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 REPLY 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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PRELIMINARY STATEMENT

Plaintiffs do not dispute the governing law: a consent decree, as both a contract and judicial injunction, may be modified only upon specific factual findings of a significant and unanticipated change in circumstances. *See* S&S Br. at 28-29.[1] Nor do Plaintiffs dispute that even when changed circumstances warrant modification, a district court must adhere to strict procedural requirements and must "suitably tailor[]" any modification to the new circumstances presented. *Crumpton v. Bridgeport Educ. Ass'n*, 993 F.2d 1023, 1028-30 (2d Cir. 1993). It is likewise uncontested that Section III.C.3 of the Apple Injunction, which doubled Simon &Schuster's cooling-off period (the term in which it is prohibited from imposing discounting restrictions) from two years to four, met none of these requirements. *See* S&S Br. at 28-35.

Plaintiffs assert only one argument in defense of the extension of Simon & Schuster's cooling-off period: They claim it was not a modification at all. Specifically, despite conceding from the very beginning that the Apple Injunction's "practical impact" was to impose "spillover effects" on Simon & Schuster and extend its cooling-off period, Plaintiffs contend it did not modify the Consent

[1] *See also, e.g., Rufo v. Inmates of Suffolk Cnty. Jail*, 502 U.S. 367, 394 (1992); *United States v. Sec'y of Hous. & Urban Dev.*, 239 F.3d 211, 217 (2d Cir. 2001); *Stills Pharmacy, Inc. v. Cuomo*, 981 F.2d 632, 637 (2d Cir. 1992).

Decree because "the Injunction by its terms runs against Apple, not against the Publisher-Defendants." Pl. Br. at 101.

That is not the test for modification but, even if it were, Plaintiffs would fail it. It is the *effects*—not the *terms*—of an order that determine whether it modifies an injunction. *See Weight Watchers Int'l, Inc. v. Luigino's Inc.*, 423 F.3d 137, 141 (2d Cir. 2005). Section III.C.3 of the Apple Injunction modifies the injunction in the Consent Decree because it effectively doubles Simon & Schuster's cooling-off period. In any case, the injunction does run against Simon & Schuster "by its terms": Section III.C.3 names Simon & Schuster expressly; the length of the extension was purportedly based on the timing of Simon & Schuster's settlement, not anything to do with Apple; and Plaintiffs concededly intended Section III.C.3 to restrict Simon & Schuster's agreements with all retailers, not merely with Apple. By any measure, Section III.C.3 is a modification of the Consent Decree.

Separately, the extension of the cooling-off period is barred by the doctrine of judicial estoppel, which "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). To gain approval of the Consent Decree, Plaintiffs argued, and the district court accepted, that the two-year cooling-off period was all that was needed to restore competition

to the market. Then, more recently, Plaintiffs persuaded the court to extend that period by arguing exactly the opposite. Judicial estoppel prohibits this turnabout.

ARGUMENT

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

Plaintiffs contend the extension of Simon & Schuster's cooling-off period did not modify the injunction in the Consent Decree. Pl. Br. at 100-01. That contention is wrong for at least three independent reasons.

First, whether an order modifies an injunction "is determined by its actual effect." *Weight Watchers*, 423 F.3d at 141. "[A] modification alters the legal relationship between the parties, or substantially changes the terms and force of the injunction." *Id.* at 141-42 (internal quotation marks and alteration omitted); *see also Berger v. Heckler*, 771 F.2d 1556, 1568 (2d Cir. 1985) (order that "expand[s] . . . the agreement of the parties" is a modification). There is no doubt Section III.C.3 substantially changed the terms of the Consent Decree. Simon & Schuster originally was enjoined from entering into agreements containing discount restrictions for a two-year period, after which it would be free to negotiate such agreements with any e-book retailer. As the government explained, "[t]his 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. No. 81, at vi-vii (emphasis

added). Section III.C.3 altered this critical provision of the Consent Decree. Now Simon & Schuster must wait four years instead of two to negotiate discount restrictions with at least one key retailer. And if other retailers insist on the same pricing discretion that Section III.C.3 bestows on Apple—as Plaintiffs intended, *see infra* pp.6-7—the extension will apply across all of Simon & Schuster's accounts.

Plaintiffs have never denied the Apple Injunction will have this effect. In fact, they conceded it from the start: "Plaintiffs recognize that the practical effect of Section III.C is that it extends the Publishers' 'cooling off' period . . . ." Letter from Lawrence E. Buterman, U.S. Dep't of Justice, to the Hon. Denise L. Cote (Aug. 8, 2013) ("DOJ Ltr.") (Dkt. No. 342). But they maintain the effects of the order are irrelevant so long as its terms run only against Apple. That is a roadmap for circumventing Rule 60(b) that the law of this circuit wisely precludes. *See Weight Watchers*, 423 F.3d at 141; *Berger*, 771 F.2d at 1568.

Second, and in any event, Section III.C.3 of the Apple Injunction does run against Simon & Schuster. It provides that "[f]or agreements between Apple and Simon & Schuster," there shall be no discount restrictions until "36 months after the Effective Date of this Final Judgment." Plaintiffs think it dispositive that the order states "Apple shall not enter into" such agreements with Simon & Schuster. But that is a formality. If it provided instead that Simon & Schuster shall not agree

with Apple, or both shall not agree with each other, the meaning would be the same: the agreements are proscribed by law.

The duration of the extended cooling-off period confirms that Section III.C.3 was intended to and does run against Simon & Schuster in particular. As Plaintiffs confirmed, the duration was explicitly based on the timing of Simon & Schuster's settlement. *See* Pls. Mem. at 4 (Dkt. No. 361). Plaintiffs got the facts wrong: Simon & Schuster's settlement was filed and approved at the same time as Hachette's and HarperCollins', yet Simon & Schuster received a far longer extension. *See* S&S Br. at 31-32 & n.14. But, putting that error aside, the timing of Simon & Schuster's settlement indisputably had nothing to do with Apple. The district court also concluded that the extended cooling-off period was justified to remedy a "continuing danger" of the publishers' (not Apple's) alleged collusion (based on the publishers filing a joint brief), and the publishers' (not Apple's) supposed lack of "remorse." *See* S&S Br. at 18-19. Significantly, not even Plaintiffs argue that any of this alleged conduct amounts to a "significant change in circumstances" that could warrant modifying the Consent Decree. *Barcia v. Sitkin*, 367 F.3d 87, 99 (2d Cir. 2004).[2]

[2] Plaintiffs' repeated suggestion, both before the district court (*see* DOJ Ltr. at 2), and on appeal (*see* Pl. Br. at 39), that the court found that the publishers had colluded or otherwise engaged in a "horizontal price-fixing conspiracy" is incorrect, and in any event, should have no bearing on Simon & Schuster's appeal. Simon & Schuster was not on trial in the district court, having already settled and

Third, Plaintiffs intended the extension of the cooling-off period to apply not only to Simon & Schuster's agreements with Apple but to agreements with other retailers too. Again, Plaintiffs conceded as much. In their brief submitted to the district court, they explained 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* Pls.' Injunction Br. (Dkt. No. 329) at 6 (emphasis added). And they followed up with a letter to the district court arguing that extending the cooling-off period was "necessary to ensure that Apple (*and hopefully other retailers*) can discount e-books and compete on retail price for as long as possible." DOJ Ltr. at 2 (emphasis added). So while Plaintiffs now predicate their entire defense on the claim that Section III.C.3 runs only against Apple, they concededly intended it to constrain Simon & Schuster's agreements with other retailers besides Apple.

Plaintiffs' admitted objective of preventing Simon & Schuster from entering agreements with discount restrictions "for as long as possible" is irreconcilable with the compromise the parties made in the Consent Decree. There, Plaintiffs'

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entered the Consent Decree. Moreover, any subsequent "implied" findings by the district court cannot justify modifying the parties' settlement agreement: "the scope of a consent decree must be discerned within its four corners and not by reference to . . . what might have been written had the plaintiff established his factual claims and legal theories in litigation." *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 574 (1984) (internal citation and quotation marks omitted).

position was that a two-year cooling-off period would be wholly sufficient to "evaporate[]" any effects of the alleged collusion, and that afterward Simon & Schuster could "seek future agency agreements." Resp. of Pl. United States to Pub. Cmts. on the Proposed Final J. (Jul. 23, 2012) (Dkt. No. 81), at vi-vii. The district court agreed, emphasizing that the cooling-off period "is strictly limited in time." *United States v. Apple, Inc.*, 889 F. Supp. 2d 623, 637 (S.D.N.Y. 2012) ("*Apple I*"). Plaintiffs cannot ignore these limits unless and until they meet the requirements of Rule 60(b). They concededly have not done so.

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

Simon & Schuster's opening brief also showed that Section III.C.3 of the Apple Injunction was invalid, independently, as a violation of settled principles of judicial estoppel. To gain approval of the Consent Decree, Plaintiffs repeatedly represented that a two-year cooling-off period was "sufficient to allow competition to return to the market." *See* Pl. United States' Competitive Impact Statement (Apr. 11, 2012) (Dkt. No. 5) at 12; *see also* S&S Br. 12-15. The district court accepted those representations when it approved the Consent Judgment under the Tunney Act, which expressly directs courts to evaluate "the competitive impact of [the] judgment, including termination of alleged violations" and the "duration of the relief sought." 15 U.S.C. § 16(e)(1); *see also Apple I*, 889 F. Supp. 2d at 632-33 ("two year limitation on retail price restraints . . . appear[s] wholly adequate").

But after the Consent Decree was entered, Plaintiffs reversed course and claimed it was "necessary" to extend the cooling-off period "for as long as possible." DOJ Ltr. at 2. The judicial estoppel doctrine prohibits this change of position. *See New Hampshire*, 532 U.S. at 749.

Plaintiffs' principal defense is to deflect blame onto the district court. They contend judicial estoppel should not apply because "Plaintiffs did not seek any extension of the Publisher-Defendants' own cooling-off periods." Pl. Br. at 102. Rather, Plaintiffs suggest, the district court "sua sponte" ordered those extensions. *Id.* But Plaintiffs' own words refute this defense. There is no denying they represented that a two-year cooling-off period was sufficient to "break the collusive status quo and allow truly bilateral negotiations between publishers and retailers to produce competitive results."[3] Nor can Plaintiffs deny that they advocated for the extension in Section III.C.3 by arguing it was "necessary" to ensure that retailers could discount ebooks for a longer period. DOJ Ltr. at 2. In fact, as they acknowledge, Plaintiffs sought an even longer *five-year* cooling-off period. Pl. Br. at 102.

Plaintiffs' change of position obviously was detrimental to Simon & Schuster. The parties bargained for (and the district court approved) a two-year

[3] *See* Resp. of Pl. United States to Pub. Cmts. on the Proposed Final J. (Jul. 23, 2012) (Dkt. No. 81), at 17-18.

cooling-off period, and Simon & Schuster compromised valuable rights to conclude its settlement with DOJ. The cooling-off period was then extended significantly based on Plaintiffs' new position that a longer period was necessary. Judicial estoppel exists to prevent parties from unfairly reversing their litigation positions "according to the exigencies of the moment." *New Hampshire*, 532 U.S. at 749-50. Plaintiffs' attempt to do so here should be rejected.

CONCLUSION

For the foregoing reasons and those set forth in Simon & Schuster's opening brief, the district court's modification of the Simon & Schuster Consent Decree should be reversed.

Dated: June 24, 2014
New York, New York

Respectfully submitted,

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1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B). It contains 2,081 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 font.

Dated: June 24, 2014