UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, Plaintiff, v. APPLE, INC., HACHETTE BOOK GROUP, INC., HARPERCOLLINS PUBLISHERS L.L.C., VERLAGSGRUPPE GEORG VON HOLTZBRINCK GMBH, HOLTZBRINCK PUBLISHERS, LLC d/b/a MACMILLAN, THE PENGUIN GROUP, A DIVISION OF PEARSON PLC, PENGUIN GROUP (USA), INC., and SIMON & SCHUSTER, INC., Defendants.	Civil Action No. 1:12-CV-2826

COMPETITIVE IMPACT STATEMENT

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

I. NATURE AND PURPOSE OF THE PROCEEDING

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

Shortly after filing the Complaint, the United States filed a proposed Final Judgment with respect to Settling Defendants. The proposed Final Judgment is described in more detail in Section III below. The United States and Settling Defendants have stipulated that the proposed Final Judgment may be entered after compliance with the APPA, unless the United States withdraws its consent. Entry of the proposed Final Judgment would terminate this action as to Settling Defendants, except that this Court would retain jurisdiction to construe, modify, and enforce the proposed Final Judgment and to punish violations thereof.[1]

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

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

II. DESCRIPTION OF THE EVENTS GIVING RISE TO THE ALLEGED VIOLATION OF THE ANTITRUST LAWS

A. The E-Books Market

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

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

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

B. Illegal Agreement to Raise E-Book Prices

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

In private meetings among their executives, Publisher Defendants complained about the "$9.99 problem" and the threat they perceived it posed to the publishing industry.[2] Through these communications, each Publisher Defendant gained assurance that its competitors shared concern about Amazon's $9.99 e-book pricing policy.

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

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

lose sales to other Publisher Defendants. Accordingly, Publisher Defendants agreed to act collectively to raise retail e-book prices.

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

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

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

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

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

The Apple Agency Agreements contained two primary features that assured Publisher Defendants of their ability to wrest pricing control from retailers and raise e-book retail prices above $9.99. First, Apple insisted on including a Most Favored Nation clause ("MFN" or "Price MFN") that required each publisher to guarantee that no other retailer could set prices lower than what the Publisher Defendant set for Apple, even if the Publisher Defendant did not control that other retailer's ultimate consumer price. The effect of this MFN was twofold: it not only protected Apple from having to compete on retail price, but also dictated that to protect themselves from the MFN's provisions, Publisher Defendants needed to remove from all other e-book retailers the ability to control retail price, including the ability to fund discounts or promotions out of the retailer's own margins.[3] Thus, the agreement eliminated retail price competition across all retailers selling Publisher Defendants' e-books.

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

The negotiations between Apple and Publisher Defendants culminated in all five Publisher Defendants signing the Apple Agency Agreements within a three-day span, with the last Publisher Defendant signing on January 26, 2010. The next day, Apple announced the iPad at a launch event. At that event, then-Apple CEO Steve Jobs, responding to a reporter's question about why customers should pay $14.99 for an iPad e-book when they could purchase that e-book for $9.99 from Amazon or Barnes & Noble, replied that "that won't be the case. . . . The

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

prices will be the same." Jobs later confirmed his understanding that the Apple Agency Agreements fulfilled the publishers' desire to increase prices for consumers. He explained that, under the agreements, Apple would "go to [an] agency model, where [publishers] set the price, and we get our 30%, and yes, the customer pays a little more, but that's what [publishers] want anyway."

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

After Amazon acquiesced to the agency model, all of Publisher Defendants' major retailers quickly transitioned to the agency model for e-book sales. Retail price competition on e-books had been eliminated and the retail price of e-books had increased.

C. Effects of the Illegal Agreement

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

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

III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

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

A. Required Conduct (Section IV)[4]

1. Sections IV.A and IV.B

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

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

the contractual relationships between Apple and the Settling Defendants to be reset subject to competitive constraints.

The Apple Agency Agreements included MFN clauses that ensured Publisher Defendants would take away retail pricing control from all other e-book retailers. Accordingly, Section IV.B requires the termination of those contracts between a Settling Defendant and an e-book retailer that contain either (a) a restriction on an e-book retailer's ability to set the retail price of any e-book, or (b) a Price MFN. Under the proposed Final Judgment, termination will occur as soon as each contract permits, starting 30 days after the Court enters the proposed Final Judgment.[5] All of Settling Defendants' contracts with major e-book retailers contain one of these provisions and would be terminated. Section IV.B also allows any retailer with such a contract the option to terminate its contract with the Settling Defendant on just 30 days notice. These provisions will ensure that most of Settling Defendants' contracts that restrict the retailer from competing on price will be terminated within a short period.

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

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

2. Section IV.C

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

3. Section IV.D

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

B. Prohibited Conduct (Section V)

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

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

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

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

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

2. Section V.D

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

3. Sections V.E and V.F

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

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

C. Permitted Conduct (Section VI)

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

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

D. Antitrust Compliance (Section VII)

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

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

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

IV. ALTERNATIVES TO THE PROPOSED FINAL JUDGMENT

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

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

V. REMEDIES AVAILABLE TO PRIVATE LITIGANTS

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

VI. PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

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

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

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

Written comments should be submitted to:

John Read, Chief
Litigation III Section
Antitrust Division
U.S. Department of Justice
450 5th Street, NW, Suite 4000
Washington, DC 20530

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

VII. STANDARD OF REVIEW UNDER THE APPA FOR THE PROPOSED FINAL JUDGMENT

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

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

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

Under the APPA a court considers, among other things, the relationship between the remedy secured and the specific allegations set forth in the United States' complaint, whether the decree is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree may positively harm third parties. *See Microsoft*, 56 F.3d at 1458-62. With respect to the adequacy of the relief secured by the decree, the court's function is "not to determine whether the proposed [d]ecree results in the balance of rights and liabilities that is the one that will *best* serve society, but only to ensure that the resulting settlement is within the *reaches* of the public interest." *KeySpan*, 763 F. Supp. 2d at 637 (quoting *United States v. Alex Brown & Sons, Inc.*, 963 F. Supp. 235, 238 (S.D.N.Y. 1997)) (internal quotations omitted). In making this determination, "[t]he [c]ourt is not permitted to reject the proposed remedies merely because the court believes other remedies are preferable. [Rather], the relevant inquiry is whether there is a factual foundation for the government's decision such that its conclusions regarding the proposed settlement are reasonable." *Id.* at 637–38 (quoting *United States v. Abitibi–Consolidated Inc.*, 584 F. Supp. 2d 162, 165 (D.D.C. 2008).[6] The government's predictions about the efficacy of its remedies are entitled to deference.[7]

Courts have greater flexibility in approving proposed consent decrees than in crafting their own decrees following a finding of liability in a litigated matter. "[A] proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is 'within the reaches of public interest.'" *United States v. Am. Tel. & Tel. Co.*, 552 F. Supp. 131, 151 (D.D.C. 1982) (citations omitted) (quoting

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

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

United States v. Gillette Co., 406 F. Supp. 713, 716 (D. Mass. 1975)), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983); *see also United States v. Alcan Aluminum Ltd.*, 605 F. Supp. 619, 622 (W.D. Ky. 1985) (approving the consent decree even though the court would have imposed a greater remedy). To meet this standard, the United States "need only provide a factual basis for concluding that the settlements are reasonably adequate remedies for the alleged harms." *SBC Commc'ns*, 489 F. Supp. 2d at 17.

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

In its 2004 amendments, Congress made clear its intent to preserve the practical benefits of utilizing consent decrees in antitrust enforcement, adding the unambiguous instruction that "[n]othing in this section shall be construed to require the court to conduct an evidentiary hearing or to require the court to permit anyone to intervene." 15 U.S.C. § 16(e)(2). This language effectuates what Congress intended when it enacted the Tunney Act in 1974, as Senator Tunney explained: "[t]he court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process." 119 Cong. Rec. 24,598 (1973) (statement of Senator Tunney).

Rather, the procedure for the public interest determination is left to the discretion of the court, with the recognition that the court's "scope of review remains sharply proscribed by precedent and the nature of Tunney Act proceedings." *SBC Commc'ns*, 489 F. Supp. 2d at 11.[8]

VIII. DETERMINATIVE DOCUMENTS

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

Dated: April 11, 2012

Respectfully submitted,

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

CERTIFICATE OF SERVICE

I, Stephen T. Fairchild, hereby certify that on April 11, 2012, I caused a true and correct copy of the foregoing Stipulation and attached Proposed Final Judgment to be served via electronic mail on:

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