IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA	)	
	)	
Plaintiff	)	
	)	**Civil Action No.12-CIV-2826 (DC)**
v.	)	
	)	
APPLE, INC. et al	)	
	)	
Defendants	)	

PUBLIC COMMENTS SUBMITTED TO THE UNITED STATES BY STEERADS INC.[1] CONCERNING A PROPOSED FINAL JUDGMENT AND SUPPORTING STIPULATION AND COMPETITIVE IMPACT STATEMENT FILED WITH THE COURT IN THE ABOVE-CAPTIONED MATTER

PRELIMINARY STATEMENT

On April 24, 2012, Plaintiff, United States of America, through the Attorney General of the United States ("AG"), gave notice in the Federal Register (77 Fed. Reg. 24,518, April 24, 2012), pursuant to the Antitrust Procedures and Penalties Act ("APPA") 15 U.S.C. § 16 (b) - (h), that the United States had filed a proposed Final Judgment and supporting Stipulation and Competitive Impact Statement (PFJ), in the above-captioned matter. The notice invited public comments. We, hereby, file public comments for the consideration of the AG. We submit that terms and conditions imposed on settling defendants in the PFJ are clear and complete, thus enforceable; nevertheless, in our view, the PFJ should have prima facie effect under the APPA 15 U.S.C. 16 (a).

COMMENTS

We submit that the AG should compel settling defendants to accept the inclusion of a prima facie provision in the PFJ, as a condition of settlement. Inclusion of a prima facie provision in the

---

[1] Steerads is a corporation governed by the laws of the Province of Québec, Canada, having its principal place of business at 3535 Queen Mary Street, Suite 200, Montréal, Québec, H3V 1H8, Canada, and an office in the United States, at 461 22nd Street West, Suite E, New York City, New York 10111, USA. www.steerads.com. Daniel Martin Bellemare, Attorney at Law, has prepared public comments on behalf of Steerads, pro bono.

PFJ is warranted, considering: (i) the standard of review governing entrance of consent judgment under the APPA , as set forth in *United States v. Microsoft Corp.,* 56 F.3d 1448 (1995) (Silberman, C.J.); (ii) the gravity of the antitrust offense committed by settling defendants, a per se offense under Sherman Act § 1 (15 U.S.C. § 1); and (iii) the strength of the AG's case. The PFJ, as it stands, provides uncomplete relief, for it lacks a specific measure to deter future violation of the law.

The claims in the complaint filed in support of the PFJ show that the government has conducted an exhaustive investigation. The government gathered a vast amount of evidence showing that settling defendants and other unnamed co-conspirators have committed a serious antitrust offense. There is overwhelming evidence of an agreement (meetings, emails, memoranda, phone calls, lunches). See complaint, ¶¶ 37-40, 42-44, 49-51, 53-54, 57-58, 62-64, 69-73, 82, 87. The alleged agreement is horizontal. See *United States v. Sealy, Inc.* 388 U.S. 350, 353-54 (1967) (Fortas, J.); *United States v. Topco Associates, Inc.* 405 U.S. 596, 608-609 (1972) (Marshall, J.).

The parties entered into an agreement to control trade e-books retail price in the United States, "with no purpose except stifling of competition". *White Motor Co. v. United States,* 372 U.S. 253, 263 (1963) (Douglas, J.). We are in presence of "a classic conspiracy in restraint of trade". *United States v. General Motors, Corp.,* 384 U.S. 127, 140 (1966) (Fortas, J.). The agreement is a naked horizontal price agreement, a per se offense under Sherman Act § 1. See *United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927); *United States v. Socony-Vaccum Oil Co.,* 310 U.S. 150 (1940); *Catalano, Inc. v. Target Sales, Inc.,* 446 U.S. 643 (1980); *Arizona v. Maricopa County Med. Soc'y* 457 U.S. 332 (1982). As such, the agreement represents an "actual or potential threat to the central nervous system of the economy". *Socony-Vaccum Oil Co.,* 310 U.S., at 224 n. 59 (Douglas, J.).

The trade e-books cartel is consolidated marketwide by vertical price-fixing. The major e-books suppliers, who share market power, Complaint, ¶ 101, have been using resale price maintenance to achieve control over trade e-books retail price. The practice of resale price maintenance alleged in the complaint is highly suspicious, even under the rule of reason standard — the legal standard applied for assessing the legality of vertical price-fixing. *Leegin v. PSKS, Inc.,* 551 U.S. 877, 897 (2007) (Kennedy, J.). ("Resale price maintenance should be subject to more careful scrutiny ... if many competing manufacturers adopt the practice"). So, the vertical price fixing scheme under review is in all likelihood illegal under section 1 of the Sherman Act, also; a "quick look analysis", *California Dental Ass'n v. Federal Trade Commission* 526 U.S. 756, 770 (Souter, J.), suffices to reach that conclusion. Leegin., 551 U.S., at 898-99.

The PFJ by no means "appears to make a mockery of judicial power", Microsoft Corp. 56 F.3d., at 1462, although a prima facie provision would, assuredly, place the PFJ "within the reaches of the public interest", Microsoft Corp. 56 F.3d., at 1458-59 (emphasis and references omitted). Accordingly, we believe that the AG should insist on the inclusion of a prima facie provision in the PFJ. Easing recovery of treble damages is paramount to deter future illegal conduct, as settling defendants are part of a group of e-books suppliers who, in 2010, sold for above $300 million of that product, nationwide. Complaint, ¶ 21.

We share the AG's concern to "quickly restore retail price competition to consumers", 77 Fed. Reg. 24,518, at 24,532 (Competitive Impact Statement). Still, expeditiousness shall not compromise deterrence, especially where the antitrust claim is serious and the amount of interstate commerce involved substantial. Importantly, the e-books cartel is the target of a pending class action by a group of e-books purchasers. The U.S. District Court for the Southern District of New York

denied defendants' motion to dismiss under rule 12 (b) (6) Fed.R.Civ.P. *In Re: Electronic Books Antitrust Litigation,* 11 MD 2293 (DLC) (May 15, 2012). Recovery of treble damages is more uncertain where the statutory presumption established in the APPA 15 U.S.C. § 16 (a) fails to apply while collateral estoppel is no substitute for the presumption. See Hovenkamp, Herbert FEDERAL ANTITRUST POLICY (West 4th Edition) § 16.8d. ("[A] defendant who had *a full and fair opportunity to litigate issues in one proceeding* could be precluded from relitigating them in a later collateral proceeding to which it is also a party") (emphasis added); citing *Parklane Hosiery Co. v. Shore* 439 U.S. 322 (1979).

For the foregoing reasons we respectfully submit that the PFJ should have prima facie effect.

Submitted June 24, 2012.

/s/
DANIEL MARTIN BELLEMARE
ATTORNEY AT LAW
Vermont Bar # 3979
Québec Bar 184129-7
1010 Sherbrooke Street West Suite 2200
Montréal, Québec,
Canada H3A 2R7
Tel: (514) 284-2322
dmbellemare@videotron.ca

Counsel to Steerads Inc.

/s/
BENJAMIN MASSE
3535 Queen Mary Street Suite 200
Montréal, Québec
Canada H3V 1H8

President Steerads Inc.

TO: John R. Read
Chief, Litigation III Section,
Antitrust Division, Department of Justice
Washington D.C. 20530