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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

MEMORANDUM IN SUPPORT OF MOTION OF AMERICAN BOOKSELLERS ASSOCIATION AND BARNES & NOBLE, INC. FOR LEAVE TO FILE *AMICI CURIAE* RESPONSES TO THE U.S. DEPARTMENT OF JUSTICE'S TUNNEY ACT FILINGS

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The American Booksellers Association ("ABA") and Barnes & Noble, Inc. ("Barnes & Noble") respectfully seek leave to be heard with respect to the U.S. Department of Justice's ("DOJ's") July 23, 2012, Response to Public Comments and DOJ's Motion to Enter the Proposed Final Judgment (to be filed on or about August 3, 2012). The Proposed Final Judgment represents an unprecedented effort by DOJ to reject its traditional role of ending alleged collusion and to become a super-regulator of thousands of publishing industry participants, the vast majority of whom are not before the Court, in a nascent technology industry DOJ little understands. The proposal is not a run-of-the-mill Tunney Act anti-collusion order. Instead, the proposed consent decree seeks extraordinary remedies not requested in the DOJ's Prayer for Relief and beyond the scope of the parties and conduct which are the subject of the Complaint.

DOJ's lack of understanding about the publishing industry was clearly on display in its July 23, 2012, 66-page filing, which deserves a response from the third parties most directly affected by the Proposed Final Judgment: booksellers. If the Court were not to permit ABA and Barnes & Noble to serve as *amici* in this matter, it is likely that DOJ's numerous arguments in that filing that are specifically directed against Barnes & Noble and ABA, complete with their factual inaccuracies, would go unrebutted by any party currently before the Court.[1]

The Proposed Final Judgment, in direct contrast to the Complaint, would for two years regulate the terms of publishers' agency contracts, requiring publishers to terminate their current agency agreements, including with ABA members and Barnes & Noble, and then forbid those same parties from entering similar, *legal* agency agreements. This new regulatory regime will injure innocent third parties, including ABA member bookstores, Barnes & Noble, authors, and

[1] DOJ discusses Barnes & Noble and ABA throughout its July 23, 2012, 66-page filing, and then dedicates 8 pages to rebutting their specific arguments.

non-defendant publishers; hurt competition in an emerging industry; and ultimately harm consumers. Not surprisingly, industry stakeholders have widely denounced the Proposed Final Judgment as harmful to the public interest, the future of copyrighted expression and bookselling in general, not only with regard to the sale of electronic books ("e-books"). The end loser of this unnecessary and burdensome regulatory approach will be the American public, who will experience higher overall average e-book and hardback prices and less choice.

Standard of Review

An *amicus* brief should "aid in the determination of the motions at issue." *James Square Nursing Home, Inc. v. Wing*, 897 F. Supp. 682, 683 (N.D.N.Y. 1995), *aff'd*, 84 F.3d 591 (2d Cir. 1996). For example, an *amicus* brief may "explain the impact a potential holding might have on an industry or other group." *Neonatology Associates, P.A. v. C.I.R.*, 293 F.3d 128, 132 (3d Cir. 2002) (Alito, J.).

Courts have repeatedly granted leave for organizations and businesses in a given industry to file *amicus* briefs in Tunney Act proceedings when the proposed settlement seeks to or may affect industry-wide practices. *See Massachusetts v. Microsoft Corp.*, 373 F.3d 1199, 1206 (D.C. Cir. 2004) (permitting computer and software industry associations to file *amicus* in Tunney Act proceeding); *see also United States v. Thomson Corp.*, Civ. A. No. 96-1415 (PLF) 1996 WL 554557, at *3 (D.D.C. Sept. 25, 1996).

Indeed, where third-party commentators and the overwhelming majority of industry stakeholders contend that a proposed settlement will injure third parties to the proposed consent agreement, the Court should be particularly interested in hearing from and evaluating those concerns. *United States v. Microsoft Corp.*, 56 F.3d 1448, 1461-62 (D.C. Cir. 1995). Here, an unprecedented 868 comments have been submitted to DOJ during the comment period, over 90

percent of which contend that the proposed two-year agency ban will harm individuals and businesses involved in the selling, writing and publishing of books.

Interests of Amici

ABA and Barnes & Noble are well-positioned to highlight the anti-consumer, anti-competitive, and anti-business effects that the Proposed Final Judgment is likely to cause.

Part of ABA's mission is to guide independent bookstores through dynamic change in the publishing industry, an industry that regularly adapts to technological innovation and market transformation. ABA represents more than 1,600 locally owned and operated independent bookstores nationwide, 400 of which participate in an association-sponsored ecommerce program, IndieCommerce, through which they sell physical books, e-books, tickets to author events and other items, www.indiecommerce.com. More than 200 ABA members submitted comments to the Proposed Final Judgment during the comment period.[2]

Barnes & Noble is a leading bookseller, content, commerce and technology company that provides customers easy and convenient access to books, magazines, newspapers and other content across its multi-channel distribution platform. The company operates 691 retail bookstores in 50 states, and 647 college bookstores serving more than 4.6 million students and faculty members at colleges and universities across the United States. Barnes & Noble conducts its online business through BN.com (www.bn.com), one of the Web's largest e-commerce sites,

[2] DOJ, apparently very concerned that more than 200 independent booksellers, representing hard-working small businesspeople, wrote in to oppose the Proposed Final Judgment, erroneously contends that ABA members merely repeated ABA "talking points" in their submission of comments. (DOJ Response to Comments at 3 n.4, 38.) While ABA did alert its members to the Tunney Act proceeding and provided information about how to submit comments, those ABA members who were interested in doing so wrote their own comments, not from any ABA-drafted "talking points." This is obvious to any reader of the comments, since booksellers wrote from their unique viewpoints — although uniformly expressing the view that the Proposed Final Judgment would be disastrous for small businesses newly engaged in the sale of e-books since the publishers' adoption of the Agency Model made this a viable business model.

which also features more than two million titles in its NOOK Bookstore™ (www.bn.com/ebooks).

In its Response to Comments, DOJ acknowledges that the Proposed Final Judgment will require settling defendants to terminate their current agency contracts with Barnes & Noble and with Google, ABA's current e-book supplier. (DOJ Response to Comments at 28, 38.) The direct impact of the Proposed Final Judgment on the terms and conditions under which ABA and Barnes & Noble can continue to sell e-books gives them a keen interest in serving as *amici* in this proceeding.

Argument

Before e-books, publishers typically sold physical books to retailers using a wholesale pricing model, with a suggested retail price pre-printed on the book cover, and the retailer determined the book's retail price. (Compl. ¶¶ 23-24.) When e-books were introduced, publishers initially employed a reseller model for their sale (not a wholesale model, as DOJ incorrectly asserts), but did not directly control e-book pricing. In early 2010, five publishers adopted the agency pricing model at issue in this case, wherein the publisher sets the retail price and sells the book through an agent retailer that is paid a commission but has no pricing control over the book, a practice that is common in many industries.

Nowhere in the Complaint, Competitive Impact Statement ("CIS") or Response to Comments does DOJ ever contend that the agency pricing model is itself illegal, nor does the DOJ seek as relief in the Complaint a determination that agency pricing agreements should not be a legal business option. Nonetheless, elimination of existing and potential future agency agreements is a key component of the Proposed Final Judgment, and an issue as to which ABA and Barnes & Noble deserve to be heard.

DOJ acknowledges that, under the reseller model, Amazon engaged in questionable pricing offering, at a minimum, newly released and *New York Times* best-selling e-books at the anticompetitive below-cost price of $9.99, in a bid to attract consumers. (*Id.* ¶ 30.) Amazon's anticompetitive, below-cost pricing model led to its 90 percent share of the e-book market and threatened all publishers, including five of the major book publishers (the "Publisher Defendants"), in their ability to ensure widespread e-book distribution both online and in brick-and-mortar locations that could not afford to sell e-books below publisher cost. (*Id.* ¶¶ 32-34.) Amazon's pre-agency, anticompetitive, below-cost pricing also served as a barrier to entry into the e-book market by other booksellers, including independents and large retail chains, and contributed to the demise (and hence reduced competition) of numerous independent booksellers and at least one large retail chain, Borders. For all of these reasons, publishers had, and continue to have, entirely legitimate business justifications to adopt agency pricing to preserve their distribution channels, especially in the wake of the Borders bankruptcy. As U.S. Senator Charles Schumer noted recently, "If publishers, authors and consumers are at the mercy of a single retailer that controls 90% of the market and can set rock-bottom prices, we will all suffer."[3]

Today, after the implementation of agency pricing, Amazon's market share has dropped to approximately 60 percent and hundreds of additional retailers have entered the market, considerably diversifying the offerings available to the reading public. Indeed, 400 ABA members now sell e-books through the ABA's IndieCommerce subsidiary and at least several others use B&T RetailerPlace or other ecommerce platforms. Likewise, with the introduction of agency pricing, Barnes & Noble has introduced multiple versions of its e-reader, the NOOK, as well as a self-publishing platform, PubIt!, lending and Read-in-Store programs.

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[3] Charles E. Schumer, Memo to DOJ: Drop the Apple E-Books Suit, WALL STREET JOURNAL (July 17, 2012) (available at http://online.wsj.com/article_email/SB10001424052702303740704577527211023581798-lMyQjAxMTAyMDEwNzExNDcyWj.html) (attached as Exhibit A to Declaration of David N. Wynn).

Oddly, the Proposed Final Judgment does not directly punish any individuals or companies who allegedly colluded, as one would expect, but instead chooses to dismantle a distribution system that has supported numerous diverse retailers, hundreds of whom submitted comments in opposition to DOJ's proposal.

In its Response to Comments, DOJ dismisses the arguments of ABA, Barnes & Noble, the Authors Guild and others of the approximately 800 commenters opposing the Proposed Final Judgment as merely supportive of "collusive" pricing, which DOJ erroneously contends is higher than before the agency model was adopted. As commenters noted and as independent industry researcher Book Industry Study Group recently reported, the Agency Model has resulted in demonstrably lower e-book prices, lower hardback prices, substantially lower wholesale e-book prices, increased competition among publishers, and increased the quality and availability of e-books.[4]

Surely, ABA and Barnes & Noble have no interest in preserving "collusive" pricing agreements, if any in fact occurred. What ABA and Barnes & Noble do want to preserve is competition among publishers on quality and price through their chosen distribution channels — a right clearly accorded to publishers, and which directly impacts the retailers who promote, curate and hand-sell publishers' products. *Morrison v. Murray Biscuit Co.,* 797 F.2d 1430, 1437 (7th Cir. 1986) (the agency model is simply an example of principals "telling their agents what price to charge the consumer"); s*ee also Leegin Creative Leather Prods., Inc. v. PSKS, Inc.,* 551 U.S. 877, 889-92 (2007). It cannot "seriously be argued that the ancient and ubiquitous practice

[4] Commenters clearly submitted evidence and observations of lower pricing of e-books and more vigorous price competition among publishers after the agency model was adopted. (Barnes & Noble Comments at 11-14; ABA Comments at 2.) The Book Industry Study Group BookStats demonstrate that, "[i]n 2011, the first full year of agency pricing, the average publisher price for an ebook was $6.62, 8 percent lower than the year before (a drop over over [sic] 50 cents). In the biggest category--adult fiction--the average publisher ebook price was even lower; $6.24 a unit, down over 9.5 percent from 2010." Michael Cader, A Closer Look at What BookStats Says About the Trade (It's Still Flat), Publisher's Lunch (Deluxe), July 25, 2012 (Wynn Decl. at Exh. B.)

of principals' telling their agents what price to charge the consumer is just some massive evasion of the rule against price fixing." *Morrison,* 729 F.2d at 1437.

DOJ's Response to Comments provides no rationale as to why the elimination of the agency business model is in "the public interest," which rationale the Court should require since the vast majority of commenters predict that returning to a system which allows Amazon to continue its below-cost, anticompetitive pricing will restore Amazon to a monopolistic market share. As DOJ noted in its Response to Comments, of the 868 timely comments filed, only 70 were in favor of the consent decree and 52 of those 70 submitted a form letter provided by Wordpress.com. (DOJ Response to Comments at 2.) This means there were only 19 unique comments submitted in favor of the Proposed Final Judgment.

This Court should not accept the opinion of DOJ and 19 entities as representing "the public interest" as against nearly 800 commenters who opposed the Proposed Final Judgment — especially without hearing from ABA, which is comprised of 1,600 independent booksellers, and Barnes & Noble, which is the world's largest bookseller.

ABA and Barnes & Noble also note that the Proposed Final Judgment improperly reaches beyond the trade e-book market to impact sales related to non-trade e-books. The Complaint specifically defines two separate book markets, trade e-books ("general interest fiction and non-fiction books"), (Compl. ¶¶ 27, 99), and non-trade e-books ("children's picture books, academic textbooks, reference materials . . ."), (Compl. ¶ 27 n.1), excluding non-trade e-books from its allegations ("the relevant product market for purposes of this action is trade e-books"), (Compl. ¶ 99). By contrast, the Proposed Final Judgment applies to the sale of all e-books, including e-textbooks and other college and university book titles. (Proposed Final Judgment § II.D.)[5]

[5] For a more complete discussion of this issue, see the June 19, 2012, Comments submitted by the National Association of College Stores ("NACS").

Nearly half of Barnes & Noble's brick-and-mortar bookstores are college bookstores. Similarly, many of ABA's members are college bookstores. It is quite clear that the non-trade e-book market was never the subject of DOJ's investigation. Terms allowing DOJ to regulate this market are improperly included in the Proposed Final Judgment.[6]

Conclusion

Together, Barnes & Noble and ABA member stores sell millions of e-books a year under the agency model. The Agency Model agreements, which were individually negotiated at arm's length and entered into by Barnes & Noble and ABA member stores, have increased consumer choice, have promoted competition among publishers in the marketplace, have broadened e-book distribution, and have eliminated economic distortions. Forced termination of these agreements with Barnes & Noble and ABA members and forced implementation of a flawed pricing model threatens to restore undue market power to a single seller, to allow that seller to continue its below-cost pricing to regain its monopoly marketplace position, and to impede publishing diversity and consumer choice.

For those reasons, ABA's and Barnes & Noble's interests are directly impacted by the Proposed Final Judgment and the Court's independent determination as to whether it should be accepted as is or whether modifications are needed.

ABA and Barnes & Noble respectfully request that the Court grant this motion for leave to file *amici curiae* responses to the DOJ's July 23, 2012, Response to Public Comments and

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[6] Since DOJ's July 23, 2012, Response to Comments was filed, NACS has pointed out that, "Factually, the terms 'academic textbook' and 'e-textbook' are not used consistently [in the Proposed Final Judgment], so without an explicit definition in the settlement agreement, interpretation of the document will be difficult and could cause publishers to hesitate to experiment in the higher education marketplace. Are 'the Odyssey' or 'The Grapes of Wrath' academic books when sold for use in a classroom?" College Stores Association Argues Against DOJ, E-Books and E-Textbooks Are Different, Digital Book World (July 24, 2012) (available at http://www.digitalbookworld.com/2012/college-stores-association-argues-against-doj-e-books-and-e-textbooks-are-different/) (Wynn Decl. at Exh. C).

DOJ's Motion to Enter the Proposed Final Judgment (to be filed on or about August 3, 2012). ABA and Barnes & Noble also request that their counsel be allowed to participate at any hearing the Court may conduct to determine whether the Proposed Final Judgment is in the public interest.

Dated: July 31, 2012

Respectfully submitted,

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