

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----	X	
United States of America,	:	No. 12-civ-2826 (DLC)
Plaintiff,	:	
v.	:	
Apple, Inc., et al.,	:	
Defendants.	:	
-----	X	

**ANSWER OF DEFENDANT HOLTZBRINCK PUBLISHERS, LLC
D/B/A MACMILLAN TO THE COMPLAINT**

Defendant Holtzbrinck Publishers, LLC d/b/a Macmillan (“Macmillan”) through its undersigned counsel, for its Answer to the Complaint, filed on April 11, 2012 (the “Complaint”), responds as follows to the allegations of the Complaint, and avers generally that the responses contained herein are with respect to the allegations of the Complaint directed to Macmillan only, as it is not required to respond to allegations put forth against any other Defendant, and that when Macmillan refers to “eBooks” and “print books,” it refers to trade books unless it specifically indicates otherwise.

As detailed below more specifically, Macmillan did not participate in any illegal conspiracy. It did not participate in any conspiracy to raise, fix or stabilize e-book prices, to end price competition among e-book retailers, to limit retail price competition between publishers, or to move the distribution of e-books to the agency model.

Despite an extensive investigation including production of the e-mails, calendars, and telephone logs of Macmillan’s CEO and other senior management, extensive interrogatories, and two full days of deposition of Macmillan’s CEO and presumably similarly-extensive discovery of the other defendants, the lack of direct evidence of conspiracy cited in the Government’s Complaint is telling. Absent any direct evidence of conspiracy, the Government’s Complaint is

necessarily based entirely on the little circumstantial evidence it was able to locate during its extensive investigation, on which it piles innuendo on top of innuendo, stretches facts and implies actions that did not occur and which Macmillan denies unequivocally.

For the record: Macmillan did not conspire with other publishers in New York City restaurants. Macmillan's CEO, John Sargent, dined once or at most twice with peers from certain other publishing houses, but these dinners were social in nature. One of those dinners was held for the exclusive purpose of welcoming to New York a new head of publishing of one of the other houses, *a house not even alleged to be part of the alleged conspiracy*. No conspiracy was hatched over any such dinner.

Further building its case on innuendo, the Government alleges that publishers conspired to raise eBook prices under the "guise" of joint venture discussions throughout 2009. The implication that industry joint venture participation was a pretext for conspiracy is demonstrably false. The Complaint fails to reveal that these discussions, which were overseen by counsel, ripened into a legitimate new business entity known as Bookish, which is a joint venture of two settling defendants and Penguin. Macmillan formally, and in writing, withdrew from consideration of this joint venture in the early Fall 2009, well before any discussions about the agency model began. More importantly, the Complaint does not challenge the legitimacy of Bookish, does not mention or acknowledge its existence, does not name Bookish as a defendant, does not seek to have it dissolved as a sham enterprise and the proposed consent decree with the settling publisher defendants does not require them to do anything, including undertaking any remedial action, related to Bookish. The Government's deafening silence about Bookish indicates its acceptance of the legitimacy of the joint venture itself and of its formative process.

Finally, Macmillan did not conspire with other publishers to move to the agency model in December 2009 - January 2010. Macmillan denies that any telephone conversation between Sargent and other publisher CEOs involved collusion. Indeed, more than half of these telephone “conversations” lasted no more than a few seconds and were nothing more than missed calls.

Macmillan independently adopted an agency model for eBook distribution solely as a result of bilateral negotiations between Macmillan and Apple. Apple proposed to distribute Macmillan’s eBooks (on a device that came to be known as the iPad) only on the basis that Apple would serve as Macmillan’s sales agent in exchange for receiving a commission on each sale. Apple had previously used the agency model in its iTunes App Store, and Macmillan uses the agency model in its distribution of the print books of other publishers. Apple proposed these terms to Macmillan on a “take it or leave it” basis. Macmillan’s unilateral decision to accept Apple’s “take it or leave it” offer to adopt the agency model was made by Sargent alone.

Macmillan independently adopted the agency model for eBooks because the wholesale model of distribution, which was initially carried over to eBooks from the physical book environment, led to Amazon’s monopolization of eBook distribution. Charging below wholesale prices, Amazon erected impenetrable barriers to entry to meaningful competition in eBook distribution, thus protecting its more than 90% share of the business. At the time Macmillan switched to the agency model, the Borders bookstore chain was on the verge of bankruptcy; it has since become bankrupt. The Barnes & Noble bookstore chain lacked the long-term ability to sustain competition in the face of Amazon’s below cost pricing of many *New York Times* bestseller eBooks. Amazon’s black and white Kindle, which sold originally for nearly \$400 per unit, was the only eReader with any significant market penetration. Pre-agency model, the future of competition for eBook distribution and eReader innovation was increasingly bleak.

From January 2010 when Macmillan switched to agency through the date of the Government's Complaint in this litigation, the eBook distribution and eReader businesses have been characterized by vigorous rivalry instead of monopolization. In that time, the cost of eReaders has fallen hundreds of dollars per device to less than \$50 for some models (and eReaders have even been given away for free as promotional advertising). Innovation in eReader functions, including internet connectivity and color, has flourished. Apple introduced the iPad. Barnes & Noble regained the ability to compete long-term for eBook sales.¹ Consumer purchases of eBooks have taken off like a rocket. And all the while, the eBook publishers that switched to the agency model essentially embraced a distribution model that they knowingly accepted would lead to *lower*, not higher, margins and profits for them.

In sum, Macmillan did not engage in collusion with anyone prior to, while, or after adopting the agency model, and it flatly denies the substance of the Government's Complaint:

1. Denies the allegations contained in the last sentence of paragraph 1 of the Complaint to the extent that they relate to Macmillan. Denies knowledge or information sufficient to respond to the vague characterizations contained in paragraph 1 of the Complaint. Admits the remaining allegations contained in paragraph 1 of the Complaint to the extent that they relate to Macmillan. With respect to all other Defendants, Macmillan denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 1 of the Complaint.

¹ On the day the Government announced its lawsuit against Apple and five publishers, Barnes & Noble lost over 6% of its market value.

2. Denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 2 of the Complaint, except admits that Macmillan's eBook sales have increased substantially since the first eReader was introduced.

3. Denies the allegations contained in paragraph 3 of the Complaint to the extent that they relate to Macmillan, except admits that Macmillan believed that Amazon's below-wholesale-cost pricing threatened to harm the publishing ecosystem. With respect to all other Defendants, Macmillan denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 3 of the Complaint.

4. Denies the allegations contained in paragraph 4 of the Complaint to the extent that they relate to Macmillan. With respect to all other Defendants, Macmillan denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 4 of the Complaint.

5. Denies the allegations contained in paragraph 5 of the Complaint to the extent that they relate to Macmillan, except admits that there was a time when Macmillan sold print books and eBooks to retailers under a wholesale model of distribution whereby retailers typically set the retail price, and admits that Macmillan now sells eBooks under an agency model of distribution, whereby the principal typically sets the price. With respect to all other Defendants, Macmillan denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 5 of the Complaint.

6. Denies the allegations contained in paragraph 6 of the Complaint to the extent that they relate to Macmillan. With respect to all other Defendants, Macmillan denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 6 of the Complaint.

7. Denies the allegations contained in paragraph 7 of the Complaint to the extent that they relate to Macmillan, except admits that Macmillan and Apple entered into an agency distribution contract for Macmillan's trade eBooks and further admits that Macmillan had the right to set the retail prices for its trade eBooks distributed by Apple and refers to that contract for a true and complete statement of its contents. With respect to all other Defendants, Macmillan denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 7 of the Complaint.

8. Denies the allegations contained in paragraph 8 of the Complaint to the extent that they relate to Macmillan, except admits that Macmillan had the right to set the retail prices for its trade eBooks distributed by Apple and entered into agency distribution contracts with other retailers and refers to those contracts for a true and complete statement of their contents. With respect to all other Defendants, Macmillan denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 8 of the Complaint.

9. Denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 9 of the Complaint.

10. Denies the allegations contained in paragraph 10 of the Complaint to the extent that they relate to Macmillan. With respect to all other Defendants, Macmillan denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 10 of the Complaint.

11. Avers that, because the allegations contained in paragraph 11 of the Complaint purport to state a legal conclusion, no responsive pleading is required.

12. Admits the allegations contained in the second sentence of paragraph 12 of the Complaint to the extent that they relate to Macmillan. Denies knowledge or information sufficient to form a belief as to the truth or falsity of the remaining allegations contained in paragraph 12 of the Complaint.

13. Denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 13 of the Complaint.

14. Denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 14 of the Complaint.

15. Admits the allegations contained in the first two sentences of paragraph 15 of the Complaint. Denies the remaining allegations contained in paragraph 15 of the Complaint, except admits that Verlagsgruppe Georg von Holtzbrinck GmbH is the general partner of Georg von Holtzbrinck GmbH & Co. KG, which is a limited partnership that indirectly wholly owns Macmillan and has its principal place of business at [Gänsheidestraße 26, Stuttgart 70184, Germany].

16. Denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 16 of the Complaint.

17. Denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 17 of the Complaint.

18. Avers that, because the allegations contained in paragraph 18 of the Complaint purport to state a legal conclusion, no responsive pleading is required.

19. Avers that, because the allegations contained in paragraph 19 of the Complaint purport to state a legal conclusion, no responsive pleading is required.

20. Admits the allegations contained in paragraph 20 of the Complaint to the extent that they relate to Macmillan, except denies that Macmillan engaged in any acts in furtherance of any illegal conspiracy. With respect to all other Defendants, Macmillan denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 20 of the Complaint.

21. Admits the allegations contained in the first three sentences of paragraph 21 of the Complaint to the extent that they relate to Macmillan, except denies knowledge or information sufficient to respond to the vague characterizations contained in the first three sentences of paragraph 21 of the Complaint. Denies knowledge or information sufficient to form a belief as to the truth or falsity of the remaining allegations contained in paragraph 21 of the Complaint.

22. Denies the allegations contained in paragraph 22 of the Complaint to the extent that they relate to Macmillan. With respect to all other Defendants, Macmillan denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 22 of the Complaint.

23. Admits the allegations contained in paragraph 23 of the Complaint to the extent that they relate to Macmillan. With respect to all other Defendants, Macmillan denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 23 of the Complaint.

24. Denies the allegations contained in paragraph 24 of the Complaint to the extent that they relate to Macmillan, except admits that retailers typically purchase print books directly from publishers or through wholesale distributors or through distribution agents and resell them to consumers, and further admits that under a wholesale model, a retailer takes

ownership of the books and resells them to consumers. With respect to all other Defendants, Macmillan denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 24 of the Complaint.

25. Admits the allegations contained in the first sentence of paragraph 25 of the Complaint. Denies the remaining allegations contained in paragraph 25 of the Complaint, except avers that a substantial portion of the cost of publishing a book is incurred regardless of the book's format and each format has its own unique costs associated with it.

26. Admits the allegations contained in the first sentence of paragraph 26 of the Complaint. Denies knowledge or information sufficient to form a belief as to the truth or falsity of the remaining allegations contained in paragraph 26 of the Complaint.

27. Denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 27 of the Complaint, except denies the allegations in footnote 1, but admits that children's picture books, academic textbooks, reference materials, and other specialized texts are treated differently from trade eBooks by Macmillan and that trade and non-trade eBooks are not reasonable substitutes for each other.

28. Admits the allegations contained in paragraph 28 of the Complaint to the extent that they relate to Macmillan and only to the extent that the rather simplified description of competition captures only a small measure of the competition in the very dynamic publishing industry. With respect to all other Defendants, Macmillan denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 28 of the Complaint.

29. Admits the allegation contained in the first sentence of paragraph 29 of the Complaint that Macmillan is, by certain measures, one of the six largest publishers of trade

books in the United States. Denies knowledge or information sufficient to respond to the vague characterizations contained in the second sentence of paragraph 29 of the Complaint to the extent that they relate to Macmillan because the term “vast majority” is vague, ambiguous, and undefined. Admits the allegations contained in the last sentence of paragraph 29 of the Complaint to the extent that they relate to Macmillan. Denies the remaining allegations contained in paragraph 29 of the Complaint to the extent that they relate to Macmillan. With respect to all other Defendants, Macmillan denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 29 of the Complaint.

30. Denies the allegations contained the second sentence of paragraph 30 of the Complaint to the extent that they relate to Macmillan. Denies knowledge or information sufficient to form a belief as to the truth or falsity of the remaining allegations contained in paragraph 30 of the Complaint.

31. Denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 31 of the Complaint.

32. Denies the allegations contained in paragraph 32 of the Complaint to the extent that they relate to Macmillan, except admits that Macmillan believed that Amazon’s below-wholesale-cost pricing threatened to harm the publishing ecosystem. With respect to all other Defendants, Macmillan denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 32 of the Complaint.

33. Denies the allegations contained in paragraph 33 of the Complaint to the extent that they relate to Macmillan, except admits that Macmillan believed that Amazon’s below-wholesale-cost pricing threatened to harm the publishing ecosystem. With respect to all

other Defendants, Macmillan denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 33 of the Complaint.

34. Denies the allegations contained in paragraph 34 of the Complaint to the extent that they relate to Macmillan. With respect to all other Defendants and Amazon, Macmillan denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 34 of the Complaint.

35. Denies the allegations contained in paragraph 35 of the Complaint to the extent that they relate to Macmillan, except admits that Amazon distributed Macmillan's eBooks. With respect to all other Defendants, Macmillan denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 35 of the Complaint.

36. Denies the allegations contained in paragraph 36 of the Complaint to the extent that they relate to Macmillan. With respect to all other Defendants, Macmillan denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 36 of the Complaint.

37. Denies the allegations contained in paragraph 37 of the Complaint to the extent that they relate to Macmillan. With respect to all other Defendants, Macmillan denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 37 of the Complaint.

38. Denies the allegations contained in paragraph 38 of the Complaint to the extent that they relate to Macmillan. With respect to all other Defendants, Macmillan denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 38 of the Complaint.

39. Denies the allegations contained in paragraph 39 of the Complaint to the extent that they relate to Macmillan, except admits that Macmillan CEO John Sargent attended one or two, but no more than two, dinners that were social in nature with CEOs of multiple Publisher Defendants and none later than January 2009. With respect to all other Defendants, Macmillan denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 39 of the Complaint.

40. Denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 40 of the Complaint.

41. Denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 41 of the Complaint.

42. Denies the allegations contained in paragraph 42 of the Complaint to the extent that they relate to Macmillan. With respect to all other Defendants, Macmillan denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 42 of the Complaint.

43. Denies the allegations contained in paragraph 43 of the Complaint to the extent that they relate to Macmillan. With respect to all other Defendants, Macmillan denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 43 of the Complaint.

44. Denies the allegations contained in paragraph 44 of the Complaint to the extent that they relate to Macmillan, except admits that Mr. Sargent met once with executives of Georg von Holtzbrinck GmbH & Co. KG and executives of another Defendant and its parent company in Europe in the fall of 2009, but denies that they “met...to communicate about e-books.” With respect to all other Defendants, Macmillan denies knowledge or information

sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 44 of the Complaint.

45. Denies that Macmillan's CEO ever met with another publisher's CEO "to discuss how they collectively could solve 'the \$9.99 problem.'" Denies the remaining allegations contained in paragraph 45 of the Complaint to the extent that they relate to Macmillan. With respect to all other Defendants, Macmillan denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 45 of the Complaint.

46. Denies the allegations contained in paragraph 46 of the Complaint to the extent that they relate to Macmillan. With respect to all other Defendants, Macmillan denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 46 of the Complaint.

47. Denies the allegations contained in paragraph 47 of the Complaint to the extent that they relate to Macmillan. With respect to all other Defendants, Macmillan denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 47 of the Complaint.

48. Denies the allegations contained in paragraph 48 of the Complaint to the extent that they relate to Macmillan. With respect to all other Defendants, Macmillan denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 48 of the Complaint.

49. Denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 49 of the Complaint.

50. Denies the allegations contained in paragraph 50 of the Complaint to the extent that they relate to Macmillan, but admits that Macmillan began considering the agency model in late 2009. With respect to all other Defendants, Macmillan denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 50 of the Complaint.

51. Denies the allegations contained in paragraph 51 of the Complaint to the extent that they relate to Macmillan. With respect to all other Defendants, Macmillan denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 51 of the Complaint.

52. Denies the allegations contained in paragraph 52 of the Complaint to the extent that they relate to Macmillan. With respect to all other Defendants, Macmillan denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 52 of the Complaint.

53. Admits the allegations contained in the first sentence of paragraph 53 of the Complaint to the extent that they relate to Macmillan. Denies the remaining allegations contained in paragraph 53 of the Complaint to the extent that they relate to Macmillan. With respect to all other Defendants, Macmillan denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 53 of the Complaint.

54. Denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 54 of the Complaint.

55. Denies the allegations contained in paragraph 55 of the Complaint to the extent that they relate to Macmillan. With respect to all other Defendants, Macmillan denies

knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 55 of the Complaint.

56. Denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 56 of the Complaint.

57. Denies the allegations contained in paragraph 57 of the Complaint to the extent that they relate to Macmillan. With respect to all other Defendants, Macmillan denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 57 of the Complaint.

58. Admits the allegations contained in the first two sentences of paragraph 58 of the Complaint to the extent that they relate to Macmillan. Denies the remaining allegations contained in paragraph 58 of the Complaint to the extent that they relate to Macmillan. With respect to all other Defendants, Macmillan denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 58 of the Complaint.

59. Denies the allegations contained in paragraph 59 of the Complaint to the extent that they relate to Macmillan. With respect to all other Defendants, Macmillan denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 59 of the Complaint.

60. Denies the allegations contained in paragraph 60 of the Complaint to the extent that they relate to Macmillan, except admits that Apple demanded a 30 percent commission from Macmillan. With respect to all other Defendants, Macmillan denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 60 of the Complaint.

61. Denies the allegations contained in paragraph 61 of the Complaint to the extent that they relate to Macmillan. With respect to all other Defendants, Macmillan denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 61 of the Complaint.

62. Denies the allegations contained in paragraph 62 of the Complaint to the extent that they relate to Macmillan, except refers to the quoted email sent to Macmillan for a true and complete statement of its contents. With respect to all other Defendants, Macmillan denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 62 of the Complaint.

63. Denies the allegations contained in paragraph 63 of the Complaint to the extent that they relate to Macmillan, except refers to the quoted proposal for a true and complete statement of its contents. With respect to all other Defendants, Macmillan denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 63 of the Complaint.

64. Admits the allegations contained in the first sentence of paragraph 64 of the Complaint to the extent that they relate to Macmillan. Denies knowledge or information sufficient to form a belief as to the truth or falsity of the remaining allegations contained in paragraph 64 of the Complaint.

65. Denies the allegations contained in paragraph 65 of the Complaint to the extent that they relate to Macmillan, except refers to the agreement sent to Macmillan for a true and complete statement of its contents. With respect to all other Defendants, Macmillan denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 65 of the Complaint.

66. Denies the allegations contained in paragraph 66 of the Complaint to the extent that they relate to Macmillan. With respect to all other Defendants, Macmillan denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 66 of the Complaint.

67. Denies the allegations contained in the first sentence of paragraph 67 of the Complaint to the extent that they relate to Macmillan. Denies knowledge or information sufficient to form a belief as to the truth or falsity of the remaining allegations contained in paragraph 67 of the Complaint, except admits that Macmillan's agreement with Apple contains an MFN.

68. Denies the allegations contained in paragraph 68 of the Complaint to the extent that they relate to Macmillan, except admits that Mr. Cue proposed terms to Macmillan on or about January 16, 2010 and further admits that Mr. Cue and representatives of Macmillan met the following week and refers to the offer of revised terms for a true and complete statement of its contents. With respect to all other Defendants, Macmillan denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 68 of the Complaint.

69. Denies the allegations contained in paragraph 69 of the Complaint to the extent that they relate to Macmillan. With respect to all other Defendants, Macmillan denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 69 of the Complaint.

70. Denies the allegations contained in paragraph 70 of the Complaint to the extent that they relate to Macmillan. With respect to all other Defendants and Amazon,

Macmillan denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 70 of the Complaint.

71. Denies the allegations contained in paragraph 71 of the Complaint to the extent that they relate to Macmillan. With respect to all other Defendants, Macmillan denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 71 of the Complaint.

72. Denies the allegations contained in paragraph 72 of the Complaint to the extent that they relate to Macmillan, except admits that during December 2009 and January 2010, Mr. Sargent placed at least seven calls to the CEOs of other Publisher Defendants, five of which lasted no more than twenty seconds. With respect to all other Defendants, Macmillan denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 72 of the Complaint.

73. Denies the allegations contained in paragraph 73 of the Complaint to the extent that they relate to Macmillan, except denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegation that Mr. Sargent received the call alleged in the fourth bulleted sub-paragraph of paragraph 73 of the Complaint. With respect to all other Defendants, Macmillan denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 73 of the Complaint.

74. Denies the allegations contained in paragraph 74 of the Complaint to the extent that they relate to Macmillan, except admits that Macmillan signed an eBooks distribution agreement with Apple within two days of January 24, 2010, which went into effect on April 3, 2010. With respect to all other Defendants, Macmillan denies knowledge or information

sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 74 of the Complaint.

75. Denies the allegations contained in paragraph 75 of the Complaint to the extent that they relate to Macmillan, except refers to the eBook distribution agreement that Macmillan signed with Apple for a true and complete statement of its contents. With respect to all other Defendants, Macmillan denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 75 of the Complaint.

76. Denies the allegations contained in paragraph 76 of the Complaint to the extent that they relate to Macmillan and refers to the quoted presentation for a true and complete statement of its contents. With respect to all other Defendants, Macmillan denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 76 of the Complaint.

77. Denies the allegations contained in paragraph 77 of the Complaint to the extent that they relate to Macmillan and refers to the transcript of Mr. Jobs's comments for a true and complete statement of its contents. With respect to all other Defendants, Macmillan denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 77 of the Complaint.

78. Denies the allegations contained in paragraph 78 of the Complaint to the extent that they relate to Macmillan. With respect to all other Defendants, Macmillan denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 78 of the Complaint.

79. Denies the allegations contained in paragraph 79 of the Complaint to the extent that they relate to Macmillan and refers to Macmillan's Apple Agency Agreement for a

true and complete statement of its contents, except admits that within four months of signing the Apple Agency Agreement, Macmillan entered into agency agreements with Amazon, Barnes & Noble, and certain other agents, under which the principal sets the price, and denies knowledge or information sufficient to respond to the vague characterizations contained in paragraph 79 of the Complaint. With respect to all other Defendants and Amazon, Macmillan denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 79 of the Complaint.

80. Admits the allegations contained in the first sentence of paragraph 80 of the Complaint to the extent that they relate to Macmillan. Denies knowledge or information sufficient to form a belief as to the truth or falsity of the remaining allegations contained in paragraph 80 of the Complaint, except admits that Amazon stopped selling Macmillan's print books and eBooks for a certain period of time.

81. Denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 81 of the Complaint.

82. Admits the allegations contained in paragraph 82 of the Complaint to the extent that they relate to Macmillan and refers to the quoted emails for a true and complete statement of their contents. With respect to all other Defendants, Macmillan denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 82 of the Complaint.

83. Denies the allegations contained in paragraph 83 of the Complaint to the extent that they relate to Macmillan and refers to the transcript of Mr. Sargent's deposition for a true and complete statement of its contents. With respect to all other Defendants and Amazon,

Macmillan denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 83 of the Complaint.

84. Denies the allegations contained in paragraph 84 of the Complaint to the extent that they relate to Macmillan, except refers to Amazon's public statements for a true and complete statement of their contents. Denies knowledge or information sufficient to form a belief as to the truth or falsity of the remaining allegations contained in paragraph 84 of the Complaint.

85. Denies the allegations contained in the last sentence of paragraph 85 of the Complaint to the extent that they relate to Macmillan. Denies knowledge or information sufficient to form a belief as to the truth or falsity of the remaining allegations contained in paragraph 85 of the Complaint.

86. Denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 86 of the Complaint.

87. Denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 87 of the Complaint.

88. Denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 88 of the Complaint.

89. Denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 89 of the Complaint.

90. Denies the allegations contained in paragraph 90 of the Complaint to the extent that they relate to Macmillan. With respect to all other Defendants, Macmillan denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 90 of the Complaint.

91. Denies the allegations contained in paragraph 91 of the Complaint to the extent that they relate to Macmillan. With respect to all other Defendants, Macmillan denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 91 of the Complaint.

92. Denies the allegations contained in paragraph 92 of the Complaint to the extent that they relate to Macmillan. With respect to all other Defendants, Macmillan denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 92 of the Complaint.

93. Denies the allegations contained in the first sentence of paragraph 93 of the Complaint to the extent that they relate to Macmillan. Denies knowledge or information sufficient to form a belief as to the truth or falsity of the remaining allegations contained in paragraph 93 of the Complaint.

94. Denies the allegations contained in paragraph 94 of the Complaint to the extent that they relate to Macmillan. With respect to all other Defendants, Macmillan denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 94 of the Complaint.

95. Denies the allegations contained in paragraph 95 of the Complaint to the extent that they relate to Macmillan. With respect to all other Defendants, Macmillan denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 95 of the Complaint.

96. Denies the allegations contained in paragraph 96 of the Complaint to the extent that they relate to Macmillan. With respect to all other Defendants, Macmillan denies

knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 96 of the Complaint.

97. Denies the allegations contained in paragraph 97 of the Complaint to the extent that they relate to Macmillan. With respect to all other Defendants, Macmillan denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 97 of the Complaint.

98. Denies the allegations contained in paragraph 98 of the Complaint to the extent that they relate to Macmillan. With respect to all other Defendants, Macmillan denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 98 of the Complaint.

99. Denies the allegations contained in paragraph 99 of the Complaint to the extent that they relate to Macmillan and avers that, to the extent that the allegations contained in paragraph 99 of the Complaint purport to state a legal conclusion, no responsive pleading is required. With respect to all other Defendants, Macmillan denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 99 of the Complaint.

100. Admits the allegations contained in the first sentence of paragraph 100 of the Complaint. Denies knowledge or information sufficient to form a belief as to the truth or falsity of the remaining allegations contained in paragraph 100 of the Complaint.

101. Denies the allegations contained in paragraph 101 of the Complaint to the extent that they relate to Macmillan. With respect to all other Defendants, Macmillan denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 101 of the Complaint.

102. Denies the allegations contained in paragraph 102 of the Complaint to the extent that they relate to Macmillan. With respect to all other Defendants, Macmillan denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 102 of the Complaint.

103. Denies the allegations contained in paragraph 103 of the Complaint to the extent that they relate to Macmillan. With respect to all other Defendants, Macmillan denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 103 of the Complaint.

104. Avers that, because the allegations contained in paragraph 104 of the Complaint purport to state a legal conclusion, no responsive pleading is required.

To the extent that the Complaint sets forth any allegations to which Macmillan has not responded above, these are denied.

AFFIRMATIVE AND OTHER DEFENSES

FIRST DEFENSE

The Complaint fails to state a claim against Macmillan upon which relief can be granted.

SECOND DEFENSE

The claims asserted in the Complaint against Macmillan are barred because Macmillan was not a part of any contract, combination, or conspiracy in restraint of trade.

THIRD DEFENSE

The claims asserted in the Complaint against Macmillan are barred because agency agreements are not subject to Section 1 of the Sherman Act.

FOURTH DEFENSE

The claims asserted in the Complaint against Macmillan are barred because Macmillan's alleged actions did not result in any harm to competition.

FIFTH DEFENSE

The claims asserted in the Complaint against Macmillan describe lawful activity under the rule of reason because the procompetitive justifications for Macmillan's alleged actions outweigh any harm to competition resulting therefrom.

SIXTH DEFENSE

The claims asserted in the Complaint against Macmillan are barred because the relief sought is broader than what is necessary to remedy the harm alleged.

SEVENTH DEFENSE

The claims asserted in the Complaint against Macmillan are barred because the relief sought is not in the public interest.

EIGHTH DEFENSE

Macmillan hereby adopts and incorporates by reference any and all other defenses asserted or to be asserted by any other defendant to the extent Macmillan may share in such defense.


NINTH DEFENSE

Macmillan reserves the right to assert other defenses, cross-claims, and third-party claims when and if they become appropriate in this action.

WHEREFORE, Macmillan seeks judgment:

- A. dismissing with prejudice all claims asserted against Macmillan;
- B. awarding the costs of defending this action, including reasonable attorneys' fees, costs and disbursements; and
- C. granting such other and further relief as this Court may deem just and proper.

Dated: May 29, 2012



Joel M. Mitnick
John J. Lavelle
Alexandra Shear
David J. Carey

SIDLEY AUSTIN LLP
787 Seventh Avenue
New York, New York 10019
Tel.: (212) 839-5300

Attorneys for Defendant
Holtzbrinck Publishers, LLC
d/b/a Macmillan