FINAL FORM

13-3741-cv(L)

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

IN THE

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,

(Additional Caption on the Reverse)

On Appeal from the United States District Court for the Southern District of New York (Cote, J.)

REPLY BRIEF FOR DEFENDANTS-APPELLANTS VERLAGSGRUPPE GEORG VON HOLTZBRINCK GMBH, HOLTZBRINCK PUBLISHERS, LLC, d/b/a MACMILLAN

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v.

APPLE, INC., SIMON & SCHUSTER, INC., VERLAGSGRUPPE GEORG VON HOLTZBRINCK GMBH, HOLTZBRINCK PUBLISHERS, LLC, d/b/a MACMILLAN, SIMON & SCHUSTER DIGITAL SALES, INC.,

Defendants-Appellants,

and

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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INTRODUCTION

The government tersely contends Macmillan and Simon & Schuster's modification and judicial estoppel arguments fail for essentially the same reason, *viz.*, that the injunction on appeal was directed at Apple and its purpose was not to alter the publishers' consent decrees. Govt. Br. at 100–02. That is misdirection.

Regardless of whether the injunction named the publishers (and it did) or was specifically aimed at them (and it was), it materially increased their burdens above those in their consent decrees. Therefore, the injunction was a modification. Because the government cannot—and does not attempt to—show that such modification satisfied Federal Rule of Civil Procedure 60(b), reversal is warranted.

Reversal also is proper because the government should have been judicially estopped from seeking such additional relief. Contrary to the government's suggestion, judicial estoppel does not turn on why a party seeks relief or whether a court orders relief that matches a party's request in all its particulars. Instead, estoppel depends on whether a party benefits from changing a factual position on which the court previously relied. Here, the government obtained judicial approval of Macmillan's consent decree by stating that it sufficed to restore competition and dispel the threat of future collusion; then, the government said—without showing changed conditions—that more relief was necessary to restore competition and guard against future collusion. That should have triggered estoppel.

ARGUMENT

I. THE DISTRICT COURT MODIFIED MACMILLAN'S CONSENT DECREE WITHOUT JUSTIFICATION.

In its opening brief, Macmillan showed that the Apple Injunction modified Macmillan's consent decree by (i) altering the court-approved package of restraints to which Macmillan had agreed and (ii) extending the duration of the most onerous restrictions. *See* Macmillan Br. 27–30. Macmillan showed that reversal is required because the court did so without satisfying the requirements of Federal Rule of Procedure 60(b). *Id.* at 31–36 (incorporating Simon & Schuster Br., Argument § I.B.1–2 by reference).

In response, the government does not offer any argument that the requirements of Rule 60(b) were satisfied. Govt. Br. 100–02. Instead, the government broadly contends that the Apple Injunction did not "modify" Macmillan's decree at all. *Id.* at 100 (calling it an "erroneous premise that the Injunction entered against Apple had the effect of amending the Publisher-Defendants' own previously entered consent decrees"). The government bases its argument on its view that the injunction on appeal was directed only at Apple. *Id.* at 101 ("[T]he injunction by its terms runs against Apple, not against the Publisher-Defendants."); *id.* (characterizing the publishers' relationship to the injunction as merely a "spillover effec[t]" and a "practical impact"). The government's position is wrong on several levels.

First, the government's argument depends on a peculiar understanding of the word "modify." In common speech, that word simply means "[t]o change in form or character; alter." *The American Heritage Dictionary of the English Language* 1130 (4th ed. 2000). The same is true in legal speech. *Black's Law Dictionary* 1095 (9th ed. 2009) (defining "modification" as "[a] change to something" or "an alteration"). The word does not have a different meaning in the particular context of Rule 60. On the contrary, whether a modification exists is not defined by "against" whom an order's "terms run," Govt. Br. 101, but "is determined by its actual effect." *Weight Watchers Int'l, Inc. v. Luigino's, Inc.*, 423 F.3d 137, 141 (2d Cir. 2005).

Here, irrespective of whether the order facially ran against Apple, *but see infra* at 4–5, it effectively amended Macmillan's decree. Macmillan's decree authorized it to cap *all* retailers' discounts at the value of their aggregate annual commissions during the 23-month cooling-off period. After the Apple injunction, Macmillan cannot do so. Now, it may cap the discounts of *all but one* of its retailers. Also, under its consent decree Macmillan was free to negotiate a discount-prohibiting agency agreement with all of its eBook retailers in December 2014. Under the injunction on appeal, however, it may not do so until October *2017*. Thus, Macmillan now has two fewer sticks in its bundle of legal rights than it did before the injunction was entered. That increase in legal disability is a

modification of Macmillan's initial decree. *See Weight Watchers*, 423 F.3d at 141–42 (a modification exists where it "'alters the legal relationship between the parties, or substantially change[s] the terms and force of the injunction.'"); *Crumpton v. Bridgeport Educ. Ass'n*, 993 F.2d 1023, 1029 (2d Cir. 1993).

Second, even if—as the government suggests—the existence of a modification were to turn on whether a party is the nominal object or intended target of an injunction, that test would be met here. The record shows that the post-trial injunction was directed at the publishers just as it was aimed at Apple itself. To start, on its face, the Apple Injunction targeted the publishers; its provisions reference each of them individually and impose legal restrictions on each of them by name. SPA205 § III.C.1–5. Additionally, in advocating for the injunction, the government singled out the publishers as objects of the restraints. The government emphasized to the District Court that "[e]nsuring that Apple can discount e-books and compete on retail price will make it more difficult for *the Publisher Defendants* to prohibit other retailers from doing so." *See* A2311 (Pls.' Injunction Br.) (emphasis added).

Less than a week later, the government again put the publishers squarely in its crosshairs, arguing that the new injunction was "necessary to ensure that Apple (*and hopefully other retailers*) can discount e-books and compete on retail price for as long as possible." A2356 (DOJ Letter) (emphasis added). But providing Apple

(and other retailers) with unfettered pricing discretion is not a remedy directed at *Apple*.[1] It is a remedy directed at those who control that pricing discretion, which—under the agency model of distribution—is the publishers.[2] Indeed, the government openly argued that it believed it was justified in imposing additional burdens on the publishers because it had already proved at trial that "the publishers themselves were engaged in a horizontal price-fixing conspiracy." *Id.*

Finally, there is no merit to the government's suggestion that the Publisher-Defendant-focused language of the injunction is simply a necessary outgrowth of the price-fixing conspiracy it proved against Apple at trial. Govt. Br. 100 (describing the staggered cooling-off periods as a "sensible precaution" directed at preventing "Apple [from] 'renegotiating with all the publisher defendants at once'"). As an initial matter, the government's argument does not speak to whether the injunction worked a modification of the Macmillan decree; instead, it merely addresses whether the modification was a salutary or desirable one. But

[1] If anything, the injunction actually confers a competitive *benefit* on Apple, making it the only eBook retailer to be (1) wholly free from discount caps during the publishers' cooling-off periods and (2) guaranteed to retain plenary pricing authority after the Publisher-Defendants exit their initial cooling-off periods. *See* Macmillan Br. § I.A; Simon & Schuster Br. § I.A.

[2] Moreover, by mandating total price freedom for Apple, the injunction is a remedy that pursues the same end (restoring competition) via the same means (cooling off periods for the Publisher-Defendants) that the government had pursued (and pledged it would achieve, *see infra* § II) in the publishers' consent decrees.

Rule 60(b) governs *all* revisions to existing injunctions, not only harmful, offensive, or wrongheaded changes.

Regardless, the government errs in suggesting that staggering the times at which Apple was able to contract with the publishers was a necessary measure. The resumption of Apple–publisher negotiations was already staggered by virtue of the disparate times at which they each settled. Consent decrees for Hachette, Simon & Schuster, HarperCollins were all approved on September 5, 2012, *see United States v. Apple, Inc.* 889 F. Supp. 2d 623 (S.D.N.Y. 2012); SPA1, and provided that their two-year cooling-off periods with Apple would begin within seven days of the order, and thus would conclude in September 2014. SPA8, SPA10–SPA11 (S&S Final Judgment) §§ IV.A, V.A.[3] Penguin's final judgment was approved in May 2013, SPA200, resulting in a cooling-off period that would end by May 2015. And, although Macmillan was the last to settle, it received the shortest cooling-off period and arranged for it to begin running immediately, such that it would finish its cooling-off period with Apple in December 2014. SPA192 (Final Macmillan Judgment) § V.A. Consequently, the status quo at the time the court issued the injunction on appeal already reduced the possibility that Apple (or other retailers) would ever be negotiating with all of the publishers simultaneously.

[3] Neither the government in submitting these decrees for approval nor the District Court in simultaneously approving them suggested that staggering the periods when the publishers would be able to reach unencumbered agreements with Apple and other retailers was necessary to restore competition or prevent collusion.

In sum, the District Court modified Macmillan's consent decree when it extended Macmillan's cooling-off period and withdrew Macmillan's authority to cap Apple's eBook discounts. Furthermore, whether Macmillan was the express object of the injunction on appeal is not relevant to the modification inquiry—and even if it were, both the text of the injunction and the government's arguments in support of it show that the injunction targeted Macmillan and the other Publisher-Defendants. The enhanced restrictions of the Apple Injunction must be reversed.

II. THE COURT ERRED IN FAILING TO ESTOP THE GOVERNMENT FROM CHANGING ITS POSITION ON THE RELIEF NECESSARY TO RESTORE COMPETITION.

Properly applied, the doctrine of judicial estoppel asks whether the party to be estopped has made a factual representation that is relied upon by a court and then, at a later time, takes a factual position that is clearly inconsistent with its earlier representation to the detriment of its opponent. *See New Hampshire v. Maine*, 532 U.S. 742, 749 (2001); Macmillan Br. 37–40. The government contends that estoppel does not apply because (i) it sought the injunction on appeal against Apple, not the Publisher-Defendants, Govt. Br. 101–02, and (ii) the District Court rejected the specific form of relief the government proposed—a five-year cooling-off period for Apple–Publisher-Defendant agreements—and instead imposed the staggered (and newly extended) cooling-off periods, *id.* at 102.

The government's first argument is a non-starter because the relief that the government euphemistically describes as having "a practical impact on the Publisher-Appellants" is, as shown, plainly a new detriment to Macmillan. *Supra* § I; *see also* Macmillan Br. 48–51.

The second argument is a non sequitur. The decisive issue is not whether the District Court agreed with the government on the best way to translate a new factual position into an injunctive remedy. Instead, the issue is whether the government has abandoned an earlier factual position that was relied on by the court. *See* Macmillan Br. 38–39, 40–48. Here, there is no question that the government did so. As Macmillan showed, the government jettisoned its position that the time limitations in the publishers' consent decrees were sufficient to restore competition by adopting the view that additional time periods in which Apple and the publishers could not agree to certain terms actually were necessary and sufficient to restore competition. *Id.* at 37–38, 41–44 (contrasting the 23-month to two-year periods the government originally represented were necessary with the five-year period it subsequently sought but did not obtain). Although the government did not receive the entire five-year cooling-off period it requested after trial, its new representations about what was necessary to restore competition allowed it to obtain more injunctive relief than it had through the consent decrees.

Specifically, to obtain approval of the decrees, the government made factual representations about the cooling-off periods' effect on competition: "a two-year period, in which Settling Defendants must provide pricing discretion to retailers, is sufficient to allow competition to return to the market." A942 (Original CIS); *see also*, *e.g.*, Macmillan Br. 42–43 (collecting government's representations). And, as to the Macmillan settlement, the government declared that, "given the settlements of all the other Publisher Defendants, a 23-month cooling-off period is sufficient to ensure that future contracts entered into by these publishers will not be set under the collusive conditions that produced the Apple Agency Agreements." A1162–A1163 (Macmillan CIS).

Only months later, however, the government asked the District Court to impose additional restraints on the Publisher-Defendants as an aspect of its permanent injunction against Apple. A2310–A2311 (Pls.' Injunction Br.). The government asserted that the extended cooling-off period was "necessary to rid the e-book market of the effects of a successful, long-running price-fixing conspiracy, and to restore this market to competitive health." A2355 (DOJ Letter). It also asserted that a longer period of pricing freedom for "Apple (and hopefully other retailers)" was "necessary" because it suspected that the Publisher-Defendants were planning to engage in collusive eBook pricing as soon as their cooling-off periods ended. A2356. These representations were irreconcilable with the

government's earlier assurances about the sufficiency of the cooling-off periods in the decrees, including—most strikingly—how the Macmillan decree would be "sufficient" to undo the allegedly "collusive conditions that produced the *Apple* Agency Agreements." A1162–A1163 (emphasis added).

The government's about-face is alone significant and sufficient to trigger judicial estoppel. The government's action is particularly noteworthy within the Tunney Act setting. This context makes estoppel more imperative given the purposes of the deliberative process Congress established, *see* Macmillan Br. 5–7, and demonstrates that the government's original representations upon which the District Court relied in approving the decrees cannot be dismissed as puffery or mere boilerplate.

The government has brought and settled dozens of Section 1 cases in the decades since the Tunney Act was passed, and a survey of those settlements shows that, on each occasion, it has carefully appraised the settlement's likely effect on competition and given an assessment tailored to the circumstances. As here, when the government, after careful study, believes that a remedy proposed in a consent decree will fully restore competition, it unambiguously says so. *See, e.g.*, *United States v. Okla. State Chiropractic Indep. Physicians Ass'n*, 78 Fed. Reg. 4439, 4441 (Jan. 22, 2013) ("The proposed Final Judgment *will prevent the recurrence of the violations alleged in the Complaint and restore competition* in the sale of

chiropractic services in Oklahoma." (emphasis added)), *consent decree entered by* No. 13-cv-21-TCK, 2013 U.S. Dist. LEXIS 90485 (N.D. Okla. May 21, 2013); *United States v. Consol. Multiple Listing Serv., Inc.*, 74 Fed. Reg. 22,965, 22,970 (May 15, 2009) ("The proposed Final Judgment *will restore competition* to the Columbia-area brokerage market . . . ." (emphasis added)), *consent decree entered by* No. 3:08-cv-01786, 2009 WL 3150388 (D.S.C. Aug. 27, 2009); A1162–A1163 (Macmillan CIS) (settlement is "sufficient to ensure that future contracts entered into by these publishers will not be set under the collusive conditions that produced the Apple Agency Agreements"); A942 (Original CIS) ("[A] two-year period . . . is sufficient to allow competition to return to the market.").

By contrast, in cases where the decree's effect on competition will be something less than total restoration, the government says that too. Indeed, approval under the Tunney Act requires only that the decree be "in the public interest," not that it be a panacea for the allegedly anticompetitive conduct at issue. 15 U.S.C. § 16(e). Thus, the government frequently asserts, for instance, that proposed decrees could help competition or are in the public interest. *See, e.g.*, *United States v. KeySpan Corp*., 75 Fed. Reg. 9946, 9951 (Mar. 4, 2010) (describing the remedy as "necessary to protect the public interest"), *consent decree entered by* 763 F. Supp. 2d 633 (S.D.N.Y. 2011); *United States v. MathWorks, Inc.*, 67 Fed. Reg. 64,657, 64,663 (Oct. 21, 2002) ("Section IV of the

proposed Final Judgment . . . *is designed to assist* the United States in its efforts to *promote continued competition*." (emphasis added)), *consent decree entered by* No. 02-888-A, 2003 U.S. Dist. LEXIS 4622 (E.D. Va. Mar. 6, 2003)).[4]

These examples demonstrate that when seeking Tunney Act approval for an antitrust settlement, the Department of Justice says what it means, and it means what it says. Such representations shape the understandings and expectations of settling defendants, the public's evaluation of and comments on consent decrees, and the courts' appraisal and approval of the decrees. Here, the government said that the time-limitations in Macmillan's consent decree would suffice to restore competition in light of the decrees the government had previously entered with the other Publisher-Defendants, and that the decrees would dispel any threat of future collusion. Under the doctrine of judicial estoppel, the government is bound to that assessment, and, in the context of the Tunney Act, the assessment has unique force. Accordingly, this Court should reverse the greater restrictions the government

[4] *Accord United States v. Steinhardt Mgmt. Co.*, 60 Fed. Reg. 3258, 3265 (Jan. 13, 1995) ("The United States submits that the proposed Final Judgment is in the public interest."), *consent decree entered by* No. 94 Civ. 9044, 1995 U.S. Dist. LEXIS 19250 (S.D.N.Y. May 5, 1995); *see also, e.g.*, *United States v. Prof'l Consultants Ins. Co.*, 70 Fed. Reg. 55,415, 55,421 (Sept. 21, 2005) ("The proposed Amended Final Judgment . . . *seeks to prevent* PCIC and its members from engaging in anticompetitive communications and uses of LOL information . . . ." (emphasis added)), *consent decree entered by* No. 1:05-CV-1272, 2005 WL 6579716 (D.D.C. Nov. 26, 2005).

secured against the publishers by abandoning the factual positions it took during Tunney Act proceedings.

* * *

Both here and in the District Court, the government has based its support of the injunctive relief at issue on the flawed premise that it has "proved . . . [a] horizontal conspiracy among the Publisher-Defendants." Govt. Br. 39; *see also* A2356 (DOJ Letter) .

But that is wrong. By the time of Apple's trial, all of the publishers had long since settled, forgoing their right to participate in that trial and cutting off any possibility of a finding against them in that proceeding. Moreover, each of their consent decrees expressly recognized that it did not represent any finding or admission of wrongdoing—or, for that matter, a finding on *any* of the substantive allegations in the government's complaint. SPA183 (Final Macmillan Judgment). The government cannot revise that history now and seek to transform its success against Apple into a victory over those it opted not to face at trial. Indeed, as Macmillan noted at the outset of its opening brief, the central question in this appeal is whether the government can use a victory against a non-settling defendant to tighten the screws on other defendants who settled and exited the litigation months or years before. Whether viewed through the lens of modification or judicial estoppel, the answer must be no.

CONCLUSION

For the foregoing reasons, as well as those stated in the opening briefs of Macmillan and Simon & Schuster, the District Court's judgment should be reversed as to Macmillan, and this Court should direct that the relief in Macmillan's consent decree should be restored.

Dated: June 24, 2014

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

In accordance with Circuit Rule 32(a) and Rule 32(a)(7) of the Federal Rules of Appellate Procedure, the undersigned certifies that the accompanying brief has been prepared using 14-point Times New Roman typeface, and is double-spaced (except for headings and footnotes).

The undersigned further certifies that the font used in this brief is proportionally spaced and contains 3,157 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

Dated: July 15, 2014

/s/ Eamon P. Joyce
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