

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE ELECTRONIC BOOKS ANTITRUST
LITIGATION

No. 11-md-02293 (DLC)
ECF Case

This Document Relates to:

CLASS ACTION

ALL ACTIONS

**MEMORANDUM IN SUPPORT OF SETTLEMENT CLASS'S MOTION FOR FINAL
APPROVAL OF HARPERCOLLINS, HACHETTE
AND SIMON & SCHUSTER SETTLEMENTS**

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FEDERAL RULES

Federal Rule of Civil Procedure 23 *passim*

STATE STATUTES

Minn. Stat. § 8.31, subd. 2(b)4

I. INTRODUCTION

On August 5, 2013, the Court preliminarily approved a settlement agreement between Minnesota residents and defendants HarperCollins, Hachette, and Simon & Schuster.¹ Plaintiffs have provided direct notice to more than 440,000 eligible consumers, together with general publication notices, in compliance with the Court's order. The deadline has passed for filing exclusions and objections. No objections to the Settlement were filed, and three requests to opt-out were received.² The fairness hearing for the Settlement is set for December 6, 2013.

Pursuant to Federal Rule of Civil Procedure 23, plaintiffs now request the Court find that the settlement is fair, reasonable and adequate, and grant final approval. In their Memorandum in Support of Class Plaintiffs' Motion for Preliminary Approval of the Settlement,³ plaintiffs set forth the legal and factual bases to conclude that the Settlement meets the fair, reasonable and adequate standards for preliminary approval and, to a large extent, provided the necessary support for final approval. The settlement is the result of arm's length settlement negotiations, with a formal mediation session conducted by Honorable Judge Kimba M. Wood. For all of the reasons discussed in the preliminary approval papers, and discussed herein, it is respectfully submitted that the settlement meets the standards for final approval and merits the approval of the Court.

¹ Consistent with the settlement agreement, "Hachette" means Hachette Book Group, Inc., Hachette Digital, Inc. and Hachette Livre SA. "HarperCollins" means HarperCollins Publishers L.L.C. and "Simon & Schuster" means Simon & Schuster, Inc. and Simon & Schuster Digital Sales, Inc.

² See Declaration of Kim Schmidt Regarding Notice Provided by Rust Consulting Regarding Preliminarily Approved Settlements ("Schmidt Declaration" or Schmidt Decl.), Ex. E, ECF No. 452-4, Nov. 21, 2013 (One exclusion request is from a Minnesota consumer and two exclusion requests did not provide a state of residence. Plaintiffs count them here as Minnesota consumers in an abundance of caution.).

³ June 21, 2013, ECF No. 362. Unless otherwise stated, ECF Nos. here refer to *In re Electronic Books Antitrust Litig.*, No. 11-md-02293 (DLC) (S.D.N.Y.)

II. FACTUAL AND PROCEDURAL BACKGROUND

A. Plaintiffs' Investigation

Class Counsel began its investigation in about April 2010, after market prices for titles of E-books that the publisher defendants sold all went up by 30 to 50 percent – nearly simultaneously. This pricing behavior caused Class Counsel to start analyzing the market and developing the facts pled in the first civil litigation filed, *Petru, et al. v. Apple Inc., et al.*, No. 11-cv-03892-EMC (N.D. Cal.). Class Counsel retained experts and investigators who, collectively, spent over 200 hours analyzing the market, retrieving electronic pricing information, and conducting their analysis in order to present robust factual allegations in the *Petru* action. On December 9, 2011, the United States Judicial Panel on Multidistrict Litigation transferred all related actions to the Southern District of New York. On December 21, 2011, this Court appointed Hagens Berman Sobol Shapiro LLP and Cohen Milstein Sellers & Toll PLLC as co-lead counsel for the plaintiff classes, after which they filed the Class Complaint.⁴

B. Litigation to Date

Defendants jointly moved to dismiss the Class Complaint. The Court denied the motions to dismiss on May 15, 2012, and the parties began several months of coordinated discovery. Class plaintiffs (in conjunction with the State Attorneys General and the Department of Justice in the coordinated litigation) obtained and analyzed more than 1.6 million documents and detailed transactional data from the six defendants and numerous third parties, and conducted more than fifty-six depositions.

⁴ “Class Complaint” refers to Consolidated Amended Class Action Complaint, Jan. 20, 2012, ECF No. 47.

C. Settlement Negotiations

Class plaintiffs and HarperCollins, Hachette and Simon & Schuster began discussing possible resolution of the claims of Minnesota residents in October 2012. On April 16, 2013, a formal mediation session was held before Judge Kimba M. Wood. On June 20, 2013, the parties executed a formal Settlement Agreement.⁵

Although this motion for final approval is being filed separately, the administration of the Minnesota-only settlement is being consolidated into an aggregated distribution plan as explained below.

III. THE PROPOSED SETTLEMENTS

The Settlement is comprised of monetary payments and releases. If the Court grants final approval, these components will be implemented as follows:

A. Monetary Payments

1. Consumer Compensation

The primary component of the Settlement is the payment to Minnesota residents who purchased E-books from any defendant publisher from April 1, 2010 to May 21, 2012. Pursuant to the Settlement Agreement, HarperCollins, Hachette and Simon & Schuster agree to pay the sum of \$2,119,000 to compensate Minnesota class members. These funds, together with any accrued interest, will be distributed according to a joint distribution plan with the State Attorneys General and other class settlements. If consumer funds remain after initial distribution, the Settlement Agreement contemplates such funds be reserved for additional future consumer distribution resulting from settlement or judgment. Any residue will be distributed to *cy pres*

⁵ Settlement Agreement (“Settlement”) (between HarperCollins, Hachette, and Simon & Schuster and Class Plaintiffs), June 21, 2013, ECF No. 362-1.

Reading is Fundamental, a non-profit organization dedicated to motivating children to become lifelong readers, or as otherwise directed by the Court.

2. Payment of Class Counsel's Attorneys' Fees and Costs

HarperCollins, Hachette and Simon & Schuster agree to pay to counsel for the Settlement Class \$731,000 for their attorneys' fees, costs of investigation, litigation and other related costs. On October 7, 2013, Class Counsel filed a separate motion requesting an award of attorneys' fees and costs.⁶

3. Compensation to the State of Minnesota

A separate Assurance of Discontinuance was filed on June 28, 2013, by the State of Minnesota in Minnesota state court pursuant to Minn. Stat. § 8.31, subd. 2(b). HarperCollins, Hachette and Simon & Schuster have agreed to pay \$25,000 each to the State of Minnesota for the costs of its investigation.

4. Settlement Notice and Administrative Costs

HarperCollins, Hachette and Simon & Schuster have paid and will continue to pay all reasonable costs associated with administering the Settlement, including expert costs, the consumer notice plan, and the distribution plan. The settling parties agreed to use the funds already available in the settlement cost account to cover further administration costs.⁷ The defendants have agreed to make additional payments to this account as needed, upon notice from the State Liaison Counsel. If monies remain in this account at the conclusion of this matter, such monies will be returned to the settling publishers on a *pro rata* basis.

⁶ Memorandum in Support of Class Counsel's Motion for Award of Attorneys' Fees, Reimbursement of Expenses, and Participation Awards for Named Plaintiffs, Oct. 8, 2013, ECF No. 419.

⁷ Settlement Agreement at 10, ECF No. 362-1.

B. Release of Claims

The class shall release the claims of individual consumers who purchased E-books from any of the defendant publishers from April 1, 2010 to May 21, 2012, with the exception of claims of individual consumers who exercised the right to exclude themselves from the Settlement. Claims are released against HarperCollins, Hachette and Simon & Schuster only, not any other publisher defendant or Apple.

IV. THE APPROVED NOTICE WAS ADEQUATE AND SATISFIED DUE PROCESS

For class settlements “notice to class members must be reasonably calculated under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.”⁸ In addition, the notice should “fairly, accurately, and neutrally describe the claims and parties in the litigation, as well as the terms of the proposed settlement and the identity of persons entitled to participate in it.”⁹

Class Counsel, working with Rust Consulting, Inc., the State Attorneys General and with the oversight of this Court, prepared the direct notices for consumers. These notices provided clear and comprehensive information concerning the proposed settlements, the consumer’s options, and the procedures to follow. In order to provide these direct notices to as many eligible consumers as possible, plaintiffs’ counsel (working with Rust Consulting) worked with the six largest E-book retailers – Amazon, Barnes & Noble, Apple, Kobo, Sony, and Google. These retailers confirmed they had determined which of their Minnesota customers are eligible consumers for purposes of the Settlement and had determined the eligible purchases of those customers. Emailed or mailed notice was sent directly to 440,956 unique email addresses

⁸ *In re AremisSoft Corp. Sec. Litig.*, 210 F.R.D. 109, 119 (D.N.J. 2002); *see Cronas v. Willis Group Holdings, Ltd.*, No. 06 Civ. 15295, 2011 U.S. Dist. LEXIS 147171, at *13 (S.D.N.Y. Dec. 19, 2011). Internal citations omitted and emphasis added, unless otherwise noted.

⁹ *In re Marsh ERISA Litig.*, 265 F.R.D. 128, 145 (S.D.N.Y. 2010).

identified by these retailers as eligible Minnesota consumers.¹⁰ Because these retailers collectively accounted for more than 98 percent of E-book sales during the relevant period, plaintiffs believe this direct notice apprised almost all interested parties of the settlements. Details concerning the processes used by Rust Consulting and the retailers to identify and notify eligible consumers are found in the affidavits or declarations of representatives for Rust Consulting, Amazon, Barnes & Noble, Apple, Kobo, Sony, and Google.¹¹

To reach those relatively few eligible Minnesota consumers who may not have received direct notice from the Claims Administrator or their retailer, Kinsella Media, LLC placed web-based advertisements on four online websites and networks, as well as two networks that serve advertisements to mobile devices and one to RSS feeds.¹² The detailed website utilized for the previously approved settlements between certain defendants and the settling State Attorneys General has remained active, but a new webpage was activated specifically for Minnesota consumers on August 30, 2013.¹³ This Minnesota-consumer website has been continually updated to include all notices and relevant pleadings in this case and electronic forms for eligible

¹⁰ Schmidt Decl., ¶ 17.

¹¹ Schmidt Declaration, ECF No. 452-4; Declaration of Charles S. Wright Regarding Notice of Preliminary Approval of Settlements Provided by Amazon.com, Nov. 21, 2013, ECF No. 452-5; Declaration of Bradley A. Feuer Regarding Notice of Preliminary Approval of Settlements Provided by Barnes & Noble, Inc., Nov. 21, 2013, ECF No. 452-6; Declaration of Daniel Quinn Regarding Notice of Preliminary Approval of Settlements Provided by Apple Inc., Nov. 21, 2013, ECF No. 452-7; Declaration of Nicolas Catros Regarding Notice of Preliminary Approval of Settlements Provided by Kobo Inc., Nov. 21, 2013, ECF No. 452-8; Declaration of Natascha Helbig Regarding Notice of Preliminary Approval of Settlements Provided by Sony Electronics, Inc., Nov. 21, 2013, ECF No. 452-9; and Declaration of Stella Loh Regarding Notice of Preliminary Approval of Settlements Provided by Google, Inc., Nov. 21, 2013, ECF No. 452-10.

¹² Declaration of Katherine Kinsella (“Kinsella Decl.”), ¶¶ 17-19, Nov. 21, 2013, ECF No. 452-3.

¹³ Schmidt Decl., ¶ 20.

consumers to use for claims, check requests and exclusions.¹⁴ Users who clicked on the related online, mobile and RSS feed advertisements were connected to this website.

Both direct and indirect advertising notices for the Settlement were sent out beginning on August 30, 2013.¹⁵ Pursuant to the Order of Preliminary Approval¹⁶, eligible consumers had a 45-day notice period to submit objections to the Settlements, request to opt-out from one or more of the Settlements, request a check instead of a credit, or submit a claim form, if necessary. Only one known Minnesota consumer and two possible Minnesota consumers (who states of residence are unknown) requested exclusion from the settlement. No consumer filed an objection to this settlement.¹⁷

The Notice Plan, as implemented, exceeds the requirements of due process in this case: an overwhelming majority of eligible consumers received direct, clear and comprehensive notices of the settlement and their rights to participate in them.¹⁸

V. THE SETTLEMENT MEETS THE STANDARDS FOR FINAL APPROVAL

A. The Settlement Process Was Procedurally Fair

In evaluating the fairness, reasonableness and adequacy of a class action settlement, courts consider and balance a number of factors under Rule 23. “A presumption of fairness, adequacy, and reasonableness may attach to a class settlement reached in arm’s-length negotiations between experienced, capable counsel after meaningful discovery.”¹⁹

¹⁴ *Id.*

¹⁵ *Id.*, ¶¶ 9-13.

¹⁶ “Order of Preliminary Approval or “Prelim. App. Order” refers to the Order Preliminarily Approving Class Plaintiffs’ Settlement with HarperCollins, Hachette, and Simon & Schuster, Aug. 5, 2013, ECF No. 374.

¹⁷ *Id.*, ¶¶ 22-23.

¹⁸ Kinsella Decl., ¶ 32.

¹⁹ *Cronas*, 2011 U.S. Dist. LEXIS 147171, at *6-7.

Here, settlement discussions were initiated by experienced counsel for all parties after voluminous, substantive and meaningful discovery. Negotiating counsel for both sides were well-prepared to analyze this complicated antitrust matter. This settlement is entitled to a presumption of procedural fairness.

B. The Settlement Is Reasonable, Adequate and Substantively Fair

This Court has already initially considered all the relevant factors in deciding to grant preliminary approval of the settlement (with the exception of the reaction of class members), and found that the settlement falls within the range of reasonableness meriting possible final approval.²⁰ The Court has also already spent copious time reviewing the settlements with these three defendants and the Attorneys General of fifty-five States, Commonwealths, Territories and Possessions. During that review, the Court found that the previously approved settlements satisfied the factors for final approval under *Grinnell*.²¹ Given the similarity between those settlements and this, the Settlement should be seen as fair, reasonable and adequate. Plaintiffs address each of the *Grinnell* factors briefly below.²²

²⁰ See Prelim. App. Order at 2, ECF No. 374.

²¹ *City of Detroit v. Grinnell Corp.*, 495 F.2d 448 (2d Cir. 1974); Transcript of February 8, 2013 Fairness Hearing for Final Approval of Settlements with HarperCollins, Simon & Simon and Hachette, *The State of Texas, et al. v. Hachette Book Group, Inc. et al.*, No.12-cv-6625 (S.D.N.Y.).

²² The nine *Grinnell* factors to be considered by the Court at final approval are: (1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; and (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation. See *Grinnell*, 495 F.2d at 463.

1. The Complexity, Expense, and Likely Duration of the Litigation

As this Court is aware, antitrust litigation is complex, expensive and likely to take years to reach resolution. And even after completion in the trial court, appeals are likely. One needs to look no further than Apple's recent opposition to class certification to understand the vociferous opposition faced by any class plaintiff. Short of settlement, this litigation would likely take at least another year to complete. This settlement drastically reduced the duration, complexity, expert analysis and evidentiary issues for both the first proceeding and the scheduled second trial, and removes the expense and delay which would accompany an expected appeal in absence of the settlement. Where litigation is potentially lengthy and will result in great expense, settlement is in the best interest of class members.²³

2. The Reaction of the Class to the Settlement

“[T]he reaction of the class to the settlement is perhaps the most significant factor to be weighed in considering its adequacy.”²⁴ Here, the class's reaction to the settlement was overwhelmingly positive. As noted above, direct notice of the settlement was sent to 440,956 Minnesota consumers. Other web-based notices and newspaper notices ensured that a very high percentage of eligible consumers received important information about their legal rights relating to these Settlements. Despite this exceptional notice coverage, no class members objected to this settlement and only three class members requested exclusion. When relatively few opt-out or object to the settlement, the lack of opposition supports approval.²⁵ The total absence of

²³ *Slomovics v. All for a Dollar, Inc.*, 906 F. Supp. 146, 149 (E.D.N.Y. 1995).

²⁴ *Maley v. Del Global Techs. Corp.*, 186 F. Supp. 2d 358, 362 (S.D.N.Y. 2002).

²⁵ *See In re Sony SXRDRear Proj. Tele. Class Action Litig.*, No. 06 Civ. 5173, 2008 WL 1956267, at *6 (S.D.N.Y. May 1, 2008) (“The small number of opt-outs and objections relative to the size of the class in this case supports approval of the Settlement.”)

objections demonstrates Minnesota class members' satisfaction with the settlement's terms.²⁶ Indeed, "the lack of objections may well evidence the fairness of the [s]ettlement."²⁷ This *Grinnell* factor weighs heavily in favor of approving the proposed settlement.

3. The State of the Proceedings and Amount of Discovery Completed

This factor weighs whether the litigation was developed sufficiently to provide counsel with an adequate appreciation of the merits of the case from which to fairly negotiate and settle the action. Prior to filing the lawsuit, plaintiffs engaged in substantial investigations of the defendants' actions. After filing a complaint, plaintiffs vigorously prosecuted the lawsuit, both individually and jointly with the State Attorneys General and the Department of Justice, pursuant to joint prosecution agreements. A vast amount of litigation discovery has taken place. As noted in the preliminary approval papers, over 1.6 million documents have been produced and catalogued by the plaintiffs, and fifty-six witnesses have been deposed – nine of whom are employees of the HarperCollins, Hachette and Simon & Schuster defendants. Expert analysis was conducted by both plaintiffs and defendants, and all parties were well represented by experienced counsel who were well-aware of the strengths and weaknesses of each other's case. This factor strongly supports approval of the Settlements.

4. The Risk of Establishing Liability

With the benefit of the judgment and the 168-page Opinion and Order issued by this Court in favor of the Department of Justice and Plaintiff States in the June 2013 trial against Apple, it is clear that plaintiffs had a strong case, not only against Apple but also against the

²⁶ See *Castagna v. Madison Square Garden, L.P.*, No. 09-cv-10211, 2011 WL 2208614, at *5 (S.D.N.Y. June 7, 2011) (noting that "[t]he absence of objectants may itself be taken as evidencing the fairness of the settlement") (alteration in original).

²⁷ *Maley*, 186 F. Supp. 2d at 362.

publishers. But without the pre-trial Settlements, plaintiffs would have still faced some uncertainties in proving all the necessary elements of conspiracy for the relevant period for HarperCollins, Hachette and Simon & Schuster.

5. The Risk of Establishing Damages

Proving damages for HarperCollins, Hachette and Simon & Schuster would present litigation risks. The Plaintiff States and the Class have also offered the report of Dr. Roger Noll in support of both class certification and as a testifying expert in this action regarding the damages caused by the conspiracy.²⁸ Although it is uncertain what these settling defendants might have argued, Apple devotes most of its recent opposition to class certification to arguing that Dr. Noll's model is "fatally flawed" and cannot measure damages on a class wide basis.²⁹ In fact, under Apple's expert's opinion, consumers have received more than treble damages already.³⁰ Even though plaintiffs believe their expert's analyses are well-founded and substantial damages will be provable at trial, as with any damages analysis, the use of experts involves additional litigation costs and risks.

6. The Risks of Maintaining a Class Action Through Trial

The risk of establishing and maintaining class certification through trial and appeal exists for the present settlements. Although it is uncertain what arguments may have been raised by these defendants in opposition to class certification, in its recent papers, Apple has argued that a

²⁸ See Corrected Declaration of Roger G. Noll ("Noll Decl."), Oct. 21, 2013, ECF No. 428.

²⁹ See Defendant Apple Inc.'s Memorandum of Law in Opposition to Plaintiffs' Motion for Class Certification ("Apple's Opposition") at 18, Nov. 15, 2013, ECF No. 443.

³⁰ See Declaration of Jonathan Orszag in support of Apple's Opposition, filed Under Seal on Nov. 15, 2013.

heightened level of scrutiny applies to any class certification motion.³¹ Numerous courts have recently rejected many of Apple's exact arguments and certified classes with far more complex pricing dynamics than present here.³² Thus, plaintiffs are confident that a class action is the correct and proper vehicle through which to litigate their claims, but are mindful that a risk always exists that a court might disagree.

7. The Ability of Defendants to Withstand a Greater Judgment

HarperCollins, Hachette and Simon & Schuster could withstand a larger judgment. Therefore, neither potential insolvency nor lack of ability to pay is a factor that needs to be considered, or accorded much weight in the Court's determination.³³ As such, this factor is insignificant.

8. The Range of Reasonableness of the Settlement Fund in Light of the Best Possible Recovery

In approving the prior settlements with HarperCollins, Hachette and Simon & Schuster, the Court found the settlement funds were fair and reasonable under the circumstances of the case.³⁴ Here, the settlement with these three defendants on behalf of Minnesota residents provides for a higher amount of recovery than the Previously Approved Settlements, due to the later stage of litigation. This settlement is well within the range of reasonableness.

³¹ Apple's Opposition at 6 (arguing that a "fundamental paradigm shift" has occurred "in the standards applied to the analysis of class certification in antitrust litigation").

³² *In re Nexium (Esomeprazole) Antitrust Litig.*, No. 12-md-02409, 2013 U.S. Dist. LEXIS 162276 (D. Mass. Nov. 14, 2013); *In re Cathode Ray Tube (CRT) Antitrust Litig.*, No. C-07-5944, 2013 U.S. Dist. LEXIS 137946 (N.D. Cal. Sept. 19, 2013); *In re High-Tech Emps. Antitrust Litig.*, No. 11-cv-02509, 2013 U.S. Dist. LEXIS 153752 (N.D. Cal. Oct. 24, 2013).

³³ *Meijer, Inc. v. 3M*, No. 04-5871, 2006 U.S. Dist. LEXIS 56744, at *51 (E.D. Pa. Aug. 15, 2006) (finding defendants could withstand a higher judgment but "this determination in itself does not carry much weight in evaluating the fairness of the Settlement"); *see also In re PaineWebber Ltd. Partnerships Litig.*, 171 F.R.D. 104, 129 (S.D.N.Y. 1997), *aff'd*, 117 F.3d 721 (2d Cir. 1997).

³⁴ Final Judgment at 4, Feb. 8, 2013, ECF No. 279.

9. The Range of Reasonableness of the Settlement Fund to a Possible Recovery in Light of All the Attendant Risks of Litigation

Any class action is attendant with a high amount of risk. This Court has already ruled that similar settlements between these defendants and the Attorneys General of fifty-five States, Commonwealths, Territories and Possessions in their *parens patriae* capacity was “in all respects fair, reasonable, and adequate and in the best interests of the Consumers in the Plaintiff States.”³⁵ This settlement agreement provides for a larger percentage of recovery than these prior settlements due to the later stage of litigation, while avoiding the same or higher risks of litigation. This settlement equally deserves a finding of fairness, reasonableness and adequacy.

All the relevant facts surrounding this Settlement supports the conclusion that the legal standards for approval have been met or exceeded and that these Settlements are both procedurally and substantively fair, adequate and reasonable.

VI. THE CONSUMER DISTRIBUTION PLAN MEETS THE STANDARDS FOR FINAL APPROVAL

The fair, adequate and reasonable standard also applies to the distribution of funds to consumers. Upon final approval by the Court, the implementation of the Distribution Plan will compensate the largest possible number of injured consumers in a way that makes it very simple for them to participate and receive value. The proposed Consumer Distribution Plan generally tracks the provisions of the Distribution Plan, although Minnesota class members will receive money from the five pending settlements (with Penguin, Macmillan, HarperCollins, Hachette and Simon & Schuster) at the same time. If however, an objector to the Macmillan and Penguin settlements appeal, plaintiffs may ask this Court to approve distribution of funds to certain class members, including those in Minnesota.

³⁵ *Id.*

A. Eligible Purchases and a Simplified and Reasonable Distribution Plan

For the purposes of this settlement, the settlement class is any natural person who purchased E-books published by a named publisher during the period from April 1, 2010 until May 21, 2012, and who resided in Minnesota at the time of their E-book purchase.³⁶ Eligible consumers and purchases were identified either through retailer records or by the consumer timely filing a claim form.

Depending on the retailer through which the eligible consumer bought the E-book, that consumer will either receive an account credit or a check for the amount as calculated according to the provisions of the Distribution Plan. Eligible consumers who purchased through Amazon, Barnes & Nobles, Apple, or Kobo will receive a credit in their current E-book account, which they can use for additional purchases of E-books or print books, unless they timely requested a check.³⁷ These consumers will receive their credits or requested checks without being required to file any claim or take any other action other than activating or using their credits or cashing their checks. The Claims Administrator will provide a list of customers who have elected either to opt-out or to receive a check to each retailer participating in the distribution of credits. After final approval, crediting retailers will credit customers' accounts and inform such customers that their credits are available to use. These retailers will also send an email reminder after six months to customers that have not used their credits. After a retailer has properly invoiced the credits used by its customers, the Claim Administrator will reimburse that retailer from the escrow funds. Unused credits shall expire one year after they were made available.

³⁶ Settlement Agreement at 4-5, ECF No. 362-1.

³⁷ An important provision of the Distribution Plan is that all eligible consumers have the choice to request a check, even if they qualify for a direct credit.

Eligible consumers who bought through Sony are in a unique position relative to others. Although Sony cannot provide account credits, Sony was able to provide the Claims Administrator with comprehensive list of names for eligible consumers. Because of this, most eligible Sony customers received direct notice of the Settlements and will receive a check without having to file a claim form.

Eligible consumers who bought from any other retailer (estimated to be less than two percent of all eligible consumers) are required to timely file a claim form and, once verified as eligible purchasers, will receive a check.

B. Adequate and Reasonable Consumer Compensation Amounts

As discussed above, the total settlement amount provides reasonable and adequate compensation when compared to damages suffered. Consumer damages are calculated separately for *New York Times* Bestsellers and non-*New York Times* Bestsellers. Such an allocation that reimburses consumers based on the type and extent of injury is reasonable.³⁸ For Minnesota consumers, they will receive slightly more per book than residents of other States and Territories: \$3.83 per *New York Times* Bestsellers (versus \$3.06 for non-Minnesota residents) and \$0.93 for non-*New York Times* Bestsellers (versus \$0.73 for non-*New York Times* Bestsellers).

VII. THE PROPOSED CLASS MEETS ALL THE REQUIREMENTS OF RULE 23

The Court has already conditionally certified the settlement class and appointed the class representatives and Class Counsel to represent the settlement class members.³⁹ As set forth in plaintiffs' motion for preliminary approval, the settlement class satisfies the requirements of

³⁸ *In Re Ikon Office Solutions, Inc.*, 194 F.R.D. 166, 183-84 (E.D. Pa. 2000).

³⁹ *See* Prelim. App. Order at 1, ECF No. 374.

class certification set forth in Rule 23(a) and Rule 23(b)(3).

The settlement class satisfies the Rule 23(a) prerequisites of numerosity, commonality, typicality, and adequacy for purposes of settlement. Given that over 440,000 Minnesota consumers received notice of this settlement, the numerosity requirement is readily satisfied.

Commonality is satisfied through the common question of whether settlement class members were injured by defendants' conspiracy to stabilize the prices of E-books.

Plaintiffs contend, and defendants do not oppose for purposes of settlement, that the typicality requirement is met because the claims of the named plaintiffs and the settlement class members are all based primarily on the same alleged core facts and underlying legal theories: defendants' violations of the Sherman Act through their conspiracy to eliminate price competition for E-books.

In addition, plaintiffs contend, and defendants do not oppose for purposes of settlement, that the named plaintiffs are adequate to represent the settlement class, and that there is no conflict between the named plaintiffs' interests and those of the settlement class. Finally, with respect to Rule 23(a), Class Counsel Hagens Berman and the Cohen Milstein are indisputably qualified and experienced in class action litigation, as the Court found when appointing lead counsel.⁴⁰

Plaintiffs contend, and defendants do not dispute for purposes of settlement, that the settlement class also satisfies the requirements for certification under Rule 23(b)(3) that common questions predominate because many of the same alleged operative facts and legal issues apply to all of the settlement class members' claims. The overwhelming focus of plaintiffs' evidence and theory of the case is the defendants' conscious commitment to a common scheme to elevate

⁴⁰ Case Management Order, Dec. 21, 2011, ECF No. 23.

the prices of E-books, and each individual defendant's participation in that scheme. The documents, testimony, and data demonstrate that defendants agreed to raise retail prices for E-books and eliminate competition – and each piece of evidence focuses on the actions of defendants, rather than any individual class member.⁴¹ Common issues predominate.

Accordingly, plaintiffs respectfully request that the Court grant final approval of certification of the settlement classes.

VIII. CONCLUSION

For the foregoing reasons, plaintiffs respectfully request the Court to:

- 1) Certify the Proposed Class for the purpose of this Settlement;
- 2) Find that the notice was fair, adequate and reasonable and in compliance with due process, Rule 23 and the Court's prior orders;
- 3) Grant final approval of the Settlement Agreement and Distribution Plan; and
- 4) Authorize plaintiffs' counsel to make disbursements to consumers pursuant to the Distribution Plan.

DATED: November 26, 2013

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By _____
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⁴¹ See, e.g., Class Complaint, ¶¶ 5, 6, 18-19, 70, 79-82 (using defendants' public statements to demonstrate coordinated activities); ¶¶ 84-89 (using pricing data common to the class to demonstrate injury and damages); ¶¶ 152, 164 (meetings between defendants to implement the E-book price fix – evidence common to the class).

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CERTIFICATE OF SERVICE

I hereby certify that on November 26, 2013, I electronically filed the foregoing document using the CM/ECF system which will send notification of such filing to the e-mail addresses registered in the CM/ECF system, as denoted on the Electronic Mail Notice List, and I hereby certify that I have caused to be mailed a paper copy of the foregoing document via the United States Postal Service to the non-CM/ECF participants indicated on the Manual Notice List generated by the CM/ECF system.



STEVE W. BERMAN