

Nos. 13-3857, 13-3864, 13-3867

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

THE STATE OF TEXAS, et al.,

Plaintiffs-Appellees,

v.

PENGUIN GROUP (USA) INC., et al.,

Defendants/Defendants-Appellants.

On Appeal From The United States District Court
For The Southern District Of New York
No. 1:12-cv-3394 (DLC)

JOINT MOTION TO CONSOLIDATE APPEALS

Cynthia Richman
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, NW
Washington, DC 20036
(202) 955-8500

Theodore J. Boutrous, Jr.
Daniel G. Swanson
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, CA 90071
(213) 229-7000

Counsel for Defendant-Appellant Apple Inc.

James W. Quinn
Yehudah L. Buchweitz
Gregory Silbert
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, NY 10153
(212) 310-8256

*Counsel for Defendants-Appellants
Simon & Schuster, Inc. and Simon &
Schuster Digital Sales, Inc.*

Eamon Paul Joyce
SIDLEY AUSTIN LLP
787 Seventh Avenue
New York, NY 10019
(212) 839-8555

*Counsel for Defendant-Appellant
Holtzbrinck Publishers, LLC d/b/a
Macmillan*

Eric Lipman
Assistant Attorney General
Office of the Texas Attorney General
P.O. Box 12548
Austin, TX 78711
(512) 463-1579

Counsel for Plaintiffs-Appellees

CORPORATE DISCLOSURE STATEMENTS

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Defendants-appellants state the following:

Apple Inc. has no parent corporation. To the best of Apple Inc.'s knowledge and belief, and based on publicly filed disclosures, as of November 22, 2013, no publicly held corporation owns 10% or more of Apple Inc.'s stock.

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

Simon & Schuster Digital Sales, Inc. is a non-governmental corporate entity and its direct parent entity is Simon & Schuster, Inc. Simon & Schuster, Inc. is a non-governmental corporate entity and its direct and indirect parent entities are: French Street Management LLC, CBS Operations, Inc., and CBS Corporation ("CBS Corp.").

CBS Corp. is a publicly held corporation. To CBS Corp.'s knowledge without inquiry, GAMCO Investors, Inc. ("GAMCO") filed a Schedule 13D/A with the Securities and Exchange Commission on March 15, 2011 reporting that GAMCO and

certain persons and entities affiliated therewith (any of which may be publicly held) own in the aggregate more than 10% of CBS Corp.'s Class A voting common stock.

JOINT MOTION TO CONSOLIDATE APPEALS

The parties jointly request that this Court consolidate this appeal (State Action),¹ with the appeal of the action brought by the United States Department of Justice, *United States of America v. Apple Inc.*, No. 13-3741 (United States Action).²

The claims and issues raised in both sets of appeals relate to the trade e-books market and were litigated and tried concurrently below by defendant-appellant Apple and plaintiffs-appellees. Apple submitted evidence, briefing, and filings jointly in both the State Action and the United States Action, as did plaintiffs-appellees. On July 10, 2013, the district court issued an opinion and order that relied on the same findings of fact and legal analysis to make conclusions regarding Apple's liability in both the State Action and the United States Action. *See* State Action ECF No. 237; United States Action ECF No. 326. The court concluded that Apple violated Section 1 of the Sherman Act "and relevant state statutes to the extent those laws are congruent with Section 1." State Action ECF No. 237 at 159; United States Action ECF No. 326 at 159. And on September 6, 2013, the district court entered a permanent injunction that granted identical injunctive relief in both actions. *See* State

¹ According to PACER, the Court has already consolidated Apple's appeal in the State Action (No. 13-3857) with the publishers' appeals (Nos. 13-3864, 13-3867).

² Similarly, according to PACER, the Court has already consolidated Apple's appeal in the United States Action (No. 13-3741) with the publishers' appeals (Nos. 13-3748, 13-3783).

Action ECF No. 286; United States Action ECF No. 374. Defendants-appellants all appeal from this injunction.

This Court has authority to consolidate appeals arising from the same underlying litigation. *See* Fed. R. App. P. 3(b)(2); *Chem One, Ltd. v. M/V Rickmers Genoa*, 660 F.3d 626, 642 (2d Cir. 2011). The district court effectively tried both cases as though they were consolidated. And the appeals involve the same issues and the same orders and rulings. Consolidating these appeals into a single appellate proceeding will avoid duplicative litigation and the risk of potentially divergent outcomes.

CONCLUSION

The Court should consolidate case numbers 13-3857, 13-3864, and 13-3867 with case numbers 13-3741, 13-3748, and 13-3783 for all purposes, including briefing and oral argument.³

³ Appellants Simon & Schuster, Inc. and Simon & Schuster Digital Sales, Inc. (“S&S”), although joining in this motion to consolidate their appeals in the State Action and in the United States Action (Nos. 13-3748, 13-3864), take the position that their appeals need not be briefed, argued, or decided together with Apple’s appeals (Nos. 13-3741, 13-3857) because the S&S appeals raise a narrow issue concerning a single provision in the injunction against Apple that S&S assert modified their own agreed upon Final Judgment in the United States Action (ECF No. 119), and the Order and Stipulated Injunction in the parallel State settlement case. *See* No. 12-cv-6625 (ECF No. 71).

Respectfully submitted,

Date: November 26, 2013

/s/ Theodore J. Boutrous, Jr.

Theodore J. Boutrous, Jr.
Daniel G. Swanson
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, CA 90071
(213) 229-7000

Cynthia Richman
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, NW
Washington, DC 20036
(202) 955-8500

*Counsel for Defendant-Appellant
Apple Inc.*

Date: November 26, 2013

/s/ Yehudah L. Buchweitz

James W. Quinn
Yehudah L. Buchweitz
Gregory Silbert
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, NY 10153
(212) 310-8256

*Counsel for Defendants-Appellants
Simon & Schuster, Inc. and Simon &
Schuster Digital Sales, Inc.*

Date: November 26, 2013

/s/ Eamon Paul Joyce

Eamon Paul Joyce
SIDLEY AUSTIN LLP
787 Seventh Avenue
New York, NY 10019
(212) 839-8555

*Counsel for Defendant-Appellant
Holtzbrinck Publishers, LLC d/b/a
Macmillan*

Date: November 26, 2013

/s/ Eric Lipman

Eric Lipman
Assistant Attorney General
Office of the Texas Attorney General
P.O. Box 12548
Austin, TX 78711
(512) 463-1579

Counsel for Plaintiffs-Appellees

CERTIFICATE OF SERVICE

I hereby certify that on November 26, 2013, an electronic copy of the foregoing Joint Motion to Consolidate Appeals was filed with the Clerk of Court for the United States Court of Appeals for the Second Circuit using the Court's CM/ECF system and was served electronically by the Notice of Docket Activity upon registered CM/ECF participants.

/s/ Theodore J. Boutrous, Jr.
Theodore J. Boutrous, Jr.
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, CA 90071