13-3741(L),

13-3748(CON), 13-3783(CON), 13-3857(CON), 13-3864(CON), 13-3867(CON)

United States Court of Appeals
for the
Second Circuit

UNITED STATES OF AMERICA, STATE OF TEXAS, STATE OF CONNECTICUT, COMMONWEALTH OF PUERTO RICO, STATE OF UTAH, STATE OF ALABAMA, STATE OF ALASKA, STATE OF SOUTH DAKOTA, STATE OF NORTH DAKOTA, DISTRICT OF COLUMBIA, STATE OF ARIZONA, STATE OF TENNESSEE, STATE OF NEBRASKA, STATE OF MICHIGAN, STATE OF COLORADO, STATE OF VERMONT, COMMONWEALTH OF MASSACHUSETTS, STATE OF ILLINOIS, STATE OF WEST VIRGINIA, STATE OF NEW MEXICO, STATE OF IOWA, COMMONWEALTH OF VIRGINIA, STATE OF KANSAS, STATE OF MARYLAND, STATE OF NEW YORK, STATE OF IDAHO, STATE OF MISSOURI, STATE OF ARKANSAS, STATE OF OHIO, STATE OF LOUISIANA, COMMONWEALTH OF PENNSYLVANIA, STATE OF WISCONSIN, STATE OF DELAWARE,

Plaintiffs-Appellees,

– v. –

APPLE, INC., SIMON & SCHUSTER, INC., VERLAGSGRUPPE GEORG VON HOLTZBRINCK GMBH, HOLTZBRINCK PUBLISHERS, LLC, DBA MACMILLAN, SIMON & SCHUSTER DIGITAL SALES, INC.,

Defendants-Appellants,

(For Continuation of Caption See Reverse Side of Cover)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

PAGE PROOF BRIEF FOR DEFENDANTS-APPELLANTS SIMON & SCHUSTER, INC. and SIMON & SCHUSTER DIGITAL SALES, INC.

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HACHETTE BOOK GROUP, INC., HARPERCOLLINS PUBLISHERS L.L.C.,
THE PENGUIN GROUP, A Division of Pearson PLC, PENGUIN GROUP (USA), INC.,

Defendants.

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Defendants-Appellants Simon & Schuster, Inc. and Simon & Schuster Digital Sales, Inc. state the following :

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.

PRELIMINARY STATEMENT

These appeals present a narrow issue relating to the unauthorized modification of a single provision of a consent decree resolving two antitrust actions brought by the United States and 55 plaintiff states and territories (collectively, "Plaintiffs") against Simon & Schuster, Inc. and its subsidiary, Simon & Schuster Digital Sales, Inc. (collectively "Simon & Schuster"). After extensive negotiations with the Plaintiffs over the terms of comprehensive injunctive relief to resolve the actions, the parties agreed upon a two-year term (the "cooling-off period") during which Simon & Schuster would be prohibited from imposing discounting restrictions on any retailer—including Apple, Inc. ("Apple")—for the sale of e-books. Plaintiffs consistently confirmed the effectiveness of the two-year term as a remedial measure, and in granting the government's motion for entry of the consent decree (the "Simon & Schuster Consent Decree" or "Consent Decree"), the district court expressly relied on these assurances. The duration of the cooling-off period was, by far, the most critical component of the parties' bargain.

Nevertheless, after Apple went to trial and was found liable, the government seized the opportunity to enhance Simon & Schuster's cooling-off period under the guise of crafting injunctive relief against Apple. It sought a five-year cooling-off period that would specifically prohibit Simon & Schuster from entering into

agreements with Apple that restrict retail discounting—despite its prior representations that a two-year term was adequate. The final judgment and permanent injunction against Apple (the "Apple Injunction") ultimately adopted an extension resulting in a total cooling-off period for Simon & Schuster of four years. In approving the Apple Injunction, the district court made no findings of intervening factual developments pertaining to Simon & Schuster to support modification of the Consent Decree, despite Plaintiffs' acknowledgment that the extension would further punish Simon & Schuster.

The district court's modification of the Consent Decree circumvented the requirements of Federal Rule of Civil Procedure 60(b) because there had been no significant change in circumstances to support an extension of the cooling-off period to which Simon & Schuster and Plaintiffs had previously agreed. Separately, Plaintiffs' change of position concerning the appropriate duration of the cooling-off period violated fundamental principles of judicial estoppel. The Apple Injunction's modification of the prior Simon & Schuster Consent Decree was improper, unauthorized, and should be reversed.

JURISDICTIONAL STATEMENT

In *United States v. Apple, et al.*, No. 12-cv-2826 (S.D.N.Y.), the district court had subject matter jurisdiction under Section 4 of the Sherman Act, 15 U.S.C. § 4, and 28 U.S.C. §§ 1331, 1337(a), and 1345. Simon & Schuster, Inc. timely appealed the Plaintiff United States' Final Judgment entered September 6, 2013 and filed its notice of appeal on October 4, 2013. This court's jurisdiction arises under 28 U.S.C. § 1291.

In *The State of Texas, et al. v. Penguin Group (USA) Inc., et al.*, No. 12-cv-3394 (S.D.N.Y.), the district court had subject matter jurisdiction under Section 1 of the Sherman Act, 15 U.S.C. § 1, Sections 4c and 16 of the Clayton Act, 15 U.S.C. §§ 15c, 26 and under 28 U.S.C. §§ 1331, 1337. Simon & Schuster, Inc. and Simon & Schuster Digital Sales, Inc. timely appealed the Plaintiff States' Order Entering Permanent Injunction entered September 6, 2013 and filed their notice of appeal on October 4, 2013. This court's jurisdiction arises under 28 U.S.C. §§ 1291, 1292(a)(1).[1]

[1] All appeals taken from the Plaintiff United States' Final Judgment and the Plaintiff States' Order Entering Permanent Injunction (Dkt. #374), *The State of Texas et al. v. Penguin Group (USA) Inc. et al.*, 12-cv-3394 (Dkt. #286), were consolidated by order of this Court on December 4, 2013.

ISSUES PRESENTED

1) Whether the district court's modification of the prior Simon & Schuster Consent Decree was unauthorized or invalid for failure to comply with the requirements set forth in Federal Rule of Civil Procedure 60(b) and with equitable principles.

2) Whether the district court erred in permitting Plaintiffs to take a contrary position with respect to the entry of the Apple Injunction than they took with respect to the entry of the prior Simon & Schuster Consent Decree in violation of principles of judicial estoppel.

STATEMENT OF THE CASE

A. Factual Background

The actions giving rise to these appeals were brought by the United States and various plaintiff states (the "Plaintiff States")[2] asserting violations of the Sherman Act and state law (the "DOJ Action" and the "States Action" respectively) surrounding the electronic book or "e-book"[3] selling practices of Apple and five leading trade book[4] publishers,[5] including Simon & Schuster. *See United States v. Apple*, No. 12-cv-2826 (DLC) (S.D.N.Y.); *The State of Texas v. Penguin Group (USA) Inc.*, No. 12-cv-3394 (DLC) (S.D.N.Y.).[6]

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[2] While 33 states and territories went to trial against Apple, 55 states and territories settled with Simon & Schuster pursuant to a separate settlement complaint. *See* Order and Stipulated Inj., *In re Electronic Books Antitrust Litigation*, 11-md-2293 (Feb. 8, 2013) (Dkt. #278), *The State of Texas et al. v. Hachette Book Group Inc., et al.*, 12-cv-6625 (Dkt. #70).

[3] "E-books are books that are sold to consumers in electronic form, and that can and must be read on a dedicated electronic device such as the iPad, the Barnes & Noble Nook, or Amazon's Kindle." *United States v. Apple*, 952 F. Supp. 2d 638, 648 (S.D.N.Y. 2013) ("*Apple II*").

[4] "Trade books consist of general interest fictions and non-fiction books. They are to be distinguished from 'non-trade' books such as academic textbooks, reference materials, and other texts." *Apple II*, at 648 n.4.

[5] In addition to Simon & Schuster, the publisher defendants include Hachette Book Group, Inc. ("Hachette"), HarperCollins Publishers LLC ("HarperCollins"), Holtzbrinck Publishers LLC d/b/a Macmillan ("Macmillan"), and Penguin Group (USA), Inc. ("Penguin").

[6] A related action was also brought by a putative class of e-book purchasers. *See In re Electronic Book Antitrust Litigation*, No. 11-md-2293 (DLC) (S.D.N.Y.).

At issue was the adoption of five separate agency agreements between individual publishers and Apple that restricted Apple's ability to discount the price of e-books in the spring of 2010. Prior to Apple's entry into the e-book market with the launch of its iBookstore in April of that year, Amazon.com ("Amazon") was the dominant e-book retailer, selling nearly 90% of all e-books. *See Apple II*, at 649. Simon & Schuster and other publishers distributed e-books to Amazon and others through a wholesale pricing model, providing e-books to the retailer for a wholesale price, which was a percentage of the publisher's suggested retail price. The retailer could then sell the e-book to consumers at any price it chose. *See id*. "[W]holesale prices for e-books typically fell in the range of $13 to $15, and some were even sold at prices as high as $17.50." *Id*. at 656-57. Amazon adopted a $9.99 price point for new release and bestselling e-books—a steep discount from the publishers' wholesale prices—thus selling e-books drastically below cost. *See id.* at 647-48.

The complaints alleged that, in advance of the launch of its iPad in January 2010, Apple proposed an agency agreement with Simon & Schuster for the sale of its e-books. Under this approach, the retailer sells the e-book at a price set by the publisher, as the publisher's agent. *See id*. at 648. The retail agent then receives a fixed percentage commission of each e-book it sells. Simon & Schuster's agency agreement with Apple gave Apple a 30% commission on e-book sales through its

iBookstore. It also contained price tiers that would cap list prices for most e-books at $14.99, and a price parity provision, or "Most-Favored-Nation" ("Price MFN") clause, which generally permitted Apple to match the lowest retail price listed on any competitor's e-bookstore to ensure that Apple's prices would not be undercut by other retailers, including Amazon. *See id*. at 648, 662-63. The upshot of Apple's proposal was to enable it to enter the e-book market and compete with Amazon, while ensuring a secure revenue stream from each e-book sale even if Amazon continued to sell below cost. Simon & Schuster signed its agreement with Apple just days before the iPad launch on January 27 and subsequently entered into agency agreements with Amazon, as did other publishers.

B. The Simon & Schuster Consent Decree

Plaintiffs filed suit on April 11, 2012. The gravamen of the complaints was that Apple facilitated a horizontal conspiracy in violation section 1 of the Sherman Act, 15 U.S.C. § 1, by coordinating the adoption of identical agency agreements with each of the defendant publishers, including Simon & Schuster. *See* Complaint[7] (Apr. 11, 2012) (Dkt. #1) ("Compl.") ¶ 94-97.

At the time the complaints were filed, Simon & Schuster had already been in negotiations with the United States and the lead investigating Plaintiff States,

[7] All documents cited herein are available on the district court docket for *United States v. Apple, Inc., et al.*, No. 12-cv-2826 (with docket numbers noted) unless otherwise indicated.

Connecticut and Texas. Simon & Schuster was among a group of three defendant publishers, including Hachette and HarperCollins, to first settle the DOJ Action on the same day the complaints were filed, April 11, 2012, pursuant to a proposed consent decree containing wide-ranging injunctive relief. Following proceedings under the Tunney Act, 15 U.S.C. § 16(b)-(h), and a 60-day public comment period that yielded 868 comments, the government moved for entry of the proposed final consent judgment on August 3, and the district court granted the motion by decision and order dated September 5, 2012. *See* Opinion & Order Granting Pl. United States' Mot. for Entry of Final J. (Sept. 5, 2012) (Dkt. #113). The Simon & Schuster Consent Decree was entered the following day. *See* Final J. As to Defs. Hachette, HarperCollins, and Simon & Schuster (Sept. 6, 2012) (Dkt. #119).

The Tunney Act required the district court, prior to entry of the Consent Decree, to determine that entry is "in the public interest." 15 U.S.C. § 16(e)(1); *see also Untied States v. Int'l Bus. Mach. Corp.*, 163 F.3d 737, 740 (2d Cir. 1998). The statute directs the court to evaluate, among other considerations, "the competitive impact of such judgment, including termination of alleged violations, . . . duration of relief sought, anticipated effects of alternative remedies actually considered . . . ; and . . . the impact of entry of such judgment upon competition in the relevant market or markets [and] upon the public generally . . . ." 15 U.S.C. § 16(e)(1); *United States v. Apple, Inc.*, 889 F.Supp.2d 623, 631 (S.D.N.Y. 2012)

("*Apple I*") ("When assessing a consent decree, a court should consider the relationship between the complaint and the remedy secured, the decree's clarity, whether there are any foreseeable difficulties in implementation, and whether the decree might positively injure third parties." (citing *United States v. Microsoft Corp.*, 56 F.3d 1448, 1458 (D.C. Cir. 1995)). Accordingly, as the district court recognized, "Congress intended the Tunney Act to 'prevent judicial rubber stamping of proposed consent decrees,'" *see id*. (quoting *United States v. Keyspan Corp.*, 763 F.Supp.2d 633, 637 (S.D.N.Y. 2011)), by requiring the court to confirm a proposed decree's adequacy.

The Simon & Schuster Consent Decree contains numerous requirements and restrictions, which both the government and the district court confirmed would be sufficient to restore competition to the market and remedy any effects of the alleged antitrust violations. The most heavily negotiated provision—and the only one at issue in these appeals—prohibits Simon & Schuster from entering into any new contract with an e-book retailer that restricts the retailer's ability to discount e-book prices for two years. *See* Consent Decree § V.A-B. The Consent Decree also requires Simon & Schuster to, *inter alia*, terminate their agency agreements with Apple within 7 days of the Judgment's entry, *see* Consent Decree § IV.B, terminate all contracts with e-book retailers that contain restrictions on discounting

or a Price MFN,[8] *see id.* § IV.B, and refrain for five years from entering into any agreement with an e-book retailer that contains a Price MFN, *see id.* §§ V.C, XI. Simon & Schuster must also inform the government before forming or modifying a joint venture between it and another publisher related to e-books, *see id.* § IV.C, and meet other ongoing reporting and notification requirements, *see, e.g.*, *id.* § IV.C. Moreover, the Consent Decree prohibits Simon & Schuster from entering into any agreement with another e-book publisher to raise or set e-book prices, *see id.* § V.E, and from communicating "any competitively sensitive information" to other e-book publishers, *id.* § V.F.

The two-year cooling-off period generated significant public opposition. *See Apple I*, at 637 n.11 ("[T]here can be no denying the true passion reflected in many of the public comments opposing the decree's two-year ban on retail discounting restrictions."). "Perhaps the most forceful species of criticism leveled at the decree is that it will have manifestly *anticompetitive* effects." *Id.* at 639 (emphasis in original). Commenters noted, among other things, "that Amazon was a monopolist engaged in predatory pricing and . . . defendants' use of the agency model reduced Amazon's market share and capacity to engage in these practices." *Id.*; *see also id.* at 640 ("[I]t is undisputed that Amazon's market share in e-books decreased from 90 to 60 percent in the two years following the introduction of

[8] *See* Simon & Schuster Consent Decree, § II.M (defining "Price MFN").

agency pricing."). A two-year moratorium on discounting restrictions, commenters argued, would reduce competition among e-book retailers.[9] *See id*. at 639-41.

In response to the public comments, the government assured the public that the agency model could be re-implemented once the two-year cooling-off period expired: "This brief cooling-off period will ensure that the effects of the collusion will have evaporated before defendants seek future agency agreements." Resp. of Pl. United States to Pub. Cmts. on the Proposed Final J. (Jul. 23, 2012) (Dkt. #81), at vi-vii; *see also id*. at vi (the United States "does not object to the agency method of distribution in the e-book industry, only to the collusive use of agency to eliminate competition and thrust higher prices onto consumers"). The government also reaffirmed the sufficiency of the two-year cooling-off period to restore market competition. *See* Pl. United States' Competitive Impact Statement (Apr. 11, 2012)

[9] Commenters also noted that allowing publishers, rather than retailers, to set e-book prices promoted greater competition among publishers where the market was less concentrated, citing evidence that publishers "did in fact engage in rigorous price competition after switching to the agency model." *Apple I*, at 640. And commenters observed that restricting below-cost pricing allowed other large and small e-book retailers to enter the market and/or compete more effectively against Amazon. *Id.* Eliminating these barriers to entry is particularly important in the e-book market because, "[u]nlike physical books, e-books cannot be utilized absent additional components like an e-reader," such as an Amazon Kindle, "and an internet-based platform for purchasing and downloading titles." *Id.* Because an e-book system with more users will support more titles and programs, the e-book market will "tend to tip towards a single, dominant firm, resulting in monopoly." *Id.*

(Dkt. #5) at 12 ("In light of current industry dynamics, including rapid innovation, a two-year period, in which Settling Defendants must provide pricing discretion to retailers, is sufficient to allow competition to return to the market."). The district court relied on the government's assessment of this remedial measure in granting the motion for entry of the proposed final judgment over these strenuous public objections, specifically acknowledging—as the government had contended—that the two-year cooling-off period would be sufficient to remedy any effects of the alleged collusion. *See Apple I*, at 632-33 ("The two year limitation on retail price restraints and the five year limitation on Price MFNs appear wholly appropriate . . . . The Government reasonably describes these time-limited provisions as providing a 'cooling-off period' for the e-books industry that will allow it to return to a competitive state free from the impact of defendants' collusive behavior."); *cf.* Resp. of Pl. United States to Pub. Cmts. on the Proposed Final J., at 17-18 ("The limitations placed on the terms of agency contracts entered into by Settling Defendants for a period of two years will break the collusive status quo and allow truly bilateral negotiations between publishers and retailers to produce competitive results.").

The Plaintiff States also confirmed that the two-year cooling-off period would be effective and adopted substantially identical injunctive relief in their proposed settlement with the early settlers: Simon & Schuster, HarperCollins, and

Hachette. In moving for approval of this proposed settlement on September 13, 2012, the Plaintiff States noted that the "injunction precludes further conspiratorial conduct, establishes a monitoring and reporting program, and imposes certain requirements that must be met if publishers and retailers wish to continue to conduct business under the agency model." Mem. in Supp. of Pl. States' Mot. for Preliminary Approval of Settlements and Proposed Consumer Notice and Distrib. Plans, *The State of Texas v. Hachette Book Group, Inc.*, 12-cv-6625 (Sept. 13, 2012) (Dkt. #11) at 7. Like the United States, the Plaintiff States represented to the court that "[t]hese requirements are intended to reestablish price competition at the retail level in a market free of the taint of the prior conspiracy." *Id.*

After entering the Consent Decree with Simon & Schuster, Plaintiffs repeatedly reaffirmed that the two-year cooling-off period, along with other relief in the decree, was sufficient to restore competition to the e-books market. The Plaintiff States continued to endorse the two-year cooling-off period when they moved for approval of their settlements with the two remaining defendant publishers, Penguin and Macmillan, on June 21, 2013. *See* Mem. in Supp. of Pls.' Mot. for Preliminary Approval of Macmillan and Penguin Settlements and Proposed Consumer Notice and Distrib. Plans, *The State of Texas v. Penguin Group (USA) Inc.*, 12-cv-3394 (Jun. 21, 2013) (Dkt. #235), *In re Electronic Books Antitrust Litigation*, 11-md-2293 (Dkt. #360), *The State of Texas et al. v. Hachette*

Book Group Inc., et al., 12-cv-6625 (Dkt. #83) at 7. The United States also confirmed that the proposed injunctive relief was adequate and in the public interest in response to public comments on the Penguin and Macmillan settlements. *See, e.g.*, Resp. by Pl. United States to Pub. Cmts. on the Proposed Final J. As to the Penguin Defs. (Apr. 5, 2013) (Dkt. #201) at 16 ("The United States continues to believe that the proposed Penguin Final Judgment, as drafted, provides an effective and appropriate remedy for the antitrust violations alleged in the Complaint and that it is therefore in the public interest."); Resp. by Pl. United States to Pub. Cmts. on the Proposed Final J. As to the Macmillan Defs. (May 24, 2013) (Dkt. #261) at 7 (same). Indeed, the government pointed to "reported reductions in the prices of e-book titles offered by HarperCollins, Hachette, and Simon & Schuster," as evidence that the Penguin Final Judgment would be similarly effective "to eliminate Penguin's illegal conduct, prevent recurrence of the same or similar conduct, and establish a robust antitrust compliance program." Resp. by Pl. United States to Pub. Cmts. on the Proposed Final J. As to the Penguin Defs. (Apr. 5, 2013) (Dkt. #201) at 5.

Two features of the two-year ban on restricting e-book discounts are salient to these appeals. First, the ban "is strictly limited in time." *Apple I*, at 637. This is important because injunctive relief cannot exceed the scope necessary to remedy prior anticompetitive conduct, *see, e.g.*, *City of New York v. Mickalis Pawn Shop*,

LLC, 645 F.3d 114, 144 (2d Cir. 2011), and because the ban itself is potentially anticompetitive, *see Apple I*, at 637 n.11, 639-41. Second, it applies uniformly to agreements with all e-book retailers. A discounting restriction ban that reached certain retailers but not others would make little sense as a means of enhancing competition. If, for example, Amazon alone retained the discretion to offer e-books at discount prices, then it would have a government-sponsored competitive advantage over other retailers, especially since the Consent Decree also prohibits the use of Price MFNs. Amazon could then use its unique, government-created pricing authority to undercut competitors.

C. The Apple Injunction

Apple proceeded to trial and was ultimately found liable. *See Apple II*, at 645. Plaintiffs filed their brief and Proposed Final Judgment and Order Entering Permanent Injunction (the "Proposed Final Judgment") on August 2, 2013. The Proposed Final Judgment specifically restricted Simon & Schuster and the other defendant publishers for a period of five years from entering into any agreement with Apple that imposes retail discounting restrictions. *See* Proposed Final Judgment, § III.C (prohibiting defendant publishers from forming any agreement "that restricts, limits, or impedes Apple's ability to set, alter, or reduce the Retail Price of any E-Book"). The defendant publishers, who had all since settled pursuant to consent decrees containing injunctive relief substantially similar to the

Simon & Schuster Consent Decree,[10] objected to this provision as an unauthorized extension of their cooling-off periods. *See generally* Settling Defs.' Mem. of Law In Opp'n to Pl. United States' Proposed Final J. and Pl. States' Proposed Order Entering Permanent Inj. (Aug. 7, 2013) (Dkt. #333). Indeed, Simon & Schuster, along with the two other original settling defendants, had already been in compliance with the Consent Decree for nearly a year when the Proposed Final Judgment threatened to deprive them of the benefit of their bargain with this new restriction on otherwise legitimate business activity.

Plaintiffs acknowledged in no uncertain terms that this provision extended Simon & Schuster's cooling-off period beyond what had been agreed to in the Consent Decree. *See* Letter from Lawrence E. Buterman, U.S. Dep't of Justice, to the Hon. Denise L. Cote (Aug. 8, 2013) (Dkt. #342) ("While Plaintiffs recognize that the practical effect of Section III.C is that it extends the Publishers' cooling off

[10] Final Judgment as to Penguin and Macmillan in the DOJ Action was entered on May 17, 2013 and August 12, 2013 respectively, and their injunctions with respect to the Plaintiff States were entered on December 9, 2013. *See* Final Judgment As to Defendants The Penguin Group, a Division of Pearson PLC, and Penguin Group (USA), Inc. (May 17, 2013) (Dkt. #259); Final Judgment As to Defendants Verlagsgruppe Georg Von Holtzbrinck GMBH & Holtzbrinck Publishers, LLC d/b/a Macmillan (Aug. 12, 2013) (Dkt. #354); Order and Stipulated Inj., *In re Electronic Books Antitrust Litigation*, 11-md-2293 (Dec. 9, 2013) (Dkt. #476), *The State of Texas et al. v. Penguin Group (USA) Inc. et al.*, 12-cv-3394 (Dkt. #363); Order and Stipulated Inj., *In re Electronic Books Antitrust Litigation*, 11-md-2293 (Dec. 9, 2013) (Dkt. #477), *The State of Texas et al. v. Penguin Group (USA) Inc. et al.*, 12-cv-3394 (Dkt. #364).

period with the retailer with which it engaged in a price-fixing conspiracy for an additional three years, Plaintiffs believe such a limited extension is necessary."). Although the proposed extension of the cooling-off period followed from a liability determination against Apple, it penalized only Simon & Schuster and other publishers. By further restraining publishers with respect to Apple alone, the extension of the cooling-off period conferred a market *advantage* on Apple. It decrees that Apple, but not other retailers, must retain the discretion to offer e-books at discount prices even after the Consent Decree's two-year cooling-off period expires. Accordingly, Apple is free to set any price for Simon & Schuster's e-books during this extended period, giving it a clear competitive benefit over Simon & Schuster's other agents who may not retain such discretion after the original cooling-off period expires.

The court endorsed extending the cooling-off period at an August 9, 2013 hearing, but its justifications for the extension were sparse. It cited a concern that the defendant publishers' "joint opposition to the injunctive relief . . . reflects . . . a seriously continuing danger of collusion," Hr'g Tr. (Aug. 9, 2013) (Dkt. #356) at 54:7-10, and it asserted that the defendants had not expressed remorse for their alleged misconduct, *id*. 63:21-65:6 ("None of the publisher defendants—and this is true for Apple, as well—have expressed any remorse over their actions, made any public statements admitting wrongdoing, undertaken any voluntary program to

prevent a recurrence. They are, in a word, unrepentant."). The court later withdrew its criticism of the publishers' joint briefing. *See id*. 70:20-24 ("I didn't find the submission of the joint brief a problem. Indeed, I appreciated the fact that if they had a unified position that it be submitted to me at once, not five times, so I thank you for that."). And the court never identified any statements from Simon & Schuster that it lacked remorse or any other factual findings pertaining to Simon & Schuster to support belated modification of the Consent Decree. Despite the unmistakable penalty imposed on Simon & Schuster by the modification, and the competitive benefit conferred on Apple, the court justified the extension of the cooling-off period as a sanction against Apple. *See id*. at 64:20-21 ("[T]his injunction is a remedy imposed upon Apple and not [on] the publisher defendants."); *id*. at 71:21-23 (same).

The district court suggested implementing Plaintiffs' proposed extension of the cooling-off period in a staggered fashion instead of for a uniform five-year period. The staggered approach would separately preclude each publisher from entering into agency agreements restricting discounting with Apple for terms ranging from two to four years from the effective date of the Proposed Final Judgment (with six month intervals between the expiration dates for each Publisher). Pursuant to the district court's recommendation, Plaintiffs submitted a revised proposed judgment (the "Revised Judgment") on August 23, 2013. *See*

Mem. in Supp. of Pls.' Revised Proposed Inj. (Aug. 23, 2013) (Dkt. #361) at 4. Section III.C of the Revised Judgment provides that each defendant publisher is prohibited from entering into any agency agreement with Apple restricting discounting from the Revised Judgment's effective date for the following durations: Hachette for 24 months, HarperCollins for 30 months, Simon & Schuster for 36 months, Penguin for 42 months, and Macmillan for 48 months. Because Simon & Schuster had already been subject to the Consent Decree for one year, it had only one year left when it could not prevent retailers from discounting. The Apple Injunction added two more years with respect to Apple.

According to Plaintiffs, this ordering "generally reflect[ed] the sequence in which the Publisher Defendants settled with Plaintiffs." *Id*. at 4. But despite the fact that Simon & Schuster, Hachette, and HarperCollins all settled with the United States at the same time, Simon & Schuster received the longest extension of its cooling-off period among them. Simon & Schuster submitted a letter to the district court on August 27, 2013 further detailing these objections, but the letter was not docketed.[11] As an alternative, Simon & Schuster suggested shorter time intervals of between 30 and 60 days between the first three settling defendants, *see* Letter from Yehudah L. Buchweitz on behalf of Simon & Schuster, Inc. to the Hon.

[11] The letter has become part of the record on appeal pursuant to stipulation of the parties as so-ordered by the district court. *See* Stip. and Order Making Certain Corresp. Part of the Record File (Oct. 29, 2013), Nos. 12-cv-2826, 12-cv-3394.

Denise L. Cote (Aug. 27, 2013) at 2, but the district court ignored the proposal. The district court never ruled on any of the defendant publishers' objections, and the Apple Injunction was entered on September 6, 2013. *See* Pl. United States' Final J. and Pl. States' Order Entering Permanent Inj. (Dkt. #374), *The State of Texas et al. v. Penguin Group (USA) Inc. et al.*, 12-cv-3394 (Dkt. #286).

Simon & Schuster timely appealed to this court on October 4, 2013.

SUMMARY OF ARGUMENT

I. Section III.C.3 of the Apple Injunction is a modification of the Simon & Schuster Consent Decree, and exists only to further punish Simon & Schuster. In adopting the extension, the district court circumvented the requirements of Federal Rule of Civil Procedure 60(b), which governs modification of consent decrees. Rule 60(b) imposes a high bar. Consent decrees may be altered only upon a showing of significant unanticipated changed circumstances. Neither the district court nor Plaintiffs even attempted to make this required showing, nor could they. No change in factual conditions had occurred to support a modification of the parties' prior bargain. Moreover, even assuming that the district court's lingering concern of a continuing risk of collusion could support unraveling Simon & Schuster's prior agreement with Plaintiffs, doubling its cooling-off period was not an appropriately tailored remedial measure.

II. Separately, judicial estoppel precludes Plaintiffs from changing their position with respect to the adequacy of the two-year cooling-off period. After entering into the Consent Decree, Simon & Schuster has undisputedly been faithfully abiding by the decree's terms. Plaintiffs' sudden embrace, nearly a year later, of an extension of the cooling-off period squarely contradicted their numerous prior statements that a two-year restraint on discounting was adequate and effective to remedy any alleged collusion. The district court relied on these prior statements in approving the Simon & Schuster Consent Decree, and the government's abrupt about-face fundamentally undermined the parties' bargain, to Simon & Schuster's unfair detriment. Having persuaded the court to adopt the Consent Decree based on their earlier position, Plaintiffs should not have been permitted to change course.

Accordingly, the district court's adoption of section III.C.3 should be reversed and the two-year cooling-off period in the Consent Decree should be reinstated without modification.

ARGUMENT

I. The Apple Injunction Improperly Modified the Prior Simon & Schuster Consent Decree

A. The District Court Modified the Key Term of the Consent Decree

Section III.C.3's extension of Simon & Schuster's cooling-off period fundamentally alters the terms of the Consent Decree, which was extensively

negotiated and agreed to approximately a year prior to entry of the Apple Injunction.

This court reviews *de novo* whether a district court ruling has modified a consent decree. *See Wilder v. Bernstein*, 49 F.3d 69, 72 (2d Cir. 1995). This determination requires interpretation of the decree's terms. *See id*.; *Crumpton v. Bridgeport Educ. Ass'n*, 993 F.2d 1023, 1028 (2d Cir. 1993) ("While a consent decree is a judicial pronouncement, it is principally an agreement between the parties and as such should be construed like a contract."). In doing so, "a court construing such a document is 'not entitled to expand or contract the agreement of the parties as set forth in the consent decree.'" *Id*. (quoting *Berger v. Heckler*, 771 F.2d 1556, 1568 (2d Cir.1985)). Accordingly, unless the court's ruling is expressly contemplated or authorized by the decree, it constitutes an improper modification of the parties' agreement. *See id*. 1028-29 (to determine whether consent decree has been modified, court looks "within the four corners of the decree" (citation and internal quotation marks omitted)). A modification has unquestionably occurred when the district court augments the relief to which the parties agreed. *See id*. at 1029 (holding that court's ruling constituted modification because the purported "'clarification,' . . . unquestionably does more than *preserve* the affirmative action gains made; rather it allows Bridgeport to *increase* these gains" (emphases in original)).

The Consent Decree was carefully negotiated to prohibit Simon & Schuster from imposing discounting restrictions on e-book retailers for a *two-year* period. This cooling-off period was the most critical component of the parties' agreement and already reflects significant compromise by Simon & Schuster. Many public commenters opposed the cooling-off period altogether—with "true passion," as the district court observed—because they believed it would be "manifestly *anticompetitive*." *See, e.g., Apple I,* at 639-41 & 637 n.11. As the government explained, the cooling-off period was intended to be "brief" and, once it ended, Simon & Schuster was free to pursue agency agreements incorporating discounting restrictions. *See, e.g.,* Resp. of Pl. United States to Pub. Cmts. on the Proposed Final J., at vi-vii. In adopting the Consent Decree, the district court recognized that this two-year moratorium on discounting restrictions would be adequate to restore market competition. *See, e.g., Apple I,* at 632-33.

Section III.C.3 of the Apple Injunction expressly modifies the Consent Decree by extending Simon & Schuster's cooling-off period well beyond the agreed upon duration. The provision explicitly names Simon & Schuster and restrains it from legitimate business activity,[12] using the same language as the

[12] *See* Apple Injunction III.C ("Apple shall not enter into or maintain any agreement with a Publisher Defendant that restricts, limits, or impedes Apple'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. The prohibitions in this Section III.C shall expire, for

Consent Decree to describe the restricted conduct. *Compare* Consent Decree § V.B *with* Apple Injunction § III.C. The Final Judgment clearly and unequivocally establishes an additional 36-month term during which Simon & Schuster is prohibited from entering into any agreement imposing discounting restrictions on Apple. And because the 36-month extension runs from the Final Judgment's effective date of September 5, 2013—a year after entry of the Consent Decree—the total cooling-off period for Simon & Schuster is now effectively set at four years, double what the parties had agreed upon in the Consent Decree.

This extension of the discounting restriction ban penalizes Simon & Schuster; it does not penalize Apple, as the district court incorrectly stated. *See* Hr'g Tr. at 64:20-21; 71:21-23. On the contrary, Section III.C.3 confers a competitive *benefit* on Apple by singling it out among e-book retailers to retain guaranteed pricing discretion. Augmenting Simon & Schuster's cooling-off period with regard to Apple, but not with regard to other retailers, provides Apple with additional time to enjoy unfettered pricing authority, giving it a market advantage over its competitors, who are not similarly protected. A *uniform* ban on discounting restrictions, like the one in the Consent Decree, provides no particular benefit to one retailer as compared with others because all are affected equally.

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agreements between Apple and a Publisher Defendant, on the following dates: . . . For agreements between Apple and Simon & Schuster: 36 months after the Effective Date of this Final Judgment.").

But a *non-uniform* discounting restriction ban, like the one in the Final Judgment, creates an uneven playing field at the retail level. Apple is the clear winner in this arrangement.

To be certain, the complaints alleged that when Apple first wanted to enter the e-books market in January 2010 it proposed agency agreements with discounting restrictions and Price MFNs to the defendant publishers. But at the time, it was trying to break into a market dominated by a single competitor that was selling e-books below cost. Apple, now an established industry player, does not have the same incentives today, nor could it be presumed to have them when the two-year cooling-off period in the Consent Decree expires. And in Simon & Schuster's original agency agreement with Apple, the discounting restriction was offset by a Price MFN provision, ensuring that Apple could discount titles if its competitors did so. The Consent Decree, however, precludes Simon & Schuster from entering agreements with Price MFNs for five years. So a key term of the prior agency agreement that protected Apple against the risk from discounting restrictions is no longer available. Apple has little reason to invite discounting restrictions under these circumstances. Simon & Schuster, on the other hand, might still prefer to limit discounting for some e-books, for ordinary and procompetitive reasons. *See Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*,

551 U.S. 877, 889 (2007) ("[E]conomics literature is replete with procompetitive justifications for a manufacturer's use of resale price maintenance.").

The district court may have speculated that no retailer would accept a discounting restriction proposed by Simon & Schuster if Apple could not be bound by one. An extended cooling-off period for *all* retailers, not merely Apple, is apparently what the government intended to achieve with the Apple Injunction. *See* Letter from Lawrence E. Buterman, U.S. Dep't of Justice, to the Hon. Denise L. Cote (Aug. 8, 2013) ("[I]t is necessary to ensure that Apple (*and hopefully other retailers*) can discount e-books and compete on retail price for as long as possible." (emphasis added)). But if the district court or the government did expect to preclude Simon & Schuster from applying discounting restrictions to other retailers for this extended period, then it is even more clear that there has been a modification of the two-year cooling-off period agreed upon in the Consent Decree. Simon & Schuster's ability to enter into agency agreements with all e-book retailers (including Apple) and restrict them from discounting following the two-year cooling-off period was explicitly agreed upon and embodied in the terms of the Consent Decree. A further restriction of that ability is a modification of the decree.

Because section III.C.3 unequivocally augments the relief for which the parties previously bargained and the Consent Decree "does not unquestionably

sanction" this extension, section III.C.3 constitutes a modification of the decree. *Crumpton*, 993 F.2d at 1029.

B. The District Court's Modification of the Prior Simon & Schuster Consent Decree Contravened the Established Procedures for Modification of Final Judgments Under Federal Rule of Civil Procedure 60(b) and Equitable Principles

A district court's modification of a consent decree is reviewed for abuse of discretion. *See Barcia v. Sitkin*, 367 F.3d 87, 99 (2d Cir. 2004); *Juan F. ex rel. Lynch v. Weicker*, 37 F.3d 874, 878 (2d Cir. 1994) ("Consent decrees, of course, are injunctions, and their modification is reviewed under an abuse-of-discretion standard.").

1. No Unanticipated Intervening Factual or Legal Developments Have Rendered the Simon & Schuster Consent Decree Inequitable or Unworkable

In order to modify a consent decree, the district court must make specific factual findings that modification is warranted. Federal Rule of Civil Procedure 60(b) governs modification of consent judgments.[13] *See Barcia*, 367 F.3d at 99. In interpreting this provision, this Court has required that the party seeking modification "show[] that there has been a significant change either in factual

[13] Federal Rule of Civil Procedure 60(b) provides in relevant part: "On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons: . . . (5) the judgment has been satisfied, released or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or (6) any other reason that justifies relief."

conditions or in law" to support modification. *United States v. Sec'y of Hous. & Urban Dev.*, 239 F.3d 211, 217 (2d Cir. 2001) ("*HUD*") (citation and internal quotation marks omitted); *see also Rufo v. Inmates of Suffolk Cnty. Jail*, 502 U.S. 367, 394 (1992); *HUD*, 239 F.3d at 217 (holding that party seeking modification must demonstrate "a significant change in circumstances warrants the modification"). Importantly, "changing circumstances anticipated at the time the consent decree was drafted should not be used as a basis for modification." *Stills Pharmacy, Inc. v. Cuomo*, 981 F.2d 632, 637 (2d Cir. 1992). Because there has been no unanticipated significant change in factual conditions or law since the entry of the Simon & Schuster Consent Decree, the district court's modification of the decree was an abuse of discretion and should be reversed. *See, e.g.*, *United Airlines, Inc. v. Brien*, 588 F.3d 158, 180 (2d Cir. 2009) (reversing grant of 60(b) relief because "circumstances were not sufficiently extraordinary to merit relief"); *DeWeerth v. Baldinger*, 38 F.3d 1266, 1276 (2d Cir. 1994) (reversing district court's grant of relief under 60(b)(5)).

The district court made no new factual findings to support modification of the Simon & Schuster Consent Decree, nor could it. Instead, it relied on a purported "seriously continuing danger of collusion," based solely on the publishers' submission of a joint opposition to the Proposed Final Judgment. Hr'g Tr. at 54:7-10 ("The publisher defendants' . . . joint opposition to the injunctive

relief requested here by the government reflects, I believe, a continuing, and a seriously continuing danger of collusion."). Joint submission of a brief is hardly a reason to modify a consent decree. The court itself later disclaimed this as a basis for finding a danger of collusion. *See id*. 70:20-24 ("I didn't find submission of the joint brief a problem. Indeed, I appreciated the fact that if they had a unified position that it be submitted to me at once, not five times, so I thank you for that."); *cf. Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 509-11 (1972) (holding that antitrust violations cannot be premised on constitutionally-protected conduct of petitioning judiciary).

In any event, a concern about collusion was nothing new. Combatting alleged collusion had always been the principal objective in fashioning the injunctive relief against the defendant publishers. The two-year cooling-off period in the Simon & Schuster Consent Decree adequately addressed this concern, as both the government and district court previously recognized. *See Apple I*, at 632-33 ("The two year limitation on retail price restraints . . . appear[s] wholly appropriate. . . . The Government reasonably describes these time-limited provisions as providing a 'cooling-off period' for the e-books industry that will allow it to return to a competitive state *free from the impact of defendants' collusive behavior*." (emphasis added)). All parties understood that Simon & Schuster would be free to negotiate discounting restrictions with e-book retailers at

the conclusion of the cooling-off period and that the moratorium would not be permanent. *See, e.g.*, Resp. of Pl. United States to Pub. Cmts. on the Proposed Final J., at vi-vii ("This brief cooling-off period will ensure that the effects of the collusion will have evaporated before defendants seek future agency agreements.").

There were no new factual developments that required a reexamination of the Consent Decree. For one thing, facts developed at the Apple trial could not properly be applied to enhance the penalty against Simon & Schuster, which was not a party to those proceedings. In any event, nothing at that trial touched on Simon & Schuster's post-Consent Decree conduct. The court criticized Simon & Schuster and other publishers for purportedly being "unrepentant." *See* Hr'g Tr. at 64:4-8. But even if a lack of remorse after entering a consent decree could be a ground for modifying the decree, the district court did not and could not point to a single fact to support this conclusion about Simon & Schuster.

The district court's staggered approach to extending discounting restrictions, which punishes Simon & Schuster more severely than other publishers, also rests on an improper ground for modification. The ordering supposedly reflects "the sequence in which the Publisher Defendants settled with Plaintiffs." Mem. in Supp. of Pls.' Revised Proposed Inj., at 4. The staggered dates at which the Final Judgment terminates the extended discounting restriction bans are poor

approximations of the publishers' actual settlement order; Simon & Schuster settled with the United States at the same time as HarperCollins and Hatchette, but its extended cooling-off period exceeds theirs by six months and twelve months, respectively.[14] But regardless, the sequence in which defendants agreed to settle claims was already known when the Consent Decree was entered. It is not post-decree conduct that could justify a modification of the settlement's terms.

The district court's modification of the Consent Decree is particularly inappropriate because, after the decree was entered, the Plaintiffs repeatedly confirmed that the injunctive relief imposed on Simon & Schuster would be effective to restore market competition and was in the public interest. *See, e.g.*,

[14] Simon & Schuster entered into its proposed settlement with the United States on April 11, 2012, at the same time as Hachette and HarperCollins, contemporaneously with the filing of the Complaint. Simon & Schuster signed a memorandum of understanding of a proposed settlement with the Plaintiff States on May 10, 2012. This was a mere 29 days later than Hachette and HarperCollins, and because the Plaintiff States adopted the injunctive relief brokered by the United States in the DOJ Action for the injunctive component of their settlement, this short period to negotiate other aspects of the settlement in the States Action is immaterial. In any event, the Plaintiff States filed their motion for preliminary approval of the settlement with all three defendant publishers on the same day, *see* Mem. in Supp. of Pl. States' Mot. for Preliminary Approval of Settlements and Proposed Consumer Notice and Distrib. Plans, *In re Electronic Books Antitrust Litigation*, 11-cv-6625 (Dkt. #11), and the court granted preliminary approval and final approval of the settlement on the same day, *see* Order Preliminarily Approving Proposed Settlements, *In re Electronic Books Antitrust Litigation*, 12-cv-6625 (Dkt. #15); Order and Stipulated Inj., *In re Electronic Books Antitrust Litigation*, 11-md-2293 (Dkt. #278), *The State of Texas et al. v. Hachette Book Group Inc., et al.*, 12-cv-6625 (Dkt. #70).

Resp. by Pl. United States to Pub. Cmts. on the Proposed Final J. As to the Penguin Defs., at 5 ("Based on reported reductions in the prices of e-book titles offered by HarperCollins, Hachette, and Simon & Schuster, the proposed Penguin Final Judgment likely will lead to lower e-book prices for many Penguin titles. . . . [T]he requirements and prohibitions [i.e., the two-year cooling-off period] included in the proposed Penguin Final Judgment will eliminate Penguin's illegal conduct, prevent recurrence of the same or similar conduct, and establish a robust antitrust compliance program."); Resp. by Pl. United States to Pub. Cmts. on the Proposed Final J. As to the Macmillan Defs., at 3 (same); Resp. by Pl. United States to Pub. Cmts. on the Proposed Final J. As to the Penguin Defs., at 16 ("The United States continues to believe that the proposed Penguin Final Judgment, as drafted, provides an effective and appropriate remedy for the antitrust violations alleged in the Complaint and that it is therefore in the public interest."). The Plaintiff States similarly endorsed the injunctive relief in the Consent Decree. *See* Mem. in Support of Pl. States' Mot. for Preliminary Approval of Settlements and Proposed Consumer Notice and Distrib. Plans, *The State of Texas v. Hachette Book Group, Inc.*, (Sept. 13, 2012) 12-cv-6625 (Dkt. #11) at 7 ("[T]he . . . requirements that must be met if publishers and retailers wish to conduct business under the agency model . . . . are intended to reestablish price competition at the retail level in a market free of the taint of the prior conspiracy."). And by approving subsequent

consent decrees entered into with other defendant publishers on substantially the same terms, the district court further confirmed that the relief in the Consent Decree is properly crafted to remedy the alleged collusion and antitrust violations. *See* Final J. As to Defs. The Penguin Group, a Division of Pearson PLC, and Penguin Group (USA), Inc. (May 17, 2013) (Dkt. #259); Final J. As to Defendants Verlagsgruppe Georg Von Holtzbrinck GMBH & Holtzbrinck Publishers, LLC d/b/a Macmillan (Aug. 12, 2013) (Dkt. #354); Order and Stipulated Inj., *In re Electronic Books Antitrust Litigation*, 11-md-2293 (Dec. 9, 2013) (Dkt. #476), *The State of Texas et al. v. Penguin Group (USA) Inc. et al.*, 12-cv-3394 (Dkt. #363); Order and Stipulated Inj., *In re Electronic Books Antitrust Litigation*, 11-md-2293 (Dec. 9, 2013) (Dkt. #477), *The State of Texas et al. v. Penguin Group (USA) Inc. et al*., 12-cv-3394 (Dkt. #364).

In short, there were no intervening factual or legal developments to justify augmenting the injunctive relief in the Simon & Schuster Consent Decree, and the district court could not identify any. And beyond this substantive failure, the district court did not even attempt to afford Simon & Schuster appropriate procedural protections. At the conclusion of the August 9 hearing, it expressly excluded the defendant publishers from further negotiations over the final injunction, *see* Hr'g Tr. at 71:20-21 ("I don't want the publisher defendants to be involved in these negotiations, certainly not now."), and although purporting to

provide them "an opportunity to be heard on any proposed injunction," *id*. at 71:24-72:1, failed to rule on their objections or afford them any process—in the form of a hearing or further briefing on the modification—before the Apple Injunction was entered. Simon & Schuster submitted a letter to the court objecting to the arbitrary staggering of the defendant publishers' extended cooling-off periods in the Revised Judgment, and the letter was not even docketed, let alone ruled upon.

2. Even Assuming Changed Circumstances That Could Support Modification, Extension of Simon & Schuster's Cooling-Off Period Was Not Appropriately Tailored To Any Such Changed Circumstances

If a district court makes the requisite factual findings to support modification of a consent decree, it must then craft a modification that is "suitably tailored" to the changed circumstances. *See Crumpton*, 993 F.2d at 1028-30; *Still's Pharmacy*, 981 F.2d at 638-39. This Court has repeatedly instructed that a district court must not fashion injunctive relief that is "broader than necessary to cure the effects of the harm caused by the violation." *Mickalis Pawn Shop*, 645 F.3d at 144 (citation and internal quotation marks omitted); *Forschner Grp., Inc. v. Arrow Trading Co.*, 124 F.3d 402, 406 (2d Cir. 1997).

In performing its obligations under the Tunney Act, 15 U.S.C. § 16(b)-(h), the district court already determined that the Simon & Schuster Consent Decree was adequate to redress the alleged collusion and that entry of the decree would be

in the public interest. Even assuming that a "continuing danger of collusion"—based on no new factual findings whatsoever—could support modification of the Consent Decree, a doubling of Simon & Schuster's cooling-off period is by no measure appropriate to address this concern. The original cooling-off period was already sufficient, as Plaintiffs and the district court repeatedly confirmed. Nothing in the record supports a two-fold enhancement of it.

The extension of Simon & Schuster's cooling-off period is not just overbroad, it is also arbitrary. Simon & Schuster received the longest extension of the three early settlers for absolutely no reason. The only proffered basis was the order of settlements, but although these three publishers settled the DOJ Action at the same time, Simon & Schuster's penalty exceeds the others by six months and twelve months, respectively. Simon & Schuster objected to this arbitrary ordering in its August 27 letter, and urged that, if the court must apply a staggered approach, the intervals for the first three settling defendants should be limited to 30 – 60 days, rather than six months. Its objections were never ruled upon.

Moreover, as Simon & Schuster explained below, the Consent Decree already contains numerous provisions to prevent collusion among the Publishers and Apple. *See* Letter from Yehudah L. Buchweitz on behalf of Simon & Schuster, Inc. to the Hon. Denise L. Cote (Aug. 27, 2013) at 2. The Consent Decree includes fulsome antitrust compliance provisions that will be in effect for

five years from entry—until September 7, 2017— such as: designation of an Antitrust Compliance Officer; annual antitrust training for employees; signed employee acknowledgements and certification; annual antitrust compliance audits; mechanisms to encourage employees to disclose potential antitrust violations without reprisal; mandatory ceasing and notification to the government of any violations and the corrective actions taken; periodic reporting of any violations of the Consent Decree; periodic reporting of logs of oral and written communications among the defendant publishers; and annual compliance reports. *See* Simon & Schuster Consent Decree, § VII. In addition, the Consent Decree provides substantial inspection rights, including the ability to access documents and interview employees concerning alleged violations, *see id*. § VIII. And Simon & Schuster cannot enter into any agreement containing a Price MFN for five years, *see id*. §§ V.C, XI. There is simply no need to further extend the cooling-off period in light of these comprehensive measures, and the district court did not provide one. There has never been any allegation that Simon & Schuster is doing anything other than faithfully complying with all of its obligations under the Consent Decree and that it has been doing so for nearly a year and half as of the filing of this brief.

Absent any unanticipated significant factual developments or a finding that extension of the cooling-off period is appropriately tailored to any changed

circumstances, the district court's modification of the Simon & Schuster Consent Decree was an abuse of discretion and should be reversed.

II. The District Court's Modification of the Prior Simon & Schuster Consent Decree Violates Fundamental Principles of Judicial Estoppel

Whether judicial estoppel applies is a question of law this court reviews *de novo*. *See Uzdavines v. Weeks Marine, Inc.*, 418 F.3d 138, 143 (2d Cir. 2005).

A. Judicial Estoppel Precludes Plaintiffs from Taking A Position with Respect to the Simon & Schuster Cooling-Off Period That Is Inconsistent with Their Prior Position

Not only is section III.C.3 of the Apple Injunction an improper modification of the Consent Decree but Plaintiffs are also independently precluded from seeking an extension of Simon & Schuster's cooling-off period by principles of judicial estoppel. "[J]udicial estoppel . . . generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase." *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) (citation and internal quotation marks omitted). The doctrine applies when: (1) the party's subsequent position is "clearly inconsistent" with its prior position, (2) the party succeeded in persuading the court to adopt its prior position, and (3) the party will derive an unfair benefit or impose a detriment on the opposing party if not estopped. *See id*. at 750-51. All three factors are present in this case.

Plaintiffs' proposal to extend Simon & Schuster's cooling-off period expressly contradicted numerous prior statements that a two-year cooling-off

period would be sufficient to restore competition and remedy the effects of the alleged collusion among the defendant publishers. In connection with its motion to approve the Simon & Schuster Consent Decree, the government repeatedly confirmed the adequacy of the cooling-off period. *See, e.g.*, Pl. United States' Competitive Impact Statement, at 12 ("In light of current industry dynamics, including rapid innovation, a two-year period, in which Settling Defendants must provide pricing discretion to retailers, is sufficient to allow competition to return to the market."); Resp. of Pl. United States to Pub. Cmts. on the Proposed Final J., at 17-18 ("The limitations placed on the terms of agency contracts entered into by Settling Defendants for a period of two years will break the collusive status quo and allow truly bilateral negotiations between publishers and retailers to produce competitive results."). The district court also noted that the two-year cooling-off period "is strictly limited in time," *Apple I*, at 637, and the government confirmed that the moratorium on discounting restrictions was intended to be "brief," *see* Resp. of Pl. United States to Pub. Cmts. on the Proposed Final J., at vi-vii ("This brief cooling-off period will ensure that the effects of the collusion will have evaporated before defendants seek future agency agreements."). In connection with the subsequent entry of the Penguin and Macmillan judgments—containing identical cooling-off periods—Plaintiffs again reaffirmed the sufficiency of a two-year moratorium on discounting restrictions. *See, e.g.*, Resp. by Pl. United States

to Pub. Cmts. on the Proposed Final J. As to the Penguin Defs., at 5; Resp. by Pl. United States to Pub. Cmts. on the Proposed Final J. As to the Macmillan Defs., at 3; Resp. by Pl. United States to Pub. Cmts. on the Proposed Final J. As to the Penguin Defs., at 16; Mem. in Supp. of Pls.' Mot. for Preliminary Approval of Macmillan and Penguin Settlements and Proposed Consumer Notice and Distrib. Plans, *In re Electronic Books Antitrust Litigation*, 11-md-2293 (Dkt. #360), *The State of Texas et al. v. Penguin Group (USA) Inc. et al.*, 12-cv-3394 (Dkt. #235), *The State of Texas et al. v. Hachette Book Group Inc., et al.*, 12-cv-6625 (Dkt. #83).

It was only when Plaintiffs began crafting the Apple Injunction that they made an abrupt about-face in their assessment of the adequacy of the injunctive relief imposed on Simon & Schuster. *See, e.g.*, Letter from Lawrence E. Buterman, U.S. Dep't of Justice, to the Hon. Denise L. Cote (Aug. 8, 2013) ("While Plaintiffs recognize that the practical effect of Section III.C is that it extends the Publishers' 'cooling off' period with the retailer with which it engaged in a price-fixing conspiracy for an additional three years, *Plaintiffs believe such a limited extension is necessary*." (emphasis added)). Despite their prior statements that the two-year cooling-off period in the Simon & Schuster Consent Decree would be sufficient to restore competition, Plaintiffs expressly sought to use the Apple Injunction to further punish the publishers by preserving Apple's

discounting authority for an additional extended period. *See id*. ("[I]t is necessary to ensure that Apple (and hopefully other retailers) can discount e-books and compete on retail price for as long as possible.").

With respect to the second factor, the district court expressly accepted the government's position in granting its motion for entry of the Consent Decree and relied on Plaintiffs' representations regarding the effectiveness of the two-year restriction. *See Apple I*, at 632-33 ("The two year limitation on retail price restraints and the five year limitation on Price MFNs appear wholly appropriate given the Settling Defendants alleged abuse of such provisions in the Agency Agreements, the Government's recognition that such terms are not intrinsically unlawful, and the nascent state of competition in the e-books industry."). And while the district court's approval of the Consent Decree is sufficient to satisfy this requirement, *see New Hampshire*, 532 U.S. at 752-54 (holding that Court accepted position of estopped party by entering consent decree adopting agreed-upon provision),[15] the court went even further in conducting its review under the Tunney Act to conclude—based on the government's representations—that the Consent

[15] *See, e.g., Capmark Fin. Grp. Inc. v. Goldman Sachs Credit Partners L.P.*, 491 B.R. 335, 353 (S.D.N.Y. 2013) ("Judicial estoppel does not require that a court expressly assume a party's position in formulating its opinion or issue a final decision on the merits. It is enough that the court accept the accuracy of a party's representation and that the court 'might have' made a different decision had the party not taken that position." (citing *New Hampshire*, 532 U.S. at 752)).

Decree is in the public interest. In granting Plaintiffs' motion for entry of the Consent Decree, the court specifically agreed with the government that the two-year cooling-off period "will allow [the e-books industry] to return to a competitive state," *Apple I*, at 632, and that the "remedies [in the Consent Decree] will result in a return to the pre-conspiracy status quo," *id*. at 633. Plaintiffs' subsequent arguments in support of the Revised Judgment essentially rendered their previous statements upon which the district court relied meaningless.

Finally, the unfair detriment to Simon & Schuster from the modification of its Consent Decree is clear and indisputable. Simon & Schuster made a calculated decision to settle this action, and the Consent Decree represents a heavily negotiated compromise between the parties. The cooling-off period was the critical component of that bargain. Indeed, Plaintiffs induced Simon & Schuster to enter into the Consent Decree on the condition that it could use the agency model consistent with the Consent Decree's terms and would be free, in two years, to enter into any type of otherwise lawful distribution contract.[16] Plaintiffs' about-face regarding the duration of that cooling-off period denied Simon & Schuster the

[16] Notably, the government recognized the legitimate business value of the agency model to the publishers and noted how the consent decree would "allow[] a Settling Defendant to prevent a retailer selling its entire catalogue at a sustained loss." Pl. United States' Competitive Impact Statement, at 15. It also repeatedly disclaimed any intention to act as a "regulator" of the e-books industry. Resp. of Pl. United States to Pub. Cmts. on the Proposed Final J., at 25.

benefit of that bargain: Simon & Schuster's cooling-off period has now doubled. Judicial estoppel prevents Plaintiffs from benefitting from their change of position. *See New Hampshire*, 532 U.S. at 749-50 (judicial estoppel is intended "to protect the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment" (citation and internal quotation marks omitted)).

CONCLUSION

For the foregoing reasons, the district court's modification of the Simon & Schuster Consent Decree should be reversed.

Dated: February 7, 2014
New York, New York

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CERTIFICATE OF COMPLIANCE WITH F.R.A.P. RULE 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B). It contains 10,182 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6). It has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman.

Dated: February 7, 2014