

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

v.

APPLE, INC., HACHETTE BOOK GROUP, INC.,  
HARPERCOLLINS PUBLISHERS L.L.C.,  
VERLAGSGRUPPE GEORG VON  
HOLTZBRINCK GMBH, HOLTZBRINCK  
PUBLISHERS, LLC d/b/a MACMILLAN, THE  
PENGUIN GROUP, A DIVISION OF PEARSON  
PLC, PENGUIN GROUP (USA), INC., and  
SIMON & SCHUSTER, INC.,

Defendants.

CASE NO. 12-CV-2826

**COMMENTS OF INDEPENDENT BOOK PUBLISHERS IN OPPOSITION TO THE  
PROPOSED FINAL JUDGMENT**

Abrams Books, Chronicle Books, Grove/Atlantic, Inc., Chicago Review Press, Inc., New Directions Publishing Corp., W. W. Norton & Company, Perseus Books Group, The Rowman & Littlefield Publishing Group, Inc. and Workman Publishing, a group of mid-sized trade publishers often referred to as independent publishers (“the Independent Book Publishers”), respectfully submit these comments pursuant to the Antitrust Procedures and Penalties Act (“the Tunney Act”), 15 U.S.C. § 16(b)-(h), in opposition to the Proposed Final Judgment (“proposed settlements”) between the United States Department of Justice (“DOJ”) and Defendants Hachette Book Group, Inc., HarperCollins Publishers L.L.C. and Simon & Schuster, Inc.

**I. INTRODUCTION.**

The Independent Book Publishers submit these comments in order to provide their unique perspective on why the proposed settlements will adversely impact competition—harming independent publishers, authors, booksellers and consumers—and should be rejected.

The Independent Book Publishers are medium-sized trade book publishers which operate on the next tier down from the “Big Six” publishers in terms of production scale.<sup>1</sup> Independent book publishers provide a very valuable and significant service to the reading public. While each independent publisher is smaller than each of the five “Big Six” publishers accused of collusion by DOJ, in aggregate, according to market data published by Nielsen BookScan, independent publishers accounted for approximately 49% of total trade book sales nationwide in 2011.

There has never been and could not be any suggestion that the Independent Book Publishers have engaged in any price-fixing conspiracy. Nor have the Independent Book Publishers ever been successful in establishing agency pricing relationships with Amazon and most other booksellers. Rather, they continue to sell on a wholesale model under which booksellers are able to set prices as they choose, whether the prices are above or below the prices charged to retailers by the Independent Book Publishers.

However, the Independent Book Publishers, along with authors, booksellers and consumers, benefitted significantly from the fact that the Big Six publishers were able to adopt agency pricing arrangements with Amazon. Those arrangements contributed dramatically to increased competition and diversification in the distribution of e-books. This significantly increased the selection of e-readers and produced technical innovations that have enhanced the e-reading experience for consumers. In addition, those arrangements helped support the health of diversified brick and mortar retail choices for book-buying consumers. Moreover, because publishers operate in a highly competitive market, under the agency model they have continued to compete vigorously with one another on both the price and quality of e-books. Indeed, despite DOJ’s allegation that, after adoption of the agency model, the prices for certain e-books that had previously been sold by Amazon for \$9.99 increased in price for some period of time, DOJ

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<sup>1</sup> The “Big Six” consists of each of the defendant publishers and Random House, Inc.

makes no allegation that average e-book prices have increased at all, and the evidence submitted to DOJ by Barnes & Noble, Inc. and the American Booksellers Association in their Tunney Act comments show that average e-book prices have actually decreased under the agency model.

The Independent Book Publishers are uniquely situated to understand the inevitable impact of the proposed settlements both because they are publishers not implicated in the alleged conspiracy and because they already sell to Amazon and most other book retailers on a wholesale model. If the agency model is effectively banned, Amazon will have the ability to price whole categories of e-books below cost in a way that is likely to drive out competition from other, less deep-pocketed e-booksellers as well as brick and mortar booksellers. DOJ, however, has completely ignored the Independent Book Publishers. DOJ never contacted or sought to collect information from the Independent Book Publishers as part of its investigation that led to the filing of the lawsuit at issue. And the proposed settlements (as well as the Competitive Impact Statement accompanying the proposed settlements) demonstrate a lack of understanding of the Independent Book Publishers and, indeed, of the publishing industry as a whole. By effectively banning the agency model for the settling publishers, the proposed settlements would harm rather than enhance competition—enabling one large retailer (Amazon) to regain a monopoly or near monopoly position through below-cost pricing.

The proposed settlements are flawed for two fundamental reasons. *First*, although agency agreements are common, are perfectly lawful and are not inherently the product of collusion or any other anticompetitive conduct, the proposed settlements effectively ban the settling publishers from entering into agency agreements with booksellers for a period of two years. That provision lacks an adequate factual foundation and is contrary to the public interest because it would reverse the enhanced competition that has resulted from the agency model. To

the extent the defendants engaged in unlawful collusion, competition among the defendants should be restored in a way that does not harm innocent third parties such as the Independent Book Publishers, authors, booksellers and consumers.

*Second*, although the proposed settlements purport to allow the settling publishers to limit discounting by retailers, those provisions are completely unworkable and unenforceable because they assume that publishers can keep track of every price at which Amazon and other retailers sell a publisher's e-books over the course of a year and then compare the average of those discounts to the total amount of commissions earned by those retailers. Given the large number of individual e-book titles sold and the fact that pricing for such titles by retailers like Amazon can change multiple times every day, DOJ's proposed formula cannot practically be monitored or enforced. And even if it were possible to track pricing in this way, a twelve month period is simply far too long a time horizon to allow below-cost pricing to be pursued with impunity. The damage to competition and consumer choice that could occur over twelve months could be impossible to repair.

DOJ asserts in its Competitive Impact Statement that the goal of the proposed settlements should be "to provide prompt, certain and effective remedies that will begin to restore competition to the marketplace". The proposed settlements manifestly fail that test because they will impair rather than enhance competition. For that reason, the proposed settlements are not in the public interest and should be rejected.

## II. DESCRIPTION OF THE INDEPENDENT BOOK PUBLISHERS.

Founded by Harry N. Abrams in 1949, Abrams Books is the preeminent publisher of high quality art and illustrated books. Now a subsidiary of La Martinière Groupe, Abrams is the publisher of bestsellers such as the wildly popular *The Diary of a Wimpy Kid* series by Jeff Kinney, the award-winning cookbooks of Alton Brown and the stunning photography of Yann

Arthus-Bertrand's *Earth from Above*. Abrams publishes books in the areas of art, photography, cooking, interior design, craft, fashion, sports, pop culture, as well as children's books and general interest. The company's imprints include Abrams; Abrams Appleseed; Abrams ComicArts; Abrams Image; Abrams Books for Young Readers; Amulet Books; Stewart, Tabori & Chang; and STC Craft/Melanie Falick Books.

Chicago Review Press, Inc. publishes more than 140 titles a year under several imprints including Chicago Review Press, Lawrence Hill Books, Ball Publishing, and others, and is the parent company of Independent Publishers Group ("IPG"). Founded in 1971, IPG is one of the largest trade book distributors in North America and vendor of record for more than 500 small and medium-sized publishers through several distribution programs including IPG, Trafalgar Square Publishing, River North Editions, Art Stock Books and Small Press United. It performs sales, marketing, customer service, data management, fulfillment, billing and accounts receivable functions for publishers with lists ranging in size from one to thousands of titles. IPG currently makes available more than 4,000 new titles a year—achieving economies of scale essential for publishers to be competitive in the industry. Clients include Triumph Books, Crossroad Publishing, African American Images, Amherst Media, ECW, Medallion Press, PM Press, Wings Press and many others. Through its various programs, IPG's list includes more than 60,000 print and digital titles.

One of America's most admired and respected book publishing companies, Chronicle Books was founded in 1967 and over the years has developed a reputation for award-winning, innovative books. The company continues to challenge conventional publishing wisdom, setting trends in both subject and format, publishing over 350 new titles annually across a wide array of subjects for both adults and children.

Grove Atlantic is one of the oldest and most distinguished independent literary publishers in America. It consists of the Atlantic Monthly Press, founded in 1917, and Grove Press, founded in 1947. Over the last 90 years, the two imprints have published hundreds of books that have impacted the culture and won every major literary award numerous times. The winners of the Nobel Prize in Literature include Octavio Paz, Samuel Beckett, Kenzaburo Oe and Harold Pinter. Winners of the Pulitzer Prize include Samuel Eliot Morrison, John Kennedy Toole, Frances Fitzgerald, David Mamet and Kay Ryan. Winners of the National Book Award include George Keenan, Ron Chernow and Charles Frazier. Winners of the Man Booker Prize include Penelope Lively, Kiran Desai and Anne Enright. In the late 1950s and early 1960s, Grove Press fought the censorship battles that challenged the obscenity laws of the time, publishing Henry Miller's *Tropic of Cancer* and William Burroughs' *Naked Lunch*. Other notable titles published over the decades are *Mutiny on the Bounty*, *The Soul of a New Machine*, *The Autobiography of Malcolm X*, *Cold Mountain* and *Black Hawk Down*.

Founded in 1936 by James Laughlin, New Directions Publishing Corp. was the first American publisher of Nabokov, Borges, Lorca, Rimbaud, Camus, Isherwood, Parra, Pasternak, Paz, Michaux, Mishima, Dylan Thomas, Neruda and Tennessee Williams. With a backlist of more than 1,000 titles, New Directions publishes 40 new books a year. Recent discoveries include W.G. Sebald, Roberto Bolaño, László Krasznahorkai and César Aira. New Directions also publishes a large, experimental American poetry list—from Pound, H.D., and W.C. Williams to Creeley, Susan Howe, Michael Palmer and Nathaniel Mackey—as well as great world poets such as Inger Christensen, Kamau Brathwaite, Tomas Tranströmer and Bei Dao.

W. W. Norton & Company is the nation's largest independent, employee-owned book publishing house. Founded by William Warder Norton in 1923, the firm now publishes approximately 450 books annually in its combined divisions. Its many textbook offerings are highlighted by the *Norton Anthology of English Literature*, and its distinguished and wide-ranging trade list has been honored with 9 Pulitzer Prizes and 6 National Book Awards over the past 20 years. The firm continues to adhere to its original motto, "Books that Live", striving to publish works of enduring distinction in the areas of nonfiction, fiction, poetry and textbooks.

The Perseus Books Group is a leading independent publishing company as well as the book industry's leading distributor of independent publishers, with more than 300 independent publisher clients for whom it serves as the vendor of record. Perseus publishes books under imprints including Basic Books, Da Capo Press, Public Affairs and Running Press as well as through partnerships with The Newsweek Daily Beast Company, The Nation Institute and The Weinstein Company. Its books and authors have won every major publishing award including The Nobel Prize, The Pulitzer Prize and The National Book Award. Examples of prize-winning authors and books published by the company include the #1 New York Times bestseller *Friday Night Lights* by Buzz Bissinger, *A Problem From Hell*, which won the Pulitzer Prize, by Samantha Power, *Banker to the Poor* by Nobel Peace Prize Winner Muhammad Yunus, *Mighty Be Our Powers* by Nobel Peace Prize Winner Leymah Gbowee, *Godel Escher Bach*, which won the Pulitzer Prize, by Douglas Hofstadter, *The Case for Democracy* by Presidential Medal of Freedom recipient Natan Sharansky and *Roots*, which won The National Book Award, by Alex Haley .

The Rowman & Littlefield Publishing Group, Inc. was founded in 1975. Located in the Washington, DC area, the company is one of the largest independent book publishers in

the United States. Publishing under several different imprints, Rowman & Littlefield will release approximately 1,400 new titles in 2012. The company publishes college textbooks, scholarly books, and reference works in the humanities and social sciences as well as K-8 supplementary educational materials. The imprints include Rowman & Littlefield, Scarecrow Press, Lexington Books and Sundance-Newbridge. In addition to its publishing business, Rowman & Littlefield owns National Book Network which is one of North America's largest book distributors. NBN handles sales representation, order fulfillment, customer service and credit and collections functions for approximately 200 independent publishers in North America and an additional 150 client publishers in the NBN International facility in Plymouth, England.

Workman Publishing, an independently-owned business, began as a book packager in 1967 and published its first book under the Workman imprint in 1971. That book is Richard Hittleman's *Yoga 28-Day Exercise Plan* and is still in print. A string of iconic bestsellers followed, including B. Kliban's *Cat*, Sandra Boynton's children's books, Rufus Butler Seder's *Gallop!*, as well as *The Official Preppy Handbook*, *The Silver Palate Cookbook*, *What to Expect® When You're Expecting*, *Brain Quest®* and *1,000 Places to See Before You Die®*. Additionally, Workman was an early innovator in the calendar business with one of the first branded wall calendars, *Cat*, and is the creator of the boxed calendar under the *Page-A-Day® Calendar* brand. In 1989, Workman acquired Algonquin Books of Chapel Hill, known for discovering new writers and publishing surprising bestsellers such as *Water for Elephants* and *A Reliable Wife*, as well as distinguished non-fiction such as Richard Louv's *Last Child in the Woods*. And in 1994, Workman launched Artisan, a publisher of finely illustrated cookbooks and gift books, including Thomas Keller's *The French Laundry Cookbook* and *Medal of Honor*. Other distinctive Workman imprints are Storey Publishing (2001), Timber Press (2006) and



HighBridge Audio (2006). Workman also handles distribution for Black Dog & Leventhal, Greenwich Workshop Press and The Experiment.

### III. BACKGROUND.

E-Books were popularized in 2007 upon Amazon's introduction of its e-reading device, the Kindle. By 2009, Amazon had attained greater than a 90% share of the rapidly-growing e-book market. At the time, Amazon and other retailers were purchasing e-books from publishers on the wholesale model. Under the wholesale model, publishers set the suggested retail price for a given book and sell to a retailer at a discounted price. The retailer then sets the price to the consumer, and can decide to sell at the suggested retail price or at a lower price. The wholesale model thus allowed Amazon to set prices to consumers below the actual cost of those books paid by Amazon to book publishers, not to mention Amazon's costs of sale, a strategy that successfully secured for Amazon its market-dominant position in e-books. Other e-book retailers, which lacked comparable financial resources, were unable to successfully compete with Amazon's below-cost pricing, and brick & mortar retailers—which similarly lack the resources to sell below cost—also suffered as their product was sold below cost in digital format.

In 2010, Apple entered the e-book market with the launch of its iPad device and entered into agreements with five of the six major publishers on the agency model. Under the agency model, publishers set the ultimate price to consumers and the retailer collects a commission on each e-book sale. Following Apple's entrance into the e-book market and the corresponding introduction of the agency model, the defendant publishers—and later Random House, which is not alleged to have participated in any unlawful price-fixing conspiracy—also entered into agency agreements with Amazon and other booksellers, and thereafter sold to Amazon and those other retailers under the agency model. Since that time, Amazon's share of

the e-book market has decreased from over 90% to around 60%, and the market share of competitors such as Apple and Barnes & Noble has increased. This increased competition spurred innovation in the e-reading experience as retailers developed new and exciting features including backlit screens on e-readers, e-books with color and with illustrations and read-along capabilities for children's e-books. Prices for e-readers dropped precipitously. E-book distribution expanded and became more diversified. In the absence of below-cost pricing, brick and mortar retailers were able to compete more effectively. Each of these developments served to benefit consumers.

Although Amazon entered into agency agreements with the Big Six publishers, as has been widely reported Amazon has refused to enter into agency agreements with any other book publishers. *See Buy Button Bingo*, PUBLISHERS LUNCH (Mar. 17, 2010), *available at* <http://www.publishersmarketplace.com/lunch/archives/006330.php> ("Amazon [has] reiterated that as a matter of policy they are declining to negotiate an agency model with any publisher outside of the five who have already announced agreements with Apple's iBookstore."). The Independent Book Publishers nevertheless benefited from use of the agency model by the defendant publishers because it spurred competition and provided them with viable alternatives to Amazon for the distribution of their publications. Although the experience of the Independent Book Publishers is thus key to understanding the potential impact of the settlement terms—because Amazon does not sell the Independent Book Publishers' e-books on an agency model—DOJ simply ignored the independent publishers throughout its multi-year investigation.

The Complaint alleges collusion among five of the Big Six publishers and Apple but it does not assert—and could not assert—that agency agreements are inherently unlawful or anticompetitive. Nevertheless, the proposed settlements would effectively ban the use of agency

agreements for a two-year period by generally prohibiting the settling publishers from entering into agreements with retailers that limit the retailers' ability to set their own prices and offer discounts (Final Judgment V.B.); such agreements are fundamental to establishing any true sales agency relationship. Moreover, although a separate provision of the proposed settlements purports to permit the settling publishers to enter into so-called "Agency Agreements" that restrict discounting (*id.* VI.B.), these would not be true agency agreements because the settling publishers would not have the ability to set the price of their e-books. To make matters worse, these so-called "Agency Agreements" would need to comply with a complicated and unworkable formula under which the retailer would still be free to discount up to the aggregate amount of commissions the retailer earned over the course of one year. In addition, because retailers are only limited to discounting to their cost in the aggregate, they would be free to price certain titles below cost when they find it advantageous.

#### IV. THE PROPOSED FINAL JUDGMENT SHOULD BE REJECTED BECAUSE IT IS NOT IN THE PUBLIC INTEREST AND LACKS AN ADEQUATE FACTUAL BASIS.

##### A. Legal Standard.

Before a court may enter a consent judgment proposed by DOJ in an antitrust case, the court must determine whether the judgment terms serve the public interest. *See* 15 U.S.C. § 16(e)(1). In making a determination of whether a proposed settlement serves the public interest, "the relevant inquiry is whether there is a factual foundation for the government's decisions such that its conclusions regarding the proposed settlement are reasonable". *United States v. Abitibi-Consol. Inc.*, 584 F. Supp. 2d 162, 165 (D.D.C. 2008) (quoting *United States v. SBC Commc 'ns, Inc.*, 489 F. Supp. 2d 1, 15 (D.D.C. 2007)). Thus, the government must demonstrate that there is "a factual basis for concluding that the [proposed settlement terms] are reasonably adequate remedies for the alleged harms". *Id.* (quoting *SBC Commc 'ns, Inc.* 489 F.

Supp. 2d at 17). Although the government’s predictions about the effects of proposed remedies are given deference, *SBC Commc’ns, Inc.*, 489 F. Supp. 2d at 17, courts do not merely “rubber stamp” proposed settlement terms, and may reject them where there is a legitimate concern that the proposed terms could harm rather than enhance competition. *United States v. Thomson Corp.*, 949 F. Supp. 907, 914, 926–27 (D.D.C. 1996).

Courts are required to consider several factors when determining whether a proposed settlement is in the public interest, including the impact of the settlement on competition and on the public generally. *See* 15 U.S.C. § 16(e)(1)-(2) (listing factors). In addition, “[a] district court should pay attention to a proposed judgment’s clarity in order to make implementation of the judgment manageable”, and “should closely examine compliance mechanisms in a proposed settlement”. *SBC Commc’ns, Inc.*, 489 F. Supp. 2d at 17 (citing *United States v. Microsoft Corp.*, 56 F.3d 1448, 1461–2 (D.C. Cir. 1995)). Importantly, “the court should be concerned with any allegations that the proposed settlement will injure a third party”. *Id.* (citing *Microsoft Corp.*, 56 F.3d at 1462); *see also Microsoft Corp.*, 56 F.3d at 1462 (noting that district courts should “hesitate” to approve decrees under the Tunney Act where third parties claim that they will be harmed by the decree); *Thomson Corp.*, 949 F. Supp. at 914 (citing *Microsoft Corp.*, 56 F.3d at 1462) (same). That is precisely the case here.

**B. The Overall Structure of the Proposed Settlement is Misguided and Lacks an Adequate Factual Basis.**

As revealed in the Complaint, the proposed Final Judgment and the Competitive Impact statement, DOJ’s view of the publishing industry—a world in which Amazon is supposedly the champion of consumer welfare because it priced certain e-books for \$9.99 regardless of how much Amazon paid for those e-books—is seriously flawed. True competition and consumer benefits began with the adoption of the agency model and true competition and

consumer benefits will be imperiled if DOJ succeeds in effectively eliminating the agency model through the proposed settlements.

1. Agency agreements are not unlawful.

As an initial matter, the proposed settlements are overly broad because, even if the existing agency agreements entered into by the five defendant publishers were the result of improper collusion, DOJ does not and cannot allege that agency agreements are inherently unlawful. Nor does or could DOJ allege that, prospectively, the five defendant publishers are incapable of negotiating agency agreements absent any improper collusion. Accordingly, there is no factual basis for the provisions in the proposed settlements that would effectively ban the use of the agency model by the settling defendants for two years.

Agency agreements are common and courts have consistently held that they are not unlawful. “It is well-settled that ‘genuine contracts of agency’ [are lawful] because the ‘owner of an article’ is permitted to ‘fix the price by which his agents transfer the title from him directly to the consumer.’” *Day v. Taylor*, 400 F.3d 1272, 1276 (11th Cir. 2005) (alteration omitted) (quoting *United States v. Gen. Elec. Co.*, 272 U.S. 476 (1926)); *see also Illinois Corporate Travel, Inc. v. Am. Airlines, Inc.*, 806 F.2d 722, 725-26 (7th Cir. 1986) (finding no violation of antitrust laws where true agency relationship existed); *Morrison v. Murray Biscuit Co.*, 797 F.2d 1430, 1437 (7th Cir. 1986) (“[T]he cases allow a seller to tell his sales agents what price to charge.”); *Kellam Energy, Inc. v. Duncan*, 668 F. Supp. 861, 886 (D. Del. 1987) (“To the extent that [a] retailer is considered an agent of [a] wholesaler, the wholesaler may set the prices of the retailer without an antitrust violation.”); *Donahue v. Pendleton Woolen Mills, Inc.*, 633 F. Supp. 1423, 1429 n.3 (S.D.N.Y. 1986) (noting that a supplier may use an agent to sell its goods and may dictate to that agent the sale price to consumers).

DOJ never contends otherwise. In its Complaint, DOJ requested that the existing agency agreements entered into by the five defendant publishers be declared null and void (§ 104(d)) and that defendants be enjoined from colluding to set the price or release date for e-books, collectively negotiate e-book agreements or otherwise restrain retail price competition for e-books (§ 104(b))—positions with which the Independent Book Publishers do not quarrel. But DOJ did not request any order prohibiting the use of agency agreements going forward that were not the result of unlawful collusion. Nor does DOJ’s Competitive Impact Statement even purport to explain why, going forward, a two-year ban on agency agreements is supposedly necessary because new agency agreements could not be negotiated and entered into absent collusion. DOJ merely says that a two-year period is “sufficient to allow competition to return to the market” (Competitive Impact Statement 12)—an assertion that is meaningless absent some evidence (or even allegation) that competition could not be returned to the market while allowing the settling publishers to enter into new agency agreements in the absence of collusion.

DOJ suggests that the proposed settlements “do not dictate a particular business model, such as agency or wholesale” (*id.*) but, at a minimum, that argument elevates semantics over substance. The very nature of a true agency sales agreement is that the principal (here, the publisher) sets the price. However, for a two-year period, the proposed settlements would *prohibit* the settling publishers/principals from entering into any agreement with retailers unless the publisher cedes complete pricing and discounting control to the retailer/agent—subject only to an unworkable and unenforceable formula for limiting but not prohibiting discounts (which is discussed further below).

Accordingly, while it would certainly be appropriate for the proposed settlements to void the existing agency agreements entered into by the settling publishers, there is no factual

basis for an order that would effectively prohibit the settling defendants from negotiating and entering into new agency agreements with Amazon or any other retailer.

2. The proposed settlements are based on a misunderstanding of competition in the book publishing industry.

DOJ proceeds as if any below-cost pricing by Amazon has been targeted and promotional in nature<sup>2</sup> and utterly ignores the impact of Amazon's actual below-cost pricing on the book selling industry. The evidence (ignored by DOJ) demonstrates that where Amazon has the ability to price below-cost, it does so on a widespread basis that is likely to drive out competition. Because the e-books published by the Independent Book Publishers are sold to Amazon and other retailers on the wholesale model, Amazon's pricing of these e-books is illustrative. For example, focusing on every single hardcover e-book (that is an e-book for which there is a corresponding hardcover physical book) published by six independent publishers—a total of more than 600 e-book titles—a review of Amazon's website shows that in March 2012 Amazon was offering an average discount of 61%. The average discount for hardcover e-books for sale by Amazon from these six publishers has increased dramatically in the last two years, from 49% in November of 2010 to 53% in August of 2011 and then to 61% by March of 2012. The Independent Book Publishers cannot publicly disclose (or disclose to one another) the specific commercial terms on which they sell to Amazon, but it is widely known and reported that average publisher e-book discounts to retailers are around 50%. See Michael Cader, *Two Distributors Do Sign With Kindle—And Pay eBook Coop*, PUBLISHERS LUNCH (Feb. 28, 2012), available at <http://lunch.publishersmarketplace.com/2012/02/two-distributors-do-sign-with-kindle-and-pay-ebook-coop/>. So there can be no question that, where it can (*i.e.*, where there are no agency agreements), Amazon engages in widespread below-cost pricing. And if DOJ ever

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<sup>2</sup> *E.g.*, Complaint ¶ 30 (“Amazon’s e-book distribution business has been consistently profitable, even when substantially discounting some newly released and bestselling titles.”).

had a doubt about that, all DOJ needed to do was contact the Independent Book Publishers as part of its multi-year investigation—which, as noted, DOJ never did. DOJ ignored independent publishers despite the fact that, as noted above, data show that in aggregate independent publishers, including the Independent Book Publishers, represent essentially as many books sold each year as do the “Big Six” in aggregate.

There also cannot be any real dispute that, by limiting Amazon’s ability to engage in below-cost pricing, the adoption of the agency model by the Big Six publishers has enhanced rather than harmed competition—making it possible for companies that do not have the size and scale of Amazon, and thus cannot absorb the huge losses that Amazon has absorbed through below-cost pricing, to compete for the distribution of e-books and for the sales of physical books through bricks and mortar retail. As noted above, after the adoption of the agency model by the five defendant publishers, Amazon’s share of e-book sales declined dramatically and other smaller distributors like Barnes & Noble were able effectively to compete with Amazon. This benefitted consumers, authors, publishers and booksellers by promoting a diversity of sources for e-books as well as physical books. Increased competition also drove innovations in content distribution at the retailer level. Specifically, many new and creative advances have been applied to e-readers (including color, backlit screens and audio/visual functions) to attract more consumers. Consumer access to e-Books has been broadened and diversified, with more brick-and-mortar options available as well.

There is also no factual basis provided by DOJ for concluding that price competition itself was harmed rather than enhanced by the adoption of the agency model. Agency agreements do not end price competition but rather shift price competition from retailers to publishers, which continue to compete vigorously on the price and quality of e-books.



Notably, while DOJ asserts that, after adoption of the agency model, the prices for certain e-books that had previously been sold by Amazon for \$9.99 increased in price for some period of time, DOJ does not—and, therefore, presumably cannot—assert that average prices for e-books has increased at all. Indeed, evidence cited in the Tunney Act comments submitted by Barnes & Noble and the American Booksellers Association shows that the average price of e-books paid by consumers actually decreased under the agency model. It is also extremely naïve to think that, should Amazon's below-cost pricing permit it to regain a monopoly or near monopoly share, it would continue indefinitely to price e-books below cost. Basic economics dictates that decreased competition will ultimately lead to higher prices, not lower prices.

Thus, it is not just independent publishers, authors and booksellers that will be harmed by the elimination of the agency model but also consumers as well. Consumers benefit from the innovation and low prices that accompany increased competition and consumers will clearly be harmed in the long run if below-cost pricing leads to decreased competition.

DOJ's Competitive Impact Statement does not even acknowledge, much less address or analyze the impact on competition if eliminating the agency model—even for a period of two years—enables Amazon to return to even wider-scale below-cost pricing that is likely to harm Amazon's e-book distribution competitors as well as bricks and mortar competitors. As noted above, the Court is charged with determining whether the proposed settlements are likely to harm any innocent third parties. Here, it is clear that numerous third parties—not just the Independent Book Publishers but also authors, booksellers and the public—are threatened if the elimination of the agency model enables Amazon to regain a monopoly or near monopoly position over the distribution of e-books. The Court can also properly consider the fact that, whereas concentration is regulated in other media industries, such as television, radio and

newspapers, no regulatory scheme is currently in place to limit harmful concentration of power in the distribution of books.

DOJ either failed to consider or willfully ignored the potential harm that the proposed settlements would cause to independent publishers and consumers. To the extent that unlawful collusion among certain publishers occurred, competition among those publishers should be restored in ways that do not negatively impact third parties. Here, there are numerous provisions of the settlements—such as those voiding existing agreements that were allegedly the result of collusion—that are sufficient to undo the effects of the unlawful behavior alleged in the Complaint. In addition, there are claims for alleged overcharges being pursued by the state attorneys general and in the class action that are also remedies better-tailored to address the unlawful conduct alleged by DOJ. But the proposed settlements, as currently constituted, go too far, seeking remedies that are not rationally related to the misconduct alleged and that would inevitably injure independent publishers, consumers and all other industry participants.

Therefore, the proposed settlements should be rejected.

C. The Proposed Formula for Regulating Discounts by Retailers is Unworkable and Unenforceable.

In addition to the misguided overall structure of the proposed settlements, DOJ's proposed formula for regulating retailer discounts going forward is ill-conceived and unworkable. Under the terms of the proposed settlements, the settling publishers would be allowed to enter into so-called "Agency Agreements"—which, as discussed, are in fact not really agency agreements at all since the publisher/principal would have to generally cede pricing control to the retailer/agent—and could only limit discounting pursuant to a complicated formula under which retailers could discount however they wish so long as the discounts offered, when evaluated in the aggregate, over the course of a year, are no more than commissions earned by

the retailer as an agent. This supposed ability to limit discounting is illusory. E-book retailers such as Amazon typically institute multiple price changes on each e-book title multiple times every day. As a practical matter, it is simply impossible for book publishers to monitor each of these price changes for each title and then calculate the average aggregate discount in order to compare it to the aggregate of commission earned over the course of a year. Twelve months is also far too long a period to allow below-cost pricing to be pursued unfettered. The consequences for a competitive market that provides choices for consumers could be irreversible.

As noted above, the Court is required to determine whether the provisions of the proposed settlements are manageable, workable and enforceable. The provision in the proposed settlements limiting discounting by retailers fails that test.

#### V. CONCLUSION.

The proposed settlements lack an adequate factual basis, are contrary to the public interest and should be rejected. Particularly taking into account the procompetitive effects the use of the agency model has had on the distribution of e-books, there is no basis for effectively banning the use of the agency model for two years. Because the Independent Book Publishers are not on the agency model, their interactions with Amazon are a natural experiment for what would happen if the settling publishers are also effectively prevented from using the agency model. Amazon would be able to engage in across-the-board below-cost pricing that would threaten the more robust competition for e-books and bricks and mortar retail that has emerged in the last two years. To the extent the defendants have engaged in unlawful collusion, competition among those defendants should be restored in a way that does not harm innocent parties such as the Independent Book Publishers, other trade book publishers, authors, booksellers and consumers.

June 25, 2012

ABRAMS BOOKS,

by



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Michael Jacobs  
President and Chief Executive Officer

CHRONICLE BOOKS LLC,

by

---

Jack Jensen  
President

GROVE/ATLANTIC, INC.

by

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Morgan Entrekin  
President and Publisher

CHICAGO REVIEW PRESS, INC.

by

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Mark Suchomel  
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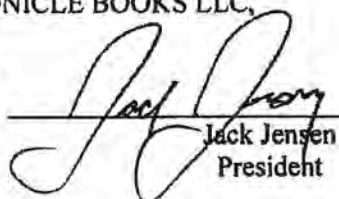
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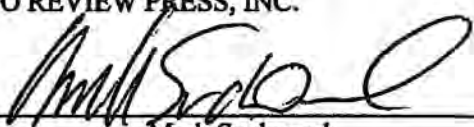
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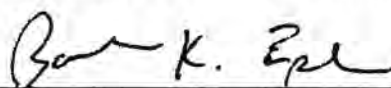
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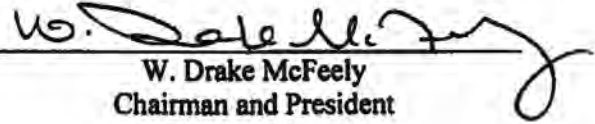
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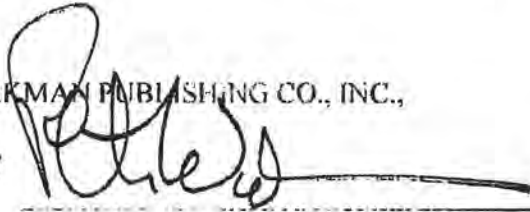
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