

MEMO ENDORSED



U.S. Department of Justice

Antitrust Division

USDC SDNY
DOCUMENT
ELECTRONICALLY FILED
DOC #:
DATE FILED: 6/11/2012

Liberty Square Building
450 Fifth Street, N.W.
Washington, DC 20530

HAND-DELIVERED

June 7, 2012

Honorable Denise L. Cote
United States District Court
Southern District of New York
500 Pearl Street, Room 1610
New York, NY 10007

Re: *United States, et al. v. Apple, Inc., et al.*, Case No. 12-CIV-2826 (DLC)

Dear Judge Cote:

The United States asks that the Court excuse costly *Federal Register* publication of the voluminous public comments submitted in this matter, and instead authorize electronic publication for good cause, pursuant to 15 U.S.C. § 16(d). The United States has conferred with all parties to this action and this motion is unopposed. Attached as "Exhibit 1" is a Proposed Order permitting the United States to satisfy its statutory publication obligations by posting public comments on the Antitrust Division's website, in tandem with *Federal Register* publication of the relevant internet address.

The United States filed its complaint in this case on April 11, 2012, along with a proposed Final Judgment with respect to Hachette Book Group, Inc., HarperCollins Publishers L.L.C., and Simon & Schuster, Inc. As required by the Antitrust Procedures and Penalties Act, 15 U.S.C. § (b)-(h) (the "Tunney Act"), the United States caused notices to be published in the *Federal Register*, the *Washington Post* and the *New York Post*, providing instructions for public comment on the proposed Final Judgment. Although the 60-day comment period will not close until June 25, 2012, the United States already has received more than 150 comments.

As required by the Tunney Act, the United States will file with the Court and serve on all parties to this action a Response to Comments, which will include copies of all comments submitted, as an attachment.¹ The Response to Comments will be published in the *Federal Register*. The Tunney Act also requires that the comments be made available to the public, which, before the Tunney Act was amended in 2004, the United States was required to accomplish through publication in the *Federal Register*.

¹ Given the volume of public comments received and ECF restrictions on attachment file-size, the United States seeks to file and serve comments via digital files submitted on physical media.

However, the Tunney Act now authorizes the United States to publish comments by “alternative means” pursuant to 15 U.S.C. § 16(d) when the costs of *Federal Register* publication exceed the benefits thereof. In this case, the United States already has received over 200 pages of comments, most of which will require photographic treatment for *Federal Register* publication at a rate of \$522 per page,² generating publication costs of more than \$100,000. The United States anticipates the receipt of a similar or greater volume of comments before the closing of the public comment period, on June 25, 2012.

Further, publication in the *Federal Register* does not confer any significant public interest benefit that cannot be better served by electronic publication. Indeed, at the time of passage of the 2004 amendment authorizing alternative publication, Senator Leahy of the Judiciary Committee noted that *Federal Register* publication can offer “little benefit, because those materials are, if anything, more accessible on the Web than in a library.” 150 CONG. REC. 6,328 (2004). Likewise, Senator Kohl opined that alternatives such as “posting the proposed decrees electronically, [] are sufficient to inform interested persons of the proposed consent decree.” 150 CONG. REC. 6,332 (2004).

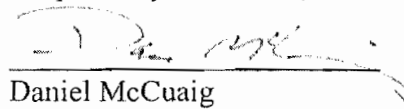
Recognizing the benefits of electronic publication, other courts have excused *Federal Register* publication of Tunney Act comments and/or attachments in favor of electronic publication in several recent cases. See *United States v. American Express Company, et al.*, No. 10-CV-4496-NGG (E.D.N.Y. June 20, 2011) (attached as Exhibit 2); *United States v. KeySpan Corp.*, No. 1:10-cv-01415-WHP (S.D.N.Y. June 28, 2010) (attached as Exhibit 3); *United States, et al. v. Ticketmaster Entertainment, Inc., et al.*, No. 1:10-cv-00139-RMC (D.D.C. June 15, 2010) (attached as Exhibit 4).

Finally, electronic publication also will ensure timely filing of the United States’ motion for entry of the proposed Final Judgment. Prior to filing its motion for entry, the United States must satisfy all of the Tunney Act procedures, including making comments available to the public. Relief from the obligation to publish comments in the *Federal Register*, a process not under the control of the United States and subject to delay, will ensure that the United States can meet the Court’s July 27, 2012 deadline.

Accordingly, the United States asks that the Court excuse publication of the public comments in the *Federal Register* and, instead, allow comments to be posted on the Antitrust Division website in conjunction with *Federal Register* publication of the internet address at which comments can be read and downloaded.

Granted.
James Cote
June 11, 2012

Respectfully Submitted,


Daniel McCuaig
Counsel for the United States

cc: Provided electronically to all parties in this action.

² See Government Printing Office Circular Letter No. 777 (July 2, 2010), available at: <http://www.gpo.gov/customers/letters/777.htm>.