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

UNITED STATES OF AMERICA, Plaintiff, v. APPLE INC., et al. Defendants.	Civil Action No.: 12-cv-02826 (DLC) (ECF Case)
IN RE ELECTRONIC BOOKS ANTITRUST LITIGATION This document relates to: ALL ACTIONS	Civil Action No.: 11-md-02293 (DLC) CLASS ACTION
THE STATE OF TEXAS; THE STATE OF CONNECTICUT; et al., Plaintiffs, v. PENGUIN GROUP (USA) INC., et al., Defendants.	Civil Action No.: 12-cv-03394 (DLC)

APPLE INC.'S MEMORANDUM OF LAW IN OPPOSITION TO THE UNITED STATES' MOTION FOR ENTRY OF FINAL JUDGMENT AGAINST DEFENDANTS HACHETTE BOOK GROUP, INC., HARPERCOLLINS PUBLISHERS, L.L.C., AND SIMON & SCHUSTER, INC.

I. INTRODUCTION

Apple has not settled with the Government; it denies the allegations against it and is actively defending this case. Apple has never participated in, encouraged, or sought to benefit from collusion. It has no objection to the Proposed Judgment's bar on collusion. But the Government proposes to go much further. It seeks to terminate and rewrite Apple's bargained-for contracts[1] before a single document has been introduced into evidence, before any witness has testified, and before the Court has resolved the disputed facts. Once its existing contracts are terminated, Apple could not simply reinstate them after prevailing at trial. The Court's decision would be irreversible. Nullifying a non-settling defendant's negotiated contract rights by another's settlement is fundamentally unfair, unlawful, and unprecedented. The Government does not cite a single case in which such relief was granted without a trial or merits determination.

The Tunney Act requires that the Court consider "the public benefit, if any, to be derived from a determination of the issues at trial." 15 U.S.C. § 16(e)(1)(B). Moreover, because the Proposed Judgment does not apply to all defendants, it may be entered only if there is "no just reason for delay." Here, the need for a trial on hotly-contested issues affecting the eBook industry is clear. And delaying judgment would avoid imposing a settlement on Apple that implicates contracts that Apple is entitled to defend at trial. Apple has pushed for an early trial. In approximately ten months, the Court will be asked to determine, based on admissible evidence, agency's impact on eBook prices, whether there is any basis for the Government's claim that Apple conspired, and whether Apple's contracts are anticompetitive. Apple respectfully submits that the Court should not simply take the Government's word for it now and

[1] *See* Proposed Final Judgment Sections IV.A, V.A, V.B, V.C, and VI.B.

impose a penalty on Apple before it has had its day in court.

II. THE SETTLEMENT UNLAWFULLY PENALIZES APPLE WITHOUT A TRIAL AND GRANTS MORE RELIEF THAN WOULD A POST-TRIAL JUDGMENT

"[A] court may not enter a consent decree that imposes obligations on a party that did not consent to the decree." *Firefighters Local 93 v. Cleveland*, 478 U.S. 501, 529 (1986). This principle of black letter law, which "is fundamental to our notions of due process," *EEOC v. Pan Am. World Airways, Inc.*, 897 F.2d 1499, 1506 (9th Cir. 1990), "is commonsensical." *Tourangeau v. Uniroyal, Inc.*, 101 F.3d 300, 306 (2d Cir. 1996) (citation omitted).

This case is about an alleged conspiracy to force Amazon to adopt agency. Thus, a settlement enjoining collusion or precluding publishers from forcing agency on Amazon would be appropriate.[2] Yet the Government goes much farther. The Proposed Judgment penalizes Apple in a manner that is inconsistent with the public interest and the law. Without Apple's consent and without a trial, the Proposed Judgment automatically terminates Apple's agreements (IV.A.) and effectively bars Apple (and other retailers) from selling eBooks under the agency model for two years by mandating shared responsibility for pricing between principal and agent (V.B., VI.B.). This result also is inconsistent with the fundamental tenet of agency relationships, not justified by proven facts, and has been overwhelmingly opposed by the public.

The Government justifies the termination of Apple's contracts before trial on the grounds that they are causing ongoing harm. ECF No. 90 at 4. The Government is seeking to impose a remedy on Apple before there has been *any finding* of an antitrust violation. Nor has the Government proven that the MFNs in Apple's agency agreements forced any publisher to adopt agency with other retailers. The evidence will show that many independent publishers have

[2] Indeed, Apple has no issue with several of the proposed settlement's provisions. *See* Proposed Final Judgment Sections IV.C., IV.D., V.E., V.F., VII, and VIII.

signed similar contracts with Apple while maintaining wholesale agreements with Amazon. The Government's theory regarding Apple's MFN is legally unprecedented and, more important for this proceeding, factually unproven.[3]

The Government contends that it may terminate Apple's contracts because "as the Complaint alleges . . . [they arose] from a conspiracy," and "form the bedrock of [that] conspiracy." ECF No. 81 at 48. Yet those are mere allegations, not facts, and cannot serve as a basis for judgment. The cases cited by the Government do not support its proposal. In each, a court voided contracts *after a finding of the existence of a* conspiracy. *See, e.g.*, *United States v. Paramount Pictures*, 334 U.S. 131, 149 (1948); *United States v. Nat'l Lead Co.*, 332 U.S. 319, 327-28 (1947). These cases do not support terminating a defendant's legal rights based only on unproven allegations and the willingness of other defendants to settle under pressure.[4] And the cases holding that a judgment can go beyond remedying the alleged harm are unavailing for that same reason.[5] There have been no findings here that could warrant pre-trial termination of contracts that Apple contends are perfectly legal. And there certainly is no factual basis to

[3] A decision to condemn these MFNs would conflict with existing case law, which requires a showing of market power. *See, e.g.,* Interview with Sharis A. Pozen, The Antitrust Source at 7 (April 2012), *available at* http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/apr12_pozen_intrvw_4_26f.authcheckdam.pdf ("It's not that all MFNs lead to competitive harm. But we take a close look at them when employed by firms with significant market power."). Apple had zero market share and no market power when it negotiated its entry through the challenged agency agreements; even today, Apple is a distant third to Amazon and Barnes & Noble.

[4] *See, e.g.*, HBG's Statement on the US Dept of Justice Case (Apr. 13, 2012) *available at* https://www.hachettebookgroup.biz/about-HBG/item/hbgs-statement-us-dept-justice-case/ ("Although we remain confident that we did not violate the antitrust laws, we faced the prospect of lengthy and costly litigation with government plaintiffs with virtually unlimited resources. Hachette has decided that the costs, uncertainties, and distractions of this litigation would be too disruptive to our business."); HarperCollins Publishers Settles e-Books Pricing Dispute with the Department of Justice (Apr. 11, 2012) *available at* http://www.harpercollins.com/footer/release.aspx?id=994&b=&year=2012 ("HarperCollins did not violate any anti-trust laws and will comply with its obligations under the agreement. . . . HarperCollins made a business decision to settle the DOJ investigation in order to end a potentially protracted legal battle.").

[5] ECF No. 81 at 11-12. *See Int'l Salt Co. v. United States*, 332 U.S. 392, 395-396 (1947) (decree entered after summary judgment granted); *United States v. U.S. Gypsum Co.*, 340 U.S. 76, 89 (1950) (decree entered after trial); *Zenith Radio Corp. v. Hazeltine Research, Inc.,* 395 U.S. 100, 132 (1969) (same); *Ford Motor Co. v. United States*, 405 U.S. 562, 573 (1972) (same).

preclude the use of a business model in an evolving industry as a supposed remedy for collusion.

III. THE SETTLEMENT DOES NOT MEET TUNNEY ACT STANDARDS

The Tunney Act was enacted to "assure that courts undertake meaningful review of antitrust consent decrees to assure that they are in the public interest and analytically sound . . . [and] to preclude a court from engaging in rubber stamping of antitrust consent decrees." *United States v. SBC Commc'ns, Inc.*, 489 F. Supp. 2d 1, 12 (D.D.C. 2007) (internal citations and quotations omitted). The Proposed Settlement has generated a firestorm of criticism. Everyone from a United States Senator to authors to publishers to retailers big and small to readers have delivered the same message to the Antitrust Division: this decree does not serve the public interest and poses a significant threat to future competition.

This Court is vested with responsibility to determine whether the decree is in the public interest. The Court's review should be particularly searching because the overwhelming majority of comments (about 800 of 868, or 92%)—submitted by actual market participants—oppose the settlement as posing a significant threat to competition and the public interest.

The crux of the Government's position is that the settlement is in the public interest because Apple's agreements with the Publisher Defendants caused a handful of eBook prices to increase, and the settlement will somehow reduce the prices of those eBooks without increasing the price of other eBooks. Apple and others hotly dispute this contention, and it will be a subject for trial. The Government's casual dismissal of the torrent of objections as being the views of persons who "misunderstand" the settlement or have an interest in higher prices is unpersuasive. ECF No. 81 at v, vi. These authors, publishers, retailers, and consumers know the marketplace better than anyone. They are concerned that the Government threatens to harm future competition in a nascent market that it does not fully understand. The Government gave its

critics the back of the hand with the message that the Government, not the people operating day-to-day in the market, knows what best serves the public interest. The critics have raised significant and substantial questions about the threat to future competition and the industry posed by the Proposed Judgment; these questions counsel strongly in favor of developing a full record before the requested relief is imposed.[6]

IV. THE COURT NEED NOT DECIDE THE GOVERNMENT'S MOTION NOW

As an alternative, the Proposed Judgment need not be ruled upon now. Since the Proposed Judgment "does not apply to all defendants in this action, it may be entered only if the Court 'expressly determines that there is no just reason for delay'" under Rule 54(b). ECF No. 90 at 3 (quoting Fed. R. Civ. P. 54(b)). Respect for the "historic federal policy against piecemeal appeals," *Curtiss-Wright Corp. v. Gen. Elec. Co.*, 446 U.S. 1, 8 (1980) (citations and quotations omitted), provides reason for delay here. There is a significant risk of "piecemeal appeals" here given that Apple could, and likely would, appeal a decision to enter the Proposed Judgment now,[7] while any of the non-settling defendants or the Government could appeal a judgment after trial.[8] Apple would have to appeal now because there is no guarantee that it would be able to reinstate its contracts once it prevails at trial. The Court should avoid raising these issues by deferring judgment until after trial, just ten months away.

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[6] For example, many expressed concerns about the possibility that the Government has unwittingly placed a thumb on the scales in favor of Amazon, the industry monopolist. Amazon was the driving force behind the Government's investigation, and it told a story to the Government that has yet to be scrutinized. Amazon talked with the Government repeatedly throughout the investigation, even hosting a two-day meeting at its Seattle headquarters. In all, the Government met with at least fourteen Amazon employees—yet not once under oath. The Government required that Amazon turn over a mere 4,500 documents, a fraction of what was required of others.

[7] ECF No. 90 at 4. Because the Proposed Judgment would interfere with Apple's contractual rights, Apple has standing to appeal. *See Zupnick v. Fogel*, 989 F.2d 93, 98 (2d Cir. 1993) (non-settling defendant has standing to appeal co-defendants' settlement "where it can demonstrate that it will sustain some formal legal prejudice as a result of the settlement" (quotation omitted)).

[8] *See also O'Bert ex rel. Estate of O'Bert v. Vargo*, 331 F.3d 29, 41 (2d Cir. 2003) (a court's "power to enter a final judgment before the entire case is concluded . . . [must] be exercised sparingly.").

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