

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

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	Civil Action No. 12-CV-2826 (DLC)
)	
v.)	
)	ECF Case
APPLE, INC., <i>et al.</i> ,)	
)	
Defendants.)	
)	

**MEMORANDUM IN SUPPORT OF MOTION BY THE UNITED STATES
FOR ENTRY OF THE PROPOSED PENGUIN FINAL JUDGMENT**

Pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)-(h) (“APPA” or “Tunney Act”), the United States moves for entry of the proposed Final Judgment as to Defendants The Penguin Group, a division of Pearson PLC, and Penguin Group (USA), Inc. (collectively, “Penguin”). The proposed Final Judgment as to Penguin (“proposed Penguin Final Judgment”), attached as Exhibit A, may be entered at this time without further hearing if the Court determines that entry is in the public interest. The Competitive Impact Statement filed by the United States on December 18, 2012 (Docket No. 163), and Response to Comments filed by the United States on April 5, 2013 (Docket No. 201), explain why entry of the proposed Penguin Final Judgment is in the public interest. The United States has attached to this Memorandum as Exhibit B a Certificate of Compliance setting forth the steps taken by the parties to comply with all applicable provisions of the APPA, and certifying that the statutory waiting period has expired.

I. BACKGROUND

On April 11, 2012, the United States filed a civil antitrust Complaint alleging that Apple, Inc. (“Apple”) and five of the six largest publishers in the United States (“Publisher Defendants”) conspired to raise prices of electronic books (“e-books”) in the United States in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. This court entered a Final Judgment (“Original Final Judgment”) as to three settling Publisher Defendants, Hachette Book Group, Inc., HarperCollins Publishers L.L.C., and Simon & Schuster, Inc., on September 6, 2012 (Docket No. 119).

On December 18, 2012, the United States reached a settlement with Penguin on substantially the same terms as those contained in the Original Final Judgment, and filed the proposed Penguin Final Judgment and a Stipulation signed by the United States and Penguin consenting to the entry of the proposed Penguin Final Judgment after compliance with the APPA (Docket No. 162).

II. COMPLIANCE WITH THE APPA

The APPA requires a sixty-day period for the submission of public comments on a proposed Final Judgment. *See* 15 U.S.C. § 16(b). In compliance with the APPA, the United States filed its Competitive Impact Statement (“CIS”) with the Court on December 18, 2012 (Docket No. 163); published the proposed Final Judgment and CIS in the *Federal Register* on December 31, 2012, *United States v. Apple, Inc., et al.*, 77 Fed. Reg. 77094; and summaries of the terms of the proposed Final Judgment and CIS, together with directions for the submission of

written comments relating to the proposed Final Judgment, were published in *The Washington Post* for seven days beginning on December 23, 2012 and ending on December 29, 2012 and in the *New York Post* for seven days beginning on December 27, 2012 and ending on January 4, 2013. Penguin filed the statement required by 15 U.S.C. § 16(g) on April 15, 2013 (Docket No. 204). The sixty-day period for public comments ended on March 5, 2013. The Division received three comments, the response to which was filed with the Court on April 5, 2013, and published in the *Federal Register* on April 15, 2013, *see* 78 Fed. Reg. 22298. The Certificate of Compliance filed with this Memorandum as Exhibit B recites that all the requirements of the APPA have now been satisfied. Following any briefing by other parties, as permitted by the Court's January 7, 2013 Order (Docket No. 169), it will be appropriate for the Court to make the public interest determination required by 15 U.S.C. § 16(e) and to enter the proposed Penguin Final Judgment.¹

¹ On February 8, 2013, the United States reached a settlement with Defendants Verlagsgruppe Georg von Holtzbrinck GmbH and Holtzbrinck Publishers, LLC d/b/a Macmillan (collectively, "Macmillan"), and filed a proposed Final Judgment as to Macmillan ("proposed Macmillan Final Judgment") and a Stipulation signed by the United States and Macmillan consenting to entry of the proposed Macmillan Final Judgment after compliance with the Tunney Act (Docket No. 174). The public comment period on the proposed Macmillan Final Judgment will expire on April 28, 2013.

III. STANDARD OF JUDICIAL REVIEW

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

(A) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and

(B) the impact of entry of such judgment upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. § 16(e)(1).

In its Opinion and Order finding that the Original Final Judgment satisfied the requirements of the Tunney Act, this Court articulated the public interest standard under the APPA. *See United States v. Apple, Inc.*, 2012 WL 3865135, at *5-6 (Slip Op. (Docket No. 113) at 12-16) (S.D.N.Y. Sept. 5, 2012). The public has had the opportunity to comment on the proposed Penguin Final Judgment as required by law. As explained in the CIS and the Response to Comments, entry of the proposed Penguin Final Judgment meets the standard articulated by the Court and is in the public interest. The United States therefore requests that, following any briefing by other parties, this Court enter the proposed Penguin Final Judgment.

IV. THERE IS NO JUST REASON FOR DELAY IN ENTERING THE PROPOSED PENGUIN FINAL JUDGMENT

Because the proposed Penguin Final 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.” Fed. R. Civ. P. 54(b). Upon entry of the proposed Penguin Final Judgment, Penguin will be required to terminate any agreement with an e-book retailer that limits the retailer’s ability to offer discounts to consumer purchasers of ebooks. *See* proposed Penguin Final Judgment (Attachment A), ¶¶ IV.A and IV.B. Based on reported reductions in the prices of e-book titles offered by HarperCollins, Hachette, and Simon & Schuster following entry of the Original Final Judgment,² the proposed Penguin Final Judgment likely will lead to lower e-book prices for many Penguin titles. There is no just reason to delay the availability of these benefits for consumers.

² *See, e.g.*, Scott Nichols, *HarperCollins Offering Discounted eBooks After Price Fixing Settlement*, TechRadar (Sept. 12, 2012), <http://www.techradar.com/news/portable-devices/portable-media/harpercollins-offering-discounted-ebooks-after-price-fixing-settlement-1096467> (“Bestselling ebooks from the publisher such as ‘The Fallen Angel’ and ‘Solo’ can now be found for \$9.99 on Amazon, Barnes and Noble, and other online retailers.”); Nate Hoffelder, *Hachette Has Dropped Agency Pricing on eBooks*, The Digital Reader (Dec. 4, 2012), <http://www.the-digital-reader.com/2012/12/04/hachette-has-dropped-agency-pricing-on-ebooks/> (“Amazon is discounting the ebooks by \$1 to \$4 from the list price, and both Barnes & Noble and Apple are making similar discounts”); Jeremy Greenfield, *Simon & Schuster Has a New Deal With Amazon, Other Retailers*, Digital Book World (Dec. 9, 2012), <http://www.digitalbookworld.com/2012/looks-like-simon-schuster-has-a-new-deal-with-amazon-other-retailers/> (“Ebook prices were lowered for Simon & Schuster titles over the weekend on sites like Amazon and Nook.com to levels several dollars below what they had been earlier in the week.”).

V. CONCLUSION

For the reasons set forth in this Memorandum, the CIS, and the Response to Comments, the Court should find that entry of the proposed Final Judgment is in the public interest and enter the proposed Final Judgment.

Dated: April 18, 2013

Respectfully submitted,

s/Mark W. Ryan

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CERTIFICATE OF SERVICE

I, Stephanie A. Fleming, hereby certify that on April 18, 2013, I caused a copy of the Memorandum in Support of Motion of the United States for Entry of the Proposed Penguin Final Judgment to be served by the Electronic Case Filing System, which included the individuals listed below.

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Additionally, courtesy copies of this Memorandum in Support of Motion of the United States for Entry of the Proposed Penguin Final Judgment have been provided to the following:

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