agreement to fix maximum amount for claims under health insurance plan).[4]

The trade e-books retail cartel is consolidated nation wide by vertical price-fixing. A resale price maintenance scheme was implemented by way of a so-called "agency model", whereby Publisher Defendants set retailers' pricing policy in the relevant market, according to terms and conditions set forth in Apple Agency Agreements. Complaint, ¶¶ 5-7. By implementing the agency model market wide, Apple gained two advantages: (i) Firstly, a competition-proof retail environment for the sale of e-books; (ii) secondly, guaranteed profit margins (30% commission and most favored nation pricing commission). Complaint, ¶ ¶ 56, 60, and 65.

Publisher Defendants count among the Nation's five most important trade e-book publishers out of a total of six; they enjoy market power within the relevant market. Complaint, ¶¶ 29 and 101. The practice of resale price maintenance alleged in the complaint is suspicious under the rule

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[4]"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 has built an internal retail pricing apparatus sufficient to do anything other than set retail prices at the Apple Agency Agreements' ostensible cap". Complaint, ¶ 90. The Agency Agreements imposed on retailers by Publisher Defendants, through Apple, are nothing but an "actual or potential threat to the central nervous system of the economy". *Socony-Vaccum Oil Co.,* 310 U.S., at 224 n. 59.

of reason, the legal standard for assessing the legality of vertical price-fixing. *Leegin v. PSKS, Inc.,* 551 U.S. 877, 897 (2007) (Kennedy, J.) ("Resale price maintenance should be subject to more careful scrutiny ... if many competing manufacturers adopt the practice") (references omitted). See also Robert H. Bork *The Antitrust Paradox* (1978) at 294 ("[P]resence of an industry-wide pattern of resale price maintenance should, as in the case of the dealer cartel, attract government attention"); *In Re: Electronic Books Antitrust Litigation* 859 F.Supp. 2d, at 692-693.

The vertical price fixing scheme challenged in the complaint under Section 1 of the Sherman Act is in all likelihood illegal. This kind of restraint "give[s] rise to an intuitively obvious inference of anticompetitive effect". *California Dental Ass'n v. Federal Trade Commission* 526 U.S. 756, 781 (Souter, J.). Pursuant to an "abbreviated or quick look analysis under the rule of reason, an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect". Ibid, at 770 (quotes omitted). A vertical price fixing agreement designed to maintain a two-tier horizontal price fixing scheme (wholesale and retail) is, by any standards, inimical to market principles protected by antitrust laws. See *In Re: Electronic Books Antitrust Litigation* 859 F.Supp. 2d, at 692-693.

B.

In comments submitted last June, we argued that the Original Judgment should have prima facie effect. Steerads (ATC-0374). The United States filed a response in U.S. District Court for the Southern District of New York in opposition to an "asphalt clause", on the ground that we "[misread] the [APPA], which allows the use of a final judgment or decree as prima facie evidence in other proceedings, but not if the consent judgment or decree is entered before any testimony has been taken. Because no testimony has been taken in this litigation, the proposed Final Judgment

would not constitute prima facie evidence in any private litigation, regardless of how the decree is worded" [brackets, quotes, italics and statutory references omitted]. Response of Plaintiff United States to Public Comments on the proposed Final Judgment (July 23, 2012) at 46. We disagree.

For reasons stated in earlier comments, we submit that consent to PFJ should be withdrawn, unless an "asphalt clause" is incorporated therein. In short, an "asphalt clause ... gives a consent decree the effect of a litigated decree. It states that the defendant will not deny in any court that the consent decree holds him prima facie liable in treble damages to any person who can prove injury from the conduct alleged in the complaint" (italics omitted). Mark J. Green, Beverly C. Moore, Jr., and Bruce Wasserstein, *The Closed Enterprise System* (1972) at 205 (citing *United States v. Lake Asphalt & Petroleum Co.,* 1960 Trade Cases ¶ 69,835 (D. Mass.); *United States v. Allied Chemical Corp.,* 1961 Trade Cases ¶ 69,923 (D. Mass.); *United States v. Bituminous Concrete Ass'n,* 1960 Trade Cases ¶ 69,878 (D. Mass.).

An "asphalt clause" would compel Defendant, simply, to waive all statutory limitations set forth in the APPA (15 U.S.C. § 16 (a)) — specifically, the provision preventing consent judgment from having prima facie effect. The proposed relief establishes a mere presumption in favor of persons injured by Defendant's conduct; Defendant would then have the burden of rebutting the presumption while the burden of persuasion would remain on those seeking damages. Fed. R. Evidence 301. See also Herbert Hovenkamp *Federal Anittrust Policy (4th Ed.) (§ 16.8d.)* ("[The] prima facie evidence rule applies only to matters that were put in issue, explicitly decided and necessary to the outcome. Even then, the statute creates only a rebuttable presumption in the plaintiff's favor"). The presumption is not conclusive, refuting any argument that an "asphalt clause" would be unfair to Defendant.

Consumers were overcharged in the amount of tens of millions of dollars as a result of Publisher Defendants' conduct. Complaint, ¶ 10. Neither PFJ nor the Original Judgment provides compensatory relief. A multidistrict class action was filed by class representatives "on behalf of themselves and others who paid higher prices for their electronic books ... as a direct and foreseeable result of defendants' allegedly unlawful conduct". *In Re: Electronic Books Antitrust Litigation,* 859 F.Supp. 2d 671, 673 (S.D.N.Y. 2012) *stay denied* 2012 U.S. Dist. LEXIS 90190 (S.D.N.Y., June 27, 2012). The U.S. District Court for the Southern District of New York denied defendants' motions to dismiss, ruling instead that "the Complaint survives the test imposed by Rule 12 (b) (6) and states a Sherman Act violation". Ibid., at 689.

In addition, sixteen (16) state attorney generals have filed civil actions, parens patriae. Those civil actions are pending in the U.S. District Court for the Western District of Texas. 859 F.Supp 2nd, at 680. The multidistrict antitrust class action provides an opportunity to send a clear message that price fixing is unprofitable. An asphalt clause is the best way to achieve deterrence, at very low cost to the Department of Justice. It would maximize allocation of scarce resources available to enforce antitrust laws; judicial resources would be saved, too. Antitrust plaintiffs would enjoy a presumption; this would simplify the adjudication of a nation wide complex multidistrict class action. An "asphalt clause" is the most indicated and effective relief under the circumstances.[5]

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[5]On February 8, 2013, the United States Department of Justice announced in a news release that it had reached a settlement with MacMillan, in the above captioned matter. Justice Department Reaches Settlement With Macmillan in E-Books Case, (February 8, 2013). On the same day, MacMillan's CEO, John Sargent, explained in an online written statement to "authors, illustrators and agents" why the company had agreed to settle the case. www.jurist.org "Macmillan Settles e-Books Case With DOJ" (February 08, 2013)[tor.com blog]. Mr. Sargent explained that MacMillan " agreed to settle our case with the DOJ ... because the potential penalties became too high to risk even the possibility of an unfavorable outcome". He added: "Our company is not large enough to risk a worst case judgment. In this action the government accused five publishers and Apple of conspiring to raise prices. As each publisher settled, the remaining defendants became responsible not only for their own treble damages, but also possibly for the treble damages of the settling publishers (minus what they settled for). A few weeks ago I got an estimate of the

There is another issue: collateral. *Parklane Hosiery Co. v. Shore* 439 U.S. 322 (1979). Under the rule governing collateral estoppel, "*a defendant who had a full and fair opportunity to litigate issues in one proceeding* could be precluded from relitigating them in a later collateral proceeding to which he is also a party" (emphasis added) Hovenkamp, supra, § 16.8d. A legal doctrine "more powerful than Clayton § 5 (a)", collateral estoppel has "a broader domain". Ibid. PFJ is a pre-trial settlement. As stipulated in PFJ's Whereas clause: " this judgment does not constitute any admission by Penguin that the law has been violated or of any issue of fact or law, other than the jurisdictional facts as alleged in the Complaint are true". Defendant did not have a "full and fair opportunity" to litigate any claims in the Complaint; therefore, a condition precedent to the application of collateral estoppel is absent.

C.

We share the AAG's concern to "quickly restore retail price competition to consumers". Competitive Impact Statement, Section IV. Still, expediency shall not trump efficient and vigorous enforcement, especially where the antitrust violation unearthed is serious, and the amount of interstate commerce involved substantial. The Clayton Act provides preliminary injunction relief, 15 U.S.C. § 25 — a speedy and effective remedy. Arguendo all four requirements for the issuance of a preliminary injunction are met: Likelihood of success on the merits; likelihood of irreparable harm; the balance of equities favors granting a preliminary injunction; and, the public interest in maintaining competition in the relevant market. *Winter v. Natural Resources Defense Council*, 555

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maximum possible damage figure. I cannot share the breathtaking amount with you, but it was much more than the entire equity of our company". Ibid.

U.S. 7, 20-21 (2008) (Roberts, C.J.).[6]

Another important point deserves comments. The AAG is reviewing currently a proposed joint venture between Defendant and Random House Inc., the largest book publisher in the United States. Justice Department Reaches Settlement With Penguin Group (USA) Inc. in E-Books Case (December 18, 2012). The terms of the proposed venture are unknown to the public; but, it raises serious antitrust concerns, no matter the motivations behind it. Merger Enforcement Guidelines (August 19, 2010) § 7.2. ("The agencies presume that market conditions are conducive to coordinated interaction if firms representing a substantial share in the relevant market appear to have previously engaged in express collusion affecting the relevant market, unless competitive conditions in the market have since changed significantly").[7]

The joint venture under review could affect the effectiveness of PFJ. *Texaco Inc. v. Dagher*, 547 U.S. 1, 7 (2006). ("As a single entity, a joint venture, like any other firm, must have the discretion to determine the prices of the products it sells, including the discretion to sell a product under two different brands as a single, unified price"). See also, *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.* 509 U.S. 209, 227 (1993) (Kennedy, J.). ("Tacit collusion, sometimes called oligopolistic price coordination or conscious parallelism, describes the process, not in itself unlawful, by which firms in a concentrated market might in effect share monopoly power, setting their prices at a profit-maximizing, supracompetitive level by recognizing their shared economic interests and their interdependence with respect to price and output decisions"). See however,

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[6]A preliminary injunction would have strengthened the bargaining position of the AAG, considerably. Usually, a preliminary injunction seals the fate of an antitrust case.

[7]Arguendo Defendant played a significant role in the implementation of the agreement to fix prices in the relevant market. Complaint, ¶¶ 41-43, 49, 57, 59, 62, 64, 70,72-73, 86-88.

American Tobacco Co. v. United States 328 U.S. 781, 804-808 (1946) (Burton, J.).

The proposed joint venture could hardly yield procompetitive benefits, as each entity has ample financial resources and technical expertise to compete on its own. Those entities can develop new products and innovate without cooperation. Defendant and Random House have a very high burden: they ought to provide clear and convincing evidence of economic necessity. *Texaco Inc.,* 547 U.S., at 6 n.1. ("We presume for purposes of these cases that [this] is a lawful joint venture. Its formation has been approved by federal and state regulators, and there is no contention here that it is a sham").

Consent judgment is a valuable enforcement mechanism. We agree that consent judgment saves litigation costs and delays. Response of Plaintiff United States to Public Comments on the proposed Final Judgment (July 23, 2012) at 46; it is speedy and may be cost effective. Consent judgment should be used selectively, however. A settlement agreement embodied in a consent judgment is more appropriate in a situation where the government's case is "weak ", *Microsoft Corp.,* 56 F.3d, at 1461; or, where the practice's anticompetitive effect must be assessed under the rule of reason. This is not such a case.

CONCLUSION

For the foregoing reasons we respectfully submit that consent to the PFJ should be withdrawn, unless Defendant agrees on an "asphalt clause" .

Submitted this February 14 , 2013.

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