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)

RESPONSE OF PLAINTIFF UNITED STATES TO PUBLIC COMMENTS ON THE PROPOSED FINAL JUDGMENT*

July 23, 2012

* Public Comments are available at http://www.justice.gov/atr/cases/apple/index.html.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

PRELIMINARY STATEMENT

When Apple launched its iBookstore in April of 2010, virtually overnight the retail prices of many bestselling and newly released e-books published in this country jumped 30 to 50 percent—affecting millions of consumers. The United States conducted a lengthy investigation into this steep price increase and uncovered significant evidence that the seismic shift in e-book prices was not the result of market forces, but rather came about through the collusive efforts of Apple and five of the six largest publishers in the country. That conduct, which is detailed in the United States' Complaint against those entities, is *per se* illegal under the federal antitrust laws.

Three of the publishers named in the Complaint as defendants—Hachette Book Group, Inc., HarperCollins Publishers L.L.C., and Simon & Schuster, Inc.—have entered into settlement agreements with the United States. As it is required to do under the Tunney Act, the United States solicited comments from the public regarding the settlements. The United States received 868 comments from individuals, publishers, booksellers, and even from Apple, a key conspirator in the underlying price-fixing scheme.

Comments were submitted both in support of, and in opposition to, the proposed settlements. Those in support largely commented favorably on the government's efforts to end the conspiracy that cost e-book purchasers millions of dollars, and restore competition to the e-book market. Critical comments generally were submitted by those who have an interest in seeing consumers pay more for e-books, and hobbling retailers that might want to sell e-books at lower prices. Many such comments expressed a general frustration with conditions that arise not from the settlements or even the United States' Complaint, but from

the evolving nature of the publishing industry—in which the growing popularity of e-books is placing pressure on the prevailing model that is built on physical supply chains and brick-and-mortar stores. Many critics of the settlements view the consequences of the conspiracy—higher prices—as serving their own self-interests, and they prefer that unfettered competition be replaced by industry collusion that places the welfare of certain firms over that of the public. That position is wholly at odds with the purposes of the federal antitrust laws—which were enacted to protect competition, not competitors. *See, e.g.*, *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962).

The United States received many comments that sought to excuse price fixing as necessary to end Amazon's reported ninety percent share of the e-book market, and noted that Apple's entry effectuated erosion of Amazon's share and spurred all sorts of innovations, such as color e-books. But the reality is that, despite its conspiratorial efforts, Apple's entry into the e-book market was not immediately successful. It was, in fact, Barnes & Noble's entry—prior to Apple—that took significant share away from Amazon; and many of the touted innovations were in development long before Apple decided to enter the market via conspiracy.

Some critical comments simply misunderstand the decree. They assert that the United States is imposing a business model on the industry by prohibiting agency agreements. The United States, however, does not object to the agency method of distribution in the e-book industry, only to the collusive use of agency to eliminate competition and thrust higher prices onto consumers. Publishers that did not collude are not required to surrender agency agreements and even the settling publishers here can resume

agency, if they act unilaterally, after only two years. This brief cooling-off period will ensure that the effects of the collusion will have evaporated before defendants seek future agency agreements, if any.

Overall, the United States is entitled to broad discretion to settle with antitrust defendants, so long as the settlements are within the reaches of the public interest. In that regard, the Court's inquiry is a limited one, focused on whether the proposed Final Judgment provides effective and appropriate remedies for the antitrust violations alleged in the Complaint, with respect to the Settling Defendants. As set forth below, after carefully considering the comments received, the United States has concluded the settlements meet that test.

I. INTRODUCTION

Pursuant to the requirements of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)-(h) ("Tunney Act"), the United States hereby responds to the public comments received in this case regarding the proposed Final Judgment as to defendants Hachette Book Group, Inc., HarperCollins Publishers L.L.C., and Simon & Schuster, Inc. (collectively "Settling Defendants"). After careful consideration of the comments, the United States has concluded that the proposed Final Judgment will provide an effective and appropriate remedy for the antitrust violations alleged in the Complaint, with respect to the Settling Defendants. The United States will move the Court for entry of the proposed Final Judgment after this response has been published in the *Federal Register* and online. All timely comments are posted publicly at http://www.justice.gov/atr/cases/apple/index.html, pursuant to 15 U.S.C. § 16(d).

On April 11, 2012, the government 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. On the same day, the United States filed a proposed Final Judgment with respect to the three Settling Defendants.

The United States and Settling Defendants have stipulated that the proposed Final Judgment may be entered after compliance with the requirements of the Tunney Act. Pursuant to those requirements, the United States filed its Competitive Impact Statement ("CIS") with the Court on April 11, 2012; the proposed Final Judgment and CIS were published in the *Federal Register* on April 24, 2012, at 77 Fed. Reg. 24518; and summaries of the terms of the proposed Final Judgment and CIS, together with directions for the submission of written comments

relating to the proposed Final Judgment, were published in both *The New York Post* and *The Washington Post* for seven days beginning on April 20, 2012 and ending on April 26, 2012. The sixty-day period for public comment ("Tunney Act period") ended on June 25, 2012.

The United States received 868 comments during the Tunney Act period.[1] Nearly seventy of those comments favored the suit and settlement. The favorable comments included a submission from the Consumer Federation of America ("CFA"), the only consumer group to submit a comment on the decree. Another supportive comment included the signatures of 186 authors who favorably noted the growth of the e-book industry and the opportunities it gave them to bypass traditional distribution channels and successfully self-publish e-books at lower prices. Among the group of comments that supported the settlement were fifty-two readers and consumers, several of whom echoed the themes of a form letter suggested by online publisher Wordpress.com.[2] The comments supporting the proposed Final Judgment did, however, include several that asserted the relief obtained in the settlements did not go far enough. One observation raised in these comments was that two years is too short a period to ban Settling Defendants from prohibiting price discounting by retailers.

The remaining comments opposed the suit and/or the settlement.[3] Most of these comments came from publishers, authors, agents, and bookstores that acknowledged an interest in higher retail e-book prices. An overarching theme of their comments was that lower e-book

[1] An additional fourteen comments arrived after the Tunney Act period expired and, therefore, have not been published. However, the United States reviewed the comments and none of them raised any issue not already addressed in this Response to Comments.

[2] As of this writing, that letter is available at: http://support4settlement.wordpress.com/2012/04/30/support-the-settlement/.

[3] Two comments expressed no opinion either in favor of the suit or settlement, or in opposition to it.

prices would harm booksellers directly and others indirectly. They claimed that the pre-conspiracy lower e-book prices were caused by predatory conduct of Amazon and that the proposed Final Judgment would allow Amazon to lower prices once again, which could lead to an Amazon monopoly. These comments suggested that the current industry equilibrium, even if collusively attained, is preferable to the competitive dynamic that preceded it, and that the United States erred both in suing the conspirators and in agreeing to a settlement designed to restore competition. Comments among this group include those from the American Booksellers Association ("ABA"), The Authors Guild,[4] a group of nine mid-tier publishers ("Independent Book Publishers"), and Amazon's two largest e-book retail competitors, Barnes & Noble ("B&N") and Apple.

This response proceeds as follows: Section II describes the Complaint and the industry facts that the United States considered when it entered into the settlements. Section III outlines the legal considerations for the Court as it reviews the proposed Final Judgment. Section IV explains the provisions of the proposed Final Judgment and how they will aid in restoring competition. Finally, Section V addresses the most prominent concerns raised in comments, then responds directly to the key assertions of the most detailed comments submitted.

[4] Both the Authors Guild and the ABA posted talking points online and instructed members "How to Weigh In" on the proposed Final Judgment. As of this writing, that guidance is available at: http://authorsguild.org/advocacy/articles/the-justice-departments-e-book-proposal-needlessly.html, and http://news.bookweb.org/news/aba-members-urged-make-their-voices-heard-re-agency-model.

II. THE COMPLAINT AND THE E-BOOK INDUSTRY

On April 3, 2010, simultaneously with Apple's iPad launch, the retail prices of most bestselling and newly released e-books published by Publisher Defendants jumped from the then-prevailing price of $9.99 to $12.99 or $14.99. Compl. ¶¶ 7-8, 74. In May 2010, the United States formally opened an investigation into the possibility that the price hike was the result of collusion. During the investigation, the United States issued Civil Investigative Demands to obtain documents and sworn testimony from defendants and third parties. On the strength of the evidence gathered during its investigation, the United States filed its Complaint on April 11, 2012.

The Complaint alleges that defendants conspired and 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 Publisher Defendants. Defendants ultimately effectuated this agreement by collectively adopting and adhering to functionally identical price schedules and methods of selling e-books, as laid out in each Publisher Defendant's contract with Apple (the "Apple Agency Agreements"). In 2008, defendants began to communicate about the threat posed by Amazon's $9.99 pricing strategy, and the need to work together to end it. Compl. ¶ 37. Though Amazon's e-book distribution business was "[f]rom the time of its launch . . . consistently profitable," it "substantially discount[ed] some newly released and bestselling titles." Compl. ¶ 30. By the end of the summer of 2009, Publisher Defendants agreed to work collectively to raise Amazon's retail prices. Compl. ¶ 37.

Apple was aware of Publisher Defendants' common objective to end Amazon's $9.99 pricing. Compl. ¶ 59. In late 2009, Apple and Publisher Defendants agreed to replace the

wholesale model for e-book sales with an agency model that would allow Publisher Defendants to raise prices. Compl. ¶ 37. Apple first proposed that each publisher expressly adopt an agency pricing model for all of its retail e-book sales, Compl. ¶ 63, then replaced that express requirement with an unusual most favored nation ("MFN") pricing provision that accomplished the same result. Compl. ¶¶ 65-66. This MFN was designed to protect Apple from having to compete on price at all, while still maintaining its margin. Compl. ¶ 65. Apple facilitated this transition to agency pricing across all e-book retailers by entering into functionally identical agency contracts with each Publisher Defendant that allowed Publisher Defendants to set Apple's retail prices for e-books. Compl. ¶ 6-7. The same terms granted Apple the assurance that Publisher Defendants would raise retail e-book prices at all other e-book retailers, and contained price tiers that created de facto retail e-book prices as a function of a title's hardcover list price. Compl. ¶ 7.

As explained more fully in the Complaint and CIS, defendants' conspiracy resulted in higher consumer prices for e-books than would have been possible absent collusion. "[T]he average price for Publisher Defendants' e-books increased by over ten percent between the summer of 2009 and the summer of 2010." CIS at 8-9. "On many adult trade e-books, consumers have witnessed an increase in retail prices between 30 and 50 percent." CIS at 9. Additionally, defendants' agreement prevented e-book retailers "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." CIS at 9.

Since the proposed Final Judgment was announced, more companies are investing to enter or expand in the market and compete against Amazon, Apple, and other e-book retailers. According to public reports, Microsoft has invested hundreds of millions of dollars in Barnes & Noble's digital book business, a business that Microsoft valued at $1.7 billion.[5] Microsoft soon thereafter announced it would sell a tablet computer, named Surface, that will compete against the iPad and serve as an e-reader.[6] Google, already an e-book content provider, also announced after the settlement that it would for the first time sell a tablet, called Nexus 7. The Nexus 7 is designed to compete directly against Amazon's Kindle Fire and bring more business to Google Play, Google's online store that sells e-books and other digital content.[7]

III. STANDARD OF JUDICIAL REVIEW

Under the Tunney Act, proposed consent judgments in antitrust cases brought by the United States are 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).

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[5] *See* Shira Ovide & Jeffrey A. Trachtenberg, *Microsoft Hooks Onto Nook*, Wall Street Journal, May 2, 2012; Press Release, Barnes & Noble, *Barnes & Noble and Microsoft Form Strategic Partnership to Advance World-Class Digital Reading Experiences for Consumers*, (April 30, 2012), http://www.barnesandnobleinc.com/press_releases/4_30_12_bn_microsoft_strategic_partnership.html (quoting B&N's CEO as saying that the Microsoft partnership is an important part of the strategy "to solidify our position as a leader in the exploding market for digital content in the consumer and education segments").

[6] *See* Madalit Del Barco, *Microsoft's Surface Tablet to Compete with iPad*, National Public Radio (June 19, 2012), http://www.npr.org/2012/06/19/155337886/microsoft-debuts-surface-tablet-to-compete-with-ipad; Michael Kozlowski, *How Will the Microsoft Surface Tablet Function as an e-Reader*, Good E-Reader (June 20, 2012), http://goodereader.com/blog/electronic-readers/how-will-the-microsoft-surface-tablet-function-as-an-e-reader.

[7] *See* Joanna Stem, *Google Nexus 7 Tablet Move Over, Kindle Fire,* ABC News.com (Jun. 27, 2012), http://abcnews.go.com/blogs/technology/2012/06/google-nexus-7-tablet-move-over-kindle-fire/; Michael Liedtke, *Google, Kindle have tablet showdown*, Charlotte Observer.com (June 28, 2012), http://www.charlotteobserver.com/2012/06/28/3346735/googles-nexus-seven-tablet-challenges.html.

As discussed in more detail below, the public interest inquiry considers the relationship between the allegations in the government's complaint and the proposed remedy, with deference to the United States' role in crafting a settlement.

A. The United States is Entitled to Substantial Deference in Crafting a Settlement

When parties come before the court in a Tunney Act proceeding, they have resolved their dispute with respect to a government antitrust complaint. Accordingly, the court's inquiry is necessarily a limited one as the government 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); *accord United States v. Alex. Brown & Sons, Inc.*, 963 F. Supp. 235, 238 (S.D.N.Y. 1997) (quoting *Microsoft*, 56 F.3d at 1460), *aff'd sub nom., United States v. Bleznak*, 153 F.3d 16 (2d Cir. 1998); *United States v. KeySpan Corp.*, 763 F. Supp. 2d 633, 637 (S.D.N.Y. 2011) (same); *United States v. SBC Commc'ns, Inc.*, 489 F. Supp. 2d 1, 15-16 (D.D.C. 2007) (assessing public interest standard under the Tunney Act).

The question in a Tunney Act proceeding is not whether the reviewing court would have imposed a different decree if liability had been established in litigation. Rather, "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 *United States v. Gillette Co.*, 406 F. Supp. 713, 716 (D. Mass. 1975)); *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; *accord KeySpan Corp.*, 763 F. Supp. 2d at 637-38. The United States "need not prove its underlying allegations in a Tunney Act proceeding," as such a requirement "would fatally undermine the practice of settling cases and would violate the intent of the Tunney Act." *SBC Commc'ns*, 489 F. Supp. 2d at 20 (citing 15 U.S.C. § 16(e)(2) for the proposition that the Act does not require a court to hold an evidentiary hearing). Congress intended that the court reach its determination expeditiously, giving due deference to the government's predictions regarding the effect of its proposed remedies. *See Microsoft*, 56 F.3d at 1461.

B. The Court's "Public Interest" Inquiry Should Focus on the Relationship Between the Harm Alleged and the Remedy Selected

The Tunney Act requires the court to consider specific factors in determining whether the proposed Final Judgment 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). Courts "cannot look beyond the complaint in making the public interest determination unless the complaint is drafted so narrowly as to make a mockery of judicial power." *SBC Commc'ns*, 489 F. Supp. 2d at 15. Under the statute, the court should consider the following factors:

> (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)(A)-(B).

In other words, under the Tunney Act, a court considers, among other things, the relationship between the remedy secured and the specific allegations set forth in the government's 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, a court may not "engage in an unrestricted evaluation of what relief would best serve the public." *United States v. BNS, Inc*., 858 F.2d 456, 462 (9th Cir. 1988) (quoting *United States v. Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir. 1981)); *see also Microsoft*, 56 F.3d at 1460-62; *Alex. Brown & Sons*, 963 F. Supp. at 238; *United States v. Alcoa, Inc.*, 152 F. Supp. 2d 37, 40 (D.D.C. 2001). Instead, 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. Archer-Daniels-Midland Co.*, 272 F. Supp. 2d 1, 6 (D.D.C. 2003).

> 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. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is "*within the reaches of the public interest*." More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.

Bechtel, 648 F.2d at 666 (emphasis added) (citations omitted); *accord Alex. Brown*, 963 F. Supp. at 238.[8]

IV. THE PROPOSED FINAL JUDGMENT

The purpose of the proposed Final Judgment is to stop collusive conduct by Settling Defendants and mitigate the consequences of their collusion in the sale of e-books. Accordingly, the terms of the proposed Final Judgment are designed to accomplish three things: (1) end the current collusion; (2) restore competition eliminated by that collusion; and (3) ensure compliance.

A. Ending Collusion by Settling Defendants

The function of a decree in a Sherman Act case "includes undoing what the conspiracy achieved." *United States v. Paramount Pictures*, 334 U.S. 131, 171 (1948). Here, defendants achieved higher retail e-book prices in large part by collectively agreeing to wrest control of pricing and other terms from retailers. As explained more fully in the Complaint and CIS, the anticompetitive results of the conspiracy ultimately were ensured by Publisher Defendants' near-simultaneous execution of the Apple Agency Agreements, which included common price schedules and MFN clauses, and which proscribed retail discounting. Accordingly, the proposed Final Judgment requires that Settling Defendants terminate the Apple Agency Agreements. PFJ § IV.A. Courts have long required termination of contracts found to be unlawful under Section 1

[8] *Cf. BNS*, 858 F.2d at 464 (holding that the court's "ultimate authority under the [Tunney Act] is limited to approving or disapproving the consent decree"); *Gillette*, 406 F. Supp. at 716 (the court is constrained to "look at the overall picture not hypercritically, nor with a microscope, but with an artist's reducing glass"). *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'").

of the Sherman Act. *See United States v. Nat'l Lead Co.*, 332 U.S. 319, 328 n.4, 363-64 (1947) (approving a decree cancelling unlawful agreements and enjoining further performance); *see also United States v. Delta Dental of R.I.*, No. 96-113P, 1997 WL 527669 (D.R.I. July 2, 1997) (entering decree voiding MFN enforcement).

The proposed Final Judgment also requires that Settling Defendants terminate, as soon as they are contractually permitted to do so, all other agreements that include restrictions on the ability of e-book retailers to compete on price or that may be used to facilitate price fixing. This allows retailers the opportunity to renegotiate those contracts with Settling Defendants unimpeded by collusion. The proposed Final Judgment does not require Settling Defendants to breach any such contracts; rather, it requires Settling Defendants not to extend them, and to take any such steps necessary to terminate the contracts according to their own terms. PFJ § IV.B.

B. Restoring Competition for E-Books With Respect to Settling Defendants

To allow the competition foreclosed by defendants' collusion to reemerge, the proposed Final Judgment requires that Settling Defendants: (a) refrain for two years from entering into contracts containing retail price restrictions and price commitment mechanisms; (b) stop communicating competitively sensitive information to competitors; (c) not retaliate against retailers that exercise discounting authority; and (d) agree not to fix terms or prices with competitors for the provision of e-books. PFJ §§ V.B, V.C, V.D, V.E, and V.F.

It is well established that the remedy for a violation of the Sherman Act may extend beyond the specific agreements that embodied the violation. Once a violation has occurred, "advantages already in hand may be held by methods more subtle and informed, and more difficult to prove, than those which, in the first place, win a market." *United States v. Int'l Salt*,

332 U.S. 392, 400 (1947) (abrogated on other grounds). Consequently, while the scope of the remedy must be clearly related to the anticompetitive effects of the illegal conduct, *Microsoft*, 56 F.3d at 1460, courts are "empowered to fashion appropriate restraints on [the transgressor's] future activities both to avoid a recurrence of the violation and to eliminate its consequences." *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 697 (1978). Relief may "range broadly through practices connected with acts actually found to be illegal." *United States v. U. S. Gypsum Co.*, 340 U.S. 76, 89 (1950). A court "has broad power to restrain acts which are of the same type or class as [the] unlawful acts" and which "may fairly be anticipated" from the defendant's past conduct. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 132 (1969) (internal quotation marks and citation omitted). The relief should "unfetter a market from anticompetitive conduct," and include that which is "necessary and appropriate" in order "to restore competition." *Ford Motor Co. v. United States*, 405 U.S. 562, 573, 577 & n.8 (1972) (internal quotation marks and citations omitted).

In this case, a prohibition on price fixing or the termination of the Apple Agency Agreements standing alone would be insufficient to undo the effects of the conspiracy. By colluding, defendants learned that they shared a common goal to raise e-book prices, agreed to use particular tools to achieve that goal, found those tools to be effective, and found each other reliable in the application of those tools. It is appropriate, therefore, to restrict defendants' ability to use the tools that effectuated the conspiracy. *See, e.g.*, *United States v. Glaxo Group, Ltd.*, 410 U.S. 52, 64 (1973) (barring the use of a patent employed to effect a conspiracy); *Int'l Salt*, 332 U.S. at 400 ("it is not necessary that all of the untraveled roads" to collusion "be left open and that only the worn one be closed"). Thus, retail price restrictions and MFN pricing

clauses are prohibited for two- and five-year periods, respectively. The 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. Such precautions are particularly important in this case, as three defendants have not yet agreed to terminate their collusive behavior. These limitations also are designed not to last long enough to alter the ultimate development of the competitive landscape in the still-evolving e-books industry.

These provisions are tailored to restore a measure of competition to the market, while avoiding harm to other market participants (*e.g.*, retailers) that may have relied on the collusive agreements in effect for more than two years. For example, the proposed Final Judgment specifically permits Settling Defendants to pay for e-book promotion or marketing efforts made by brick-and-mortar booksellers. PFJ § VI.A. Each Settling Defendant also may negotiate a commitment from any e-book retailer to limit its annual discounts, so that each Settling Defendants may ensure that its entire catalog of e-books is not sold by any retailer below its total e-book costs. PFJ § VI.B. Monitoring and enforcement of this provision is left to the discretion of Settling Defendants and the retailers with which they contract.

C. Compliance and Enforcement

To ensure that Settling Defendants abide by the substantive terms of the proposed Final Judgment and decrease the likelihood that they might attempt to collude in other ways, the proposed Final Judgment requires that Settling Defendants: (a) provide the United States with copies of current retail agreements immediately, future contracts quarterly, competitor communication logs quarterly, and notification of new or changing joint ventures as needed; (b) allow the United States to investigate compliance from time to time, as authorized by the

Assistant Attorney General for Antitrust; and (c) provide officers and employees counseling on the requirements of the proposed Final Judgment and the antitrust laws so they may understand their obligations. PFJ §§ IV.C, IV.D, VII.C, VII.I, VIII.A.

These mechanisms are commonly used means of ensuring compliance with a decree, while minimizing administrative costs. *See, e.g.*, Final Judgment at §§ IV.I-O, *United States v. Comcast*, 808 F. Supp. 2d 145 (D.D.C. 2011) (No. 1:11-cv-00106) (requiring quarterly provision of communication logs and retention of twelve categories of documents); Final Judgment at § IV.C, *United States v. Graftech Int'l Ltd.*, No. 1:10–cv–02039, 2011 WL 1566781 at *3 (D.D.C. Mar. 24, 2011) (requiring quarterly and annual provision of contracts and reports). None of these provisions requires the United States Department of Justice ("Department") or the Court to become deeply involved in the daily operation of Settling Defendants' businesses. *Cf. Paramount Pictures*, 334 U.S. at 162 (rejecting provision of a consent decree because it "involves the judiciary so deeply in the daily operation of this nation-wide business").

In this case, the enforcement provisions focus on the specific terms that affected the conspiracy. Current and future agreements must be provided to confirm that retail pricing restrictions and price MFNs are not included. The requirement that Settling Defendants provide logs of communications among publishers will discourage unnecessary and anticompetitive communications, such as those that led to their e-books conspiracy. Likewise, as Publisher Defendants considered forming joint ventures to better coordinate pricing, Compl. ¶¶ 47-49, future joint ventures must be reviewed by the United States. In the event concerns about compliance arise, the proposed Final Judgment allows the United States to investigate. Finally,

in order to empower Settling Defendants to avoid such concerns, antitrust counseling also is required.

V. SUMMARY OF PUBLIC COMMENTS AND THE UNITED STATES' RESPONSE

Comments opposing the proposed Final Judgment and those supporting it have at least one element in common: they agree that entry of the decree likely will reduce retail prices for e-books, at least in the short term. Detractors insist that lower pricing will mean reduced profits for bookstores, authors, literary agents, and publishers, and an eventual reduction in quality, service, variety, and other benefits to consumers. Supporters welcome a reduction in e-book prices for consumers, and dismiss any lost benefits to industry participants as undeserved, speculative, or irrelevant.

The comments submitted in opposition to entry of the proposed Final Judgment explored five common themes: (1) the legality of restoring discount authority to retailers; (2) the economic impact on industry participants of restoring discount authority to retailers; (3) the viability of collusive pricing as a defense against perceived monopolization and/or predatory pricing; (4) collusive pricing as protection from free riding and low-cost competition; and (5) the clarity and breadth of the proposed Final Judgment.[9] Section A responds to these themes in

[9] Many of the 868 comments received from the public did not bear on issues related to the antitrust merits of the proposed Final Judgment or on any other issue arguably related to the Court's inquiry under the Tunney Act. While the United States did undertake herein to respond generally or specifically to all germane comments, we do not address those that are wholly outside the scope of Tunney Act proceedings. Following are some examples of the types of issues that arose in comments we determined were not relevant for Tunney Act review: (1) the Complaint should not have been filed, *see, e.g.*, Alicia Wendt (ATC-0314) at 1 (writing "to urge the US Department of Justice to reconsider its complaint and drop the related charges"); (2) the United States should sue Amazon, *see, e.g.*, Nancy L. Cunningham (ATC-0733) (suggesting "the Department of Justice should turn its attention to Amazon, a company that seeks to create a monopoly"); (3) tax reform is needed to require payment by online retailers, *see, e.g.*, Roberta Rubin (ATC-0323) (claiming Amazon is "evading any tax demands in most of the states in

detail. Section B highlights portions of the most detailed comments for individual responses, including comments submitted by B&N, the CFA, the Independent Book Publishers, the ABA, and the Authors Guild. Section C addresses additional comments that presented distinct ideas.[10] Finally, Section D discusses the comment submitted by Apple, which is the only comment submitted by a defendant in this matter. The United States carefully reviewed all of the submitted comments and, after serious consideration, concludes that the proposed Final Judgment is in the public interest and requires no modification.

A. Prominent Themes in Industry Comments

1. A Window for Retail Discounting Eliminates Terms That Facilitated Collusion Without Imposing a Business Model on the Industry

Many comments, including those submitted by B&N, Books-A-Million ("BAM"), the ABA, and the Authors Guild, argue that the proposed Final Judgment inappropriately prohibits the use of an agency sales model. B&N claims that the "[g]overnment should not regulate legal agreements that are independently negotiated by industry participants who are in the best position to determine if the agreements are in their interests." B&N (ATC-0097) at 24. BAM adds that "[i]t is now well-established . . . that vertical restrictions, even vertical price restrictions, are not necessarily anticompetitive." BAM (ATC-0261) at 2.

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which they sell books"); (4) the United States has been improperly influenced by Amazon to bring this lawsuit, *see, e.g.*, Richard Howorth (ATC-0790) at 1 (suggesting that the DOJ was improperly influenced because a former Deputy Attorney General sits on Amazon's board of directors).

[10] For ease of access, all of the comments discussed in Sections B and C have been collected and separately saved, and are available both in Exhibit A in the folder titled "Detailed Comments" and on the Antitrust Division's website, at http://www.justice.gov/atr/cases/apple/index.html, under "Detailed Comments."

As a preliminary matter, the proposed Final Judgment does not impose a business model on the e-book industry. Of course, publishers that were not parties to the conspiracy face no government challenge whatsoever as to agency agreements independently arrived at with e-book retailers. Even Settling Defendants, whose agency contracts were the product of the conspiracy, are not permanently barred from using the agency model. For two years, however, Settling Defendants cannot prohibit retailers from discounting e-books. The United States believes that this limited restriction is necessary to prevent Settling Defendants from continuing to benefit from their conspiracy by insisting that retailers enter new contracts that are identical to the contracts produced through collusion. *See* CIS at 10 ("[T]he proposed Final Judgment will ensure that the new contracts will not be set under the collusive conditions that produced the Apple Agency Agreements.").[11]

Nor are restrictions on agency pricing inappropriate when necessary to prevent furtherance of a conspiracy or when agency contracts were the heart of a conspiracy. As the CFA observed, when B&N and other retailers negotiated agency contracts with publishers, they were "not negotiating with independent publishers" but "with members of a cartel." CFA (ATC-0775) at 9. When "otherwise permissible practices [are] connected with the acts found to be illegal" then they "must sometimes be enjoined" to ensure relief. *United States v. Loew's, Inc.* 371 U.S. 38, 53 (1962); *see also U. S. Gypsum Co.*, 340 U.S. at 89 ("Acts entirely proper when viewed alone may be prohibited," if needed for effective relief). In this case, allowing retail price restrictions to continue without interruption would maintain the collusive status quo in the e-book industry. The limitations placed on the terms of agency contracts entered into by Settling

[11] As one comment put it more colloquially, defendants "maxed out on chutzpah," and now "[t]he only remedy for such blatant collusion is to wipe the slate clean" and let the market sort pricing out. Courtney Milan (ATC-0262).

Defendants for a period of two years will break the collusive status quo and allow truly bilateral negotiations between publishers and retailers to produce competitive results.

2. Consumers, the Victims of the Conspiracy, Will Benefit as Limits on Retail Discounting are Lifted

Many comments maintain that brick-and-mortar booksellers such as B&N, BAM, and ABA member stores will be harmed if the proposed Final Judgment removes barriers to price competition. They contend that higher retail margins produced by the conspiracy ameliorated declines in brick-and-mortar revenues, generated "procompetitive benefits" such as entry by new retail competitors and innovation, and allowed brick-and-mortar booksellers to offer new marketing service and support for e-books. *See, e.g.*, B&N at 13-14, 20; ABA (ATC-0265) at 2-3. Of course, protecting profits attributable to collusion is squarely at odds with a fundamental purpose of the antitrust laws: the promotion of competition. And, many of the so-called "procompetitive benefits" that these commenters believe will be lost if the decree is entered are illusory or cannot be attributed to the collusion.

While the Tunney Act directs the court to consider the impact of the settlement on third parties, these third parties are limited to those "alleging specific injury from the violations set forth in the complaint." 15 U.S.C. § 16(e)(1)(B). In this case, the third parties that the Court is directed to consider under the Tunney Act are the consumers of e-books, not the brick-and-mortar booksellers, which admit that they *benefited* from the conspiracy. *See, e.g.*, B&N at 19. The booksellers' objection is not that they were harmed as a result of the violation, but that the proposed Final Judgment ends the collusively-attained equilibrium that provided them with an anticompetitive windfall. This is not the type of impact that the Tunney Act directs the Court to consider. Instead, the Court should consider that consumers who were actually injured by the

conspiracy will benefit as the proposed Final Judgment returns price competition to the market. As the Second Circuit observed when terminating a consent decree despite competitor objections, "[t]he 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 Corp.*, 163 F.3d at 741-42 (2d Cir. 1998) (quoting *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 458 (1993)).[12]

In addition, many brick-and-mortar booksellers, as well as the Authors Guild, speculate that collusive limits on retail discounting were instrumental in encouraging new entry into e-book distribution by brick-and mortar booksellers, spurring entry by online distributors, and incentivizing e-reader innovation. To the contrary, brick-and-mortar stores, including B&N, were selling e-books before implementation of the Apple Agency Agreements.[13] Any expansion of brick-and-mortar sales after the Apple Agency Agreements were implemented was limited in its impact because new sellers could not compete by offering discounts. Likewise, online distributors such as B&N and Google had entered or planned to enter the e-book market before the Apple Agency Agreements were signed.[14] Additionally, innovations such as the iPad and

[12] Although the Tunney Act requires a "public interest" determination only to approve a consent decree, the Second Circuit applies the same "consider[ation of] the public interest" when evaluating a termination. *See Int'l Bus. Machines Corp.*, 163 F.3d 737, 740 (citations omitted).

[13] *See, e.g.*, Press Release, The American Booksellers Association, *ABA Indie Bookstores to Sell eContent, Sony Reader* (Aug. 25, 2009), http://www.bookweb.org/about/press/20090825.html (announcing more than 200 independent bookstores will sell ebooks through the ABA's IndieCommerce program).

[14] *See, e.g.*, David Weir, *Amazon v. Sony, et. al., in War of the eBook Giants*, BNet.com (Aug. 18, 2009), http://www.cbsnews.com/8301-505123_162-33243776/amazon-v-sony-etal-in-war-of-the-ebook-giants/?tag=bnetdomain (describing the eBook industry as "a crowded field," noting Google is one of the other "important players in this space," and Apple is expected to enter); Dan Fromer, *Sony to Unveil E-Reader With Wireless in 2 Weeks?*, Business Insider (Aug. 11, 2009), http://articles.businessinsider.com/2009-08-11/tech/30085553_1_sony-reader-e-reader-wireless.

B&N's Nook were either introduced or already planned prior to formation of the Apple Agency Agreements.[15] In the pre-conspiracy competitive market, innovation, discounting, and marketing were robust. In contrast, the conspiracy eliminated any number of potential procompetitive innovations, such as "all-you-can-read" subscription services, book club pricing specials, and rewards programs. *See* Compl. ¶ 98; CIS at 9.

3. Collusion is Not Acceptable, Even in Response to Perceived Anticompetitive Conduct

B&N, BAM, the ABA, the Authors Guild, and other industry participants claim that collusive limits on retail discounting were a necessary response to anticompetitive behavior by Amazon and, thus, should be preserved.[16] B&N claims these limits are necessary to avoid "competition with a potential Amazon below-cost price-point." B&N at 22-23. The ABA suggests that collusive agency pricing "corrects a distortion in the market fostered primarily by Amazon.com." ABA (ATC-0265) at 1. The Authors Guild insists that removing limits on retailer discounting will enable Amazon to use "predatory pricing" to return to a dominant or "monopoly" position and allow the company to charge supracompetitive prices for e-books in the future. *See, e.g.*, The Authors Guild (ATC-0214) at 1-2.

There is no mistaking the fear that many of the commenters have of the prospect of competing with Amazon on price. No doubt Amazon is a vigorous e-book competitor. In

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[15] *See, e.g.*, Jeffrey A. Trachtenberg & Geoffrey A. Fowler, *Barnes & Noble Challenges Amazon's Kindle*, Wall Street Journal (July 21, 2009), *available at* http://online.wsj.com/article/SB124812243356966275.html.

[16] Other comments dispute the benefits of retail price control. As one commenter put it, Publisher Defendants "were out-performed by Amazon" which, in contrast to Publisher Defendants, "did nothing illegal." Phillis A. Humphrey (ATC-0250). Another writes, "I don't want to be forced to pay higher prices" because Publisher Defendants "work together to slow the adoption of this relatively new technology." Kathy Baughman (ATC-0094).

addition to aggressive pricing, it was an early innovator in the e-book market, introducing its Kindle e-reader more than two years before B&N's Nook and Apple's iPad. Of course, low prices, fierce rivalries, and innovation are among the core ambitions of free markets. Contrary to the apparent views of many commenters, "the goal of antitrust law is to use rivalry to keep prices low for consumers' benefit. Employing antitrust law to drive prices up would turn the Sherman Act on its head." *Wallace v. Int'l Bus. Machine Corp.*, 467 F.3d 1104, 1107 (7th Cir. 2006).

Moreover, the notion that Amazon will come to exclude competition in e-books and monopolize the industry is highly speculative at best. Before the collusive Apple Agency Agreements, B&N had entered the market and taken significant share from Amazon. In addition, the e-book industry has attracted participation from the likes of Apple, Microsoft, Google, and Sony. The future is unclear and the path for many industry members may be fraught with uncertainty and risk. But certainly there is no shortage of competitive assets and capabilities being brought to bear in the e-books industry. A purpose of the proposed Final Judgment is to prevent entrenched industry members from arresting via collusion the potentially huge benefits of intense competition in an evolving market.

The United States recognizes that many of the comments reflect a concern that a firm with the heft of Amazon may harm competition through sustained low or predatory pricing. In the course of its investigation, the United States examined complaints about Amazon's alleged predatory practices and found persuasive evidence lacking. As is alleged in the Complaint, the United States concluded, based on its investigation and review of data from Amazon and others, that "[f]rom 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." Compl. ¶ 30.

Some of the criticism directed at Amazon may be attributed to a misunderstanding of the legal standard for predatory pricing. Low prices, of course, are one of the principal goals of the antitrust laws. *Cf. Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 340 (1990). This is because of the unmistakable benefit to consumers when firms cut prices. *Id*. "Loss leaders," two-for-one specials, deep discounting, and other aggressive price strategies are common in many industries, including among booksellers. This is to be celebrated, not outlawed. Unlawful "predatory pricing," therefore, is something more than prices that are "too low." Antitrust law prohibits low prices only if the price is "below an appropriate measure of . . . cost," and there exists "a dangerous probability" that the discounter will be able to drive out competition, raise prices, and thereby "recoup[] its investment in below-cost pricing." *Brooke Group v. Brown and Williamson Tobacco Corp*., 509 U.S. 209, 222-24 (1993). No objector to the proposed Final Judgment has supplied evidence that, in the dynamic and evolving e-book industry, Amazon threatens to drive out competition and obtain the monopoly pricing power which is the ultimate concern of predatory pricing law. The presence and continued investment by technology giants, multinational book publishers, and national retailers in e-books businesses renders such a prospect highly speculative. Of course, should Amazon or any other firm commit future antitrust violations, the United States (as well as private parties) will remain free to challenge that conduct.

Finally, even if there were evidence to substantiate claims of "monopolization" or "predatory pricing," they would not be sufficient to justify self-help in the form of collusion.

When Congress enacted the Sherman Act, it did "not permit[] the age-old cry of ruinous competition and competitive evils to be a defense to price fixing," no matter if such practices were "genuine or fancied competitive abuses" of the antitrust laws. *See United States v. Socony-Vacuum Oil*, 310 U.S. 150, 221-22 (1940); *see also, e.g., FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 421-22 (1990) ("[I]t is not our task to pass upon the social utility or political wisdom of price-fixing agreements."). Competitors may not "take the law into their own hands" to collectively punish an economic actor whose conduct displeases them, even if they believe that conduct to be illegal. *See FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 465 (1986) ("That a particular practice may be unlawful is not, in itself, a sufficient justification for collusion among competitors to prevent it."); *Fashion Originators' Guild of Am. v. FTC*, 312 U.S. 457, 467-68 (1941) (rejecting defendants' argument that their conduct "is not within the ban of the policies of the Sherman and Clayton Acts because the practices . . . were reasonable and necessary to protect the manufacturer, laborer, retailer and consumer against" practices they believed violated the law (internal quote omitted)); *Am. Med. Ass'n v. United States*, 130 F.2d 233, 249 (D.C. Cir. 1942), *aff'd* 317 U.S. 519 (1943) ("Neither the fact that the conspiracy may be intended to promote the public welfare, or that of the industry nor the fact that it is designed to eliminate unfair, fraudulent and unlawful practices, is sufficient to avoid the penalties of the Sherman Act."). Thus, whatever defendants' and commenters' perceived grievances against Amazon or any other firm are, they are no excuse for the conduct remedied by the proposed Final Judgment.

4. Protection From Aggressive Competition Does Not Justify Keeping Collusive Agreements Intact

The ABA, B&N, the Authors Guild, and others contend that brick-and-mortar booksellers require agency pricing to insulate themselves from competition from online e-book sellers, and they accuse online competitors of free riding on their efforts.[17] In support of its argument, the ABA claims that online retailers such as Amazon usurp brick-and-mortar store "showrooms," encouraging customers to browse in physical stores but buy online. However, to the extent that free riding occurs, it is just as likely that print book sales by online sellers free ride on the efforts of brick-and-mortar booksellers as e-book sales. The ABA and its members do not distinguish between print and e-book online sales, and they offer no explanation for why e-books allow free riding by online sellers but print books, which are unaffected by the proposed Final Judgment, do not.

Further, to the extent a response to "free riding" by online retailers is desirable, the proposed Final Judgment provides a path for it: Settling Defendants may compensate brick-and-mortar retailers for e-book "marketing or other promotional services." PFJ § VI.A. The CIS elaborates that this provision is intended "to support brick-and-mortar retailers by directly paying for promotion or marketing efforts." CIS at 14. Rather than subsidizing these services with the earnings from collusive e-book profits, Settling Defendants may pay brick-and-mortar stores directly for marketing and promotional support. Of course, retailers are not entitled to the continuation of a collusive equilibrium to maintain the windfall they enjoyed under that

[17] The ABA alleges that Amazon's "free-riding" has been facilitated, in part, by "sales tax avoidance," a strategy that is unavailable to brick-and-mortar booksellers. ABA at 4. A number of brick-and-mortar booksellers echoed the ABA's frustration with this cost advantage; representative comments include: Gayle Shanks (ATC-0251) and Kate Stine (ATC-0455).

collusion. As noted above, the antitrust laws are not intended, after all, to protect firms from the rigors of a competitive market. *See United States v. Visa*, 163 F. Supp. 2d 322, 404-05 (S.D.N.Y. 2001) (rejecting free riding and creation of "equal opportunity" defenses for joint venture rules that prohibited members' issuance of competing credit cards); *see also* Section V.A.3, *supra*.

5. The Proposed Final Judgment is Neither Too Regulatory Nor Too Ambiguous for Enforcement

Comments submitted by B&N, Independent Book Publishers, and others assert that the proposed Final Judgment is too "regulatory" in nature and is overbroad. At the opposite extreme, others maintain that at least one provision, Section VI.B, is vague and unenforceable. B&N argues that the proposed Final Judgment converts the Department into a "regulator of an entire industry," by restricting future agency agreements and the use of MFN clauses, and by imposing enforcement provisions. B&N at 21-22. Mistakenly relying on *SBC Communications*, B&N submits that "when the relief sought in the proposed settlement is unrelated to the violations alleged in the complaint, that relief should not be ordered." *Id*. at 15. B&N adds that, because these remedies are not included in the prayer for relief in the Complaint, they cannot be awarded. *Id*. at 21. In turn, the Independent Book Publishers object that Section VI.B, which allows Settling Defendants to negotiate retailer agreements to limit aggregate retailer discounts, is "[u]nworkable and [u]nenforceable." Independent Book Publishers at 18.

To begin with, the proposed Final Judgment does not transform the Department into a "regulator" of the e-book industry, nor are its provisions any broader than necessary to remedy the harm alleged. Far from being "unrelated" to the harm alleged in the Complaint, most of the provisions in the decree are designed to return the market to the state of competition it enjoyed

before the Apple Agency Agreements were signed. Further, nowhere does the *SBC Communications* court suggest that the Tunney Act requires a one-to-one correspondence between the specific relief requested in a complaint and the details of the remedy required by the consent decree. Instead, it emphasizes that a court must "accord deference to the government's predictions about the efficacy of its remedies." *SBC Commc'ns*, 489 F. Supp. 2d at 17; *see also U.S. Gypsum Co.*, 340 U.S. at 89 (holding that relief may "range broadly through practices connected with acts actually found to be illegal"). Additionally, the provisions in the decree designed to facilitate enforcement are narrow, requiring little more than that Settling Defendants provide their current and future contracts to the Department, which will allow the United States to detect violations of the decree. Such a requirement is consistent with past practice, as a number of decrees entered in recent cases have required that contracts be provided to the Department so that it can monitor enforcement. *See, e.g.*, *Graftech Int'l Ltd.*, 2011 WL 1566781 at *3,*5 (requiring contracts and other business documents be provided for a period of ten years). Consent decrees approving much more burdensome enforcement mechanisms have previously been approved by other courts. *See, e.g.*, *Alex. Brown & Sons*, 963 F.Supp. at 237, 239, 242, 246-47 (approving a consent decree that required monitoring of up to seventy hours of phone conversations per week for five years, because it would help to ensure the return of competition). The proposed Final Judgment in this matter is no broader than the relief requested in the Complaint, which includes a request for an injunction against future misbehavior as well as "further relief as may be appropriate." Compl. ¶ 104.

B&N, Independent Book Publishers, and others also contend that the proposed Final Judgment creates "complicated safe harbors that are difficult to implement or administer." B&N

at 22; *see also* Independent Book Publishers at 18. The proposed Final Judgment allows Settling Defendants to limit retailer discounting authority, up to the total commissions a particular retailer earns from the sale of that publisher's e-books. PFJ § VI.B. B&N and other commenters expressed concern that it will be impossible for Settling Defendants to enforce the limits on retail discounting permitted in this Section. However, this provision is entirely voluntary; neither Settling Defendants nor their retailers are compelled to enter any such agreement. Should they choose to do so, nothing in Section VI.B prohibits a Settling Defendant from agreeing with a retailer on reporting and enforcement provisions under which the Settling Defendant can ascertain the extent of the retailer's discounting of its e-books. For example, audit clauses are routinely used in contracts between publishers and retailers to enforce pricing and similar terms. *See* Section V.D.5, *infra* (discussing publishers' use of audit clauses to enforce its contracts with Apple). Significantly, Section VI.B was the product of settlement discussions between the United States and Settling Defendants. Settling Defendants evidently believed, in entering this settlement, that they could successfully implement this limited "safe harbor" for which they negotiated.

B. Individual Responses to Detailed Comments

1. Barnes & Noble, Inc.

B&N, which represents that it is "the largest bookseller in the United States," B&N (ATC-0097) at 8, objects to the proposed Final Judgment primarily because blocking the ability of its retail competitors to discount is "in B&N's economic interests," and entry of the proposed Final Judgment would upset the current collusive equilibrium. *See id*. at 19. In addition to the issues discussed in Section V.A, *supra*, B&N objects that: (a) Section IV.B of the proposed Final Judgment voids all of its agency contracts; (b) returning discount authority to retailers will

have a negative "competitive impact," and (c) the Complaint does not provide sufficient factual support for the remedy.

a. The Proposed Final Judgment Does Not Void Any Third Party Contracts

B&N's assertion that the proposed Final Judgment would "declar[e] as null and void [its] agency contracts," B&N at 18, is inaccurate. The proposed Final Judgment neither voids nor requires the breach of any contract between a Settling Defendant and a third party. Rather, it requires that, for any such contract that restricts the retailer's discounting authority or contains a price MFN and remains in effect 30 days after entry of the 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." PFJ § IV.B. In other words, Settling Defendants simply must exit those agreements as provided for by the terms of the contracts themselves. B&N is not, then, simply a company concerned about its contractual rights. Instead, more basically, it is worried that it will make less money after the conspiracy than it collected while collusion was ongoing. *See* B&N at 19 (stating that B&N "enjoy(s) somewhat greater profit margins" under the collusive agency agreements than it "experienced under the wholesale model."). This concern, that the company will lose benefits generated by collusion, is not one that the Tunney Act directs the Court to consider. *See* Section V.A.2, *supra*.

b. Returning Discounting Authority to Retailers is Not Likely to Have a Negative "Competitive Impact"

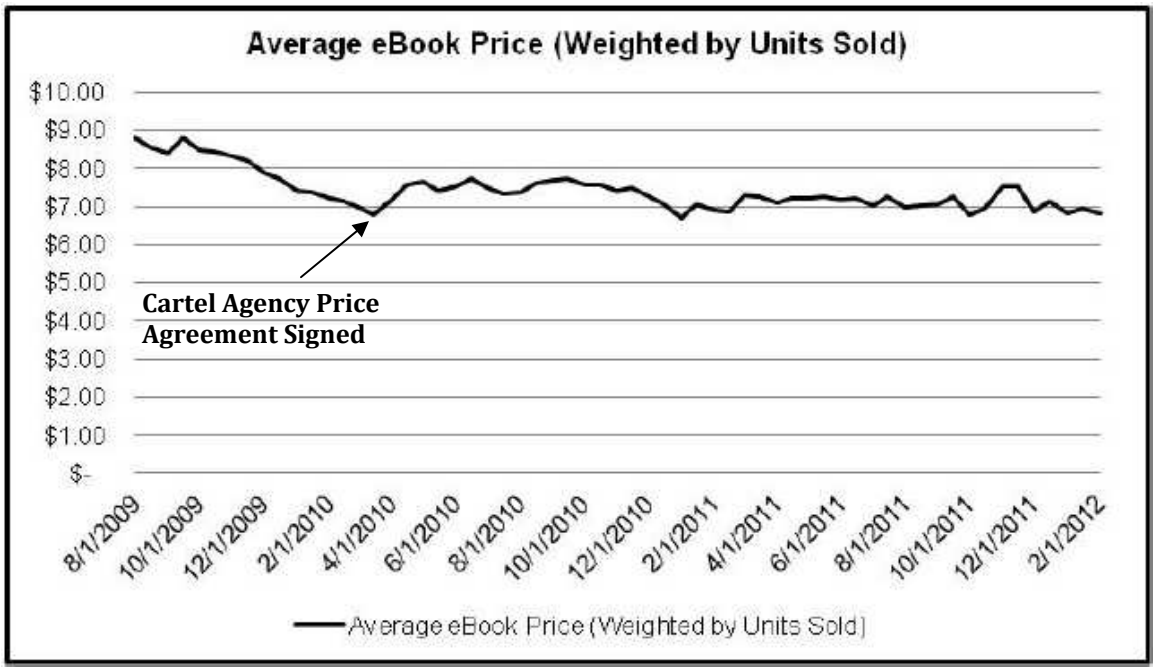
B&N maintains that allowing retailer discounting will, by driving down consumer prices, subject consumers to a variety of anticompetitive effects. But the procompetitive consumer

benefits that B&N alleges are the result of the conspiracy are either not substantiated or are untethered to the conspiracy. B&N does not explain how freeing retailers to compete on price will lead to "uncompetitive," rather than competitive, pricing, and its claim that the return of retail price competition will discourage investment is belied by the fact that, shortly after the proposed Final Judgment was filed in this matter, B&N was able to attract a $300 million investment from Microsoft specifically to "battle with Amazon and Apple in e-books."[18]

B&N also claims that "average" retail and wholesale prices for e-books have declined under the current, collusively-established regime, although it admits that the price of "some e-books" increased following Publisher Defendants' collective shift to agency and the Apple Agency Agreement price points. *See* B&N at 13-15. The United States obtained evidence that demonstrated that the conspiracy led to price increases not only in Publisher Defendants' most popular e-books, but also for "the balance of Publisher Defendants' e-book catalogues, their so-called 'backlists.'" Compl. ¶ 93. Although B&N does not describe the data that underlies its comments, it likely includes the growing volume of inexpensive (and possibly free) e-books from publishers other than Publisher Defendants, which offsets increases in the prices of Publisher Defendants' e-books, reducing "average" retail e-book prices. Further, unlike the United States, B&N does not have access to sales data from competing retailers, so its results

[18] *See* Ingrid Lunden, *Microsoft Makes $300M Investment In New Barnes & Noble Subsidiary To Battle With Amazon And Apple In E-books*, TechCrunch (April 30, 2012), http://techcrunch.com/2012/04/30/microsoft-barnes-noble-partner-up-to-do-battle-with-amazon-and-apple-in-e-books/; Press Release, *Barnes & Noble, Microsoft Form Strategic Partnership to Advance World-Class Digital Reading Experiences for Consumers*, Microsoft News Center (April 30, 2012), http://www.microsoft.com/en-us/news/Press/2012/Apr12/04-30CorpNews.aspx.

only address one retailer's slice of the market.[19] However, as the CFA observed, even with these uncertainties, B&N's own data suggests that the collusive agreement played a role in stabilizing retail e-book prices. CFA at 13. As the CFA points out, just as the collusive agency agreements were taking effect in the spring of 2010, a trend of falling e-book pricing was arrested.[20]



CFA at 13, citing its source for the graph (excluding overlay text) as "Comments of Barnes and Noble, Inc. On the Proposed Final Judgment, Civil Action No. 1:12-CV-2826, June 7, 2012, p. 12."

Finally, many of the benefits that B&N attributes to collusive pricing could be otherwise

[19] Even without access to industry data, readers noticed the price changes and attributed them to the conspiracy. One "avid reader" cites several examples of steep price hikes on books she had purchased, observing that "[s]ince 'agency' pricing was forced on Amazon, book prices have gone up very dramatically." Adrianne Middleton (ATC-0158).

[20] CFA at 13. The CFA also disputes claims by B&N and others that publisher margins declined under agency. CFA observes that cost savings "in the range of 50% to 70%" associated with the production and distribution of e-books have boosted publisher profits. CFA at 15. According to CFA, publishers "took the money that had been put on the table by technological change and put it in their pockets." CFA at 16.

achieved and may be of questionable worth. For instance, the company suggests higher retail prices allow it to invest more in services, stock, and space. However, B&N's claim that it "must meet" e-book prices set by a price leader and cannot maintain higher prices to invest in its stores, B&N at 20, casts doubt on the value that consumers assign to non-price factors when it comes to e-books. In addition, increased profitability is possible not only by raising prices but by lowering costs, which B&N may be free to do should e-book sales continue to increase in volume.[21] The proposed Final Judgment also allows Settling Defendants to subsidize B&N and other brick-and-mortar retailers for the services they provide. PFJ § VI.A. Publishers need not increase retail e-book prices to support bookstores they value; they can support them directly.

c. The Complaint Provides Sufficient Factual Support for Entry of the Proposed Final Judgment, and Delay Will Extend Harm

B&N challenges the "factual basis" for a public interest finding, and calls on the Court to "conduct a searching review" as part of its public interest determination. B&N at 18. The company submits that the proposed Final Judgment "requires close scrutiny because of its potential impact on the national economy and culture, including the future of copyrighted expression . . . ." *Id*. at 16.

The Tunney Act does not require the Court to gather evidence to supplement the facts alleged in the Complaint, no matter how broad an impact the decree may have. Instead, the statute simply *allows* the Court to gather additional evidence, at its discretion. *See* 15 U.S.C. § 16(f) ("In making its determination . . . the court *may*—(1) take testimony . . ." (emphasis added)). Nor is the Court compelled to conduct an evidentiary hearing or permit intervention.

[21] Indeed, cost reduction may be an option for all print booksellers. As one former bookstore manager explains: "[t]raditional publishing is predicated on the expectation of waste," citing the routine destruction of unsold books by bookstores. Heather Ripkey (ATC-0276) at 1. Ms. Ripkey points out that, for e-book sales, "there is no need to factor such extreme waste into the equation. *Id.*

See 15 U.S.C. § 16(e)(2) ("Nothing in this section shall be construed to require the court to conduct an evidentiary hearing . . . ."). This is consistent with legislative history; as Senator Tunney explained: "The 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).

In support of its position, B&N urges the Court to follow the expansive approach taken by the United States District Court for the District of Columbia in *SBC Communications*. But that case differed from this one in the complexity of the harm alleged, the relief imposed, and in the factual detail included in the complaint. *SBC Communications* considered potential anticompetitive effects in dozens of local markets, each including three separate product markets, arising from the merger of two telecommunications companies. 489 F. Supp. 2d at 18-19. The settlement under review in the Tunney Act process called for the divestiture of ten-year leasehold interests that gave the holder the right to use certain telecommunications fibers in 748 individual buildings. *See id.* at 7. In contrast, the United States, in this case, alleged a *per se* violation of the Sherman Act in a single national market, affecting one product area. Further, the conspiracy alleged in this matter was effectuated through the Apple Agency Agreements, the terms of which are not in dispute.[22] In addition, because litigation in this matter is proceeding against the three non-settling defendants, the United States submitted a detailed, thirty-five page complaint in this matter, which included easily verified public events and statements. In contrast, to support the relief requested in *SBC*, where the United States had already reached settlement terms with all

[22] As the *SBC Communications* court observed, the United States "need not prove its underlying allegations in a Tunney Act proceeding." 489 F. Supp. 2d at 20. Requiring it to do so "would fatally undermine the practice of settling cases and would violate the intent of the Tunney Act." *Id.* (citing 15 U.S.C. § 16(e)(2), which states that the Act does not require a court to hold an evidentiary hearing).

parties, the United States submitted a twelve-page complaint typical of cases where the dispute has been wholly resolved. *See id*. at 9. *SBC* did not involve ongoing litigation or discovery. Indeed, in this case, litigating defendants have already admitted key allegations in their answers to the Complaint.[23]

Moreover, the "impact" of the proposed Final Judgment will be limited to restoring competitive conditions that prevailed before collusion ensued—only two years ago. Under these circumstances, detailed fact finding is likely not needed to evaluate the probable effects of the entry of the proposed Final Judgment. Further, delaying entry of the proposed Final Judgment to gather additional factual support will necessarily delay the beneficial impact of its provisions. In *SBC*, the United States moved for Entry of the Final Judgment on April 5, 2006, but the decree was not entered by the court for nearly a year, on March 29, 2007. *See SBC Commc'ns*, 489 F. Supp. 2d at 8, 24. The same delay of entry of the Final Judgment in this case would exceed the period the Court has reserved for litigation with respect to the non-settling defendants. Even a much shorter delay may threaten to disrupt the discovery process for the parties that continue to litigate. Any extension of the collusion that already has persisted for two years is unwarranted, and should be avoided.

[23] *See, e.g.*, Apple Ans. at ¶ 62 ("Given the looming announcement of the iPad, each publisher would have been aware that Apple was necessarily negotiating simultaneously with numerous publishers and was attempting to develop an approach that would attract a sufficient number of publishers in total to warrant Apple's entry."); Penguin Ans. at 33-34 ("Penguin admits that Penguin Group CEO John Makinson on June 16, 2009 attended a social dinner at Picholine along with the CEO of Random House, as well as the CEOs of Hachette, Harper Collins, and Simon & Schuster – but not the CEO of Macmillian. While, in addition to purely social matters, general book industry issues and trends were discussed at high-levels of generality, including the growth of eBooks and Amazon's role therein, Makinson did so pursuant to antitrust legal advice . . . ."); Macmillan Ans. at ¶ 72 (". . . admits that during December 2009 and January 2010, Mr. Sargent placed at least seven calls to the CEOs of other Publisher Defendants, five of which lasted no more than twenty seconds.").

2. Consumer Federation of America

The CFA is the only consumer organization that submitted a comment. It wrote in support of the proposed Final Judgment. The CFA is an association of almost 300 non-profit public interest groups. It frequently is called upon to advise on Internet and digital product issues. CFA (ATC-0775) at 1. The CFA's analysis: (a) debunks the claimed procompetitive benefits of collusive pricing; and (b) concludes the proposed Final Judgment is not overbroad.

a. CFA Explains How Collusive Agency Pricing Harms Consumers

The CFA disputes the "[f]airytale" that collusive agency pricing produced benefits for consumers, reasoning that: (a) collusion on price was not necessary to attract entry; (b) if consumers valued services provided by brick-and-mortar booksellers, they would be willing to pay for those services; and (c) most such benefits are otherwise available.

First, the CFA observes that the e-book "space" experienced significant entry "before and after the advent of the cartel pricing model." *Id*. at 16. The CFA points out that B&N committed to entry before Publisher Defendants and Apple entered into agency contracts, no evidence suggests Apple would have withheld the iPad in the absence of collusion, and "[w]e doubt that Microsoft will now exit the e-book market, or cancel its plans to offer a tablet" should collusive pricing end. *Id*. at 16.

Second, the CFA questions the "carefully concocted, self-serving argument" that the physical book browsing allowed by brick-and-mortar bookstores is essential to the "literary ecosystem" when consumers "are unwilling to pay for" that experience. *Id*. at 3-4. According to the CFA, accepting "cartel agency pricing" in order to maintain physical bookstores improperly

allows "[c]olluding publishers, not the marketplace [to] decide what is good for consumers." *Id*. at 4.

Finally, the CFA points out that many of the benefits of bookstores can be realized digitally. Browsing, for instance, may be more effective online, where search engines and algorithms that personalize recommendations may make readers more inclined to try new authors and titles. *Id*. at 21. Benefits like these may, in fact, be lost if collusion, not competition, guides the market. In sum, the CFA concludes, "[i]f publishers can dictate which business models flourish and which fail, consumers and authors will be worse off," because such a practice confers no advantage on the consumer, and might discourage procompetitive developments in the digital realm. *Id*. at 19.

b. The Remedy Appropriately Addresses the Collusion

The CFA rejects the assertions of B&N that the proposed Final Judgment imposes "an unprecedented, draconian remedy that illegally and unnecessarily interrupts routine business practices . . . ." *Id*. at 11. As the CFA explains, the proposed remedy is consistent "with normal antitrust practices" and is less intrusive than remedies imposed to address antitrust concerns in related industries. *Id*. at 10-11. The CFA also articulates the importance of prohibiting Settling Defendants from restricting retailer discounting of e-books for two years: "without a moratorium on agency contracts for the colluding publishers, the publishers could tear up the offending contracts and immediately sign identical contracts, claiming to act individually to adopt terms and conditions that were worked out by the cartel. Such a remedy would make a mockery of antitrust law and enforcement." *Id*. at 9.[24] The United States shares this concern.

[24] The CFA also notes that the two-year period is shorter than antitrust agencies normally impose to allow a "market to heal." CFA at 8. But a few citizen comments took the contrary position that three to

3. Independent Book Publishers

The "Independent Book Publishers," a group of mid-sized trade publishers consisting of Abrams Books, Chronicle Books, Grove/Atlantic, Inc., Chicago Review Press, Inc., New Directions Publishing Corp., W.W. Norton & Company, Perseus Books Group, The Rowman & Littlefield Publishing Group, Inc., and Workman Publishing, submitted a joint comment.[25] They object to the proposed Final Judgment because they "benefitted significantly from the fact that the Big Six publishers were able to adopt agency pricing arrangements with Amazon." Independent Book Publishers (ATC-0727) at 2. However, to the extent the Independent Book Publishers received benefits from Settling Defendants' conspiracy to raise e-book prices, those benefits were fruits of the conspiracy and that loss is not relevant in a Tunney Act determination. *See* 15 U.S.C. § 16(e)(1)(B).

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six months would provide a sufficient "competitive reset." *See, e.g.*, Catherine Flynn Devlin (ATC-0084).

The United States determined that too short a period of time, such as three to six months, would not allow e-book retailers to stagger sufficiently the termination and renegotiation of their contracts with publishers. Allowing negotiations with multiple publishers at the same time risks continuing the collusion. *See* CIS at 10 ("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."). Also, if the cooling-off time period were too short, Settling Defendants might simply choose to forgo the sale of e-books through significant retailers in that short period of time, awaiting the opportunity to return to the collusively established agency terms.

[25] These nine publishers also complain that the United States did not contact them during its investigation. Independent Book Publishers (ATC-0727) at 3, 10. However, the United States reached out to a number of other publishers during the course of its investigation, and routinely attempts not to burden industry participants with demands for duplicative or cumulative information. In any event, industry participants that feel they have relevant information are free to contact the United States to share that information. When, as was the case here, the existence of an antitrust investigation is disclosed publicly, interested individuals frequently reach out to the United States to share their views and information. *See, e.g.*, Grant Gross, *DOJ investigating ebook pricing, official says*, Macworld (Dec. 7, 2011), http://www.macworld.com/article/1164113/doj_investigating_ebook_pricing.html.

The Independent Book Publishers do not claim to be concerned about their current e-book contracts with any retailer, as they are not agency agreements. They instead take up the cause of their competitors, the three Settling Defendants, noting that agency agreements are not "inherently unlawful," and complaining that "the proposed settlements . . . would effectively ban the use of the agency model by Settling Defendants for two years." Independent Book Publishers at 13. They believe it would be more appropriate to "void the existing agency agreements" and allow Settling Defendants to enter into "new agency agreements in the absence of collusion." *Id*. at 14. The Independent Book Publishers concede that the proposed Final Judgment does not dictate a business model, but only prohibits agreements that do not allow the retailer to discount prices (subject to the option of contracting to limit discounts to commissions earned over the course of a year). They say that this takes "true agency sales agreement[s]" off the table for two years for Settling Defendants. *Id*. at 14.

As discussed above, the United States determined that terminating existing agency agreements, without imposing limited restrictions on the contracts that would replace them, would allow Settling Defendants to immediately return to the same collusively-established contractual terms. Such an outcome would fail to eradicate the anticompetitive effects of the collusion. Courts are "empowered to fashion appropriate restraints on [the trangressor's] future activities both to avoid a recurrence of the violation and to eliminate its consequences." *Nat'l Soc'y of Prof'l Eng'rs*, 435 U.S. at 697; *see also Zenith Radio Corp.*, 395 U.S. at 132-33 (upholding an injunction against the conspiracy to block Zenith's entry into worldwide markets that were not at issue in the litigation, after finding that defendants conspired to block Zenith from entering the Canadian market). While agency agreements are not inherently illegal,

collusive agreements that prevent price competition are, and the settlement is designed to unwind the effects of agency contracts stemming from a collusive agreement.

4. American Booksellers Association and Members

The ABA submitted a detailed comment objecting to the restrictions on agency pricing in the proposed Final Judgment as well as other issues, most of which were discussed above.[26] The ABA raised one unique complaint about the impact of the proposed Final Judgment on agreements between ABA member organization IndieCommerce and Google, which were negotiated after April 2010. ABA (ATC-0265) at 5. The ABA claims that these agreements "occurred long after . . . the dates at issue in the civil complaint," and were not the product of collusion. *Id*. However, the proposed Final Judgment, which addresses only contracts in which Settling Defendants are parties, has no direct or immediate impact on arrangements between ABA member booksellers and Google. Of course, it is certainly possible that Google may seek to modify the terms of its agreements with the bookstores to reflect its new authority to discount the books of the three Settling Defendants.[27] *See also* Section V.A.1, *supra.*

5. Authors Guild and Members

The Authors Guild, representing a collection of writers and literary agents, submitted a comment that addressed the impact of removing collusive pricing restrictions on price

[26] The ABA also solicited its member booksellers to submit comments in opposition to the proposed Final Judgment, outlining its objections. As a result, the United States received approximately 200 comments from bookstores, which largely mirrored the ABA's arguments. Representative examples include Susan Novotny (ATC-0213), Kenneth J. Vinstra (ATC-0216), and Barbara Peters (ATC-0295).

[27] Prior to the filing of the Complaint, Google announced that it was terminating its reseller program in 2013 since it had "not gained the traction" Google had hoped for and because it was "clear that the reseller program has not met the needs of many readers or booksellers." Scott Dougall, *A Change to Our Retailer Partner Program: eBooks Resellers to Wind Down Next Year*, Google Book Search (Apr. 5, 2012), http://booksearch.blogspot.com/2012/04/change-to-our-retailer-partner-program.html.

competition from Amazon. The Authors Guild claims the settlement will "allow e-book vendors to routinely sell e-books at below cost, so long as the vendors don't lose money over the publisher's entire list of e-books over the course of a year." Authors Guild (ATC-0214) at 1. The Authors Guild also asked its members to submit comments, adding that the settlement "needlessly imperils brick-and-mortar bookstores while it backs an online monopolist and discourages competition among e-book vendors and e-book device developers."[28] Many authors and agents took up the torch, submitting comments that paraphrased the arguments laid out by the Authors Guild or, in some cases, simply attached the Authors Guild's email, verbatim.[29]

The Authors Guild's primary argument, that collusion was a justified response to competition from low-priced rivals, and that collusive pricing is necessary to protect brick-and-mortar bookstores, is addressed in Section V.A.3, *supra*. Likewise, the Authors Guild's concerns with Section VI.B of the proposed Final Judgment, which permits (but does not require) Settling Defendants to limit retailer discounting to the aggregate commissions earned by the retailer, are addressed in Section V.A.5, *supra*. The Authors Guild and its members, however, make two unique observations: (a) books are important cultural products and should be protected by price controls despite the antitrust laws; and (b) agency pricing is necessary to protect quality and diversity in books. But, as discussed below, some Guild members submitted comments disagreeing with their association's position, and other self-published authors see

[28] *See The Justice Department's E-Book Proposal Needlessly Imperils Bookstores; How to Weigh In,* THE AUTHORS GUILD (June 4, 2012), http://blog.authorsguild.org/2012/06/04/the-justice-departments-e-book-proposal-needlessly-imperils-bookstores-how-to-weigh-in/; *see also Last Call. Tell DOJ: Don't help Amazon target booksellers*, The Authors Guild (June 22, 2012), http://authorsguild.org/advocacy/articles/last-call-tell-the-justice-department.html.

[29] Representative comments include: T.J. Stiles (ATC-0177), Kristy Athens (ATC-0465), and Mirka Knaster (ATC-0462).

competition by e-book retailers as an opportunity to reach an audience without interference by traditional publishers.

a. The Sherman Act Applies to the Publishing Industry

While the Authors Guild did not make this argument directly, many of its members stated or implied that collusion or price fixing should be permitted in the publishing industry. They make the point that books play an important cultural role in our society. From there, these writers leap to the conclusion that a competitive marketplace cannot properly attract the investment required for books to survive. They posit that, absent an agreement that stops retailers from discounting e-books, declining revenues would undermine the perceived value of all books, reduce author royalties, and put booksellers out of business. A comment typical of this perspective suggests "fixed pricing on books" should be allowed "to protect their value." Rebecca Gardner (ATC-0077) at 1. A literary agent likewise observed that price-fixing models are being adopted "[n]early across the board" in other countries, in response to online retail discounters. Molly Friedrich (ATC-0232) at 2. However, an argument that a particular industry or market deserves a blanket exemption from the antitrust laws should be directed to Congress, rather than the United States or the Court. Otherwise, all industries are subject to "a legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services." *Nat'l Soc'y of Prof'l Eng'rs*, 435 U.S. at 695.

b. There is no Support for the Notion that Retail Discounts Will Reduce Quality or Diversity in Publishing

Many authors and agents complained that removing the ability of Settling Defendants to prohibit discounting would dissuade or prevent publishers from investing in "quality" books, or limit the variety of books likely to be published. Many comments state or imply that Publisher

Defendants must stand in the place of consumers to preserve quality. Such a paternalistic view is inconsistent with the intent of the antitrust laws, which reflect a legislative decision to allow competition to decide what the market does and does not value.[30] A market fettered by a collusive agreement cannot properly assign such a value. These comments may also reflect a misunderstanding of the discounting authority granted by the proposed Final Judgment, which requires only that Settling Defendants, for two years, give retailers the authority to compete away their own margins. PFJ §§ V.A, VI.B. The proposed Final Judgment, however, does not otherwise limit how e-books are sold. Publishers would be free, for example, to negotiate a wholesale price with retailers, and require retailers to pay them the same amount per e-book sold, regardless of the discount applied to the sale to the consumer, just as they did prior to the collusive agreements. Thus, the author can be paid out of higher wholesale price, while consumers buy more of the author's books at a lower retail price.

c. The Authors Guild's Opposition to the Settlement is Not Universal

It is worth noting that members of the Authors Guild also wrote in support of the proposed Final Judgment and against the Authors Guild's position. Joe Konrath, author of 46 books, clarifies that letter-writing campaigns by the Authors Guild and the Authors Representatives "did not solicit the views of their members, that they in no way speak on behalf of all or even most of their members." Konrath (ATC-0144) at 1. He observes that agency

[30] Many authors and readers expressed skepticism of the capacity or willingness of Publisher Defendants to protect "quality" of publications. As a retired college librarian put it, "[t]o suggest that only the Big Six are arbiters of quality is belied by much of what they have published," citing the absence of copy editing, long delays in publication, and a short shelf life for most titles. Eric Welch (ATC-0021) at 2. One reader observed anecdotally that Publisher Defendants recently granted an advance to reality television personality "Snooki" for a ghost-written book, implying themove was in response to commercial potential rather than literary quality. Cathy Greiner (ATC-0073).

pricing has slowed global growth and hurt consumers and writers. Lee Goldberg, a published author and member of the Authors Guild writes, "I believe that it's detrimental to authors and readers, as well as to the establishment of a free and healthy marketplace, for publishers to collude with Apple to create artificially inflated prices for ebooks." (ATC-0553). Author Laura Resnick writes, "breaking the law is *not* a reasonable reaction to being faced with aggressive business competition." (ATC-0801).

d. Self-Published Authors Disagree that Collusive Agency Pricing is Necessary to Protect Authors' Interests

Many comments from self-published authors, in particular, expressed appreciation that Amazon opened a path to publication that was immune from Publisher Defendants' hegemony. David Gaughran, writing on behalf of 186 self-published co-signors, writes that "Amazon is creating, for the first time, real competition in publishing" by charting a "viable path" for self-published books. Gaughran (ATC-0125) at 1, 3. Mr. Gaughran observes that "[t]he kind of disruption caused by the Internet is often messy," and those who "do quite well under the status quo" naturally resist change. *Id*. at 2. He compares publishers and literary agents to "[a]ll kinds of middlemen," which have "gone from being indispensible to optional" with the rise of the Internet. *Id.* Writing in support of the proposed Final Judgment, Mr. Gaughran confirms that self-published writers, in particular, see opportunities in a market not subject to collusive pricing.

C. Additional Responses to Comments With Unique Perspectives

1. Brian DeFiore, Literary Agent

Many literary agencies submitted comments in opposition to the proposed Final Judgment, but Mr. DeFiore's submission raised a unique issue.[31] He argues that, by removing limits on retailer discounting, the proposed Final Judgment will allow retailers to apply discounts disproportionately, reducing the retail price of some titles much more than others. He argues that the uneven price cuts undermine the ability of authors to maximize their royalty income and may impact the value of individual author's rights in future books, foreign markets, film, and television. DeFiore (ATC-0242) at 3. However, to the extent that author royalties were buoyed by collusive pricing, that windfall should not be protected at the expense of thwarting the collusion. *See* Section V.A.2, *supra*.

The adequacy of the Final Judgment should be evaluated in light of the antitrust violations alleged in the Complaint, *SBC Commc'ns*, 489 F. Supp. 2d at 14-15, and those allegations explicitly address the contractual relationships between Settling Defendants and retailers. Authors have independent contracts with Settling Defendants that govern their intellectual property licenses, and those agreements are not discussed in the Complaint or addressed by the proposed Final Judgment. Thus, all of the intellectual property rights of authors remain subject to market competition. To the extent Mr. DeFiore's complaint reflects dissatisfaction with the state of that competition, it is not relevant to the proposed Final Judgment.

[31] Simon Lipskar's comment (ATC-0807) is the most detailed of the many comments submitted by literary agents and agencies, but it did not raise unique issues. A less detailed, but typical, comment was submitted by the Association of Author's Representatives (ATC-0003).

2. Bob Kohn, CEO of Royalty Share

Copyright attorney and CEO of RoyaltyShare, Bob Kohn, submitted a lengthy comment that focused largely on his criticisms of the Complaint. Kohn (ATC-0143). Mr. Kohn offers the Court his views of the proper standard it should employ in ruling on a motion to dismiss, even though none of the settling or non-settling defendants (each of which is represented by highly experienced and sophisticated counsel) chose to move to dismiss the Complaint. Similarly, Mr. Kohn suggests a series of dispositive motions that the Court should grant in favor of the defendants, although he does not indicate whether defendants themselves contemplate such motions or explain why the Court should substitute Mr. Kohn's litigation judgments for those of defendants' counsel. Mr. Kohn's determinations that "The Complaint Alleges the Wrong Relevant Market," or "Collective Action by Competitors to Fix Prices is Not Always Illegal," *id*. at 20, 21, reflect a misunderstanding of the role that public comments play in the Court's Tunney Act inquiry. For example, seeing corollaries between this case, copyright law, and the music industry, Mr. Kohn concludes that the proposed Final Judgment is not in the public interest because the "factual allegations in the Complaint are plausibly explained by lawful behavior." *Id*. at 12. However, the Complaint sets forth in considerable detail the basis for a finding that the defendants have engaged in *per se* unlawful conduct. Defendants are, of course, free to dispute that evidence just as they are entitled to settle with the government. It would hardly be in the public interest to exclude settlements of antitrust cases whenever a member of the public asserts that there are possible "plausible" lawful explanations for the defendants' behavior. And it is difficult to see how the Court could reach the same conclusions as Mr. Kohn without the benefit of a full-blown, lengthy and expensive trial, thus substantially undercutting much of the benefit

of the settlements. It is a misreading of the Tunney Act and the role of public comments to suggest that either the government or private parties should be so severely constricted in settling antitrust cases. *Microsoft*, 56. F.3d at 1459.

Mr. Kohn also takes issue with the standard of review articulated in the CIS for a Tunney Act determination. Mr. Kohn submits that, to find a settlement only "within the reaches" of the public interest is inconsistent with the text of the Tunney Act, as amended in 2004. Kohn at 16. He maintains this argument though the same standard was applied in this District as recently as last year in *KeySpan Corp.*,763 F. Supp. 2d at 637. Kohn at 16. Further, the court in *SBC Communications* thoroughly analyzed the legislative intent behind the 2004 amendments and concluded that a settlement should be approved if it lies "within the reaches of the public interest." 489 F. Supp. 2d at 17.

Mr. Kohn also discusses language added to the Tunney Act in 2004 that requires the court to consider the impact of entry of the decree "upon competition in the relevant market or markets." Kohn at 16 (emphasis omitted). However, the legislative history of that amendment does not support Mr. Kohn's argument that the change was designed to expand the court's role in Tunney Act review. Instead, it indicates the opposite, that the change was intended only to focus review on the competitive impact of "the judgment, rather than extraneous factors irrelevant to . . . antitrust enforcement." 150 Cong Rec S 3610, *3618 (statement of Senator Kohl). Accordingly, "the 2004 amendments have left in place the [D.C.] Circuit's holding that this Court cannot look beyond the complaint in making the public interest determination, unless [a] complaint is drafted so narrowly as to make a mockery of judicial power." *SBC Comm'cs*, 489 F. Supp. 2d at 15.

3. Steerads, Inc.

Steerads, Inc. ("Steerads") is a Canadian digital advertising corporation based in Montreal, Quebec.[32] Steerads concludes that the terms of the proposed Final Judgment are "clear and complete, thus enforceable." Steerads (ATC-0374) at 1. The company requests, though, that the United States "insist on the inclusion of a prima facie provision" in the proposed Final Judgment in order to "[e]ase[] recovery of treble damages" by private litigants. *Id*. at 3. Steerads, however, misreads the statute, 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." 15 U.S.C. § 16(a). 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. Even if that were not the case, the Supreme Court has long endorsed the value of consent judgments in cases where there is no finding of liability, because they avoid the costs and delays associated with litigation.[33]

4. National Association of College Stores

The National Association of College Stores ("NACS") expressed concern that the Proposed Final Judgment will apply to "the entire e-book universe" including "e-textbooks." NACS (ATC-0845) at 7-8. NACS claims this broad application will injure third parties,

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[32] *See* STEER>ADS.COM, http://www.steerads.com/; Steerads (ATC-0374) at 4.

[33] *See Swift & Co. v. United States*, 276 U.S. 311, 327 (1928) (refusing to vacate injunctive relief in consent judgment that contained recitals in which defendants asserted their innocence); *United States v. Armour and Co.*, 402 U.S. 673, 676, 681 (1971) (interpreting consent decree in which defendants had denied liability for the allegations raised in the complaint); *see also* 18A Charles Alan Wright & Arthur R. Miller, et al., *Federal Practice and Procedure* § 4443, (2d ed. 2002) ("central characteristic of a consent judgment is that the court has not actually resolved the substance of the issues presented").

including textbook publishers and textbook retailers, which would be barred from reaping the potential procompetitive benefits they might realize from the use of agency pricing. *Id*. at 9-10. NACS claims the Complaint did not identify harm arising in the e-textbook market, so the Final Judgment should be modified to exclude e-textbooks from the prohibition of limits on retail discounting in the decree. *Id*. at 11-12. However, it was not necessary to expressly exclude e-textbooks from the proposed Final Judgment because none of the Settling Defendants sell e-textbooks, and the Complaint already makes it clear that "e-books" in the context of this case does not encompass "[n]on-trade e-books includ[ing] . . . academic textbooks . . . ." Compl. ¶ 27 n.1; *see also* Compl. ¶ 99.

5. American Specialty Toy Retailing Association

The American Specialty Toy Retailing Association ("ASTRA") writes that the proposed Final Judgment will have a chilling effect on the use of agency pricing in other markets. It reasons that the decree "could create an environment in which manufacturers are uncertain about the legality of an important pro[]competitive pricing policy." ASTRA (ATC-0228) at 1. However, the proposed Final Judgment is limited to the three Settling Defendants, none of which sells toys. Further, because the CIS expressly states that agency pricing is permissible when unpaired with anticompetitive conduct, there seems to be no plausible risk of confusion.

D. Apple, Inc.

Apple, a non-settling defendant and party to the conspiracy described in the Complaint, opposes Court entry of the decree. Apple complains that the proposed Final Judgment: (1) treats Apple unfairly; (2) "seeks to impose a business model," rather than letting market forces play out; and (3) "will enable the retrenchment of Amazon's e-book monopoly." Apple (ATC-0703)

at 1, 7. While much of what Apple offers in its comment merely echoes the same points other commenters have made and should be rejected for the reasons noted above, the United States offers a detailed response to Apple because of its central role in the events leading to the underlying enforcement action. As set forth below, Apple's protests are based on factual errors and on an unsound view of Tunney Act jurisprudence.

1. The Proposed Final Judgment Reasonably Requires the Termination of the Apple Agency Agreements

Apple argues that it has been improperly "singled out" for "uniquely punitive restrictions on its ability to negotiate agreements." *Id*. at 2. The requirement that the Apple Agency Agreements be terminated is reasonable, though, given the role of those agreements in cementing the terms of the conspiracy alleged. Further, stripped of Apple's rhetoric, there are only two substantive distinctions between Settling Defendants' required conduct as to Apple (governed by Section IV.A) and their required conduct as to all other e-book retailers (governed by Section IV.B), and those distinctions are both modest and necessary.

The agency agreements between Apple and Settling Defendants must be terminated within seven days of entry of the proposed Final Judgment, while Settling Defendants have thirty days to "take each step required" to terminate agreements with other retailers that include prohibited terms. *See* PFJ §§ IV.A, IV.B. However, as the Complaint alleges, the Apple Agency Agreements did not arise from bilateral negotiations between a retailer and a number of publishers, but from a conspiracy encompassing Apple and Publisher Defendants. Apple alone among e-book retailers was at the bargaining table when these collusive agency contracts were agreed to. Further, the Apple Agency Agreements also require immediate termination because they form the bedrock of the conspiracy and restrain trade directly. *See, e.g., Paramount*

Pictures, 334 U.S. at 149 (ordering the termination of contracts used in collusion); *Nat'l Lead Co.*, 332 U.S. at 328 (upholding termination of patent cross licenses that allowed the patents to be "forged into instruments of domination of an entire industry.").

In addition, Apple's claim that it "will have to quickly negotiate new agreements with these publishers under a dark cloud of uncertainty in just seven days," Apple at 5, ignores that more than three months have already passed since the proposed Final Judgment was filed, during which time Apple has been free to pursue its negotiations with Settling Defendants. Indeed, even under Apple's existing contracts with each Settling Defendants, each publisher has rights to terminate its own agreement. Likewise, Apple too has the right to terminate its agreement with each Settling Defendant on thirty to sixty days' notice.[34] Both Apple and Settling Defendants have been free even to execute new agreements during this period, so long as such agreements comply with the proposed Final Judgment. It is, in fact, quite typical that parties to a proposed Final Judgment execute their provisions or prepare to do so prior to entry of the decree.[35]

[34] For instance, Apple's agreement with Hachette, signed Jan. 24, 2010, reads: "'Term' means the period beginning on the Effective Date and continuing for one (1) year, and renewing for one-month successive periods unless . . . terminated at any time after the first year period *by either Party* upon advance written notice of not less than thirty (30) days." EBOOK AGENCY DISTRIBUTION AGREEMENT, § 1(m), APPLETX00018481 at -18482 (emphasis added). This was the case when the proposed Final Judgment was being negotiated (and the United States has no reason to believe this has changed).

[35] For example, in *United States v. Graftech Int'l Ltd.*, GrafTech implemented, prior to entry of the decree, a requirement that it execute new contracts with its supplier. *See GrafTech*, 2011 WL 1566781 at *2 (requiring that "[d]efendants shall not consummate the Merger until the Supply Agreements have been modified in a manner consistent with this Final Judgment."). Divestitures required for consummation of proposed mergers are also commonly executed and approved by the United States prior to entry of the Final Judgment.

2. The Proposed Final Judgment Does Not "Impose a Business Model"

Apple asserts twice in a single page that the proposed Final Judgment would "dictate business models." Apple at 7; *see also id.* at 1 ("impose a business model"). Apple fails, however, to explain what business model the proposed Final Judgment would dictate. That is because the proposed Final Judgment does nothing of the sort. Apart from the specific and limited proscriptions necessary to ensure the effectiveness of the consent decree, the proposed Final Judgment leaves open all possible legal business arrangements. Indeed, even Apple recognizes that "[t]he Proposed Judgment modifies only two terms in Apple's agreements with the Settling Defendants—the MFN and Apple's pricing discretion under the agency agreement." *Id*. at 4.

To the extent the proposed Final Judgment requires changes to the business relationship between retailers such as Apple and Settling Defendants, it ensures that retailers have more flexibility, not less. Apple's stated position on this point is that "eBook retailers such as Apple and Barnes & Noble should be free to continue with the agency model without Government-mandated changes." *Id*. at 3. They are indeed free to do so. Nothing in the proposed Final Judgment would force Apple or B&N to exercise discounting authority—they are free to carry out their own businesses exactly as before. What they may not do is continue to rely on a conspiracy to restrain their competitors.

3. The Proposed Final Judgment Will Help to Restore Competition, Not End It

Apple also insists that the proposed Final Judgment "puts Apple, and every other eBook distributor [except Amazon], in peril." Apple at 7. This is so, Apple claims repeatedly, because the proposed Final Judgment will "allow an eBook agent a nearly unfettered ability to discount a

Settling Defendant's title." *Id.* at 2, 6. That is, Apple objects that the goal of the conspiracy—to raise e-book prices by wresting discount authority from retailers—will be undone by the proposed Final Judgment, at least with respect to Settling Defendants. Under such conditions, Apple worries, some "retailers . . . may be unable to continue to do business," *id.* at 2, "dramatic and irreversible" consequences may limit innovation and diversity, *id.* at 3, and Amazon will be able to "charge monopoly prices into perpetuity." *Id.* at 4.

First, Apple is not entitled to retain the benefits of any collusive agreement, much less one it participated in directly. As has been noted throughout, it is black letter law that that the Sherman Act was "enacted for 'the protection of competition, not competitors.'" *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 767 n.14 (1984) (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) (quoting *Brown Shoe Co.*, 370 U.S. at 320)). Indeed, the Supreme Court has expressly recognized that the type of "robust competition" protected by the Sherman Act could well expose individual competitors to commercial harm. *Copperweld Corp.*, 467 U.S. at 767-68. If the proposed Final Judgment were expected to lead to a more intense competitive environment, that would be cause to embrace the proposed Final Judgment, not reject it. The same competitive forces that would pressure retailers would benefit consumers.

Further, the Tunney Act is not designed to be a weapon that is wielded by competitors seeking to forestall competition. The Act directs the Court to consider the impact of a proposed decree not on the participants in the anticompetitive conduct, but on those "alleging specific injury from the violations set forth in the complaint." 15 U.S.C. § 16(e)(1)(B); *see also Int'l Bus. Machines Corp.*, 163 F.3d at 740-42 (finding termination of a decree was in "the public interest,"

despite competitor objections, because "[t]he 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." (quoting *Spectrum Sports, Inc.*, 506 U.S. at 458). As neither the antitrust laws nor the Tunney Act purport to remedy the loss of ill-gotten gains, Apple's complaints need not be considered by the Court.

Second, Apple's claim, that the settlements will result in imminent retail exitings and lessened industry innovation, is not supported by any evidence. In fact, what the evidence does show, is to the contrary. As noted above, since the proposed Final Judgment was filed, Microsoft has made a significant investment in the industry. *See* Section II, footnote 6, *supra*. The investment is likely a boon to Apple's largest brick-and-mortar retail competitor, B&N. *See* Section V.B.1.b, footnote 18, *supra*. Google, too, rather than retiring from the e-book field, recently has announced a new investment in a tablet computer intended to promote its own e-book sales, through GooglePlay. *See* Section II, footnote 7, *supra*.

Third, like other retailers with an interest in high consumer prices and protected distributor margins, Apple makes the argument that the ability to compete on price "will enable Amazon to charge monopoly prices into perpetuity." Apple at 4. That argument assumes, without support, that Amazon could or would exercise such market power, even in the face of significant share erosion, which was already significant prior to Apple's entry. Further, the entire conspiracy alleged here was, for Publisher Defendants, about increasing the retail price of e-books. As the Complaint alleges repeatedly, the shared goal of Publisher Defendants was to "act collectively to force up Amazon's retail prices." Compl. ¶ 37. Publisher Defendants would have welcomed monopoly-like pricing with open arms; what they feared was the exact

opposite—that the Amazon-led $9.99 price would stick, to the benefit of consumers and the perceived detriment of Publisher Defendants.[36] *See also* Section V.A.3, *supra*. The proposed Final Judgment will, of course, do nothing to undermine existing law prohibiting exclusionary conduct.

4. Apple Misstates the Standard of Review Under the Tunney Act

Apple also argues that the proposed Final Judgment "ignores an important rule of law" that a remedy must be "directly related to the violations alleged in the Complaint." Apple at 6 (citing *SBC Communications*). But *SBC Communications* says no such thing. Instead, that court made clear that "[t]he government need not prove that the settlements will perfectly remedy the alleged antitrust harms; it 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. Furthermore, a court "may not require that the remedies perfectly match the alleged violations." Instead, the court must defer "to the government's predictions about the efficacy of its remedies." *Id*. Indeed, Apple's interpretation would suggest that a consent decree must be more narrowly tailored than judgments entered after trial, which often include much broader relief. *See, e.g.*, *U.S. Gypsum Co.*, 340 U.S. at 89 (holding that relief may "range broadly through practices connected with acts actually found to be illegal").

Apple's reliance on *SBC Communications* also is misplaced given that the court in that case entered the government's Proposed Final Judgment, notwithstanding arguments by *amici* that purchasers of the divested telecommunications assets were unlikely to fully replace the competition lost in the merger of two large telecommunications companies. The court

[36] As Steve Jobs said, "the customer pays a little more, but that's what you want anyway." Comp. ¶ 6.

acknowledged the purchasers' shortcomings had the potential to "reduce the effectiveness of the proposed settlements," but concluded that "the government ha[d] presented a reasonable basis for concluding that the proposed settlements . . . are reasonably adequate, and thus within the reaches of the public interest." *SBC Commc'ns*, 489 F. Supp. 2d at 21. Although the United States believes that the settlement reached in *SBC Communications* fully restored competition in the alleged relevant market, the case confirms that the United States is obligated only to show that the settlement was reasonable and within the reaches of the public interest.

5. Apple's Suggested Changes to the Proposed Final Judgment Are Self-Serving and Contrary to the Public Interest

Contrary to Apple's assertions, the terms of the proposed Final Judgment are not novel, and the provisions are closely tailored to address the harm alleged in the Complaint. *See* Section V.A.5. Apple's requested modifications to the proposed Final Judgment, on the other hand, would serve only to undermine the proposed Final Judgment's effectiveness, reducing the value of the settlement to consumers.

Apple proposes that Section VI.B be altered to "allow retailers to discount from their commissions on a per unit and not an aggregate basis." Apple at 3. That suggested modification, however, is a naked attempt by Apple to have its competitors' ability to compete on price constrained—to take away the "nearly unfettered ability to discount," *id*. at 2, 6, that a retailer who desires to compete would embrace but Apple fears. For example, Apple's modification would effectively prohibit retail innovations that benefit consumers, such as loss leading, "buy one get one free," or subscription services. Apple has provided no basis to conclude that a "per unit" constraint would better serve the public interest than an aggregate constraint, and its enforceability argument is pure makeweight. Section VI.B, which is permitted

not required conduct, contemplates voluntary agreements between Settling Defendants and retailers, and permits Settling Defendants to negotiate their own enforcement mechanisms with retailers, including Apple. That these sophisticated parties are capable of designing terms to enforce contractual obligations is demonstrated by the Apple Agency Agreements themselves, which provide an audit mechanism to verify proceeds due to the publisher on e-book sales.[37]

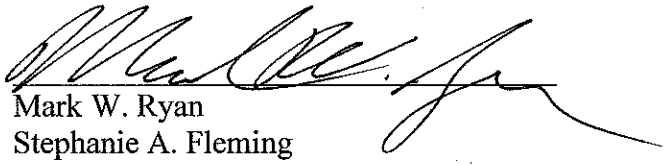
VI. CONCLUSION

The issues raised in the public comments were among the many considered by the United States when it evaluated the sufficiency of the proposed remedy. The United States has determined that the proposed Final Judgment, as drafted, provides an effective and appropriate remedy for the antitrust violations alleged in the Complaint and is therefore in the public interest. The United States will move this Court to enter the proposed Final Judgment after the comments are published on the Department's website and this Response to Comments is published in the Federal Register.

[37] "Publisher, at its expense, may audit directly applicable records of Apple . . . . [No] audit shall be conducted for a period spanning less than six (6) months." EBOOK AGENCY DISTRIBUTION AGREEMENT, § 12(b), APPLETX00018481 at -18488.

Dated: July 23, 2012

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Stephanie A. Fleming, hereby certify that on July 23, 2012, I caused a copy of the United States' Response to Public Comments to be served by the Electronic Case Filing System, which included the individuals listed below. Copies of all Public Comments, collected as digital files in a compact disc entitled "Exhibit A," have also been sent via overnight delivery to the same individuals.

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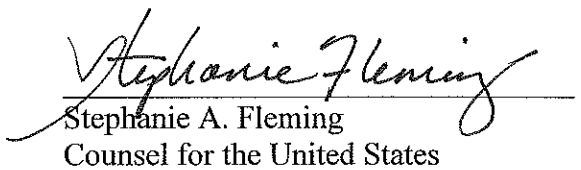

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