FINAL FORM

13-3741-cv(L)

13-3748-cv(CON), 13-3783-cv(CON), 13-3857-cv(CON), 13-3864-cv(CON), 13-3867-cv(CON)

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, STATE OF TEXAS, STATE OF CONNECTICUT, COMMONWEALTH OF PUERTO RICO, STATE OF UTAH, STATE OF ALABAMA, STATE OF ALASKA, STATE OF SOUTH DAKOTA, STATE OF NORTH DAKOTA, DISTRICT OF COLUMBIA, STATE OF ARIZONA, STATE OF TENNESSEE, STATE OF NEBRASKA, STATE OF MICHIGAN, STATE OF COLORADO, STATE OF VERMONT, COMMONWEALTH OF MASSACHUSETTS, STATE OF ILLINOIS, STATE OF WEST VIRGINIA, STATE OF NEW MEXICO, STATE OF IOWA, COMMONWEALTH OF VIRGINIA, STATE OF KANSAS, STATE OF MARYLAND, STATE OF NEW YORK, STATE OF IDAHO, STATE OF MISSOURI, STATE OF ARKANSAS, STATE OF OHIO, STATE OF LOUISIANA, COMMONWEALTH OF PENNSYLVANIA, STATE OF WISCONSIN, STATE OF DELAWARE,

Plaintiffs-Appellees,

(Additional Caption on the Reverse)

On Appeal from the United States District Court for the Southern District of New York (Cote, J.)

BRIEF FOR DEFENDANTS-APPELLANTS VERLAGSGRUPPE GEORG VON HOLTZBRINCK GMBH, HOLTZBRINCK PUBLISHERS, LLC, d/b/a MACMILLAN

Joel M. Mitnick
Eamon P. Joyce
Mark D. Taticchi
SIDLEY AUSTIN LLP
Attorneys for Defendants-Appellants Verlagsgruppe Georg Von Holtzbrinck GmbH and Holtzbrinck Publishers, LLC, d/b/a Macmillan
787 Seventh Avenue
New York, New York 10019
(212) 839-5300

v.

APPLE, INC., SIMON & SCHUSTER, INC., VERLAGSGRUPPE GEORG VON HOLTZBRINCK GMBH, HOLTZBRINCK PUBLISHERS, LLC, d/b/a MACMILLAN, SIMON & SCHUSTER DIGITAL SALES, INC.,

Defendants-Appellants,

and

HACHETTE BOOK GROUP, INC., HARPERCOLLINS PUBLISHERS L.L.C., THE PENGUIN GROUP, A DIVISION OF PEARSON PLC, PENGUIN GROUP (USA), INC.,

Defendants.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Appellants state the following:

Holtzbrinck Publishers, LLC has no subsidiaries, and its ultimate corporate parent entity is a German company called Georg Von Holtzbrinck GmbH & Co. KG. There are no publicly held companies in the chain of ownership between Holtzbrinck Publishers, LLC and its ultimate parent entity. Although Holtzbrinck Publishers, LLC has affiliate entities in the United States and around the world, none of these is a publicly held company with ownership interests or control with respect to Holtzbrinck Publishers, LLC.

Verlagsgruppe Georg Von Holtzbrinck GmbH is a privately owned German company with no ultimate corporate parent. Although Verlagsgruppe Georg Von Holtzbrinck GmbH has subsidiary and affiliate entities in the United States and around the world, none of these is a publicly held company with ownership interests or control with respect to Verlagsgruppe Georg Von Holtzbrinck GmbH.

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JURISDICTIONAL STATEMENT

These consolidated appeals arise from two companion federal antitrust cases that were before the same district judge. In the first case, *United States v. Apple, et al.*, No. 1:12-cv-2826 (S.D.N.Y.), an action brought by the Department of Justice, the District Court had jurisdiction pursuant to 28 U.S.C. §§ 1331, 1337(a), and 1345. In the companion case brought by State Attorneys General, *Texas v. Penguin Group (USA), Inc.*, No. 1:12-cv-3394 (S.D.N.Y.), the District Court had jurisdiction under 28 U.S.C. §§ 1331 and 1337. On September 6, 2013, the District Court simultaneously entered the judgment on appeal (the Apple Injunction) in both cases, which constituted the final judgment in the federal government's case, *see* SPA201/A2555 (D.E. 374),[1] and a permanent injunction in the States' action, *see id.*

Verlagsgruppe Georg von Holtzbrinck GmbH and Holtzbrinck Publishers, LLC d/b/a Macmillan (together, Macmillan) timely noticed appeals in both cases on October 4, 2013. This Court consolidated the appeals on December 4, 2013. This Court's jurisdiction over the consolidated appeals arises under 28 U.S.C. §§ 1291 and 1292(a)(1).

[1] "D.E." refers to pertinent ECF docket entry numbers at which various documents appear in the District Court's record. Unless otherwise specified, D.E. refers to entries on the District Court's docket in No. 1:12-cv-2826 (S.D.N.Y.), the case brought by the United States.

ISSUES PRESENTED

1. Whether the District Court erred by entering a judgment that materially modified Macmillan's court-approved consent decree with the government despite the absence of intervening changes of law or fact that would support such relief.

2. Whether the District Court erred by failing to hold that the government was judicially estopped from contending that a new, multi-year ban on including certain discounting provisions in Macmillan's eBook sales agreement with Apple was necessary to ensure fair competition, because the government previously represented to the District Court that a much shorter restriction would be effective to restore competition and the court approved Macmillan's consent decree on that basis.

STATEMENT OF THE CASE

Macmillan's appeal arises from injunctive relief the District Court (Cote, J.) imposed in federal antitrust actions the United States and a number of States (collectively, Plaintiffs or the government) brought against publishers, including Macmillan, and a retailer, Apple, of electronic books (eBooks). Prior to trial, the government reached settlements with each of the publishers, including appellants

Macmillan and Simon & Schuster.[2] The bargained-for settlements, embodied in consent decrees, imposed injunctive relief against each publisher and provided specific sunsets for the injunctive relief—two years for some provisions, five years for others. The settling defendants did not admit the allegations in the government's complaints or indeed any wrongdoing. After giving final approval to the decrees of Simon & Schuster, HarperCollins, and Hachette, and preliminary approval to those of Penguin and Macmillan, the District Court conducted a bench trial in June 2013, at which the government prevailed on its antitrust claims against Apple.

The crux of this appeal is whether the government, once it prevails at trial against a *non-settling* defendant, may use the post-trial remedial process to impose more onerous restraints on the *settling* defendants as well. Here, the government did so, unilaterally lengthening by nearly three years one of the most burdensome restrictions in Macmillan's court-approved consent decree. The District Court approved that extension, effectively allowing the government to walk away from the deal it struck with Macmillan, without requiring the government to meet Federal Rule of Civil Procedure 60(b)(5)'s prerequisites for modifying a consent decree; indeed, it approved the change without even addressing Macmillan's

[2] The other publisher defendants, which are not parties to this appeal, were Hachette Book Group, Inc., HarperCollins Publishers L.L.C., The Penguin Group, a Division of Pearson PLC, and Penguin Group (USA), Inc. (collectively, with Macmillan and Simon & Schuster, the Publisher Defendants).

objections on the issue. Because the government failed to satisfy Rule 60(b)(5), and in any event should have been judicially estopped from seeking those harsher remedies, the District Court's judgment should be reversed as to the Macmillan appellants in order to give effect to Macmillan's negotiated and court-approved settlement.

A. Legal Background

Section 1 of the Sherman Act, 15 U.S.C. § 1, proscribes "[e]very contract, combination . . . , or conspiracy, in restraint of trade." *Id.* The antitrust laws authorize the federal government, *id.* § 15a, the States, *id.* § 15c, and private individuals, *id.* § 15, to bring civil suits to enforce these prohibitions.

The Sherman and Clayton Acts authorize a range of remedial tools, each of which vindicates different goals. For example, government and individual plaintiffs can recoup treble damages for their antitrust injuries, *see id.* §§ 15(a), 15a, 15c(a), and these multiple-damages remedies both "compensate[s] victims," *Ill. Brick Co. v. Illinois*, 431 U.S. 720, 746 (1977), and "punish past violations," *Am. Soc'y of Mech. Eng'rs, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 575 (1982). By contrast, injunctive relief under 15 U.S.C. §§ 4 and 26 does not serve to punish defendants; rather, its function is to restore competition to the market. *Int'l Salt Co. v. United States*, 332 U.S. 392, 401 (1947), *abrogated on other grounds by Ill. Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28 (2006). Thus, although a district

court "is clothed with 'large discretion' to fit the decree to the special needs of the individual case," *Ford Motor Co. v. United States*, 405 U.S. 562, 573 (1972), it "may not impose penalties in the guise of preventing future violations," *Hartford-Empire Co. v. United States*, 323 U.S. 386, 409 (1945) (footnote omitted). *Accord United States v. E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 326 (1961); *Int'l Salt Co.*, 332 U.S. at 401.

When the federal government brings and then wishes to settle a civil antitrust claim, it must follow the procedures set forth in the Antitrust Procedures and Penalties Act (the APPA or Tunney Act), 15 U.S.C. § 16(b)–(h). That process is transparent and deliberative. In terms of transparency, every step of the settlement-approval process must be subject to public scrutiny. For instance, the proposed text of the consent decree must be published in the Federal Register at least 60 days before the decree is scheduled to take effect. *Id.* § 16(b). The public is invited to comment on that proposal, and those comments and the federal government's responses must then be published in the Federal Register. *Id.* § 16(d); *see also id.* § 16(c) (requiring newspaper publication of notice of the potential settlement and a summary of all relevant information).

With respect to deliberativeness, the Tunney Act mandates that the federal government and the court conduct a rigorous analysis to ensure that a consent decree will serve the purposes of the antitrust laws. Before it may secure judicial

approval of the proposed decree, the federal government must prepare a so-called competitive impact statement (CIS), which it must issue alongside the proposed settlement. *Id.* § 16(b). The CIS must describe the nature of the action, recite the events and practices underlying it, explain the proposed settlement, the "relief to be obtained thereby, and the anticipated effects on competition of such relief," *id.* § 16(b)(3), appraise the alternative remedies actually considered by the government, summarize potential plaintiffs' likely remedies, and describe the procedures for modifying the proposed settlement. *Id.* § 16(b)(1)–(6). As with the proposal itself, the CIS must be published in the Federal Register. *Id.* § 16(b).

Moreover, before approving any such settlement, the court must find that the proposed resolution is "in the public interest." *Id.* § 16(e). That public interest determination must take into account a range of considerations, "including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, whether [the decree's] terms are ambiguous," as well as "the impact of entry of such judgment upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury." *Id.* § 16(e)(1). Although no evidentiary hearing is required, *id.* § 16(e)(2), the court may hold one if appropriate under the circumstances, *see id.* § 16(f). It may also: review the public comments on the proposed settlement and the United States Department of

Justice's (DOJ) responses thereto; authorize intervention or amicus participation; receive expert testimony; and, if necessary, appoint a special master and consultants to advise the court. *Id.* § 16(f)(1)–(4). After completing its review of the evidence, the court may approve the settlement and enter the decree if the court concludes that it is in the public interest.

Such a consent judgment—like all consent decrees and injunctions entered as part of a final judgment—is subject to modification under Rule 60 of the Federal Rules of Civil Procedure. Relevant here, Rule 60(b)(5) provides that an injunction may be modified when (among other circumstances) "applying it prospectively is no longer equitable." Fed. R. Civ. P. 60(b)(5); *see Benjamin v. Jacobson*, 172 F.3d 144, 161-62 (2d Cir. 1999) (en banc). Under Supreme Court and Second Circuit precedent, that standard requires the party seeking modification to meet two conditions. First, there must be a change in circumstances (either factual or legal) of sufficient magnitude to justify revising the parties' accord. *Rufo v. Inmates of Suffolk Cnty. Jail*, 502 U.S. 367, 383 (1992). Second, once such a change has been shown, any adjustment to the decree must be suitably tailored to the changed factual or legal landscape. *Id.*; *Still's Pharmacy, Inc. v. Cuomo*, 981 F.2d 632, 637 (2d Cir. 1992).

This case first presents the question whether the judgment on appeal met both steps of this exacting standard. The case also presents the related issue

whether the government should have been estopped from seeking modification of Macmillan's decree, since the modification rested on factual assertions which were at odds with the government's averments in securing judicial approval for Macmillan's settlement. *See generally New Hampshire v. Maine*, 532 U.S. 742 (2001).

B. Factual Background and Procedural History

This case concerns the market for publication and purchase of trade eBooks in the United States ("trade" books consist of general interest fiction and non-fiction, as distinguished from academic texts for example). In recent years, the traditional book-publishing industry has undergone a sea change, largely due to the development of the eBook and associated technology. *See* A933 (CIS for Defendants Hachette Book Group, Inc., HarperCollins Publishers L.L.C., and Simon & Schuster, Inc. (Original CIS)). Unlike traditional books, eBooks are, as their name suggests, entirely digital and can be read on a number of electronic devices, including dedicated eBook-reading devices (e-readers), such as the Barnes & Noble Nook, or on multi-use devices like the Apple iPad. *Id.*

In 2007, Amazon, Inc. released its Kindle e-reader and began selling a wide variety of eBooks for use on its new device. *Id.* Other booksellers in the eBooks market, like Barnes & Noble, also developed their own dedicated e-readers, *see id.*, while others simply sold eBooks without creating companion devices.

In the early days of eBook publication, the major publishing houses—including Macmillan—sold eBooks via a wholesaler/retailer model. *Id.* Under that arrangement, the publisher would sell an eBook to a retailer at a price that was significantly discounted from the suggested retail price of the hardcopy version of the book. *Id.* The retailer would then resell the eBook at whatever price it chose. *Id.* Although different retailers employed that flexibility in different ways, Amazon used it to adopt an aggressive eBook pricing strategy, selling new, bestselling titles for $9.99. *Id.* Amazon, which by early 2010 had captured 90 percent of the trade eBooks market, did so notwithstanding that $9.99 was almost always below the wholesale price at which it purchased the eBook. *See United States v. Apple, Inc.*, 889 F. Supp. 2d 623, 627 & n.2, 640 (S.D.N.Y. 2012) (*Apple I*).

According to the government, that strategy raised concerns at Macmillan and other publishing houses that $9.99 would become fixed as the industry standard for all trade eBooks, A934 (Original CIS), and therefore would threaten the continued solvency of existing industry models, *see Apple I*, 889 F. Supp. 2d at 627. Recognizing the publishers' alleged concerns, and itself wishing to enter the eBook sales market when it launched its iPad tablet, Apple separately approached each Publisher Defendant to negotiate a system for Apple to sell the publishers' eBooks. After preliminary negotiations, Apple suggested that each publisher allow Apple to

market and sell its eBooks through an "agency" system. *Cf. id.* at 628. Under an agency model, a publisher sets the final market price for an eBook, and then "agents," such as Apple, market and sell the eBook to consumers at that price. *Id.* The agent is compensated via a commission for each eBook sold—in this case, 30% of the publisher-set sales price. *Id.* Macmillan and the other Publisher Defendants agreed to use Apple as an eBook sales agent pursuant to the agency model. *See id.* Thereafter, the Publisher Defendants entered agreements with other major retailers to sell eBooks exclusively through the agency model. *Id.* at 629.[3]

According to the government and the District Court, universal application of the agency model was due in significant part to a term Apple insisted be included in its eBook agency agreements, namely a "price-MFN" clause.[4] Under the clause, the publisher was required to lower the eBook price for Apple to match the lowest

[3] In the interim, Macmillan had offered Amazon the option to sell eBooks through either an agency model or a wholesale model that would provide a seven-month window in which new titles would be exclusively available in hardcover form, and Amazon selected an agency model. A920 (Compl.) ¶ 80; Holtzbrinck Answer (D.E. 59) ¶ 80.

[4] The abbreviation "MFN" stands for "most favored nation," a term of art borrowed from the law of international trade. *See* Black's Law Dictionary 1105 (9th ed. 2009). In short, when one country affords another nation MFN status, the designating country must treat its new MFN at least as favorably as all its other trading partners. *See id.*; *see also, e.g.*, SPA5–SPA6/A1121–A1122 (Final Judgment as to Defendants Hachette, HarperCollins, and Simon & Schuster (S&S Decree)) § II.M (defining MFN).

price that any other retailer was charging for a particular eBook—even if that price was set by the retailer under a traditional wholesaler/retailer arrangement. *See* A914–A915 (Compl.) ¶ 65. The government alleged that because retailers operating under the wholesale model were consistently charging prices below those contained in the pricing tiers Apple insisted be included in its agency agreements, the agency model would fail to alter the prevailing pricing structure unless all eBook distribution agreements were switched to agency. Thus, the government alleged, once Apple successfully inserted a price-MFN clause into its agency agreements, each publisher had the incentive to export the agency model to all other agreements—which, as noted, each publisher did soon after signing its agreement with Apple.

Claiming that this alleged conduct amounted to an unlawful restraint of trade under Section 1 of the Sherman Act, the federal government and the attorneys general of several States filed suit in the United States District Court for the Southern District of New York. *See* A895 (Compl.); Compl., D.E. 1 in *Penguin Group*, No. 1:12-cv-3394.[5] Specifically, they alleged that the publishers—assisted

[5] Individual plaintiffs filed a number of putative class actions on similar theories, and the Judicial Panel on Multidistrict Litigation transferred them to the Southern District of New York. *In re Elec. Books Antitrust Litig.*, 846 F. Supp. 2d 1378 (J.P.M.L. 2011). Macmillan has since settled the private antitrust actions, and they are not at issue in this appeal. *In re Elec. Books Antitrust Litig.*, No. 1:11-md-2293, slip op. (D.E. 478) (S.D.N.Y. Dec. 9, 2013).

and facilitated by Apple—had launched a coordinated, two-prong assault on eBook price competition.

First, the government claimed that the publishers agreed to force all eBook retailers to adopt an agency distribution model, in order to eliminate all pricing discretion at the retail level and concentrate it at the publisher level instead. *See* A919 (Compl.) ¶ 76. Concerted action on this point was crucial, the theory ran, because without it an individual publisher would lack the clout to force Amazon and other major retailers to surrender the pricing discretion they enjoyed under the wholesale approach. But once an eBook retailer was faced with an industry-wide ultimatum—adopt agency or lose all eBook business—even online megastores like Amazon would have no choice but to accept agency. *See id.* at A921–A922 ¶ 83. Second, the publishers allegedly agreed to establish market-wide price tiers for eBook sales, thereby effectively eliminating price competition at the publisher level as well. *See id.* at A897–A899 ¶¶ 5, 7. Macmillan answered the government's complaints and contested their allegations,[6] and Penguin did likewise. The other Publisher Defendants had settled before any responsive pleadings were due.

The government's claims against the publishers never came to trial, however. To avoid the expense and uncertainty of a trial on those allegations, the

[6] *See* D.E. 58, 59; D.E. 103 in *Penguin Group*, No. 1:12-cv-3394; D.E. 164 in *In re Elec. Books Antitrust Litig.*, No. 1:11-md-2293.

federal government entered into consent decrees with each of the publishers, though the timing of the settlements varied. Simultaneous with the filing of the Complaint, on April 11, 2012, the government announced that it had reached a compromise with Hachette, Harper Collins, and Simon & Schuster, and released a CIS and draft consent decree. As required by the Tunney Act, both documents were published in the Federal Register. *See United States v. Apple, Inc.*, 77 Fed. Reg. 24,518 (Apr. 24, 2012).

That proposed settlement—which remained largely unchanged for later-settling Publisher Defendants—imposed a variety of requirements on the publishers. Most relevant here, the decree required the publishers to (1) terminate their existing agency agreements with all eBook retailers, including Apple, *see* SPA8 (S&S Decree) § IV.A–B; Proposed Final Judgment as to Defendants Hachette, HarperCollins, and Simon & Schuster, D.E. 4, Ex. 1 (Apr. 11, 2012);[7] and (2) for two years allow retailers to offer discounts and promotions on eBooks up to the total value of the agent's aggregate annual eBooks commission (this restriction is known as the "cooling-off period"), SPA10–SPA11 § V.A–B,

[7] Macmillan's subsequent settlement with the government reached the same substantive result through a combination of contractual notices, *see* SPA189–SPA190/A2394–A2395 (Final Macmillan Judgment) § IV.A, and termination of Macmillan's sole agreement at the time of settlement with a price-MFN, its agreement with Amazon. *See id.* at SPA190 § IV.B; *see also* A1162–A1163 (Competitive Impact Statement [As To Macmillan] (Macmillan CIS)).

SPA13–SPA14 § VI.B.[8] The federal government agreed to drop its claims without any finding or admission of wrongdoing by the settling publishers. *Id.* at SPA1.

As noted, several provisions of the decree contain an express sunset, including its linchpin restriction—restraining the publishers' authority to limit retail price discounts. *See id.* at SPA10–SPA11 § V.A–B. In discussing the competitive impact of that constraint, the federal government assured both the court and public that, "[i]n light of current industry dynamics, including rapid innovation, a two-year period, in which Settling Defendants must provide pricing discretion to retailers, is sufficient to allow competition to return to the market." A942 (Original CIS).

The public responded vigorously to the proposed settlement, submitting nearly 900 comments for DOJ's review. *See* U.S. Dep't of Justice, *Index of Comments Regarding Settlement of Defendants Hachette, HarperCollins, and Simon & Schuster* (DOJ Index of Comments),

[8] Additionally, publishers were required to: agree not to include or enforce a price-MFN clause in any eBook distribution agreement for a period of five years, SPA11 § V.C, SPA18 § XI (Proposed S&S Injunction); notify DOJ before entering or modifying an eBook-related joint venture with another publisher, *id.* at SPA8–SPA9 § IV.C; not retaliate against any eBook retailer for its pricing or discounting practices, *id.* at SPA11 § V.D; abstain from sharing any competitively sensitive information with other publishers, *id.* at SPA12–SPA13 § V.F; refrain from entering into any agreement to set or raise eBook prices, *id.* at SPA11–SPA12 § V.E; implement an antitrust compliance program including detailed training, disclosure and reporting requirements; and appoint an antitrust compliance officer to verify and ensure the publisher's adherence to the decree, *id.* at SPA14–SPA16 § VII. *Accord* A939–A946 (Original CIS).

http://www.justice.gov/atr/cases/apple/index.html (last visited Jan. 29, 2014). As the District Court recognized, the comments "were both voluminous and overwhelmingly negative." *Apple I*, 889 F. Supp. 2d at 633. More than 90 percent of the comments opposed the settlement. *Id.* Many commenters believed that it would further entrench Amazon's eBook monopoly, hurt brick-and-mortar booksellers, decrease authors' royalty payments, or otherwise harm the eBook market. *See id.*; *id.* at 639–40; *see generally* DOJ Index of Comments; *see also Apple I*, 889 F. Supp. 2d at 634 (discussing comments favoring the decree, which largely "mirrored arguments presented by the Government").

A number of comments, as well as DOJ's responses, focused on the price-control restrictions in Sections V.A–B, underscoring their role as the most impactful provisions of the decree.[9] In particular, commenters disagreed about the necessary length of the "cooling-off period." For example, many thought a period shorter than two years—even as brief as three months—would be an appropriate "'competitive reset,'" whereas several commenters advocated for a longer cooling-

[9] *See generally, e.g.*, A1058–A1062 (Response of Plaintiff United States to Public Comments on the [Simon & Schuster] Proposed Final Judgment (U.S. Response to S&S Settlement Comments)) (discussing comments by Barnes & Noble, Books-A-Million, the Authors Guild, and American Booksellers Association); *id.* at A1063–A1065 (describing and responding to comments by Barnes & Noble and Independent Book Publishers); *id.* at A1066–A1069 (addressing concerns about the impact of the settlement's price-control restrictions on brick-and-mortar stores); *id.* at A1070 (discussing comments from the Consumer Federation of America).

off period. A1070 & n.24 (U.S. Response to S&S Settlement Comments) (quoting Catherine Flynn Devlin, ATC-0084, *available at* http://www.justice.gov/atr/cases/apple/comments/atc-0084.pdf (last visited Dec. 31, 2013)) (citing Consumer Federation of America, ATC-0775, at 1, *available at* http://www.justice.gov/atr/cases/apple/comments/atc-0775.pdf (last visited Dec. 31, 2013)); *see Apple I*, 889 F. Supp. 2d at 639–41.

As the federal government's response made clear, it had given the length of the cooling-off period (two years) careful study and negotiated it with the parties. *See* A1054–A1055 (U.S. Response to S&S Settlement Comments) (explaining why the federal government "negotiated [the settlements'] limited prohibitions"). The federal government assured the court that a two-year respite was sufficient to achieve the key goals of the antitrust laws and yet brief enough to avoid stifling innovation in this nascent market. First, it explained, two years would be long enough to eliminate any anticompetitive advantage that may have accrued while the agency agreements were in force: "This brief cooling-off period will ensure that the effects of the collusion will have evaporated before defendants seek future agency agreements, if any." *Id.* at A1051. It represented that the two-year period "will break the collusive status quo." *Id.* at A1059–A1060; *see also id.* at A1055 (similar).

Second, the federal government told the court that the two-year period would ensure that, going forward, there would be full competition in the eBook market. *Id.* at A1055 (averring that "these limited prohibitions a[re] a means to ensure a cooling-off period and allow movement in the marketplace away from collusive conditions"); *id.* at A1059-A1060 ("[t]he limitations placed on the . . . Settling Defendants for a period of two years will . . . allow truly bilateral negotiations between publishers and retailers to produce competitive results"); *cf.* A942 (Original CIS) (stating that "a two-year period, in which Settling Defendants must provide pricing discretion to retailers, is sufficient to allow competition to return to the market").

Finally, the federal government pledged that "[t]hese limitations also are designed not to last long enough to alter the ultimate development of the competitive landscape in the still-evolving ebooks industry." A1055 (U.S. Response to S&S Settlement Comments).

After canvassing the public's input, the federal government sought judicial approval of the proposed injunction without change. *See* Memorandum in Support of the United States' Motion for Entry of Final Judgment [as to Hachette, HarperCollins, and Simon & Schuster] (Motion for Entry of S&S Judgment), D.E. 90 (Aug. 3, 2012). In a September 5, 2012 opinion, the District Court granted the federal government's request, approved the settlement, and entered the

proposed decree. *See Apple I*, 889 F. Supp. 2d at 644; *see id.* at 632–33 (endorsing the government's representations).

Applying the public-interest standard to the duration of the discount-control restrictions, the court concluded that they "appear[ed] reasonably calculated to restore retail price competition to the market for trade e-books, to return prices to their competitive level, and to benefit e-books consumers and the public generally, at least as to the competitive harms alleged in the Complaint." *Apple I*, 889 F. Supp. 2d at 632. Analyzing the character of the prohibition and the context in which it was being imposed, the court found that the two-year limitation "appear[s] wholly appropriate given the Settling Defendants' alleged abuse of such provisions in the Agency Agreements, the Government's recognition that such terms are not intrinsically unlawful, and the nascent state of competition in the e-books industry." *Id.* After describing as "reasonabl[e]" the government's view that the two-year limitation on the publishers' discounting control would provide a "'cooling-off period' for the e-books industry that will allow it to return to a competitive state free from the impact of defendants' collusive behavior," the court approved the relief. *Id.* It stated that "[t]he time limits on these provisions suggest that they will not unduly dictate the ultimate contours of competition within the e-books industry as it develops over time." *Id.*; *see also id.* at 633 ("Based on the

factual allegations in the Complaint and CIS, it is reasonable to conclude that these remedies will result in a return to the pre-conspiracy status quo.").

The District Court also recognized that a settlement provision allowing the publishers to negotiate a cap on discounts as part of any agency agreement had been "included [by the government] . . . at the behest of the Settling Defendants, who were concerned about Amazon's discounting practices." *Id.* at 638.

At the government's request, the court entered the decree without awaiting resolution of the government's claims against the remaining defendants. *Id.* at 643–44. Before entering judgment in that posture the court was required to "determin[e] that there [wa]s no just reason for delay." Fed. R. Civ. P. 54(b). The court so found, in part because "[t]he Settling Defendants ha[d] elected to settle this dispute" and "[we]re entitled to the benefits of that choice and the certainty of a final judgment," and it entered judgment accordingly. *Apple I*, 889 F. Supp. 2d at 643–44; SPA1–SPA19 (S&S Decree). Around the same time, the States moved for preliminary approval of a settlement with those Publisher Defendants, which contained the identical injunctive relief as in the decree with the federal government. *See* Mem. Supp. Plaintiff States' Mot. for Preliminary Approval of Settlements [including Simon & Schuster settlement], No. 12-cv-6625, D.E. 11 at

7 (Aug. 29, 2012); *id.*, Appendix C at 7 (Settlement Agreement Between Simon & Schuster, Inc. and Plaintiff States).[10]

Penguin settled a few months later, on terms materially indistinguishable from those to which Hachette, HarperCollins, and Simon & Schuster agreed (*see supra* at 13–14 & n.8), including the two-year cooling-off period and associated restrictions on retailer discounts. *See* A1824. The government's CIS and motion for entry of judgment incorporated its earlier filings and the *Apple I* opinion by reference and added little to the record. *See* Memorandum in Support of Motion by the United States for Entry of the Proposed Penguin Final Judgment (D.E. 211), at 4 (Apr. 18, 2013); Competitive Impact Statement (D.E. 163), at 2 (Dec. 18, 2012). Similarly, in entering Penguin's consent decree on May 20, 2013, the court adopted by reference the reasoning of its *Apple I* opinion. *See* D.E. 257 at 3.

In February 2013, after Macmillan and the federal government reached a settlement, and the government submitted a proposed consent decree and CIS. *See* A1136; A1157 (Macmillan CIS). Once more, the government incorporated the Original CIS by reference in Tunney Act proceedings related to Macmillan's decree. *See* A1158–A1159. And once again the terms of Macmillan's decree were

[10] The court ultimately entered the same injunctive relief in the States' action that it approved in the publishers' consent decrees. D.E. 278, in *In re Elec. Books Antitrust Litig.*, No. 1:11-md-2293 (Feb. 8, 2013).

largely in lockstep with those of the initial decree. *See id.* at A1161–A1164; SPA183 (Final Macmillan Judgment).

The government did negotiate a few changes, however, including starting Macmillan's cooling-off period immediately upon Macmillan's execution of the settlement agreement rather than after the court ratified the decree. A1162. The government gave no indication that its experience with the earlier decrees had suggested that greater relief would be needed to restore competition. Instead, the government proposed a *shorter* cooling-off period for Macmillan than any of the other publishers, concluding: "[G]iven the settlements of all the other Publisher Defendants, a *23-month* cooling-off period is sufficient to ensure that future contracts entered into by these publishers will not be set under the collusive conditions that produced the Apple Agency Agreements." *Id.* at A1162–A1163 (emphasis added). On June 12, 2013, the federal government moved for entry of the Macmillan decree and final judgment. *See* Memorandum in Support of Motion by the United States for Entry of the Proposed Macmillan Final Judgment (D.E. 286) (Motion for Entry of Macmillan Judgment) (June 12, 2013); *see also* A2134 (States' Mem. in Support of Mot. for Preliminary Approval of Macmillan & Penguin Settlements) (incorporating the injunctive relief from the consent decree, and stating that it is "intended to reestablish price competition in a market free of the taint of the prior conspiracy"); Mem. Supp. Plaintiff States' Mot. for

Preliminary Approval of Settlements [including Simon & Schuster settlement], No. 12-cv-6625, D.E. 11 at 7 (same).[11]

On August 2, 2013, however, less than two months after the federal government moved for entry of Macmillan's decree (and nearly a year after entry of the Hachette, HarperCollins, and Simon & Schuster decrees), the government changed its position regarding the injunctive relief necessary to restore competition to the market. *See* A2302 (Plaintiffs' Memorandum of Law in Support of Proposed Injunction (Pls.' Injunction Br.)). Having prevailed against Apple at trial, the government now asserted that the only way to purge any anticompetitive effects and ensure a competitive eBook market was to impose a new limitation on "the distribution relationships between each Publisher Defendant and Apple" by instituting a *five-year* ban on *any* restrictions on Apple's price-discounting authority. *See id.* at A2310–A2311 (Pls.' Injunction Br.). That prohibition differed from the Publisher Defendants' decrees, which restricted publisher limits on discounting for only 2 years (or 23 months) and permitted the publishers to limit annual discounting to the aggregate annual value of the agent's sales commission. SPA13–SPA14 (S&S Decree) § VI.B.

[11] Although Macmillan's consent decree and final judgment had not been entered at the time Apple went to trial, the District Court entered a stipulated order recognizing that because the plaintiffs had settled "the entirety of their claims against Macmillan," the Macmillan appellants "will not participate as defendants in the Trial." D.E. 212 at 2.

The government provided no evidence demonstrating a change in circumstances, and did not reconcile its conflicting positions. *See* A2311 (Pls.' Injunction Br.). All it said regarding the change was that "[e]nsuring that Apple can discount e-books and compete on retail price will make it more difficult for *the Publisher Defendants* to prohibit other retailers from doing so." *Id.* (emphasis added).

The government's submission also did not address the harm to Macmillan and the other publishers that would flow from the decree and the substantial business advantage it afforded Apple. That advantage was twofold. First, during the two-year cooling-off period called for by Macmillan's decree, Macmillan could limit an eBook agent's discounts to the value of the agent's aggregate annual commission. Apple, however, was immune from that restriction.

Second, when Macmillan agreed to its settlement, it believed it would be free to adopt standard—as opposed to discount-capped—agency agreements with Amazon, Barnes & Noble, Apple, and every other eBook retailer on December 18, 2014. Under the government's proposal, however, Macmillan's ability to adopt that business model across the board would be delayed for several more years. Whereas Macmillan could seek to preclude discounting by other eBook agents (via newly negotiated agency agreements) in December 2014, Apple would enjoy an extra three years of unfettered and judicially protected control over eBook pricing

and discounts—a tool that may allow Apple to undercut its competitors in the very market the injunction purportedly would protect.

On August 7, 2013, the Publisher Defendants objected to the proposed extension as an improper modification of their consent decrees, and also submitted that the government should be judicially estopped from seeking modification, based on its representation during the settlement process that a two-year cooling off period would establish a competitive market.[12]

Less than a week later, on August 12, 2013, the District Court approved Macmillan's consent decree, once again adopting the reasoning of its *Apple I* opinion without substantial change, *see* SPA182, and signed a final judgment as to Macmillan, SPA183.[13]

Less than a month after entering Macmillan's consent decree, and without commenting on the Publisher Defendants' submissions that any modification to their cooling-off periods would be improper and also was barred by judicial estoppel, the District Court issued the judgment on appeal. *See* SPA201/A2555; D.E. 286 in No. 1:12-cv-3394. It extends the publishers' cooling-off periods as to

[12] *See* A2347–A2352 (Settling Defendants' Memorandum of Law in Opposition to Plaintiff United States' Proposed Final Judgment [as to Apple] and Plaintiff States' Proposed Order Entering Permanent Injunction).

[13] Macmillan also settled the States' claims, and the District Court entered a settlement containing the same injunctive relief mandated by the consent decree. *See* A2601, A2610–A2612. As noted *supra* at 21–22, the States endorsed that same injunctive relief in moving for approval of the settlement.

agreements with Apple. SPA205 § III.C. Notwithstanding the dates upon which each Publisher Defendant's two-year cooling-off period (and Macmillan's 23-month cooling-off period) would have expired under their individually negotiated decrees, the court ordered, *sua sponte*, that the new cooling-off periods (ranging from 24–48 months) run from the date of the Apple Injunction and expire at six-month intervals. *See id.* This process would begin with Hachette, which would exit its cooling-off period in October 2015, and end with Macmillan, which will remain in its revised cooling-off period until October 2017. *Id.*

On October 4, 2013, Macmillan timely noticed this appeal.

SUMMARY OF ARGUMENT

I. The judgment on appeal modified Macmillan's consent decree by increasing the duration of Macmillan's cooling-off period by nearly three years, and by narrowing the scope of its discount-control authority under the consent decree. In doing so, the District Court violated Rule 60(b)(5) of the Federal Rules of Civil Procedure. The government did not attempt to show changed factual or legal circumstances to warrant such relief—indeed, there *were* no significant changes of fact or law in the three-week period between the District Court's entry of Macmillan's decree and its entry of the judgment that modified it. Nor had there been any significant changes in the eBooks market in the entire year preceding the judgment on appeal, during which time other Publisher Defendants

were complying with their consent decrees and subject to government oversight. On the contrary, the government pointed to its experience with, and the effectiveness of the injunctive relief in, those decrees as support for entering Macmillan's decree. Moreover, even if a change in circumstances warranted *some* form of modification, reversal would remain appropriate because the modified injunction was inadequately tailored: the District Court revised Macmillan's decree without an evidentiary hearing, empirical data, or formal findings of fact.

II. Reversal is also warranted for the independent reason that the government should have been judicially estopped from seeking modification of Macmillan's decree. Throughout the proceedings below, the government repeatedly represented to the Publisher Defendants, the District Court, and the public that the cooling-off periods and discount-control restrictions in the consent decrees would suffice to restore price competition to the eBooks market. Having obtained judicial approval of Macmillan's consent decree on the basis of those representations, the government should not have been permitted to later recant and argue (as it did in pursuit of the Apple Injunction, the judgment now on appeal) that additional restraints—including the longer cooling-off period contained in the judgment that now binds Macmillan and a ban on all limits to Apple's discounts in the manner permitted by Macmillan's decree—were necessary to restore competition.

The judgment should be reversed as to Macmillan, and the provisions of Macmillan's consent decree should be permitted to run their course without modification.

ARGUMENT

I. THE DISTRICT COURT COMMITTED REVERSIBLE ERROR IN MODIFYING MACMILLAN'S CONSENT DECREE THROUGH THE JUDGMENT ON APPEAL.

As it did with appellant Simon & Schuster, the District Court improperly used the Apple Injunction to materially modify the terms of Macmillan's consent decree with the government. "Consent decrees are entered into by parties to a case after careful negotiation has produced agreement on their precise terms. . . . Naturally, the agreement reached normally embodies a compromise; in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with the litigation." *United States v. Armour & Co.*, 402 U.S. 673, 681 (1971). "Because the defendant has, by the decree, waived his right to litigate the issues raised, a right guaranteed to him by the Due Process Clause, the conditions upon which he has given that waiver must be respected . . . ." *Id.* at 682. Although upon a properly supported motion for modification a district court has power to increase the burdens that a consent decree imposes on a defendant, *see id.* at 674–75, those circumstances are not presented here.

Instead, without any such motion before it, the District Court entered the Apple Injunction now on appeal. That injunction: substantially extended the cooling-off period agreed upon in Macmillan's consent decree; modified the terms of the discounting restrictions applicable to Macmillan during that cooling-off period; thereby penalized Macmillan after the entry of its consent decree; and is not supported by any intervening developments. Because these circumstances are present both here and in the appeal of Simon & Schuster, Macmillan joins in and incorporates by reference Simon & Schuster's arguments regarding the District Court's improper modification of the publishers' consent decrees. *See* Opening Brief of Simon & Schuster (Simon & Schuster Br.), Argument § I; *see generally* Fed. R. App. P. 28(i). For the reasons there stated, as well as those that follow, the judgment should be reversed as to Macmillan.

A. The Judgment On Appeal Modified Macmillan's Consent Decree.

The judgment on appeal modified Macmillan's consent decree. It did so by both broadening the restrictions imposed on Macmillan during its initial cooling-off period and by extending the duration of that disability. *See supra* at 22–25; Simon & Schuster Br., Argument § I.A (discussing, *inter alia*, *Crumpton v. Bridgeport Education Ass'n*, 993 F.2d 1023, 1028–29 (2d Cir. 1993)). On the first point, whereas Macmillan bargained for and won under its consent decree the ability to cap its retailers' price discounts at the value of their aggregate annual

commission, the Apple Injunction strips that right from Macmillan as to one of the largest eBook retailers in the marketplace—Apple. In terms of its durational impact, the Apple Injunction extended from 23 months to nearly five years the cooling-off period during which Macmillan is unable to adopt a consistent, discount-restrictive agency policy. *See supra* at 25. These new burdens—and the fact that the injunction expressly refers to Macmillan by name in spelling out the restrictions it imposes, *see* SPA205 § III.C.5—confirm the binding effect of that order on Macmillan.

Nor does the government deny that these are different, *i.e.*, modified, burdens from those imposed by Macmillan's consent decree. On the contrary, in defending the new relief, the government wrote that "the practical effect of Section III.C [of the Apple Injunction [SPA205]] is that it *extends* the Publishers' 'cooling off' period . . . for *an additional three years*." A2356 (Letter from Lawrence E. Buterman to the Hon. Denise L. Cote, Aug. 8, 2013 (DOJ Letter)) (emphasis added). Similarly, the government stated that its proposal for a longer cooling-off period, which the court ultimately approved, would constitute "broader" restrictions than existed "in the Publisher Defendant[s'] consent decrees." A2310 (Pls.' Injunction Br.); *see Crumpton*, 993 F.2d at 1029 (finding modification based on "increase[s]" to relief in original decree) (emphasis omitted). In a proceeding in which Macmillan no longer was an active party, Macmillan suddenly went from

having an unencumbered right to price its products as it sees fit as of December 18, 2014, to a situation in which substantial restrictions will remain on its ability to contract for several more years, until October 2017.

The government conceded, too, that burdening the publishers was the goal of the modification, contending that the longer cooling-off periods were designed to "make it more difficult *for the Publisher Defendants* to prohibit *other retailers* from [competing on retail price]," A2311 (Pls.' Injunction Br.) (emphases added); *see also* Simon & Schuster Br., Argument § I.A (explaining that the modification benefits Apple and penalizes publishers). The District Court endorsed the government's request, expressly ordering the "modif[ication]" of "any Agency Agreement [between Apple and] a Publisher Defendant." SPA207; *cf.* A2375:20-22 (Aug. 9, 2013 Hr'g Tr.) (claiming the injunction was "a remedy imposed upon Apple and not the publisher defendants[,]" but stating "it would be reckless . . . to ignore the industry in which Apple is operating").

By substantially increasing the duration of the Macmillan's cooling-off period and narrowing Macmillan's ability to cap its retailers' price discounts, the judgment on appeal modified Macmillan's decree.

B. The District Court Abused Its Discretion In Modifying Macmillan's Decree And Imposing Additional Injunctive Relief Because No Changed Circumstances Exist Here.

As Simon & Schuster has shown, a significant change in facts or law is required to allow modification under the Federal Rules of Civil Procedure. *See* Simon & Schuster Br., Argument § I.B.1. Likewise, Simon & Schuster has demonstrated that reversal is proper because no such change exists here. *Id.*; *see also, e.g.*, *Rufo v. Inmates of Suffolk Cnty. Jail*, 502 U.S. 367, 383 (1992) (requiring that the party seeking modification carry "the burden of establishing that a significant change in circumstances warrants revision of the decree").[14] In all events, the District Court did not make the specific factual findings required to support modification. *See* Simon & Schuster Br., Argument § I.B.1. Accordingly, the court below abused its discretion. *See id.*

As to Macmillan, the absence of new facts to support modification is especially stark. In September 2012, the District Court approved consent decrees containing two-year cooling-off periods for Simon & Schuster, HarperCollins, and Hachette. *See Apple I*, 889 F. Supp. 2d 623. In February 2013, DOJ stipulated to entry of a similar—but shorter—cooling-off period for Macmillan. A1136 (Macmillan Settlement Notice); A1162–A1163 (Macmillan CIS). Four months

[14] The antitrust law did not undergo the type of significant change required to support modification. *See, e.g.*, *Agostini v. Felton*, 521 U.S. 203, 215 (1997); *In re Terrorist Attacks on Sept. 11, 2001*, 741 F.3d 353, 357 (2d Cir. 2013).

after that, it moved for formal entry of the consent decree containing that provision. Motion for Entry of Macmillan Judgment (D.E. 286); *see also* SPA183 (entering Macmillan's decree containing the 23-month cooling-off period, which was scheduled to expire in December 2014). At no point during that time, despite the government's extensive opportunity to observe the execution of other consent decrees and their impact on the trade eBooks market, did the government so much as hint that additional relief would be necessary to restore the eBook market to competitive health.

Instead, the government and the District Court not only adhered to their earlier conclusions that a two-year cooling-off period would be sufficient to restore competition, but they sanctioned a shorter cooling-off period for Macmillan. A1163 (Macmillan CIS); SPA180 (Macmillan Decree Approval Order); SPA183 (Final Macmillan Judgment). Far from suggesting that factual developments after the other Publisher Defendants decrees were entered necessitated further injunctive relief, the government claimed the opposite. It stated that "*given the settlements of all the other Publisher Defendants*," a shorter period was appropriate. A1162–A1163 (emphasis added). Thus, as to Macmillan, this case presents the converse of a typical situation in which this and other courts have held modification is appropriate, namely where experience shows that the injunctive relief imposed is insufficient to fulfill its purpose. *See, e.g.*, *King-Seeley Thermos Co. v. Aladdin*

Indus., Inc., 418 F.2d 31, 35 (2d Cir. 1969) ("[T]he power of equity has repeatedly been recognized as extending also to cases where a better appreciation of the facts in light of experience indicates that the decree is not properly adapted to accomplishing its purposes.").

The timing of the District Court's entry of Macmillan's decree is significant for two further reasons. The first is that it occurred *after* Apple's trial, which indicates that in the District Court's view nothing in the trial record had shown that Macmillan's cooling-off period would be inadequate. Second, barely three weeks passed between when the District Court entered Macmillan's judgment approving the 23-month cooling-off period on August 12 and its imposition of the Apple Injunction modifying that decree. Neither the government nor the District Court has pointed to *any* events in that brief interval that could justify a modification.[15]

[15] Simon & Schuster is correct that submitting a joint brief to the court in opposition to the Final Judgment's extended cooling-off period is lawful and cannot offer any permissible basis for modification. *See* Simon & Schuster Br. 30. Indeed, the *Noerr-Pennington* doctrine recognizes that such concerted action is protected by the parties' First Amendment right to petition the government, including the judiciary. *See, e.g.*, *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510–11 (1972) (under *Noerr-Pennington*, "the right to petition extends to all departments of Government," and the immunity applies to concerted efforts to "use the channels and procedures of state and federal agencies *and courts*") (emphasis added); *Primetime 24 Joint Venture v. NBC, Inc.*, 219 F.3d 92, 99–100 (2d Cir. 2000). Additionally, Simon & Schuster's Brief (at 32) correctly points out that the District Court's claim during an August 9, 2013 hearing that the Publisher Defendants were "unrepentant" surely cannot serve as a basis for modification; the Publisher Defendants' consent decrees explicitly state that the Publisher Defendants were not admitting the government's allegations. *See, e.g.*,

Nor could they, because nothing happened during that period except Macmillan's faithful compliance with the terms of its decree.

Because nothing has changed since Macmillan's decree was entered, and the government did not attempt to carry its burden to show otherwise, the District Court abused its discretion in modifying the decree.

C. The Modified Decree Is Insufficiently Tailored To Any Changed Circumstances.

Irrespective of whether the government had shown the necessary factual predicate for modification—which it did not—reversal would be required because the revised decree is not suitably tailored to any changed circumstances. *See* Simon & Schuster Br., Argument § I.B.2. The suitably tailored standard not only requires a substantive fit between the character of the changed circumstance and the nature of the modification, but also—as a threshold matter—mandates a minimum level of procedural protection for the party opposing the modification. *See Still's Pharmacy, Inc. v. Cuomo*, 981 F.2d 632, 638–39 (2d Cir. 1992). Specifically, a proper tailoring inquiry requires both an opportunity to supplement the original record and a hearing on the proper scope of the revised decree. *Id.*; *see generally Koon v. United States*, 518 U.S. 81, 101 (1996) ("A district court by

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SPA183. As to Macmillan, it is noteworthy that the District Court approved Macmillan's 23-month cooling-off period as sufficient *after* the court's pejorative comments about the publishers during its August 9, 2013 hearing on the Apple Final Judgment.

definition abuses its discretion when it makes an error of law."); *Evergreen Ass'n, Inc. v. City of N.Y.*, 740 F.3d 233, 242 (2d Cir. 2014) (similar). The District Court failed to provide those protections here.

Indeed, it is worth underscoring the contrast between the procedure used to craft and approve the decrees and the process relied on to modify them. As for the genesis of the decrees, the government, the publishers, and the District Court agreed to a particular, carefully negotiated package of remedies and restraints—including the 23-month cooling-off period at the heart of Macmillan's appeal. The exhaustive procedures mandated by the Tunney Act informed—and provided for close, public scrutiny of—those remedial choices and also ensured that the chosen package would be responsive to prevailing market conditions. *See supra* at 5–7.

The modification of the decrees, by contrast, rested on no empirical data, no evidentiary hearing, and absolutely no findings of fact regarding (among other things) the effects of the Publisher Defendants' cooling-off periods on the eBooks market. In *Still's Pharmacy*, a similar dearth of procedural protections led this Court to hold that the district court had abused its discretion by modifying a decree "in the absence of a developed record and without giving the [party opposing modification] the opportunity to supplement the record." 981 F.2d at 638–39. Here, of course, Macmillan and the other Publisher Defendants had no meaningful opportunity to supplement the record; they were not parties by the time of Apple's

trial. *Cf. Lindsey v. Normet*, 405 U.S. 56, 66 (1972) ("Due process requires that there be an opportunity to present every available defense."). Furthermore, as discussed above, what little analysis the government seems to have performed on the eBooks market in 2013 suggested that all was well and that the decrees were having their intended effect. *See* A1163 (Macmillan CIS); *supra* at 21–22.

Finally, even if the court had afforded Macmillan the protections required by *Still's Pharmacy*, reversal would still be the appropriate remedy here because, as Simon & Schuster persuasively shows, there is an insufficient fit between the supposedly changed circumstances of this case and the terms and duration of the extended cooling-off periods. *See* Simon & Schuster Br., Argument § I.B.2. If the District Court had substantial, record-based concerns regarding possible future collusion between Apple and the Publisher Defendants, there were ample alternative mechanisms—such as strengthened disclosure or reporting requirements (if evidence demonstrated that the already robust disclosure and reporting requirements under the decrees had proven inadequate)—available that would be both more effective and less burdensome. *See id.*

II. THE JUDGMENT SHOULD BE REVERSED AS TO MACMILLAN BECAUSE THE GOVERNMENT SHOULD HAVE BEEN JUDICIALLY ESTOPPED FROM ASSERTING THAT A LONGER COOLING-OFF PERIOD IS REQUIRED TO RESTORE COMPETITION TO THE MARKET.

Early and often in these proceedings, the government represented that the trade eBooks market would be restored to competitive health once the Publisher Defendants completed two-year terms (or in Macmillan's case a 23-month term) of reduced control over eBook prices. As the District Court summarized, the government "describe[d] [the Publisher Defendants' proposed settlements'] time-limited provisions as providing a 'cooling-off period' for the e-books industry that will allow it to return to a competitive state free from the impact of defendants' collusive behavior." *Apple I*, 889 F. Supp. 2d at 632; *see also supra* at 16–17 (collecting government's representations). These cooling-off periods were memorialized and, following notice and comment under the Tunney Act, given judicial approval in the Publisher Defendants' consent decrees. Similarly, after entry of the consent decrees, the States relied on the same cooling-off periods in securing judicial approval of injunctions against the Publisher Defendants. After prevailing over Apple at trial, however, the government abruptly changed course, arguing that further intervention in the trade eBooks market was necessary to restore competition. Specifically, it newly asserted that five years of *total* pricing freedom for Apple—and thus, effectively, a five-year cooling-off period with

respect to discount-control measures such as a traditional agency agreement—was a necessary step toward restoring eBook competition. That change in position upended the central premise of Macmillan's acquiescence in, and the District Court's approval of, the parties' consent decree. In refusing to judicially estop that change, the District Court erred. Its judgment should be reversed.[16]

The basic rule of judicial estoppel is straightforward: "'[W]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him.'" *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) (quoting *Davis v. Wakelee*, 156 U.S. 680, 689 (1895)). It "'generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase.'" *Id.* (quoting *Pegram v. Herdrich*, 530 U.S. 211, 227 n. 8 (2000)). Nor is judicial estoppel reserved for cases where a litigant has "played 'fast and loose with the courts.'" *In re Adelphia Recovery Trust*, 634 F.3d 678, 696 (2d Cir. 2011) (quoting *New Hampshire*, 532 U.S. at 750). Rather, the doctrine exists "'to protect

[16] This Court holds that a district court's application of judicial estoppel "is a pure question of law, which [is] review[ed] *de novo*." *Uzdavines v. Weeks Marine, Inc.*, 418 F.3d 138, 143 (2d Cir. 2005); *accord Lia v. Saporito*, 541 F. App'x 71, 72 (2d Cir. 2013) (summary order). It also has acknowledged that the circuits are divided over the appropriate standard of review. *Lia*, 541 F. App'x at 73 n.1 (collecting cases).

the integrity of the judicial process,'" which is threatened when a party "takes a position in the short term knowing that it may be on the verge of taking an inconsistent future action." *Id.* (quoting *New Hampshire*, 532 U.S. at 749–50).

Although "'[t]he circumstances under which judicial estoppel may appropriately be invoked are probably not reducible to any general formulation of principle,'" *New Hampshire*, 532 U.S. at 750, the Supreme Court and this Court have consistently invoked three factors in determining whether the doctrine applies. *See Adelphia Recovery Trust*, 634 F.3d at 695–96.

First, the party's two positions must be "clearly inconsistent" with one another. *New Hampshire*, 532 U.S. at 750 (internal quotation marks omitted); *Adelphia Recovery Trust*, 634 F.3d at 695; *DeRosa v. Nat'l Envelope Corp.*, 595 F.3d 99, 103 (2d Cir. 2010). Second, the earlier assertion must have been adopted or relied on by the tribunal to which it was made. *New Hampshire*, 532 U.S. at 750; *Adelphia Recovery Trust*, 634 F.3d at 695-96; *DeRosa*, 595 F.3d at 103. Relatedly, this Court directs that judicial estoppel should apply only "'where the risk of inconsistent results with its impact on judicial integrity is certain,'"—*i.e.*, "where the earlier tribunal accepted the accuracy of the litigant's statements." *Adelphia Recovery Trust*, 634 F.3d at 696 (quoting *De Rosa*, 595 F.3d at 103). "A third consideration is whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing

party if not estopped." *New Hampshire*, 532 U.S. at 751; *Adelphia Recovery Trust*, 634 F.3d at 696.

Notwithstanding the Publisher Defendants' submissions to the District Court that, based on these and additional factors, judicial estoppel precluded the government from obtaining the substantially longer cooling off period it sought—and successfully obtained—the District Court did not address any of these factors or specifically refer to judicial estoppel. The judgment on appeal should be reversed because the government's shifting positions on the necessary length of Macmillan's cooling-off period satisfy each of these elements.

A. The Government Took Clearly Inconsistent Positions At Different Phases Of The District Court Proceedings.

The District Court should have rejected the government's request for the cooling-off period in the Apple Injunction because the government's position during that phase of the case was "'clearly inconsistent'" with the federal government's position during the Tunney Act phases and the States' subsequent endorsement of the same injunctive relief. *See New Hampshire*, 532 U.S. at 750 (recognizing that judicial estoppel applies where a party's assertion is "clearly inconsistent" with one it made either during an earlier phase of the proceedings or in an earlier proceeding[17]). In entering the Apple Injunction, however, the District

[17] Prior to the Supreme Court's decision in *New Hampshire*, this Court had remarked that "judicial estoppel applies only when a tribunal in a prior *separate*

Court did not acknowledge the Publisher Defendants' submissions regarding this issue, let alone address the government's inconsistent representations.

While determining whether a party's positions are clearly inconsistent usually requires little more than a comparison of the party's statements, *see, e.g.*, *New Hampshire*, 532 U.S. at 751–52 (analyzing text of party's representations), this Court also has explained that another way to judge clear inconsistency is to ask whether "both the . . . court and the [party's opponent] undoubtedly would have approached the [earlier situation] differently" if the new position had been revealed during that earlier phase. *Adelphia Recovery Trust*, 634 F.3d at 697. Here, the inconsistency in the government's positions is clear on its face, and there is no question that Macmillan and the District Court would have approached settlement differently had the government been making the contentions that it subsequently advanced in support of the judgment on appeal.

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proceeding has relied on a party's inconsistent factual representations and rendered a favorable decision." *Adler v. Pataki*, 185 F.3d 35, 41 n.3 (2d Cir. 1999). In *Adler*, this purported separate-proceeding requirement was cited in support of the narrow rule that judicial estoppel does not bar an assertion on appeal that differs from a party's position in the district court. *Id.* Any broader application of *Adler*'s dictum, however, finds no support in this Court's cases, and, in all events, would be irreconcilable with the Supreme Court's subsequent pronouncements that judicial estoppel applies where a party makes an assertion "'in one phase of a case'" and then makes a "'contradictory argument to prevail in another phase'" of the same case. *New Hampshire*, 532 U.S. at 749 (quoting *Pegram*, 530 U.S. at 227 n.8).

Multiple times in its Tunney Act-phase filings seeking approval of the Publisher Defendants' consent decrees, the government assured the defendants, the court, and the public that a two-year cooling-off period—in which the publishers could not prevent their agents from offering discounts up to the total value of the agent's annual eBook commission—would restore the market to competitive health. For example, in its CIS for the Hachette, HarperCollins, and Simon & Schuster decrees, the government asserted that "[i]n light of current industry dynamics, including rapid innovation, a two-year period, in which Settling Defendants must provide pricing discretion to retailers, is sufficient to allow competition to return to the market." A942 (Original CIS).

The government made similar assurances on many other occasions during the same phase of this case:

- "This brief cooling-off period will ensure that the effects of the collusion will have evaporated before defendants seek future agency agreements, if any." A1051 (U.S. Response to S&S Settlement Comments).
- A two-year period "will break the collusive status quo." *Id.* at A1059–A1060.
- "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 agency agreements. *Id.* at A1055.
- "The limitations placed on the . . . Settling Defendants for a period of two years will . . . allow truly bilateral negotiations between publishers and retailers to produce competitive results." *Id.* at A1059–A1060.

- "[T]hese limited prohibitions a[re] a means to ensure a cooling-off period and allow movement in the marketplace away from collusive conditions." *Id.* at A1055.

Indeed, as to Macmillan specifically, the government's CIS stated that, "given the settlements of all the other Publisher Defendants, a *23-month* cooling-off period is sufficient to ensure that future contracts entered into by these publishers will not be set under the collusive conditions that produced the Apple Agency Agreements." A1162–A1163 (Macmillan CIS) (emphasis added). The States endorsed the same relief in seeking and obtaining approval of their settlements with the Publisher Defendants. *See, e.g.*, A2134; Mem. Supp. Plaintiff States' Mot. for Preliminary Approval of Settlements [including Simon & Schuster settlement], No. 12-cv-6625, D.E. 11 at 7.

In seeking entry of a permanent injunction against Apple, however, the government reversed course about the length of a cooling-off period that would be necessary to restore competition. The government newly asserted that a *five-year* period in which Apple would be insulated from *all* discount controls—including the discount caps authorized by the publishers' consent decrees—was "*necessary* to rid the e-book market of the effects of a successful, long-running price-fixing conspiracy, and to restore th[e] market to competitive health." A2355 (DOJ Letter); *see also, e.g.*, A2310 (Pls.' Injunction Br.) (asserting the propriety of

"prohibit[ing] Apple, for five years, from entering into e-book agreements with Publisher Defendants that limit Apple's ability to discount e-books").

These two sets of statements cannot be reconciled. If, as the government repeatedly pledged, the market will be restored to competitive health after the publishers' control over discounts is constrained for two years, the market cannot also require a ban on all restrictions on Apple's eBook pricing for five years.[18]

This is the type of inconsistency that this Court held was clear and required reversal in *Adelphia Recovery Trust.* There, a cable company (Adelphia) acquired a hockey team (the Buffalo Sabres) and also bought from various banks a series of loans that had been taken out by the team's prior owners. 643 F.3d at 683–84. A few years later, both Adelphia and the Sabres declared bankruptcy, and the team instituted an asset sale under the bankruptcy code. *Id.* at 684–85. Because the banks had sold their loans to Adelphia, they did not appear as creditors in the Sabres' asset-sale proceeding. *See id.* at 686. In that hearing, Adelphia "t[ook] the position . . . that it, and it alone, had an interest in the [relevant] Loans." *Id.* at 698. Thus believing that "there were no other entities that might have an interest in objecting to [the] sale," the bankruptcy court approved the sale of the team's assets "free-and-clear" of any later-asserted challenge. *Id.* Less than three months later,

[18] The fact that the District Court imposed bans that range from 24–48 months from the time of its judgment, rather than the singular five-year ban the government requested, does not change the analysis.

however, Adelphia sued the banks, contending that the loan purchases were fraudulent conveyances because Adelphia had not received fair value on the transactions. *Id.* at 686–87. These two positions, the court held, were clearly inconsistent with one another: If Adelphia was correct that it had not received fair value for its loan purchases—and thus could rescind the transactions—it would render false the company's prior assertion that it was the only entity with a financial interest in the loans. *See id.* at 697–98; *see also New Hampshire*, 532 U.S. at 746–48 (finding clearly inconsistent assertions).

Moreover, here, as in *Adelphia Recovery Trust*, "both the . . . court and [Macmillan] undoubtedly would have approached the [settlement process] differently" if they had known that the government would later assert that a period longer than two years would be required to jump-start price competition in the trade eBook market. 634 F.3d at 697; *see id.* at 697–98 (concluding that both the banks and bankruptcy court would have approached the asset sale differently if they had known Adelphia would later seek to nullify its ownership of the loans). Macmillan, for instance, could have sought offsetting concessions from the government, or, failing that, proceeded to vindicate its rights at trial. And if the District Court had known of the government's belief that five years of relief—including total pricing freedom for Apple—was needed to mend the eBook market,

it may well have withheld approval of Macmillan's settlement, or at the very least subjected it, and the government's explanations, to significantly closer scrutiny.

Accordingly, the District Court erred by failing to recognize that the government took clearly inconsistent positions and thus satisfied the primary factor of the judicial-estoppel analysis.

B. The District Court Relied On And Adopted The Government's Representations Regarding The Effect Of The Cooling-Off Periods On The Trade eBook Market.

The second factor supporting judicial estoppel also exists here because, in entering Macmillan's consent decree (and those of the other Publisher Defendants), the District Court relied on and adopted the government's representations that a 23-month cooling off period (and 24-month periods for the other publishers) would restore competition. *See Apple I*, 889 F. Supp. 2d at 632-33; *New Hampshire*, 532 U.S. at 750, 752 (holding that a consent decree entered in reliance on party's assertions will support later estoppel); *Adelphia Recovery Trust*, 634 F.3d at 685, 696, 698-99; *DeRosa*, 595 F.3d at 103.

The District Court's public-interest determinations, which were essential to approving Macmillan's and the other Publisher Defendants' consent decrees, *see* 15 U.S.C. § 16(e), hinged on the government's averments about the proper length of the cooling-off period. *Apple I*, 889 F. Supp. 2d at 632–33. After canvassing the decree's key restrictions—restricting the publishers' discount-control authority

for two years and their use of MFNs for five—the court concluded that they "appear[ed] reasonably calculated to restore retail price competition to the market for trade e-books, to return prices to their competitive level, and to benefit e-books consumers and the public generally, at least as to the competitive harms alleged in the Complaint." *Id.* at 632; *see also id.* at 633 ("it is reasonable to conclude that these remedies will result in a return to the pre-conspiracy status quo"). Moreover, the court expressly relied on the government's representations, stating: "The Government reasonably describes these time-limited provisions as providing a 'cooling-off period' for the e-books industry that will allow it to return to a competitive state free from the impact of defendants' collusive behavior." *Id.* at 632; *see Adelphia Recovery Trust*, 634 F.3d at 696 (requiring that earlier statement's "'impact on judicial integrity [be] certain'").

In short, each time the government sought entry of a proposed decree, it invoked its prior assertions that the cooling-off period would restore eBook competition. *See* Motion for Entry of S&S Judgment (D.E. 90), at 3; Motion for Entry of Penguin Judgment (D.E. 211), at 4; Motion for Entry of Macmillan Judgment (D.E. 286), at 1; *see also* A2134 (States' Mem. in Support of Mot. for Preliminary Approval of Macmillan & Penguin Settlements); Mem. Supp. Plaintiff States' Mot. for Preliminary Approval of Settlements [including Simon & Schuster settlement], No. 12-cv-6625, D.E. 11 at 7. And, each time, the District Court

adopted the government's recommendation and entered the proposed decree. *See Apple I*, 889 F. Supp. 2d at 644; Penguin Decree Approval Order (D.E. 257), at 3; SPA182 (Macmillan Decree Approval Order).

C. The Government Stands To Benefit, And Macmillan Will Suffer Harm, If The Government Is Allowed To Change Position.

Whether the third estoppel factor is framed as requiring proof of an unjustified detriment to Macmillan or a showing of an undeserved benefit to the government, the condition is met here. *See New Hampshire*, 532 U.S. at 751; *Adelphia Recovery Trust*, 634 F.3d at 696.

The terms of the Publisher Defendants' consent decrees—including the length and nature of the cooling-off periods—were highly negotiated. *See generally Armour & Co.*, 402 U.S. at 681. The final decrees were careful compromises reached after months of discussion and approved only after intense public and judicial scrutiny. At the outset of negotiations, the government demanded as the price of settlement a five-year cooling-off period with no publisher control over pricing during that interval. After months of negotiations, the Publisher Defendants were able to reduce that demand to a two-year period during which they could limit their agents' discounts for a given year to the value of the agent's aggregate eBooks commission for that year. *See* A941–A942 (Original CIS). Then, after further litigation and negotiation with the government, Macmillan reached a consent decree that provided a shorter cooling-off period and

the same measure of control over discounts during its pendency. A1162–A1163 (Macmillan CIS). The government's concessions regarding the cooling-off period and Macmillan's control over discounts were crucial to Macmillan's decision to enter into its consent decree with the government.

The District Court's judgment permitting the government to unilaterally revise that bargain now harms Macmillan in several respects. It undermines Macmillan's hard-fought (and indisputably lawful) ability to maintain the limited degree of control over its own eBook prices that it won in settlement negotiations with the government. Moreover, it will cause longer-term damage by changing the rules that will govern the trade eBooks market once Macmillan completes the 23-month cooling-off period required by its decree. Macmillan entered its settlement with the understanding that, as of December 18, 2014, it would be able to adopt a consistent eBook sales model, including a version of the agency model that affords Macmillan full control over matters of pricing—an approach which the government has repeatedly acknowledged is a lawful business structure for eBook publishers. *See, e.g.*, A1050 (DOJ "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"); *see also Apple I*, 889 F. Supp. 2d at 632 (describing "the Government's recognition that [agency agreements and price MFNs] are not intrinsically unlawful"). That the District

Court granted the government's demand for a longer withdrawal of Macmillan's discounting control destroys that expectation. Furthermore, by arbitrarily price advantaging Apple over all its rivals for four years, *see supra* at 23–24, the Apple Injunction changes the carefully negotiated market conditions that would have existed with the termination of the Publisher Defendants' other agency agreements pursuant to their consent decrees.

If the judgment on appeal stands, the government also will gain a windfall from its change in position. In *New Hampshire v. Maine*, the Court found that New Hampshire had benefitted from its earlier construction of a particular phrase, because the Court had entered a consent decree incorporating that construction. 532 U.S. at 752. Consequently, the Court estopped New Hampshire from offering a different reading of the same language in a later dispute over the same text. *Id.* at 756. Similarly here, the government benefitted from its earlier position, in the form of Tunney Act approval for its proposed consent decrees. Now, in an instance of opportunism, the government has used a trial victory over a different defendant to obtain restraints on Macmillan and other publishers that it abandoned at the negotiating table—and which surely would have been vociferously opposed during Tunney Act notice and comment proceedings. *See supra* at 15–16 (discussing widespread opposition to even a two-year cooling-off period). Just as

New Hampshire was barred from making a convenience-driven change of position, so too should the government be estopped from its similar shift here.

D. Other Equitable Factors Also Support Judicial Estoppel.

As the Supreme Court has observed, the judicial estoppel inquiry is a flexible one not strictly bounded by the factors just discussed. *New Hampshire*, 532 U.S. at 751. Here, two additional considerations also weigh in favor of estopping the government's change in position.

For one thing, the government's switch, if permitted, would undermine "the strong judicial policy in favor of settlements." *In re Painewebber Ltd. P'ships Litig.*, 147 F.3d 132, 138 (2d Cir. 1998) (collecting cases); *see also United States v. Microsoft Corp.*, 56 F.3d 1448, 1456 (D.C. Cir. 1995) (per curiam) ("The Tunney Act was not intended to create a disincentive to the use of the consent decree."); *see generally Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 118 (2d Cir. 2005) (affirming class action antitrust settlement and noting that "[f]ederal antitrust cases are complicated, lengthy, and bitterly fought"). One of the signal virtues of settlement, especially for commercial entities, is certainty of outcome. The specter of substantial, unexpected revision of consent decrees under the guise of remedial action against a non-settling defendant would diminish that certainty, create a serious collective-action problem, and make defendants wary of entering into prompt settlements in multi-defendant cases. That reluctance will in turn drain

more resources from parties and courts alike. *See Wal-Mart Stores*, 396 F.3d at 118 (endorsing district court's conclusion that a private antitrust action "would have taken three months to try and several years for appellate review").

The government also derives a substantial benefit from settlement—particularly early settlement—by civil defendants. Given the government's limited resources and numerous enforcement priorities, prompt settlement enables enforcement agencies to allocate resources more efficiently and maximize the return on the taxpayers' investment. *See SEC v. Randolph*, 736 F.2d 525, 529–30 (9th Cir. 1984) ("The SEC's resources are limited, and that is why it often uses consent decrees as a means of enforcement."); *SEC v. Clifton*, 700 F.2d 744, 748 (D.C. Cir. 1983) (per curiam) (similar); *see also Armour & Co.*, 402 U.S. at 681. And, as the DOJ itself has noted, enticing a defendant to assist the government in its investigation is an invaluable enforcement tool—particularly in antitrust cases. *See* Scott D. Hammond, *Cracking Cartels with Leniency Programs*, at 2 (Oct. 18, 2005), *available at* http://www.justice.gov/atr/public/speeches/212269.pdf ("Since its revision in 1993, the Antitrust Division's Corporate Leniency Program has been the Division's *most* effective investigative tool.").

In addition, Macmillan's status as a settling defendant meant that it was not fully represented in the Apple Injunction proceedings. As such, it lacked the opportunity to marshal evidence in opposition to the government's new position.

All it could do was submit a brief statement in opposition and seek to persuade the District Court of the unlawfulness and inequity of the government's change in position. The government should not be allowed to benefit from this structural disadvantage of Macmillan and the other Publisher-Defendants.[19]

For all these reasons, the judgment should be reversed because the District Court should have held that the government was judicially estopped from advocating for the longer cooling-off period in the Apple Injunction.

[19] Although judicial estoppel will not apply when the change in position is "the result of a change in facts essential to the prior judgment," *New Hampshire*, 532 U.S. at 755–56; *see United States v. Bryce*, 287 F.3d 249, 255–56 (2d Cir. 2002), for the reasons discussed *supra* § I and Argument § I of Simon & Schuster's Brief, there are no factual developments that excuse the government from recanting its prior position.

CONCLUSION

For all these reasons, the judgment on appeal should be reversed as to Macmillan, and this Court should direct that the relief in Macmillan's consent decree should be restored.

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Respectfully submitted,

/s/ Eamon P. Joyce
Joel M. Mitnick
Eamon P. Joyce
Mark D. Taticchi
SIDLEY AUSTIN LLP
787 Seventh Avenue
New York, New York 10019
Telephone: (212) 839-5300
Facsimile: (212) 839-5599
ejoyce@sidley.com

Attorneys for Holtzbrinck Publishers, LLC and Verlagsgruppe Georg von Holtzbrinck GmbH

CERTIFICATE OF COMPLIANCE

In accordance with Circuit Rule 32(a) and Rule 32(a)(7) of the Federal Rules of Appellate Procedure, the undersigned certifies that the accompanying brief has been prepared using 14-point Times New Roman typeface, and is double-spaced (except for headings and footnotes).

The undersigned further certifies that the font used in this brief is proportionally spaced and contains 12,543 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

Dated: July 15, 2014

/s/ Eamon P. Joyce
Eamon P. Joyce

Attorneys for Holtzbrinck Publishers, LLC and Verlagsgruppe Georg von Holtzbrinck GmbH