

**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.)	
)	

COMPETITIVE IMPACT STATEMENT

Pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act (“APPA” or “Tunney Act”), 15 U.S.C. §§ 16(b)-(h), Plaintiff United States of America (“United States”) files this Competitive Impact Statement relating to the proposed Final Judgment against Defendants Verlagsgruppe George Von Holtzbrinck GmbH and Holtzbrinck Publishers, LLC d/b/a Macmillan (these two entities are referred to collectively herein as “Macmillan”), submitted on February 8, 2013, for entry in this antitrust proceeding.

I. NATURE AND PURPOSE OF THE PROCEEDING

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”) restrained competition in the sale of electronic books (“e-books”), in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. Shortly after filing the Complaint, the United States filed a proposed final judgment (“Original Judgment”) with respect to Defendants Hachette Book Group, Inc. (“Hachette”), HarperCollins Publishers L.L.C. (“HarperCollins”), and Simon & Schuster, Inc. (“Simon & Schuster”). That Original Judgment (Docket No. 119)

settled this suit as to those three defendants. Following a thorough Tunney Act review process, the Court granted the United States' Motion for Entry of the Original Judgment (Docket No. 113).

On December 18, 2012, Defendants The Penguin Group, a Division of Pearson plc, and Penguin Group (USA), Inc. (collectively "Penguin") agreed to settle on substantially the same terms as those contained in the Original Judgment. That proposed Final Judgment against Penguin (Docket No. 162-1) is now subject to a public comment period, which closes on March 5, 2013. Pursuant to the Court's January 7, 2013 Order (Docket No. 169), the United States will file the public comments along with its response to the comments by April 5, 2013. If the United States continues to believe that entry of the proposed Final Judgment against Penguin is appropriate, it will move the Court for entry by April 19, 2013, and the Court will have the opportunity to determine if the proposed Final Judgment against Penguin is in the public interest.

Macmillan has now agreed to settle on substantially the same terms as those contained in the Original Judgment. A proposed Final Judgment with respect to Macmillan ("proposed Macmillan Final Judgment" or "PMFJ") that embodies that settlement was filed today. The last remaining active Defendant is now Apple, Inc.

The proposed Macmillan Final Judgment is described in more detail in Section III below. Because the language of the proposed Macmillan Final Judgment closely follows the language of the Original Judgment, this Competitive Impact Statement incorporates but does not repeat the extensive record relating to the Original Judgment. (For the Court's convenience, redlines of the proposed Macmillan Final Judgment against both the Original Judgment and the proposed Penguin Final Judgment are attached as Exhibits A and B, respectively.)

The United States and Macmillan have stipulated that the proposed Macmillan Final Judgment may be entered after compliance with the APPA, unless the United States withdraws its consent. Entry of the proposed Macmillan Final Judgment would terminate this action as to Macmillan, except to the extent that Macmillan has stipulated that it will cooperate in the United States' ongoing litigation against Apple, and that this Court would retain jurisdiction to construe, modify, and enforce the proposed Macmillan Final Judgment and to punish violations thereof.

II. BRIEF SUMMARY OF THE EVENTS GIVING RISE TO THE ALLEGED VIOLATION OF THE ANTITRUST LAWS

As described in detail in the United States' Complaint (Docket No. 1), and the two previous Competitive Impact Statements ("Original CIS," Docket No. 5 and "Penguin CIS," Docket No. 163), Publisher Defendants desired to raise retail prices for e-books. Compl. ¶ 3. They were primarily upset by Amazon.com, Inc.'s ("Amazon's") pricing of newly released and bestselling e-books at \$9.99 or less. Compl. ¶¶ 32-34. Publisher Defendants feared that Amazon would resist any unilateral attempt to force an increase in e-book prices and that, even if an individual Publisher Defendant succeeded in such an attempt, that Publisher Defendant would lose sales to any competitors that had not forced the price of their books to supracompetitive levels. Compl. ¶¶ 35-36, 46. They met privately to discuss ways to collectively solve "the \$9.99 problem." Compl. ¶¶ 39-45. Ultimately, Publisher Defendants agreed to act collectively to raise retail e-book prices. Compl. ¶¶ 47-50.

Apple's entry into the e-book business provided a perfect opportunity to coordinate the Publisher Defendants' collective action to raise e-book prices. Compl. ¶ 51. At the suggestion of two Publisher Defendants, Apple began to consider selling e-books under an "agency model,"

whereby the publishers would set the prices consumers ultimately paid for e-books and Apple would take a commission as the selling agent. Compl. ¶¶ 52-54, 63. Apple recognized that its unique ability to organize the Publisher Defendants' efforts to upset Amazon's \$9.99 pricing put it in a position to realize margins (30 percent on each sale) far in excess of what other retailers then averaged on their sales of newly released and bestselling e-books, at the cost of "the customer pay[ing] a little more." Compl. ¶ 56.

To achieve this goal, Apple first expressly proposed to each Publisher Defendant that it adopt an agency pricing model with every outlet that would compete with Apple for retail e-book sales, Compl. ¶ 58, and later replaced that express requirement with a unique most favored nation ("MFN") pricing provision that effectively enforced the Publisher Defendants' commitment to impose the agency pricing model on all other retailers. Compl. ¶¶ 65-66. This MFN protected Apple from price competition from other retailers, guaranteeing that its 30 percent margin would not be disturbed. Compl. ¶ 65. Apple kept each Publisher Defendant informed about the status of its negotiations with other Publisher Defendants. Compl. ¶ 61. In January 2010, Apple sent to each Publisher Defendant substantively identical term sheets that Apple told them were devised after "talking to all the other publishers." Compl. ¶¶ 62-64. Those term sheets formed the basis of the nearly identical agency agreements signed by each Publisher Defendant ("Apple Agency Agreements").

The purpose of these agreements was to raise and stabilize e-book prices while insulating Apple from competition. Compl. ¶ 66. Apple CEO Steve Jobs explained to one Publisher Defendant that the Apple Agency Agreements provided a path for the Publisher Defendants away from \$9.99 and to higher retail e-book prices. Compl. ¶ 71. He urged the Publisher

Defendants to “[t]hrow in with Apple and see if we can all make a go of this to create a real mainstream e-books market at \$12.99 and \$14.99.” *Id.* Apple and the Publisher Defendants adopted these price points in all of the Apple Agency Agreements, which all were signed within a three-day span in January 2010. Compl. ¶¶ 74-75. As a result of Defendants’ illegal agreement, consumers have paid higher prices for e-books than they would have paid in a market free of collusion. Compl. ¶¶ 90-93.

III. EXPLANATION OF THE PROPOSED MACMILLAN FINAL JUDGMENT

The language and relief contained in the proposed Macmillan Final Judgment is largely identical to the terms included in the Original Judgment and the proposed Penguin Final Judgment. Macmillan’s decision to join with all the other Publisher Defendants in agreeing to the settlement terms will provide prompt, certain, and effective remedies that will continue the effort to restore competition to the marketplace. Settlement likely will lead to lower e-book prices for many Macmillan titles; prices for titles offered by HarperCollins, Hachette, and Simon & Schuster fell soon after those publishers entered into new contracts as a result of the Original Judgment.¹ The requirements and prohibitions included in the proposed Macmillan Final

¹ 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.”).

Judgment will eliminate Macmillan's illegal conduct, prevent recurrence of the same or similar conduct by Macmillan, and establish a robust antitrust compliance program.

A. Differences Between the Proposed Macmillan Final Judgment and the Original Judgment and the Proposed Penguin Final Judgment

Unlike the Original Judgment and the proposed Penguin Final Judgment, the proposed Macmillan Final Judgment requires Macmillan immediately to stop enforcing restrictions on discounting or promotions contained in its contracts with retailers. The Original Judgment and the proposed Penguin Final Judgment allowed each settling publisher to choose whether to immediately allow discounting or, alternatively, to permit discounting only after the Court's approval of the settlement and the orderly termination of the publisher's existing contracts with retailers. Each Publisher Defendant under the Original Judgment and proposed Penguin Final Judgment chose the latter option and several months passed before consumers saw the benefits of the settlements through lower retail prices on many of the settling publishers' e-books. The two-year cooling-off period for those Publisher Defendants commenced when each terminated its previous contracts with retailers.

To provide for more prompt relief to consumers, the proposed Macmillan Final Judgment does not give Macmillan a choice. Macmillan must allow its e-book retailers to discount within three business days of agreeing to the settlement, even if it has not formalized new contracts with retailers. *See* PMFJ § IV.A. To induce Macmillan to accept this more stringent term, the United States agreed that the two-year cooling-off period for Macmillan would run from December 18, 2012, the date on which Penguin signed its settlement. *See* PMFJ §§ V.A-B. Consumers are better served by bringing more immediate retail price competition to the market, and, 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.

The proposed Macmillan Final Judgment contains three other significant changes. First, at the time they agreed to settle with the United States, the other settling publishers each continued to operate under the Apple Agency Agreements that were the products of the Publisher Defendants' conspiracy with Apple. Because Macmillan has already terminated its Apple Agency Agreement and has entered a new Apple contract without an MFN, requiring Macmillan to terminate its existing contract with Apple would be superfluous. Second, the proposed Macmillan Final Judgment expressly carves out the sale of electronic versions of academic textbooks from its requirements and prohibitions. *See* PMFJ § II.D (defining the term "e-book" as used in the PMFJ to exclude "the electronically formatted version of a book marketed solely for use in connection with academic coursework"). The conspiracy among the Publisher Defendants and Apple challenged in the Complaint concerned the sale of trade e-books, not e-book versions of academic textbooks. Compl. ¶¶ 27 n.1, 99. Unlike the other Publisher Defendants, which publish only trade e-books, Macmillan also publishes e-textbooks. Macmillan's settlement necessitates formalizing in the proposed Macmillan Final Judgment what the United States previously stated in its Response to Comments concerning the Original Judgment: "'e-books,' in the context of this case does not encompass '[n]on-trade e-books includ[ing] . . . academic textbooks . . .'" Response to Comments (Docket No. 81) at 46-47 (quoting Compl. ¶ 27 n.1). Third, to make it clear that Defendant Verlagsgruppe Georg von Holtzbrinck, Macmillan's German parent, would be subject to all provisions of the proposed

Macmillan Final Judgment if it worked in concert with Macmillan to evade Macmillan's obligations under the settlement (*e.g.*, by having Macmillan transfer assets to its German parent), the Applicability section (PMFJ § III) now expressly binds Defendant Verlagsgruppe Georg von Holtzbrinck if it works with Macmillan in any such evasion.

For completeness, we describe below, in abbreviated form, the purposes of the other main provisions of the proposed Macmillan Final Judgment. These provisions mirror those of the Original Judgment and proposed Penguin Final Judgment.

B. Required Conduct (Section IV)

In order to reduce the risk that Macmillan may use future joint ventures to eliminate competition among Publisher Defendants, Section IV.C requires that Macmillan provide advance notice to the Department of Justice before forming or modifying a joint venture between it and another publisher related to e-books. *See also* Original CIS § III.A.2.

Additionally, to ensure Macmillan's compliance with the proposed Macmillan Final Judgment, Section IV.D requires that Macmillan provide, on a quarterly basis, each e-book agreement it has reached with any e-book retailer on or after January 1, 2012.

C. Prohibited Conduct (Section V)

In order to ensure that e-book retailers can compete on the price of e-books sold to consumers in the future, the proposed Macmillan Final Judgment also prohibits terms that prevent retail price competition. Sections V.A, V.B, and V.C limit Macmillan's ability to enter new agreements (and enforce old agreements) that contain either of two components of the Apple Agency Agreements: a ban on retailer discounting, or retail price-matching MFNs. Sections V.A. and V.B. prevent Macmillan, until December 18, 2014, from forbidding retailers

to offer price promotions or discounts on its e-books. Prohibiting Macmillan, for a set period, from stopping e-book retailers from discounting will help ensure that Macmillan's future contracts will not be set under the collusive conditions that produced the Apple Agency Agreements. *See* PMFJ §§ V.A–B. For a five-year period, Section V.C also stops Macmillan from entering into an agreement with an e-book retailer that contains a Price MFN (defined as an MFN relating to price, revenue share, or commission available to any retailer). This will eliminate Macmillan's ability to use such MFNs to achieve, for a second time, the results of the collusive agreements. *See also* Original CIS § III.B.1.

Further, Macmillan may not retaliate against or punish an e-book retailer based on the retailer's e-book prices or its discounting or promotional choices. PMFJ § V.D. Nor may Macmillan attempt to retaliate by proxy, as this provision bars Macmillan from encouraging another company to retaliate against an e-book retailer on its behalf. However, the anti-retaliation provision does not prohibit Macmillan from unilaterally entering into and enforcing agency agreements with e-book retailers after the 23-month proscription, required in Sections V.A and V.B, has expired. *See also* Original CIS § III.B.2.

In addition to addressing terms used in the Apple Agency Agreements to implement the conspiracy, the proposed Macmillan Final Judgment also forbids a recurrence of the alleged conspiracy, and prohibits industry practices that facilitated it. Section V.E prohibits Macmillan from agreeing with e-book publishers to raise or set e-book retail prices or coordinate terms relating to the licensing, distribution, or sale of e-books. Section V.F likewise prohibits Macmillan from directly or indirectly conveying confidential or competitively sensitive information to any other e-book publisher. Banning such communications is critical here, where

communications among publishing competitors were a common practice and facilitated the collusive agreement alleged in the Complaint. *See also* Original CIS § III.B.3.

D. Permitted Conduct (Section VI)

The proposed Macmillan Final Judgment also specifically carves out some conduct, which normally is permitted under the antitrust laws, that Macmillan may pursue unilaterally. Section VI.A of the proposed Macmillan Final Judgment allows Macmillan to compensate e-book retailers for services that they provide to publishers or consumers to help promote or sell more e-books. Section VI.B permits Macmillan to negotiate a commitment from an e-book retailer that a retailer's aggregate expenditure on discounts and promotions of Macmillan's e-books will not exceed the retailer's aggregate commission under an agency agreement in which Macmillan sets the e-book price and the retailer is compensated through a commission. These provisions allow Macmillan to prevent a retailer selling its entire catalogue at a sustained loss, while still permitting retailers to offer discounts under Sections V.A and V.B. Absent the collusion here, the antitrust laws normally would permit a publisher unilaterally to negotiate for such protections. *See also* Original CIS § III.C.

E. Antitrust Compliance (Section VII)

As outlined in Section VII, Macmillan also must designate an Antitrust Compliance Officer, who is required to distribute copies of the proposed Macmillan Final Judgment; ensure training related to the proposed Macmillan Final Judgment and the antitrust laws; certify compliance with the proposed Macmillan Final Judgment; and conduct an annual antitrust compliance audit. This compliance program is necessary considering the extensive

communication among competitors' CEOs that facilitated Defendants' agreement. *See also* Original CIS § III.D.

IV. ALTERNATIVES TO THE PROPOSED MACMILLAN FINAL JUDGMENT

The United States considered, as an alternative to the proposed Macmillan Final Judgment, a full trial on the merits against Macmillan. The United States believes that the relief contained in the proposed Macmillan Final Judgment will more quickly restore retail price competition to consumers.

V. REMEDIES AVAILABLE TO PRIVATE LITIGANTS

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages the person has suffered, as well as costs and reasonable attorneys' fees. Entry of the proposed Macmillan Final Judgment will neither impair nor assist the bringing of any private antitrust damage action. Under the provisions of Section 5(a) of the Clayton Act, 15 U.S.C. § 16(a), the proposed Macmillan Final Judgment has no *prima facie* effect in any subsequent private lawsuit that may be brought against the Defendants.

VI. PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED MACMILLAN FINAL JUDGMENT

The United States and Macmillan have stipulated that the proposed Macmillan Final Judgment may be entered by this Court after compliance with the provisions of the APPA, provided that the United States has not withdrawn its consent. The APPA conditions entry of the decree upon this Court's determination that the proposed Macmillan Final Judgment is in the public interest.

The APPA provides a period of at least sixty (60) days preceding the effective date of the proposed Macmillan Final Judgment within which any person may submit to the United States written comments regarding the proposed Macmillan Final Judgment. Any person who wishes to comment should do so within sixty (60) days of publication of this Competitive Impact Statement in the Federal Register, or the last date of publication in a newspaper of the summary of this Competitive Impact Statement, whichever is later.

All comments received during this period will be considered by the United States Department of Justice, which remains free to withdraw its consent to the proposed Macmillan Final Judgment at any time prior to the Court's entry of judgment. The comments and the responses of the United States will be filed with the Court and published either in the Federal Register or, with the Court's permission, on the Department of Justice website.² Written comments should be submitted to:

John Read, Chief
Litigation III Section
Antitrust Division
U.S. Department of Justice
450 5th Street, NW, Suite 4000
Washington, DC 20530

The proposed Macmillan Final Judgment provides that the Court retains jurisdiction over this action, and the parties may apply to the Court for any order necessary or appropriate for modification, interpretation, or enforcement of the Final Judgment.

² The United States posts or links to all public materials submitted in relation to *United States v. Apple, Inc.* at: <http://www.justice.gov/atr/cases/applebooks.html>.

VII. STANDARD OF REVIEW UNDER THE APPA FOR THE PROPOSED MACMILLAN FINAL JUDGMENT

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 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, the court is directed to 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)(A) & (B); *see generally United States v. KeySpan Corp.*, 763 F. Supp. 2d 633, 637–38 (S.D.N.Y. 2011) (discussing Tunney Act standards); *United States v. SBC Commc’ns, Inc.*, 489 F. Supp. 2d 1 (D.D.C. 2007) (assessing standards for public interest determination).

In other words, under the Tunney Act, a court considers, among other things, the relationship between the remedy secured and the specific allegations set forth in the government’s complaint, whether the decree is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree may positively harm third parties. *See United States v. Microsoft Corp.*, 56 F.3d 1448, 1458-62 (D.C. Cir. 1995). The court’s inquiry is necessarily a limited one as the government is entitled to “broad discretion to settle with the

defendant within the reaches of the public interest.” *Id.* at 1461; accord *United States v. Alex. Brown & Sons, Inc.*, 963 F. Supp. 235, 238 (S.D.N.Y. 1997) (quoting *Microsoft*, 56 F.3d at 1460), *aff’d sub nom. United States v. Bleznak*, 153 F.3d 16 (2d Cir. 1998); *United States v. KeySpan*, 763 F. Supp. 2d at 637 (same). With respect to the adequacy of the relief secured by the decree, a court may not “engage in an unrestricted evaluation of what relief would best serve the public.” *United States v. BNS, Inc.*, 858 F.2d 456, 462 (9th Cir. 1988) (quoting *United States v. Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir. 1981)); see also *Alex. Brown & Sons*, 963 F. Supp. at 238. Instead, the court should grant due respect to the United States’ “prediction as to the effect of proposed remedies, its perception of the market structure, and its view of the nature of the case.” *United States v. Archer-Daniels-Midland Co.*, 272 F. Supp. 2d 1, 6 (D.D.C. 2003). After all, the court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is “*within the reaches of the public interest.*” *Bechtel*, 648 F.2d at 666 (emphasis added) (citations omitted); accord *Alex. Brown*, 963 F. Supp. at 238.³

³ *Cf. BNS*, 858 F.2d at 464 (holding that the court’s “ultimate authority under the [Tunney Act] is limited to approving or disapproving the consent decree”); *United States v. Gillette Co.*, 406 F. Supp. 713, 716 (D. Mass. 1975) (the court is constrained to “look at the overall picture not hypercritically, nor with a microscope, but with an artist’s reducing glass”). See generally *Microsoft*, 56 F.3d at 1461 (discussing whether “the remedies [obtained in the decree are] so inconsonant with the allegations charged as to fall outside of the ‘reaches of the public interest’”).

VIII. DETERMINATIVE DOCUMENTS

There are no determinative materials or documents within the meaning of the APPA that were considered by the United States in formulating the proposed Macmillan Final Judgment.

Dated: February 8, 2013

Respectfully submitted,

s/ Mark W. Ryan
Mark W. Ryan
Lawrence E. Buterman
Daniel McCuaig
Stephanie A. Fleming
Attorneys for the United States
United States Department of Justice
Antitrust Division
450 Fifth Street, NW, Suite 4000
Washington, DC 20530
(202) 532-4753
Mark.W.Ryan@usdoj.gov

CERTIFICATE OF SERVICE

I, Stephen T. Fairchild, hereby certify that on February 8, 2013, I caused a copy of the United States' Competitive Impact Statement to be served by the Electronic Case Filing System, which included the individuals listed below.

For Apple:

Daniel S. Floyd
Gibson, Dunn & Crutcher LLP
333 S. Grand Avenue, Suite 4600
Los Angeles, CA 90070
(213) 229-7148
dfloyd@gibsondunn.com

For Macmillan and Verlagsgruppe Georg
Von Holtzbrinck GMBH:

Joel M. Mitnick
Sidley Austin LLP
787 Seventh Avenue
New York, NY 10019
(212) 839-5300
jmitnick@sidley.com

For Penguin U.S.A. and the Penguin Group:

Daniel F. McInnis
Akin Gump Strauss Hauer & Feld, LLP
1333 New Hampshire Avenue NW
Washington, DC 20036
(202) 887-4000
dmcinnis@akingump.com

For Hachette:

Walter B. Stuart, IV
Freshfields Bruckhaus Deringer LLP
601 Lexington Avenue
New York, NY 10022
(212) 277-4000
walter.stuart@freshfields.com

For HarperCollins:

Paul Madison Eckles
Skadden, Arps, Slate, Meagher & Flom
Four Times Square, 42nd Floor
New York, NY 10036
(212) 735-2578
pmeckles@skadden.com

For Simon & Schuster:

Yehudah Lev Buchweitz
Weil, Gotshal & Manges LLP (NYC)
767 Fifth Avenue, 25th Fl.
New York, NY 10153
(212) 310-8000 x8256
yehudah.buchweitz@weil.com

Additionally, courtesy copies of this Competitive Impact Statement have been provided to the following:

For the State of Connecticut:

W. Joseph Nielsen
Assistant Attorney General
Antitrust Division
Office of the Attorney General
55 Elm Street
Hartford, CT 06106
(860) 808-5040
Joseph.Nielsen@ct.gov

For the State of Texas:

Gabriel R. Gervery
Assistant Attorney General
Antitrust Division
Office of the Attorney General of Texas
300 W. 15th Street
Austin, Texas 78701
(512) 463-1262
gabriel.gervery@oag.state.tx.us

For the Private Plaintiffs:

Jeff D. Friedman
Hagens Berman
715 Hearst Ave., Suite 202
Berkeley, CA 94710
(510) 725-3000
jefff@hbsslaw.com

s/ Stephen T. Fairchild
Stephen T. Fairchild
Attorney for the United States
United States Department of Justice
Antitrust Division
450 Fifth Street, NW, Suite 4000
Washington, DC 20530
(202) 532-4925
stephen.fairchild@usdoj.gov

EXHIBIT A

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

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

[PROPOSED] FINAL JUDGMENT AS TO DEFENDANTS
HACHETTE, HARPERCOLLINS, AND SIMON & SCHUSTER

VERLAGSGRUPPE GEORG VON HOLTZBRINCK GMBH &
HOLTZBRINCK PUBLISHERS, LLC D/B/A MACMILLAN

WHEREAS, Plaintiff, the United States of America filed its Complaint on April 11, 2012, alleging that Defendants conspired to raise retail prices of E-books in violation of Section 1 of the Sherman Act, as amended, 15 U.S.C. § 1, and Plaintiff and ~~Settling Defendants~~ Macmillan, by their respective attorneys, have consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law;

AND WHEREAS, this Final Judgment does not constitute any admission by ~~Settling Defendants~~Macmillan that the law has been violated or of any issue of fact or law, other than that the jurisdictional facts as alleged in the Complaint are true;

AND WHEREAS, ~~Settling Defendants agree~~Macmillan agrees to be bound by the provisions of this Final Judgment pending its approval by the Court;

AND WHEREAS, Plaintiff requires ~~Settling Defendants~~Macmillan to agree to undertake certain actions and refrain from certain conduct for the purpose of remedying the loss of competition alleged in the Complaint;

AND WHEREAS, ~~Settling Defendants have~~Macmillan has represented to the United States that the actions and conduct restrictions can and will be undertaken and that ~~they~~it will later raise no claim of hardship or difficulty as grounds for asking the Court to modify any of the provisions contained below;

NOW THEREFORE, before any testimony is taken, without trial or adjudication of any issue of fact or law, and upon consent of ~~Settling Defendants~~Macmillan, it is ORDERED, ADJUDGED, AND DECREED:

I. JURISDICTION

This Court has jurisdiction over the subject matter of this action and over ~~the Settling Defendants~~Macmillan. The Complaint states a claim upon which relief may be granted against ~~Settling Defendants~~Macmillan under Section 1 of the Sherman Act, as amended, 15 U.S.C. § 1.

II. DEFINITIONS

As used in this Final Judgment:

A. “Agency Agreement” means an agreement between an E-book Publisher and an E-book Retailer under which the E-book Publisher Sells E-books to consumers through the E-book Retailer, which under the agreement acts as an agent of the E-book Publisher and is paid a commission in connection with the Sale of one or more of the E-book Publisher’s E-books.

B. “Apple” means Apple, Inc., a California corporation with its principal place of business in Cupertino, California, its successors and assigns, and its parents, subsidiaries, divisions, groups, affiliates, partnerships, and joint ventures, and their directors, officers, managers, agents, and employees.

C. “Department of Justice” means the Antitrust Division of the United States Department of Justice.

D. “E-book” means an electronically formatted book designed to be read on a computer, a handheld device, or other electronic devices capable of visually displaying E-books. For purposes of this Final Judgment, the term E-book does not include (1) an audio book, even if delivered and stored digitally; (2) a standalone specialized software application or “app” sold through an “app store” rather than through an e-book store (*e.g.*, through Apple’s “App Store” rather than through its “iBookstore” or “iTunes”) and not designed to be executed or read by or through a dedicated E-book reading device; ~~or~~ (3) a media file containing an electronically formatted book for which most of the value to consumers is derived from audio or video content contained in the file that is not included in the print version of the book; or (4) the electronically formatted version of a book marketed solely for use in connection with academic coursework.

E. “E-book Publisher” means any Person that, by virtue of a contract or other relationship with an E-book’s author or other rights holder, owns or controls the necessary

copyright or other authority (or asserts such ownership or control) over any E-book sufficient to distribute the E-book within the United States to E-book Retailers and to permit such E-book Retailers to Sell the E-book to consumers in the United States. Publisher Defendants are E-book Publishers. For purposes of this Final Judgment, E-book Retailers are not E-book Publishers.

F. “E-book Retailer” means any Person that lawfully Sells (or seeks to lawfully Sell) E-books to consumers in the United States, or through which a Publisher Defendant, under an Agency Agreement, Sells E-books to consumers. For purposes of this Final Judgment, Publisher Defendants and all other Persons whose primary business is book publishing are not E-book Retailers.

G. “Hachette” means Hachette Book Group, Inc., a Delaware corporation with its principal place of business in New York, New York, its successors and assigns, and its subsidiaries, divisions, groups, and partnerships, and their directors, officers, managers, agents, and employees.

H. “HarperCollins” means HarperCollins Publishers L.L.C., a Delaware limited liability company with its principal place of business in New York, New York, its successors and assigns, and its subsidiaries, divisions, groups, and partnerships, and their directors, officers, managers, agents, and employees.

I. “Including” means including, but not limited to.

J. “Macmillan” means (1) Holtzbrinck Publishers, LLC d/b/a Macmillan, a New York limited liability company with its principal place of business in New York, New York (“Holtzbrinck”), its successors and assigns, and its subsidiaries, divisions, groups, and partnerships, and their directors, officers, managers, agents, and employees; and (2)

Verlagsgruppe Georg von Holtzbrinck GmbH, a German corporation with its principal place of business in Stuttgart, Germany, ~~their~~ (“VGvH”), ~~its~~ successors and assigns, and ~~their parents,~~ ~~subsidiaries,~~ ~~its~~ divisions, groups, ~~affiliates,~~ and partnerships, and their directors, officers, managers, agents, and employees. Where the Final Judgment imposes an obligation on Macmillan to engage in or refrain from engaging in certain conduct, that obligation shall apply to Macmillan and to any joint venture or other business arrangement established by Macmillan and one or more Publisher Defendants.

K. “Penguin” means (1) Penguin Group (USA), Inc., a Delaware corporation with its principal place of business in New York, New York, ~~and~~; (2) The Penguin Group, a division of – U.K. corporation Pearson ~~PLC~~ plc with its principal place of business in London, England; ~~;~~ (3) The Penguin Publishing Company Ltd, a company registered in England and Wales with its principal place of business in London, England; and (4) Dorling Kindersley Holdings Limited, a company registered in England and Wales with its principal place of business in London, England; and each of their respective successors and assigns, ~~and~~ (expressly including Penguin Random House, a joint venture by and between Pearson plc and Bertelsmann SE & Co. KGaA, and any similar joint venture between Penguin and Random House Inc.); each of their parents, ~~respective~~ subsidiaries, divisions, groups, ~~affiliates,~~ and partnerships; ~~;~~ and each of their respective directors, officers, managers, agents, and employees.

L. “Person” means any natural person, corporation, company, partnership, joint venture, firm, association, proprietorship, agency, board, authority, commission, office, or other business or legal entity, whether private or governmental.

M. “Price MFN” means a term in an agreement between an E-book Publisher and an E-book Retailer under which

1. the Retail Price at which an E-book Retailer or, under an Agency Agreement, an E-book Publisher Sells one or more E-books to consumers depends in any way on the Retail Price, or discounts from the Retail Price, at which any other E-book Retailer or the E-book Publisher, under an Agency Agreement, through any other E-book Retailer Sells the same E-book(s) to consumers;

2. the Wholesale Price at which the E-book Publisher Sells one or more E-books to that E-book Retailer for Sale to consumers depends in any way on the Wholesale Price at which the E-book Publisher Sells the same E-book(s) to any other E-book Retailer for Sale to consumers; or

3. the revenue share or commission that E-book Retailer receives from the E-book Publisher in connection with the Sale of one or more E-books to consumers depends in any way on the revenue share or commission that (a) any other E-book Retailer receives from the E-book Publisher in connection with the Sale of the same E-book(s) to consumers, or (b) that E-book Retailer receives from any other E-book Publisher in connection with the Sale of one or more of the other E-book Publisher’s E-books.

For purposes of this Final Judgment, it will not constitute a Price MFN under subsection 3 of this definition if ~~a Settling Defendant~~Macmillan agrees, at the request of an E-book Retailer, to meet more favorable pricing, discounts, or allowances offered to the E-book Retailer by another E-book Publisher for the period during which the other E-book Publisher provides that additional compensation, so long as that agreement is not or does not result from a pre-existing agreement that requires ~~the Settling Defendant~~Macmillan to meet all requests by the E-book Retailer for more favorable pricing within the terms of the agreement.

N. “Publisher Defendants” means Hachette, HarperCollins, Macmillan, Penguin, and Simon & Schuster. Where this Final Judgment imposes an obligation on Publisher Defendants to engage in or refrain from engaging in certain conduct, that obligation shall apply to each Publisher Defendant individually and to any joint venture or other business arrangement established by any two or more Publisher Defendants.

O. “Purchase” means a consumer’s acquisition of one or more E-books as a result of a Sale.

P. “Retail Price” means the price at which an E-book Retailer or, under an Agency Agreement, an E-book Publisher Sells an E-book to a consumer.

Q. “Sale” means delivery of access to a consumer to read one or more E-books (purchased alone, or in combination with other goods or services) in exchange for payment; “Sell” or “Sold” means to make or to have made a Sale of an E-book to a consumer.

~~R. “Settling Defendants” means Hachette, HarperCollins, and Simon & Schuster. Where the Final Judgment imposes an obligation on Settling Defendants to engage in or refrain from engaging in certain conduct, that obligation shall apply to each Settling Defendant~~

~~individually and to any joint venture or other business arrangement established by a Settling Defendant and one or more Publisher Defendants.~~

S.R. “Simon & Schuster” means Simon & Schuster, Inc., a New York corporation with its principal place of business in New York, New York, its successors and assigns, and its subsidiaries, divisions, groups, and partnerships, and their directors, officers, managers, agents, and employees.

F.S. “Wholesale Price” means (1) the net amount, after any discounts or other adjustments (not including promotional allowances subject to Section 2(d) of the Robinson-Patman Act, 15 U.S.C. § 13(d)), that an E-book Retailer pays to an E-book Publisher for an E-book that the E-book Retailer Sells to consumers; or (2) the Retail Price at which an E-book Publisher, under an Agency Agreement, Sells an E-book to consumers through an E-book Retailer minus the commission or other payment that E-book Publisher pays to the E-book Retailer in connection with or that is reasonably allocated to that Sale.

III. APPLICABILITY

_____ This Final Judgment applies to ~~Settling Defendants~~ Holtzbrinck and VGvH, acting individually or in concert, and all other Persons in active concert or participation with ~~any of them~~ Holtzbrinck or VGvH who receive actual notice of this Final Judgment by personal service or otherwise.

IV. REQUIRED CONDUCT

~~A.~~ Within ~~seven~~three business days after Macmillan's stipulation to the entry of this Final Judgment, ~~each Settling Defendant~~Macmillan shall ~~terminate any~~notify each E-book Retailer with which Holtzbrinck has an agreement ~~with Apple~~ relating to the Sale of E-books that ~~was executed prior to the filing of the Complaint.~~

A. ~~For each~~Holtzbrinck will no longer enforce any term or terms in any such agreement ~~between a Settling Defendant and an E-book Retailer other than Apple~~ that (1) restricts, ~~limits~~restrict, limit, or ~~impedes~~impede the E-book Retailer's ability to set, alter, or reduce the Retail Price of any E-book or to offer price discounts or any other form of promotions to encourage consumers to Purchase one or more E-books; ~~or (2),~~ except to the extent consistent with Section VI.B of this Final Judgment.

B. For each agreement between Holtzbrinck and an E-book Retailer that contains a Price MFN, ~~the Settling Defendant~~Holtzbrinck shall notify the E-book Retailer; within ~~ten~~three business days ~~of after Macmillan's stipulation to the filing~~entry of ~~the Complaint,~~this Final Judgment that the E-book Retailer may terminate the agreement with thirty-days notice and shall, thirty days after the E-book Retailer provides such notice, release the E-book Retailer from the agreement. For each such agreement that the E-book Retailer has not terminated within ~~thirty~~ten days after entry of this Final Judgment, ~~each Settling Defendant~~Holtzbrinck shall, as soon as permitted under the agreement, take each step required under the agreement to cause the agreement to be terminated and not renewed or extended.

C. ~~Settling Defendants~~Holtzbrinck shall notify the Department of Justice in writing at least sixty days in advance of the formation or material modification of any joint venture or other

business arrangement relating to the Sale, development, or promotion of E-books in the United States in which ~~a Settling Defendant~~[Holtzbrinck](#) and at least one other E-book Publisher (including another Publisher Defendant) are participants or partial or complete owners. Such notice shall describe the joint venture or other business arrangement, identify all E-book Publishers that are parties to it, and attach the most recent version or draft of the agreement, contract, or other document(s) formalizing the joint venture or other business arrangement.

Within thirty days after ~~a Settling Defendant~~[Holtzbrinck](#) provides notification of the joint venture or business arrangement, the Department of Justice may make a written request for additional information. If the Department of Justice makes such a request, ~~the Settling Defendant~~[Holtzbrinck](#) shall not proceed with the planned formation or material modification of the joint venture or business arrangement until thirty days after substantially complying with such additional request(s) for information. The failure of the Department of Justice to request additional information or to bring an action under the antitrust laws to challenge the formation or material modification of the joint venture shall neither give rise to any inference of lawfulness nor limit in any way the right of the United States to investigate the formation, material modification, or any other aspects or activities of the joint venture or business arrangement and to bring actions to prevent or restrain violations of the antitrust laws.

The notification requirements of this Section IV.C shall not apply to ordinary course business arrangements between ~~a Publisher Defendant~~[Holtzbrinck](#) and another E-book Publisher (not a Publisher Defendant) that do not relate to the Sale of E-books to consumers, or to business arrangements the primary or predominant purpose or focus of which involves: (i) E-book Publishers co-publishing one or more specifically identified E-book titles or a particular author's

E-books; (ii) ~~a Settling Defendant~~Holtzbrinck licensing to or from another E-book Publisher the publishing rights to one or more specifically identified E-book titles or a particular author's E-books; (iii) ~~a Settling Defendant~~Holtzbrinck providing technology services to or receiving technology services from another E-book Publisher (not a Publisher Defendant) or licensing rights in technology to or from another E-book Publisher; or (iv) ~~a Settling Defendant~~Holtzbrinck distributing E-books published by another E-book Publisher (not a Publisher Defendant).

D. ~~Each Settling Defendant~~Macmillan shall furnish to the Department of Justice (1) ~~within seven days after entry of this Final Judgment~~by February 15, 2013, one complete copy of each agreement, executed, renewed, or extended on or after January 1, 2012, between ~~the Settling Defendant~~Holtzbrinck and any E-book Retailer relating to the Sale of E-books, and, (2) thereafter, on a quarterly basis, each such agreement executed, renewed, or extended since ~~the Settling Defendant's~~Macmillan's previous submission of agreements to the Department of Justice.

V. PROHIBITED CONDUCT

A. ~~For two years, Settling Defendants~~Until December 18, 2014, Holtzbrinck shall not restrict, limit, or impede an E-book Retailer's ability to set, alter, or reduce the Retail Price of any E-book or to offer price discounts or any other form of promotions to encourage consumers to Purchase one or more E-books, ~~such two-year period to run separately for each E-book Retailer, at the option of the Settling Defendant, from either:~~

1. ~~the termination of an agreement between the Settling Defendant and the E-book Retailer that restricts, limits, or impedes the E-book Retailer's ability to set, alter, or reduce the Retail Price of any E-book or to offer price discounts or any other form of promotions to encourage consumers to Purchase one or more E-books; or~~

~~2. the date on which the Settling Defendant notifies the E-book Retailer in writing that the Settling Defendant will not enforce any term(s) in its agreement with the E-book Retailer that restrict, limit, or impede the E-book Retailer from setting, altering, or reducing the Retail Price of one or more E-books, or from offering price discounts or any other form of promotions to encourage consumers to Purchase one or more E-books.~~

~~Each Settling Defendant shall notify the Department of Justice of the option it selects for each E-book Retailer within seven days of making its selection.~~

B. ~~For two years after the filing of the Complaint, Settling Defendants~~Until December 18, 2014, Holtzbrinck shall not enter into any agreement with any E-book Retailer that restricts, limits, or impedes the E-book Retailer from setting, altering, or reducing the Retail Price of one or more E-books, or from offering price discounts or any other form of promotions to encourage consumers to Purchase one or more E-books.

C. ~~Settling Defendants~~Holtzbrinck shall not enter into any agreement with an E-book Retailer relating to the Sale of E-books that contains a Price MFN.

D. ~~Settling Defendants~~Macmillan shall not retaliate against, or urge any other E-book Publisher or E-book Retailer to retaliate against, an E-book Retailer for engaging in any activity that ~~the Settling Defendants are~~Holtzbrinck is prohibited by Sections V.A, V.B, and VI.B.2 of this Final Judgment from restricting, limiting, or impeding in any agreement with an E-book Retailer. After the expiration of prohibitions in Sections V.A and V.B of this Final Judgment, this Section V.D shall not prohibit ~~any Settling Defendant~~Holtzbrinck from unilaterally entering into or enforcing any agreement with an E-book Retailer that restricts, limits, or impedes the E-book Retailer from setting, altering, or reducing the Retail Price of any of ~~the Settling~~

~~Defendant's~~Holtzbrinck's E-books or from offering price discounts or any other form of promotions to encourage consumers to Purchase any of ~~the Settling Defendant's~~Holtzbrinck's E-books.

E. ~~Settling Defendants~~Holtzbrinck shall not enter into or enforce any agreement, arrangement, understanding, plan, program, combination, or conspiracy with any E-book Publisher (including another Publisher Defendant) to raise, stabilize, fix, set, or coordinate the Retail Price or Wholesale Price of any E-book or fix, set, or coordinate any term or condition relating to the Sale of E-books.

This Section V.E shall not prohibit ~~a Settling Defendant~~Holtzbrinck from entering into and enforcing agreements relating to the distribution of another E-book Publisher's E-books (not including the E-books of another Publisher Defendant) or to the co-publication with another E-book Publisher of specifically identified E-book titles or a particular author's E-books, or from participating in output-enhancing industry standard-setting activities relating to E-book security or technology.

F. ~~A Settling Defendant (including~~Holtzbrinck (and each officer of ~~each parent of the Settling Defendant~~VGVH who exercises direct control over ~~the Settling Defendant's~~Holtzbrinck's business decisions or strategies) shall not convey or otherwise communicate, directly or indirectly (including by communicating indirectly through an E-book Retailer with the intent that the E-book Retailer convey information from the communication to another E-book Publisher or knowledge that it is likely to do so), to any other E-book Publisher (including to an officer of a parent of a Publisher Defendant) any competitively sensitive information, including:

1. its business plans or strategies;

2. its past, present, or future wholesale or retail prices or pricing strategies for books sold in any format (*e.g.*, print books, E-books, or audio books);
 3. any terms in its agreement(s) with any retailer of books Sold in any format;
- or
4. any terms in its agreement(s) with any author.

This Section V.F shall not prohibit ~~a Settling Defendant~~Holtzbrinck from communicating (a) in a manner and through media consistent with common and reasonable industry practice, the cover prices or wholesale or retail prices of books sold in any format to potential purchasers of those books; or (b) information ~~the Settling Defendant~~Holtzbrinck needs to communicate in connection with (i) its enforcement or assignment of its intellectual property or contract rights, (ii) a contemplated merger, acquisition, or purchase or sale of assets, (iii) its distribution of another E-book Publisher's E-books, or (iv) a business arrangement under which E-book Publishers agree to co-publish, or an E-book Publisher agrees to license to another E-book Publisher the publishing rights to, one or more specifically identified E-book titles or a particular author's E-books.

VI. PERMITTED CONDUCT

A. Nothing in this Final Judgment shall prohibit ~~a Settling Defendant~~Macmillan unilaterally from compensating a retailer, including an E-book Retailer, for valuable marketing or other promotional services rendered.

B. Notwithstanding Sections V.A and V.B of this Final Judgment, ~~a Settling Defendant~~Holtzbrinck may enter into Agency Agreements with E-book Retailers under which the aggregate dollar value of the price discounts or any other form of promotions to encourage consumers to Purchase one or more of ~~the Settling Defendant's~~Holtzbrinck's E-books (as opposed

to advertising or promotions engaged in by the E-book Retailer not specifically tied or directed to ~~the Settling Defendant's Holtzbrinck's~~ E-books) is restricted; *provided that* (1) such agreed restriction shall not interfere with the E-book Retailer's ability to reduce the final price paid by consumers to purchase ~~the Settling Defendant's Holtzbrinck's~~ E-books by an aggregate amount equal to the total commissions ~~the Settling Defendant Holtzbrinck~~ pays to the E-book Retailer, over a period of at least one year, in connection with the Sale of ~~the Settling Defendant's Holtzbrinck's~~ E-books to consumers; (2) ~~the Settling Defendant Holtzbrinck~~ shall not restrict, limit, or impede the E-book Retailer's use of the agreed funds to offer price discounts or any other form of promotions to encourage consumers to Purchase one or more E-books; and (3) the method of accounting for the E-book Retailer's promotional activity does not restrict, limit, or impede the E-book Retailer from engaging in any form of retail activity or promotion.

VII. ANTITRUST COMPLIANCE

Within thirty days after entry of this Final Judgment, ~~each Settling Defendant Macmillan~~ shall designate ~~its Holtzbrinck's~~ general counsel or chief legal officer, or an employee reporting directly to its general counsel or chief legal officer, as Antitrust Compliance Officer with responsibility for ensuring ~~the Settling Defendant's Macmillan's~~ compliance with this Final Judgment. The Antitrust Compliance Officer shall be responsible for the following:

A. furnishing a copy of this Final Judgment, within thirty days of its entry, to each of ~~the Settling Defendant's Holtzbrinck's~~ officers and directors, ~~and~~ to each of ~~the Settling Defendant's Holtzbrinck's~~ employees engaged, in whole or in part, in the distribution or Sale of E-books, and to each of VGvH's officers, directors, or employees involved in the development of Holtzbrinck's plans or strategies relating to E-books;

B. furnishing a copy of this Final Judgment in a timely manner to each officer, director, or employee who succeeds to any position identified in Section VII.A of this Final Judgment;

C. ensuring that each person identified in Sections VII.A and VII.B of this Final Judgment receives at least four hours of training annually on the meaning and requirements of this Final Judgment and the antitrust laws, such training to be delivered by an attorney with relevant experience in the field of antitrust law;—

D. obtaining, within sixty days after entry of this Final Judgment and on each anniversary of the entry of this Final Judgment, from each person identified in Sections VII.A and VII.B of this Final Judgment, and thereafter maintaining, a certification that each such person (a) has read, understands, and agrees to abide by the terms of this Final Judgment; and (b) is not aware of any violation of this Final Judgment or the antitrust laws or has reported any potential violation to the Antitrust Compliance Officer;

E. conducting an annual antitrust compliance audit covering each person identified in Sections VII.A and VII.B of this Final Judgment, and maintaining all records pertaining to such audits;

F. communicating annually to ~~the Settling Defendant's employees~~Holtzbrinck's employees and to all VGvH employees identified in Sections VII.A and VII.B of this Final Judgment that they may disclose to the Antitrust Compliance Officer, without reprisal, information concerning any potential violation of this Final Judgment or the antitrust laws;

G. taking appropriate action, within three business days of discovering or receiving credible information concerning an actual or potential violation of this Final Judgment, to

terminate or modify ~~the Settling Defendant's~~Macmillan's conduct to assure compliance with this Final Judgment; and, within seven days of taking such corrective actions, providing to the Department of Justice a description of the actual or potential violation of this Final Judgment and the corrective actions taken;

H. furnishing to the Department of Justice on a quarterly basis electronic copies of any non-privileged communications with any Person containing allegations of ~~Settling Defendants'~~Macmillan's noncompliance with any provisions of this Final Judgment;

I. maintaining, and furnishing to the Department of Justice on a quarterly basis, a log of all oral and written communications, excluding privileged or public communications, between or among (1) any of ~~the Settling Defendant's~~Macmillan's officers, directors, or employees involved in the development of ~~the Settling Defendant's~~Holtzbrinck's plans or strategies relating to E-books, and (2) any person employed by or associated with another Publisher Defendant, relating, in whole or in part, to the ~~the~~-distribution or sale in the United States of books sold in any format, including an identification (by name, employer, and job title) of the author and recipients of and all participants in the communication, the date, time, and duration of the communication, the medium of the communication, and a description of the subject matter of the communication (for a collection of communications solely concerning a single business arrangement that is specifically exempted from the reporting requirements of Section IV.C of this Final Judgment, ~~the Settling Defendant~~Macmillan may provide a summary of the communications rather than logging each communication individually); and

J. providing to the Department of Justice annually, on or before the anniversary of the entry of this Final Judgment, a written statement as to the fact and manner of ~~the Settling Defendant's Macmillan's~~ compliance with Sections IV, V, and VII of this Final Judgment.

VIII. COMPLIANCE INSPECTION

A. For purposes of determining or securing compliance with this Final Judgment, or of determining whether the Final Judgment should be modified or vacated, and subject to any legally recognized privilege, from time to time duly authorized representatives of the Department of Justice, including consultants and other persons retained by the Department of Justice, shall, upon written request of an authorized representative of the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to ~~Settling Defendants Macmillan~~, be permitted:

1. access during ~~the Settling Defendants' Macmillan's~~ office hours to inspect and copy, or at the option of the United States, to require ~~Settling Defendants Macmillan~~ to provide to the United States hard copy or electronic copies of all books, ledgers, accounts, records, data, and documents in the possession, custody, or control of ~~Settling Defendants Macmillan~~, relating to any matters contained in this Final Judgment; and

2. to interview, either informally or on the record, ~~the Settling Defendants' Macmillan's~~ officers, employees, or agents, who may have their individual counsel present, regarding such matters. The interviews shall be subject to the reasonable convenience of the interviewee and without restraint or interference by ~~Settling Defendants Macmillan~~.

B. Upon the written request of an authorized representative of the Assistant Attorney General in charge of the Antitrust Division, ~~Settling Defendants Macmillan~~ shall submit written reports or respond to written interrogatories, under oath if requested, relating to any of the matters

contained in this Final Judgment as may be requested. Written reports authorized under this paragraph may, in the sole discretion of the United States, require ~~Settling Defendants~~ Macmillan to conduct, at their cost, an independent audit or analysis relating to any of the matters contained in this Final Judgment.

C. No information or documents obtained by the means provided in this Section shall be divulged by the United States to any person other than an authorized representative of the executive branch of the United States, except in the course of legal proceedings to which the United States is a party (including grand jury proceedings), or for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.

D. If at the time information or documents are furnished by ~~a Settling~~ Defendant Macmillan to the United States, ~~the Settling Defendant~~ Macmillan represents and identifies in writing the material in any such information or documents to which a claim of protection may be asserted under Rule 26(c)(1)(G) of the Federal Rules of Civil Procedure, and ~~the~~ Settling Defendant Macmillan marks each pertinent page of such material, "Subject to claim of protection under Rule 26(c)(1)(G) of the Federal Rules of Civil Procedure," then the United States shall give ~~the Settling Defendant~~ Macmillan ten calendar days notice prior to divulging such material in any civil or administrative proceeding.

IX. RETENTION OF JURISDICTION

This Court retains jurisdiction to enable any party to apply to this Court at any time for further orders and directions as may be necessary or appropriate to carry out or construe this Final Judgment, to modify any of its provisions, to enforce compliance, and to punish violations of its provisions.

X. NO LIMITATION ON GOVERNMENT RIGHTS

Nothing in this Final Judgment shall limit the right of the United States to investigate and bring actions to prevent or restrain violations of the antitrust laws concerning any past, present, or future conduct, policy, or practice of ~~the Settling Defendants~~ Macmillan.

XI. EXPIRATION OF FINAL JUDGMENT

Unless this Court grants an extension, this Final Judgment shall expire five years from the date of its entry.

XII. PUBLIC INTEREST DETERMINATION

Entry of this Final Judgment is in the public interest. The parties have complied with the requirements of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16, including making copies available to the public of this Final Judgment, the Competitive Impact Statement, and any comments thereon and the United States' responses to comments. Based upon the record before the Court, which includes the Competitive Impact Statement and any comments and response to comments filed with the Court, entry of this Final Judgment is in the public interest.

Date: _____

Court approval subject to procedures set forth in the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16

United States District Judge

EXHIBIT B

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

_____)	
UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	Civil Action No. 1:12-CV-2826 (DLC)
v.)	
)	ECF Case
APPLE, INC., <i>et al.</i> ,)	
)	
Defendants.)	
_____)	

[PROPOSED] FINAL JUDGMENT AS TO DEFENDANTS
THE PENGUIN GROUP, A DIVISION OF PEARSON PLC, AND
PENGUIN GROUP (USA), INC.

VERLAGSGRUPPE GEORG VON HOLTZBRINCK GMBH &
HOLTZBRINCK PUBLISHERS, LLC D/B/A MACMILLAN

WHEREAS, Plaintiff, the United States of America filed its Complaint on April 11, 2012, alleging that Defendants conspired to raise retail prices of E-books in violation of Section 1 of the Sherman Act, as amended, 15 U.S.C. § 1, and Plaintiff and PenguinMacmillan, by their respective attorneys, have consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law;

AND WHEREAS, this Final Judgment does not constitute any admission by PenguinMacmillan that the law has been violated or of any issue of fact or law, other than that the jurisdictional facts as alleged in the Complaint are true;

AND WHEREAS, PenguinMacmillan agrees to be bound by the provisions of this Final Judgment pending its approval by the Court;

AND WHEREAS, Plaintiff requires PenguinMacmillan to agree to undertake certain actions and refrain from certain conduct for the purpose of remedying the loss of competition alleged in the Complaint;

AND WHEREAS, PenguinMacmillan has represented to the United States that the actions and conduct restrictions can and will be undertaken and that it will later raise no claim of hardship or difficulty as grounds for asking the Court to modify any of the provisions contained below;

NOW THEREFORE, before any testimony is taken, without trial or adjudication of any issue of fact or law, and upon consent of PenguinMacmillan, it is ORDERED, ADJUDGED, AND DECREED:

I. JURISDICTION

This Court has jurisdiction over the subject matter of this action and over PenguinMacmillan. The Complaint states a claim upon which relief may be granted against PenguinMacmillan under Section 1 of the Sherman Act, as amended, 15 U.S.C. § 1.

II. DEFINITIONS

As used in this Final Judgment:

A. “Agency Agreement” means an agreement between an E-book Publisher and an E-book Retailer under which the E-book Publisher Sells E-books to consumers through the E-book Retailer, which under the agreement acts as an agent of the E-book Publisher and is paid a commission in connection with the Sale of one or more of the E-book Publisher’s E-books.

B. “Apple” means Apple, Inc., a California corporation with its principal place of business in Cupertino, California, its successors and assigns, and its parents, subsidiaries,

divisions, groups, affiliates, partnerships, and joint ventures, and their directors, officers, managers, agents, and employees.

C. “Department of Justice” means the Antitrust Division of the United States Department of Justice.

D. “E-book” means an electronically formatted book designed to be read on a computer, a handheld device, or other electronic devices capable of visually displaying E-books. For purposes of this Final Judgment, the term E-book does not include (1) an audio book, even if delivered and stored digitally; (2) a standalone specialized software application or “app” sold through an “app store” rather than through an e-book store (*e.g.*, through Apple’s “App Store” rather than through its “iBookstore” or “iTunes”) and not designed to be executed or read by or through a dedicated E-book reading device; ~~or~~ (3) a media file containing an electronically formatted book for which most of the value to consumers is derived from audio or video content contained in the file that is not included in the print version of the book; or (4) the electronically formatted version of a book marketed solely for use in connection with academic coursework.

E. “E-book Publisher” means any Person that, by virtue of a contract or other relationship with an E-book’s author or other rights holder, owns or controls the necessary copyright or other authority (or asserts such ownership or control) over any E-book sufficient to distribute the E-book within the United States to E-book Retailers and to permit such E-book Retailers to Sell the E-book to consumers in the United States. Publisher Defendants are E-book Publishers. For purposes of this Final Judgment, E-book Retailers are not E-book Publishers.

F. “E-book Retailer” means any Person that lawfully Sells (or seeks to lawfully Sell) E-books to consumers in the United States, or through which a Publisher Defendant, under an

Agency Agreement, Sells E-books to consumers. For purposes of this Final Judgment, Publisher Defendants and all other Persons whose primary business is book publishing are not E-book Retailers.

G. “Hachette” means Hachette Book Group, Inc., a Delaware corporation with its principal place of business in New York, New York, its successors and assigns, and its subsidiaries, divisions, groups, and partnerships, and their directors, officers, managers, agents, and employees.

H. “HarperCollins” means HarperCollins Publishers L.L.C., a Delaware limited liability company with its principal place of business in New York, New York, its successors and assigns, and its subsidiaries, divisions, groups, and partnerships, and their directors, officers, managers, agents, and employees.

I. “Including” means including, but not limited to.

J. “Macmillan” means (1) Holtzbrinck Publishers, LLC d/b/a Macmillan, a New York limited liability company with its principal place of business in New York, New York (“Holtzbrinck”), its successors and assigns, and its subsidiaries, divisions, groups, and partnerships, and their directors, officers, managers, agents, and employees; and (2) Verlagsgruppe Georg von Holtzbrinck GmbH, a German corporation with its principal place of business in Stuttgart, Germany, ~~their (“VGvH”), its~~ successors and assigns, and ~~their parents, subsidiaries, its~~ divisions, groups, ~~affiliates,~~ and partnerships, and their directors, officers, managers, agents, and employees. Where the Final Judgment imposes an obligation on Macmillan to engage in or refrain from engaging in certain conduct, that obligation shall apply to

Macmillan and to any joint venture or other business arrangement established by Macmillan and one or more Publisher Defendants.

K. “Penguin” means (1) Penguin Group (USA), Inc., a Delaware corporation with its principal place of business in New York, New York; (2) The Penguin Group, a division of U.K. corporation Pearson plc with its principal place of business in London, England; (3) The Penguin Publishing Company Ltd, a company registered in England and Wales with its principal place of business in London, England; and (4) Dorling Kindersley Holdings Limited, a company registered in England and Wales with its principal place of business in London, England; and each of their respective successors and assigns (expressly including Penguin Random House, a joint venture by and between Pearson plc and Bertelsmann SE & Co. KGaA, and any similar joint venture between Penguin and Random House Inc.); each of their respective subsidiaries, divisions, groups,

~~partnerships; and each of their respective directors, officers, managers, agents, and employees.— Where Section IV.A, IV.B, IV.D, or VII imposes an obligation on Penguin to engage in certain conduct by either a date certain or by a specified day after entry of this Final Judgment, any successor or assign whose acquisition of or combination or other relationship with Penguin is consummated after entry of this Final Judgment shall meet each such obligation within thirty days after consummation.— The prohibitions of Section V.A of this Final Judgment shall expire for any successor or assign of Penguin on the dates on which such prohibitions would have expired for Penguin had the acquisition, combination, or other relationship not occurred.— Where the Final Judgment imposes an obligation on Penguin to engage in or refrain from engaging in certain conduct, that obligation shall apply to Penguin and to any joint venture or other business-~~

~~arrangement established by Penguin and one or more Publisher Defendants and partnerships; and each of their respective directors, officers, managers, agents, and employees.~~

~~L. “Penguin Random House” means the joint venture entities, which will operate under the name “Penguin Random House,” that will be formed pursuant to the Contribution Agreement, dated October 29, 2012, by and between Pearson plc and Bertelsmann SE & Co. KGaA.~~

~~M.L.~~ “Person” means any natural person, corporation, company, partnership, joint venture, firm, association, proprietorship, agency, board, authority, commission, office, or other business or legal entity, whether private or governmental.

~~N.M.~~ “Price MFN” means a term in an agreement between an E-book Publisher and an E-book Retailer under which

1. the Retail Price at which an E-book Retailer or, under an Agency Agreement, an E-book Publisher Sells one or more E-books to consumers depends in any way on the Retail Price, or discounts from the Retail Price, at which any other E-book Retailer or the E-book Publisher, under an Agency Agreement, through any other E-book Retailer Sells the same E-book(s) to consumers;

2. the Wholesale Price at which the E-book Publisher Sells one or more E-books to that E-book Retailer for Sale to consumers depends in any way on the Wholesale Price at which the E-book Publisher Sells the same E-book(s) to any other E-book Retailer for Sale to consumers; or

3. the revenue share or commission that E-book Retailer receives from the E-book Publisher in connection with the Sale of one or more E-books to consumers depends in any

way on the revenue share or commission that (a) any other E-book Retailer receives from the E-book Publisher in connection with the Sale of the same E-book(s) to consumers, or (b) that E-book Retailer receives from any other E-book Publisher in connection with the Sale of one or more of the other E-book Publisher's E-books.

For purposes of this Final Judgment, it will not constitute a Price MFN under subsection 3 of this definition if PenguinMacmillan agrees, at the request of an E-book Retailer, to meet more favorable pricing, discounts, or allowances offered to the E-book Retailer by another E-book Publisher for the period during which the other E-book Publisher provides that additional compensation, so long as that agreement is not or does not result from a pre-existing agreement that requires PenguinMacmillan to meet all requests by the E-book Retailer for more favorable pricing within the terms of the agreement.

Q.N. "Publisher Defendants" means Hachette, HarperCollins, Macmillan, Penguin, and Simon & Schuster. Where this Final Judgment imposes an obligation on Publisher Defendants to engage in or refrain from engaging in certain conduct, that obligation shall apply to each Publisher Defendant individually and to any joint venture or other business arrangement established by any two or more Publisher Defendants.

P.O. "Purchase" means a consumer's acquisition of one or more E-books as a result of a Sale.

Q.P. "Retail Price" means the price at which an E-book Retailer or, under an Agency Agreement, an E-book Publisher Sells an E-book to a consumer.

R.Q. “Sale” means delivery of access to a consumer to read one or more E-books (purchased alone, or in combination with other goods or services) in exchange for payment; “Sell” or “Sold” means to make or to have made a Sale of an E-book to a consumer.

S.R. “Simon & Schuster” means Simon & Schuster, Inc., a New York corporation with its principal place of business in New York, New York, its successors and assigns, and its subsidiaries, divisions, groups, and partnerships, and their directors, officers, managers, agents, and employees.

T.S. “Wholesale Price” means (1) the net amount, after any discounts or other adjustments (not including promotional allowances subject to Section 2(d) of the Robinson-Patman Act, 15 U.S.C. § 13(d)), that an E-book Retailer pays to an E-book Publisher for an E-book that the E-book Retailer Sells to consumers; or (2) the Retail Price at which an E-book Publisher, under an Agency Agreement, Sells an E-book to consumers through an E-book Retailer minus the commission or other payment that E-book Publisher pays to the E-book Retailer in connection with or that is reasonably allocated to that Sale.

III. APPLICABILITY

This Final Judgment applies to PenguinHoltzbrinck and VGvH, acting individually or in concert, and all other Persons in active concert or participation with PenguinHoltzbrinck or VGvH who receive actual notice of this Final Judgment by personal service or otherwise.

IV. REQUIRED CONDUCT

~~A.—Within seventhree business days after entry of this Final Judgment, Penguin shall terminate any agreement with Apple relating to the Sale of E books that was executed prior to Penguin’s Macmillan’s stipulation to the entry of this Final Judgment.~~

A. ~~For~~, Macmillan shall notify each ~~agreement between Penguin and an~~ E-book Retailer ~~other than Apple~~ with which Holtzbrinck has an agreement relating to the Sale of E-books that Holtzbrinck will no longer enforce any term or terms in any such agreement that (1) restricts, limits restrict, limit, or impedes impede the E-book Retailer's ability to set, alter, or reduce the Retail Price of any E-book or to offer price discounts or any other form of promotions to encourage consumers to Purchase one or more E-books; ~~or (2), except to the extent consistent with Section VI.B of this Final Judgment.~~

B. For each agreement between Holtzbrinck and an E-book Retailer that contains a Price MFN, ~~Penguin~~Holtzbrinck shall notify the E-book Retailer, ~~by January 8, 2013, within three business days after Macmillan's stipulation to the entry of this Final Judgment~~ that the E-book Retailer may terminate the agreement with thirty-days notice and shall, thirty days after the E-book Retailer provides such notice, release the E-book Retailer from the agreement. For each such agreement that the E-book Retailer has not terminated within ten days after entry of this Final Judgment, ~~Penguin~~Holtzbrinck shall, as soon as permitted under the agreement, take each step required under the agreement to cause the agreement to be terminated and not renewed or extended.

C. ~~Penguin~~Holtzbrinck shall notify the Department of Justice in writing at least sixty days in advance of the formation or material modification of any joint venture or other business arrangement relating to the Sale, development, or promotion of E-books in the United States in which ~~Penguin~~Holtzbrinck and at least one other E-book Publisher (including another Publisher Defendant) are participants or partial or complete owners. Such notice shall describe the joint venture or other business arrangement, identify all E-book Publishers that are parties to it, and

attach the most recent version or draft of the agreement, contract, or other document(s) formalizing the joint venture or other business arrangement. Within thirty days after PenguinHoltzbrinck provides notification of the joint venture or business arrangement, the Department of Justice may make a written request for additional information. If the Department of Justice makes such a request, PenguinHoltzbrinck shall not proceed with the planned formation or material modification of the joint venture or business arrangement until thirty days after substantially complying with such additional request(s) for information. The failure of the Department of Justice to request additional information or to bring an action under the antitrust laws to challenge the formation or material modification of the joint venture shall neither give rise to any inference of lawfulness nor limit in any way the right of the United States to investigate the formation, material modification, or any other aspects or activities of the joint venture or business arrangement and to bring actions to prevent or restrain violations of the antitrust laws.

The notification requirements of this Section IV.C shall not apply to ordinary course business arrangements between PenguinHoltzbrinck and another E-book Publisher (not a Publisher Defendant) that do not relate to the Sale of E-books to consumers, or to business arrangements the primary or predominant purpose or focus of which involves: (i) E-book Publishers co-publishing one or more specifically identified E-book titles or a particular author's E-books; (ii) PenguinHoltzbrinck licensing to or from another E-book Publisher the publishing rights to one or more specifically identified E-book titles or a particular author's E-books; (iii) PenguinHoltzbrinck providing technology services to or receiving technology services from another E-book Publisher (not a Publisher Defendant) or licensing rights in technology to or from another E-book Publisher; or (iv) PenguinHoltzbrinck distributing E-books published by another

E-book Publisher (not a Publisher Defendant).—~~The notification requirements of this Section IV.C shall also not apply to the formation of Penguin Random House, review of which is pending before the Department of Justice.~~

D. ~~Penguin~~Macmillan shall furnish to the Department of Justice (1) by ~~January 8February 15~~, 2013, one complete copy of each agreement, executed, renewed, or extended on or after January 1, 2012, between ~~Penguin~~Holtzbrinck and any E-book Retailer relating to the Sale of E-books, and, (2) thereafter, on a quarterly basis, each such agreement executed, renewed, or extended since ~~Penguin's~~Macmillan's previous submission of agreements to the Department of Justice.

V. PROHIBITED CONDUCT

A. ~~For two years, Penguin~~Until December 18, 2014, Holtzbrinck shall not restrict, limit, or impede an E-book Retailer's ability to set, alter, or reduce the Retail Price of any E-book or to offer price discounts or any other form of promotions to encourage consumers to Purchase one or more E-books, ~~such two-year period to run separately for each E-book Retailer, at Penguin's option, from either:~~

1. ~~the termination of an agreement between Penguin and the E-book Retailer that restricts, limits, or impedes the E-book Retailer's ability to set, alter, or reduce the Retail Price of any E-book or to offer price discounts or any other form of promotions to encourage consumers to Purchase one or more E-books; or~~

2. ~~the date on which Penguin notifies the E-book Retailer in writing that Penguin will not enforce any term(s) in its agreement with the E-book Retailer that restrict, limit, or impede the E-book Retailer from setting, altering, or reducing the Retail Price of one or more~~

~~E-books, or from offering price discounts or any other form of promotions to encourage consumers to Purchase one or more E-books.~~

~~Penguin shall notify the Department of Justice of the option it selects for each E-book Retailer within seven days of making its selection.~~

B. ~~For two years after Penguin's stipulation to the entry of this Final Judgment,~~
PenguinUntil December 18, 2014, Holtzbrinck shall not enter into any agreement with any E-book Retailer that restricts, limits, or impedes the E-book Retailer from setting, altering, or reducing the Retail Price of one or more E-books, or from offering price discounts or any other form of promotions to encourage consumers to Purchase one or more E-books.

C. PenguinHoltzbrinck shall not enter into any agreement with an E-book Retailer relating to the Sale of E-books that contains a Price MFN.

D. PenguinMacmillan shall not retaliate against, or urge any other E-book Publisher or E-book Retailer to retaliate against, an E-book Retailer for engaging in any activity that PenguinHoltzbrinck is prohibited by Sections V.A, V.B, and VI.B.2 of this Final Judgment from restricting, limiting, or impeding in any agreement with an E-book Retailer. After the expiration of prohibitions in Sections V.A and V.B of this Final Judgment, this Section V.D shall not prohibit PenguinHoltzbrinck from unilaterally entering into or enforcing any agreement with an E-book Retailer that restricts, limits, or impedes the E-book Retailer from setting, altering, or reducing the Retail Price of any of Penguin'sHoltzbrinck's E-books or from offering price discounts or any other form of promotions to encourage consumers to Purchase any of Penguin'sHoltzbrinck's E-books.

E. ~~Penguin~~Holtzbrinck shall not enter into or enforce any agreement, arrangement, understanding, plan, program, combination, or conspiracy with any E-book Publisher (including another Publisher Defendant) to raise, stabilize, fix, set, or coordinate the Retail Price or Wholesale Price of any E-book or fix, set, or coordinate any term or condition relating to the Sale of E-books.

This Section V.E shall not prohibit ~~Penguin~~Holtzbrinck from entering into and enforcing agreements relating to the distribution of another E-book Publisher's E-books (not including the E-books of another Publisher Defendant) or to the co-publication with another E-book Publisher of specifically identified E-book titles or a particular author's E-books, or from participating in output-enhancing industry standard-setting activities relating to E-book security or technology.

F. ~~Penguin (including~~Holtzbrinck (and each officer of ~~each parent of Penguin~~VGvH who exercises direct control over ~~Penguin's~~Holtzbrinck's business decisions or strategies) shall not convey or otherwise communicate, directly or indirectly (including by communicating indirectly through an E-book Retailer with the intent that the E-book Retailer convey information from the communication to another E-book Publisher or knowledge that it is likely to do so), to any other E-book Publisher (including to an officer of a parent of a Publisher Defendant) any competitively sensitive information, including:

1. its business plans or strategies;
2. its past, present, or future wholesale or retail prices or pricing strategies for books sold in any format (*e.g.*, print books, E-books, or audio books);
3. any terms in its agreement(s) with any retailer of books Sold in any format;

or

4. any terms in its agreement(s) with any author.

This Section V.F shall not prohibit PenguinHoltzbrinck from communicating (a) in a manner and through media consistent with common and reasonable industry practice, the cover prices or wholesale or retail prices of books sold in any format to potential purchasers of those books; or (b) information PenguinHoltzbrinck needs to communicate in connection with (i) its enforcement or assignment of its intellectual property or contract rights, (ii) a contemplated merger, acquisition, or purchase or sale of assets, (iii) its distribution of another E-book Publisher's E-books, or (iv) a business arrangement under which E-book Publishers agree to co-publish, or an E-book Publisher agrees to license to another E-book Publisher the publishing rights to, one or more specifically identified E-book titles or a particular author's E-books.

VI. PERMITTED CONDUCT

A. Nothing in this Final Judgment shall prohibit PenguinMacmillan unilaterally from compensating a retailer, including an E-book Retailer, for valuable marketing or other promotional services rendered.

B. Notwithstanding Sections V.A and V.B of this Final Judgment, PenguinHoltzbrinck may enter into Agency Agreements with E-book Retailers under which the aggregate dollar value of the price discounts or any other form of promotions to encourage consumers to Purchase one or more of Penguin'sHoltzbrinck's E-books (as opposed to advertising or promotions engaged in by the E-book Retailer not specifically tied or directed to Penguin'sHoltzbrinck's E-books) is restricted; *provided that* (1) such agreed restriction shall not interfere with the E-book Retailer's ability to reduce the final price paid by consumers to purchase Penguin'sHoltzbrinck's E-books by an aggregate amount equal to the total commissions

PenguinHoltzbrinck pays to the E-book Retailer, over a period of at least one year, in connection with the Sale of Penguin'sHoltzbrinck's E-books to consumers; (2) PenguinHoltzbrinck shall not restrict, limit, or impede the E-book Retailer's use of the agreed funds to offer price discounts or any other form of promotions to encourage consumers to Purchase one or more E-books; and (3) the method of accounting for the E-book Retailer's promotional activity does not restrict, limit, or impede the E-book Retailer from engaging in any form of retail activity or promotion.

VII. ANTITRUST COMPLIANCE

Within thirty days after entry of this Final Judgment, PenguinMacmillan shall designate itsHoltzbrinck's general counsel or chief legal officer, or an employee reporting directly to its general counsel or chief legal officer, as Antitrust Compliance Officer with responsibility for ensuring Penguin'sMacmillan's compliance with this Final Judgment. The Antitrust Compliance Officer shall be responsible for the following:

A. furnishing a copy of this Final Judgment, within thirty days of its entry, to each of Penguin'sHoltzbrinck's officers and directors, ~~and~~ to each of Penguin'sHoltzbrinck's employees engaged, in whole or in part, in the distribution or Sale of E-books, and to each of VGvH's officers, directors, or employees involved in the development of Holtzbrinck's plans or strategies relating to E-books;

B. furnishing a copy of this Final Judgment in a timely manner to each officer, director, or employee who succeeds to any position identified in Section VII.A of this Final Judgment;

C. ensuring that each person identified in Sections VII.A and VII.B of this Final Judgment receives at least four hours of training annually on the meaning and requirements of this

Final Judgment and the antitrust laws, such training to be delivered by an attorney with relevant experience in the field of antitrust law;

D. obtaining, within sixty days after entry of this Final Judgment and on each anniversary of the entry of this Final Judgment, from each person identified in Sections VII.A and VII.B of this Final Judgment, and thereafter maintaining, a certification that each such person (a) has read, understands, and agrees to abide by the terms of this Final Judgment; and (b) is not aware of any violation of this Final Judgment or the antitrust laws or has reported any potential violation to the Antitrust Compliance Officer;

E. conducting an annual antitrust compliance audit covering each person identified in Sections VII.A and VII.B of this Final Judgment, and maintaining all records pertaining to such audits;

F. communicating annually to ~~Penguin's employees~~Holtzbrinck's employees and to all VGvH employees identified in Sections VII.A and VII.B of this Final Judgment that they may disclose to the Antitrust Compliance Officer, without reprisal, information concerning any potential violation of this Final Judgment or the antitrust laws;

G. taking appropriate action, within three business days of discovering or receiving credible information concerning an actual or potential violation of this Final Judgment, to terminate or modify ~~Penguin's~~Macmillan's conduct to assure compliance with this Final Judgment; and, within seven days of taking such corrective actions, providing to the Department of Justice a description of the actual or potential violation of this Final Judgment and the corrective actions taken;

H. furnishing to the Department of Justice on a quarterly basis electronic copies of any non-privileged communications with any Person containing allegations of Penguin's Macmillan's noncompliance with any provisions of this Final Judgment;

I. maintaining, and furnishing to the Department of Justice on a quarterly basis, a log of all oral and written communications, excluding privileged or public communications, between or among (1) any of Penguin's Macmillan's officers, directors, or employees involved in the development of Penguin's Holtzbrinck's plans or strategies relating to E-books, and (2) any person employed by or associated with another Publisher Defendant, relating, in whole or in part, to the distribution or sale in the United States of books sold in any format, including an identification (by name, employer, and job title) of the author and recipients of and all participants in the communication, the date, time, and duration of the communication, the medium of the communication, and a description of the subject matter of the communication (for a collection of communications solely concerning a single business arrangement that is specifically exempted from the reporting requirements of Section IV.C of this Final Judgment, Penguin Macmillan may provide a summary of the communications rather than logging each communication individually); and

J. providing to the Department of Justice annually, on or before the anniversary of the entry of this Final Judgment, a written statement as to the fact and manner of Penguin's Macmillan's compliance with Sections IV, V, and VII of this Final Judgment.

VIII. COMPLIANCE INSPECTION

A. For purposes of determining or securing compliance with this Final Judgment, or of determining whether the Final Judgment should be modified or vacated, and subject to any legally

recognized privilege, from time to time duly authorized representatives of the Department of Justice, including consultants and other persons retained by the Department of Justice, shall, upon written request of an authorized representative of the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to PenguinMacmillan, be permitted:

1. access during Penguin'sMacmillan's office hours to inspect and copy, or at the option of the United States, to require PenguinMacmillan to provide to the United States hard copy or electronic copies of all books, ledgers, accounts, records, data, and documents in the possession, custody, or control of PenguinMacmillan, relating to any matters contained in this Final Judgment; and

2. to interview, either informally or on the record, Penguin'sMacmillan's officers, employees, or agents, who may have their individual counsel present, regarding such matters. The interviews shall be subject to the reasonable convenience of the interviewee and without restraint or interference by PenguinMacmillan.

B. Upon the written request of an authorized representative of the Assistant Attorney General in charge of the Antitrust Division, PenguinMacmillan shall submit written reports or respond to written interrogatories, under oath if requested, relating to any of the matters contained in this Final Judgment as may be requested. Written reports authorized under this paragraph may, in the sole discretion of the United States, require PenguinMacmillan to conduct, at their cost, an independent audit or analysis relating to any of the matters contained in this Final Judgment.

C. No information or documents obtained by the means provided in this Section shall be divulged by the United States to any person other than an authorized representative of the executive branch of the United States, except in the course of legal proceedings to which the

United States is a party (including grand jury proceedings), or for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.

D. If at the time information or documents are furnished by PenguinMacmillan to the United States, PenguinMacmillan represents and identifies in writing the material in any such information or documents to which a claim of protection may be asserted under Rule 26(c)(1)(G) of the Federal Rules of Civil Procedure, and PenguinMacmillan marks each pertinent page of such material, “Subject to claim of protection under Rule 26(c)(1)(G) of the Federal Rules of Civil Procedure,” then the United States shall give PenguinMacmillan ten calendar days notice prior to divulging such material in any civil or administrative proceeding.

IX. RETENTION OF JURISDICTION

This Court retains jurisdiction to enable any party to apply to this Court at any time for further orders and directions as may be necessary or appropriate to carry out or construe this Final Judgment, to modify any of its provisions, to enforce compliance, and to punish violations of its provisions.

X. NO LIMITATION ON GOVERNMENT RIGHTS

Nothing in this Final Judgment shall limit the right of the United States to investigate and bring actions to prevent or restrain violations of the antitrust laws concerning any past, present, or future conduct, policy, or practice of PenguinMacmillan.

XI. EXPIRATION OF FINAL JUDGMENT

Unless this Court grants an extension, this Final Judgment shall expire five years from the date of its entry.

XII. PUBLIC INTEREST DETERMINATION

Entry of this Final Judgment is in the public interest. The parties have complied with the requirements of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16, including making copies available to the public of this Final Judgment, the Competitive Impact Statement, and any comments thereon and the United States' responses to comments. Based upon the record before the Court, which includes the Competitive Impact Statement and any comments and response to comments filed with the Court, entry of this Final Judgment is in the public interest.

Date: _____

Court approval subject to procedures set forth in the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16

United States District Judge