UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

IN RE ELECTRONIC BOOKS ANTITRUST LITIGATION

No. 11-md-02293 (DLC)
ECF Case

This Document Relates to:

THE STATE OF TEXAS, et al.,

Plaintiffs,

v.

PENGUIN GROUP (USA) INC., et al.,

Defendants.

No. 12-cv-03394 (DLC)

PLAINTIFF STATES' BRIEF ON CIVIL PENALTIES

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I. PRELIMINARY STATEMENT

This Court held that Apple violated Section 1 of the Sherman Act, as well as state statutes that are congruent with Section 1, by facilitating and joining a conspiracy among the Publisher Defendants to fix the prices of e-books. Many of the state statutes that Apple violated provide for the imposition of civil penalties. Twenty-four of the 33 Plaintiff States seek such penalties consistent with the Court's liability determination. Given that Apple has not contested that the statutes pursuant to which the States seek civil penalties are congruent with Section 1, the legal issues before the Court should be limited to how the respective penalty amounts should be calculated. However, consistent with its continued refusal to acknowledge its wrongdoing or face the consequences of its actions, Apple has raised several meritless arguments against the imposition of penalties.

Despite the Court's explicit finding to the contrary in its Opinion and Order of July 10, 2013, Apple contends that the Court has not actually found it liable for violations of any state laws. In light of the Court's September 25, 2013 Order, this argument borders on the frivolous. Each of the statutes pursuant to which the States seek penalties is congruent with Section 1 of the Sherman Act and the Court has made all requisite "predicate findings" to support the penalty requests, including those under the two statutes Apple erroneously contends require "further fact finding." Apple's other arguments are also unavailing. Apple does not have a right to a jury determination of the amount of civil penalties under any of the statutes at issue, because the right to a jury trial in a case filed in federal court is governed by federal law. There is no constitutional impediment to the imposition of civil penalties, either under the Excessive Fines clause of the Eighth Amendment or the Due Process Clauses of the Fifth and Fourteenth Amendments. An award of treble damages pursuant to federal law and civil penalties pursuant to state law does not

constitute impermissible "double recovery." Civil penalties are intended to be an additional remedy and are often awarded in cases where damages are also recovered. Finally, the States have not raised any "new" civil penalty requests since the filing of the Second Amended Complaint in May 2012.

Apple's continued strategy of throwing up roadblocks at every turn to avoid accountability should not be countenanced. None of Apple's arguments present a colorable basis for avoiding civil penalties. In a matter of months, a jury will determine the amount of damages for which Apple is liable. Though the maximum amount of civil penalties requested under the statutes at issue – less than $9 million – is a fraction of single damages caused by Apple's conduct, such penalties are necessary to deter Apple and others from egregious violations of law such as those proven in this case.

II. BACKGROUND

The States' Second Amended Complaint, filed May 11, 2012, alleged violations of Section 1 of the Sherman Act and various state antitrust, consumer protection, and deceptive trade practices statutes. *See* ECF No. 95.[1] On April 29, 2013, the Court ordered the States to file a supplemental brief setting forth, among other things, "the extent to which any finding under Section 1 of the Sherman Act might affect [their] state law claims." ECF No. 176. The States served that brief on Apple, with a copy provided to the Court, on May 6, 2013 (filed and docketed on May 14). *See* ECF No. 195. Apple served the States and the Court with an opposition brief on May 17.[2] At the May 23 pretrial conference, with the supplemental briefing on state law claims complete, the Court sought to clarify that the state law claims would "be tried

[1] All ECF references are to the docket in 12-cv-03394 unless otherwise stated.

[2] Apple's brief does not appear to have been filed on ECF, but was attached as Exhibit 2 to the States' September 20 letter regarding civil penalties. *See* ECF No. 297.

to the extent that those claims are parallel to the Sherman Act claims," and that any state law claims not parallel to the Sherman Act claims would be voluntarily dismissed. *See* May 23, 2013 Tr. at 21. On May 28, 2013, the States moved to voluntarily dismiss all claims not congruent with Section 1 of the Sherman Act, including seven common law claims and nine statutory claims. The Court granted the motion on May 29, 2013. *See* ECF No. 228.

On the first day of the liability trial, the Court requested confirmation that the only state law claims remaining to be tried were those congruent with the Sherman Act claims. The States so confirmed on the record, *see* June 3 Trial Tr. at 72-73, and by letter to the Court. *See* ECF No. 355 in 11-md-02293. In response to a letter from Apple to the Court seeking clarification as to when the States sought to have the Court impose civil penalties, the States acknowledged that penalties were properly assessed after the damages trial, but that the issues to be determined in the liability trial included "a determination of Apple's liability under the relevant state laws to the extent those laws are congruent with Section 1 of the Sherman Act." ECF No. 229. The Court's July 10 Opinion and Order included an explicit finding that Apple "conspired to restrain trade in violation of Section 1 of the Sherman Act and relevant state statutes to the extent those laws are congruent with Section 1." *See United States v. Apple Inc.*, 2013 WL 3454986 at *59 (S.D.N.Y. July 10, 2013) ("7/10 Opinion").

After the Court issued the 7/10 Opinion, at an August 9, 2013 Court conference, the parties discussed the States' civil penalty claims. *See* Aug. 9, 2013 Tr. at 29-32; 39-40. The Court ordered the States to notify Apple about the specifics of their civil penalty claims, and ordered the States and Apple to make simultaneous submissions to the Court of letters regarding penalties. *See id.* at 32. The parties made their respective submissions as ordered. *See* ECF Nos. 297 and 298. Having reviewed the letters from the parties, the Court issued an Order on

September 25 to "guide the parties in advance of the damages trial scheduled for May 2014." ECF No. 299 (the "9/25 Order"). In the 9/25 Order, the Court reiterated that the July 10, 2013 opinion established Apple's liability under all state statutes that are congruent with Section 1 of the Sherman Act. *See* 9/25 Order at 3. The Court ordered the parties to meet and confer to agree to a stipulation regarding Apple's liability for civil penalties and to propose a briefing schedule as to any remaining issues. *See id.* at 4.

Pursuant to the Court's order, the States reached out to Apple several times regarding possible stipulations as to Apple's liability for civil penalties. Apple refused to engage in substantive discussions, with counsel stating that such discussions were "unlikely to result in any agreement that narrows the scope of the issues in dispute." *See* November 21, 2013 email from Cynthia Richman to Eric Lipman, attached hereto as Exhibit 1. As a result, there was no stipulation and the States submit this brief to address the arguments Apple has raised in opposition to the imposition of civil penalties.[3]

III. ARGUMENT

A. Apple's Liability for Civil Penalties Has Been Established and the Amount of the Penalties to be Imposed is Within the Court's Discretion

This Court has jurisdiction to impose civil penalties pursuant to state laws. *See New York v. Hendrickson Bros., Inc.*, 840 F.2d 1065, 1086 (2d Cir. 1988). Twenty-four states seek the imposition of civil penalties against Apple, pursuant to state statutes.[4] Each of those statutes provides for the imposition of a civil penalty on a defendant upon a finding that the defendant violated the statute. And each of the enumerated statutes is congruent with Section 1 of the

[3] In light of Apple's refusal to engage in meaningful discussion, or even to clarify certain of the arguments it had previously raised, the States respectfully request leave to reserve unused pages within the Court's 25-page limit for briefs and file a reply brief of 14 pages, in excess of the 10 pages normally allowed for reply.

[4] *See* Exhibit 1 to the States' September 20 letter to the Court (ECF No. 297).

Sherman Act. Therefore, the Court's holding that Apple violated the Sherman Act necessarily entails a holding that each of those statutes was similarly violated. The issue of the congruence between Section 1 and each of these state statutes was fully briefed prior to the liability trial (*see* ECF No. 195 and ECF No. 297, Ex. 2) and the States voluntarily dismissed all state law claims that arguably included any additional or materially different elements. *See* ECF Nos. 226-228. As to the claims under which the States seek penalties, Apple acknowledged in its pretrial briefing that they are "co-extensive," and would rise and fall, with the Sherman Act claims. *See* ECF No. 297, Ex. 2 at 4-5, 9, 11.

Even in Apple's most recent submission on the topic, its September 20 letter, Apple does not dispute that 24 of the 26 statutes at issue are entirely congruent with Section 1. Rather, Apple argues only that the Court has not, in fact, concluded that those statutes were violated, because it did not "analyze the challenged conduct under the relevant state laws." ECF No. 298. The 9/25 Order, however, could not be clearer. As to the statutes congruent with Section 1, "Plaintiff States have established liability under these laws." 9/25 Order at 3. Each of the statutes pursuant to which the States seek penalties is so congruent. *See, e.g., Triple 7, Inc. v. Intervet, Inc.,* 338 F. Supp. 2d 1082, 1087 (D. Neb. 2004) ("Nebraska's Consumer Protection Act (CPA) mirrors federal law."); *Brooks Fiber Commc'ns of Tucson, Inc. v. GST Lightwave, Inc.*, 992 F. Supp. 1124, 1130 (D. Ariz. 1997) ("The Arizona Antitrust Act, A.R.S. §§ 44-1401 *et seq.*, mirrors federal antitrust law. Because summary judgment is inappropriate on the federal claims under the Sherman Act, it is also inappropriate on the state law claims."); *Smalley & Co. v. Emerson & Cuming, Inc.*, 808 F. Supp. 1503, 1516 (D. Colo. 1992) ("Because both the case law and the legislative history suggest that the federal and [Colorado] state statutes should be construed together, my analysis on plaintiff's federal antitrust claims applies equally to the state law

antitrust claim."), *aff'd*, 13 F.3d 366 (10th Cir. 1993); *see also* ECF No. 195.[5]

As to two of the civil penalty provisions, Apple contends that further fact-finding is required before a civil penalty may properly be imposed.[6] The civil penalty provision of the Connecticut Unfair Trade Practices Act provides for the imposition of a civil penalty upon a finding that the defendant "is willfully using or has willfully used" a prohibited practice. Conn. Gen. Stat. § 42-110o(b).[7] It further provides that "a willful violation occurs when the party committing the violation knew or should have known that his conduct violated" the Act. *Id.* The Virginia Antitrust Act provides for the imposition of a civil penalty "for each willful or flagrant violation." Va. Code Ann. § 59.1-9.11. Although there is no definition of "willful" in the Virginia Antitrust Act, the Virginia Supreme Court has defined the term in other contexts to mean "an act which is intentional, or knowing, or voluntary, as distinguished from accidental." *Barrett v. Commonwealth*, 597 S.E.2d 104, 111 (Va. 2004) (quoting *United States v. Murdock*, 290 U.S. 389, 394 (1933)). Apple contends that the Court cannot impose a civil penalty under these statutes because there has been no finding that Apple acted willfully. Apple is wrong.

The Court's Opinion establishes that Apple's violation of the antitrust laws was willful. A vertical player may be implicated in a horizontal conspiracy upon a showing "that the vertical player was a *knowing participant* in that [conspiracy] and facilitated the scheme." 7/10 Opinion, 2013 WL 3454986 at *41 (emphasis added) (citing *Toys "R" Us, Inc. v. FTC*, 221 F.3d 928, 936 (7th Cir. 2000); *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 225-29 (1939)). The Court

[5] The States incorporate by reference the arguments made in their May 6 brief as to the congruity of the applicable state statutes with Section 1 of the Sherman Act.

[6] Apple, in its September 20 letter, identified only these two statutes among the 26 under which the States seek penalties as requiring further fact-finding, and refused to respond to inquiries as to whether there were others it believed fell into this category. *See* Ex. 1. The States reserve the right to address on reply any such contentions as to additional statutes that Apple might raise in its opposition brief.

[7] Apple does not challenge the imposition of a penalty under Conn. Gen. Stat. § 35-38, the civil penalty provision of the Connecticut Antitrust Act, on this ground.

held that "Apple made a conscious commitment to join a scheme with the Publisher Defendants to raise the prices of e-books"; that "Apple was a knowing and active member of that conspiracy"; that it "not only willingly joined the conspiracy, but also forcefully facilitated it"; and that it did so "with the specific intent to help it succeed." *Id.* at *47, *41, *50. These findings establish that Apple knew that the Defendant Publishers were conspiring with one another in violation of Section 1 of the Sherman Act and intentionally joined that conspiracy. Under both the Connecticut and Virginia statutes, this is sufficient to find that Apple's violation was willful.[8] No further fact-finding is necessary to impose civil penalties.[9]

While Apple's liability has been established, the amount of the civil penalties to be imposed under each of the relevant statutes remains to be determined. With one exception, the statutes do not provide for a specific sum to be paid to the States as a civil penalty.[10] Instead, they only set forth a maximum penalty or a range of permissible penalties,[11] with the amount to be imposed at the discretion of the trial court.[12] *See, e.g.*, Alaska Stat. § 45.50.578 (authorizing

[8] As the Court noted in the 9/25 Order, the Sherman Act similarly requires proof that a defendant "had the intent to adhere to an agreement that was designed to achieve an unlawful objective." *Geneva Pharms. Tech. Corp. v. Barr Labs. Inc.*, 386 F.3d 485, 507 (2d Cir. 2004).

[9] The Court made clear in the 9/25 Order that, because the liability phase of this case is over, it would make no further factual findings necessary to establish liability under state statutes. *See* 9/25 Order at 3. Conversely, Apple is barred from disputing the factual findings of the Court or seeking any contrary findings in an attempt to contest the imposition of penalties concomitant with the Court's liability findings.

[10] Ohio's civil penalty statute provides for a set amount, $500, to be imposed for each day the violation of its antitrust laws persisted. *See* Ohio Rev. Code Ann. § 1331.03. At a minimum, the violation here persisted for 780 days, from April 3, 2010 to May 21, 2012. Thus, Ohio's statute calls for the imposition of a civil penalty of at least $390,000. The cap under West Virginia's statute is calculated in the same manner, provided that the resulting amount is more than $100,000, *see* W. Va. Code § 47-18-8, but the trial court retains discretion to set the amount of the penalty. The cap under the West Virginia statute is therefore at least $390,000.

[11] Some statutes express the maximum penalty that may be imposed as a certain amount "for each violation" of the statute. *See, e.g.*, S.D. Codified Laws § 37-1-14.2. The Court concluded in its 9/25 Order that Apple's conspiracy constituted a "single violation," and, for purposes of this case, the States do not dispute that conclusion.

[12] Louisiana's civil penalty statute does not impose a cap on the amount of the civil penalty that may be imposed. *See* La. Rev. Stat. Ann. § 51:1407(B) (providing for the imposition of an appropriate civil penalty upon a finding of a violation of the statute, and a maximum $5,000 enhancement upon a finding that the violating act was done with

the attorney general to bring suit against a corporation "for a civil penalty of not more than . . . $50,000,000"); Del. Code Ann. tit. 6, § 2107 (authorizing the trial court to assess a civil penalty of between $1,000 and $100,000 per violation).

When determining the propriety of a civil penalty, courts may consider a variety of factors, including "the good or bad faith of the defendant[], the injury to the public, and the defendant[‘s] ability to pay," as well as "the level of the defendant's culpability" and the "defendant's profits" from the underlying offense. *Advance Pharm., Inc. v. United States*, 391 F.3d 377, 399 (2d Cir. 2004) (citing *United States v. J.B. Williams Co.*, 498 F.2d 414, 438 (2d Cir. 1974)). Courts also may take into account whether a defendant has admitted wrongdoing. *SEC v. Colonial Inv. Mgmt. LLC*, 659 F. Supp. 2d 467, 503 (S.D.N.Y. 2009), *aff'd*, 381 F. App'x 27 (2d Cir. 2010).[13]

Application of these factors to this case compels the conclusion that the civil penalties imposed on Apple should be substantial. The Court's Opinion established that Apple acted knowingly and willfully in joining the conspiracy and in facilitating its success, *see* 7/10 Opinion, 2013 WL 3454986 at *41, thereby establishing Apple's bad faith and its high degree of culpability. Furthermore, the Court determined that Apple engaged in a horizontal price fixing conspiracy, unlawful *per se* under the Sherman Act and congruent state statutes, that served to eliminate price competition in the market for e-books. *Id.* at *41, *47. Though the precise amount of damages remains to be established in the upcoming trial, there can be no doubt that

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the "intent to defraud").

[13] Colorado's antitrust statute provides a similar list of non-exclusive factors to be considered in setting the civil penalty. *See* Colo. Rev. Stat. § 6-4-112(2) ("In determining the amount of a civil penalty, the court shall consider, among other things: The nature and extent of the violation; the number of consumers affected by the violation; whether the violation was an isolated incident or a continuous pattern and practice of behavior; whether the violation was the result of willful conduct; whether the defendant took affirmative steps to conceal such violations; and whether, given the size and wealth of the defendant, the civil penalty will be an effective deterrent against future violations.")

Apple's conspiracy resulted in substantial and widespread injury to American consumers. Indeed, we anticipate that Plaintiffs' expert, Dr. Roger Noll, will testify at trial that consumers nationwide were overcharged by approximately $280 million as a result of Apple's illegal conduct.[14]

Additionally, as the Court has already found, "consumers suffered in a variety of ways" from the conspiracy. 7/10 Opinion, 2013 WL 3454986 at *35. Not only did Apple harm consumers in readily quantifiable ways by overcharging those who actually purchased e-books, but it also harmed consumers in ways that are not as easily measured, such as by causing consumers to purchase less preferred e-books or to forego purchasing an e-book altogether. *Id.* Apple's profits from its illegal conduct were significant. The Court has also recognized Apple's size and status as "one of America's most admired, dynamic, and successful technology companies." *Id.* at *9. Indeed, according to its most recent Annual Report filed with the SEC, Apple has total assets of $207 billion, with over $147 billion in cash on hand. *See* Apple Inc., Annual Report (Form 10-K) at 24 (Oct. 30, 2013) *available at* http://investor.apple.com/secfiling.cfm?filingID=1193125-13-416534&CIK=320193 (last visited Jan. 7, 2014).[15] Apple clearly has the ability to pay a sizeable penalty, and such a penalty is necessary to serve as an effective deterrent. *See, e.g., Reddy v. CFTC*, 191 F.3d 109, 125 (2d Cir. 1999) ("If deterrence is to be achieved, substantial penalties may be necessary."); *Advance Pharm.*, 391 F.3d at 399-400 (affirming civil penalty of $2 million where defendant made a profit of approximately $2.9 million as a result of illegal conduct).

Finally, Apple has consistently refused to admit that its actions were wrong or harmful to

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[14] Approximately $155 million of this total is attributable to identified sales to consumers in the Plaintiff States.

[15] The court can take judicial notice of SEC filings. *See Kramer v. Time Warner Inc.*, 937 F.2d 767, 774 (2d Cir. 1991).

the public. During the trial, Apple argued that "its conduct was pro-competitive and created a healthier market" and warned the Court that punishing it would "deter entry into concentrated markets and punish innovation." 7/10 Opinion, 2013 WL 3454986 at *57. Even after the trial, Apple has continued to deny liability and steadfastly refused to take responsibility for its actions. *See, e.g.,* Aug. 9, 2013 Tr. at 66 ("There is no admission [by Apple] of wrongdoing. There is no contrition. There is no showing of any awareness of illegality or the danger of collusion by publisher defendants to raise eBook prices. There is no showing of institutional reforms to ensure that its executives will never engage again in such willful and blatant violations of the law."); Julie Bosman, *Judge Sets Restrictions for Apple on E-Books*, N.Y. Times, Sept. 7, 2013, at B3 (Apple spokesman denying Apple participated in conspiracy). Thus, each factor dictates that Apple should face a substantial penalty for its egregious and impenitent conduct.

B. The Court Should Determine the Appropriate Amount of Penalties

Apple has argued that the Court should conduct a statute-by-statute analysis of whether it has a right to a jury determination of the amount of the civil penalties to be imposed.[16] This argument is without merit. The right to a jury trial in federal court is governed by federal law. *See Simler v. Conner*, 372 U.S. 221, 222 (1963); *Germain v. Conn. Nat'l Bank*, 988 F.2d 1323, 1326 (2d Cir. 1993); *Empresa Cubana del Tabaco v. Culbro Corp.*, 123 F. Supp. 2d 203, 211 n.5 (S.D.N.Y. 2000), *modified on other grounds*, 2001 WL 487960 (S.D.N.Y. May 8, 2001); 9 Charles Alan Wright *et al.*, *Federal Practice & Procedure* § 2303 (3d ed. 2008) ("It now also is clear that federal law determines whether there is a right to a jury trial in a case involving state law that has been brought in federal court, and that in such a circumstance, state law is wholly irrelevant."). This is true even if state law guarantees a jury trial and federal law denies it. *See*

[16] The States asked Apple to specify the statutes under which it maintained that it had a right to a jury trial on the amount of civil penalties, but it refused to do so. *See* Ex. 1.

Herron v. S. Pac. Co., 283 U.S. 91, 92, 95-96 (1931); *see also Byrd v. Blue Ridge Elec. Coop.*, 356 U.S. 525, 538-39 (1958); *Goar v. Compania Peruana de Vapores*, 688 F.2d 417, 423-24 (5th Cir. 1982).

The federal rules require a jury determination of an issue when either the Seventh Amendment or a federal statute provides the right to a jury trial and a party demands a jury trial on that issue. *See* Fed. R. Civ. P. 38(a), 39(a). The claims at issue here arise under state statutes, and there is no federal statute providing a right to a jury trial on the issue of the amount of the civil penalties to be imposed. In addition, the Seventh Amendment does not guarantee a jury trial on the issue. *See Tull v. United States*, 481 U.S. 412, 427 (1987) ("We therefore hold that a determination of a civil penalty is not an essential function of a jury trial, and that the Seventh Amendment does not require a jury trial for that purpose in a civil action."); *see also, e.g., United States v. J.B. Williams Co.*, 498 F.2d 414, 438 & n.28 (2d Cir. 1974) (noting that there was "no need to dispute that assessment of penalties is for the judge rather than the jury"); *SEC v. Badian*, 822 F. Supp. 2d 352, 365 (S.D.N.Y. 2011) (determination of the civil penalty to be imposed is a question for the Court after the defendant's liability has been established), *modified on other grounds*, 2012 WL 2354458 (S.D.N.Y. June 20, 2012). Apple is not entitled to a jury determination of the amount of the civil penalty to be imposed under any of the States' statutes.

C. Imposing Civil Penalties on Apple is Constitutional

The assessment of civil penalties against Apple will violate no constitutional provision. Apple has raised the possibility that the imposition of penalties against it could violate the Excessive Fines Clause of the Eighth Amendment or its due process rights under the Fifth and Fourteenth Amendments. It argues that imposing a civil penalty could result in a punishment that is not proportional to its offense and that it did not have sufficient notice of what conduct is

prohibited by the state statutes, and of the potential penalties for such conduct. All of these arguments fail.

The Eighth Amendment prohibits the imposition of "excessive fines." U.S. Const. amend. VIII.[17] A "fine," for purposes of the Excessive Fines Clause, is a monetary punishment payable to the government. *See United States v. Bajakajian*, 524 U.S. 321, 327-28 (1998).[18] A monetary punishment will violate the Eighth Amendment only where it is "grossly disproportional to the gravity of a defendant's offense." *Id.* at 334. In determining whether a punishment is grossly excessive, courts consider: "(a) 'the essence of the crime' . . . and its relation to other criminal activity, (b) whether the [defendant] fit[s] into the class of persons for whom the statute was principally designed, (c) the maximum sentence and fine that could have been imposed, and (d) the nature of the harm caused by the [defendant]'s conduct." *United States v. Collado*, 348 F.3d 323, 328 (2d Cir. 2003); *see also United States v. Sabhani*, 599 F.3d 215, 262 (2d Cir. 2010).

Because these factors are similar to those a court or administrative agency considers in setting the amount of a civil penalty, "where a court properly considers such factors, 'no constitutional violation' exists." *SEC v. Pentagon Capital Mgmt. PLC*, 2012 WL 1036087, at *12 (S.D.N.Y. Mar. 28, 2012) (quoting *SEC v. Rosenthal*, 426 F. App'x 1, 4-5 (2d Cir. 2011)), *aff'd in part, vacated in part on other grounds*, 725 F.3d 279 (2d Cir. 2013). And because "judgments about the appropriate punishment for an offense belong in the first instance to the

[17] In *McDonald v. City of Chicago*, the Supreme Court observed that it had not yet decided whether the Excessive Fines Clause applies to the States through incorporation. 561 U.S. ___, 130 S. Ct. 3020, 3035 n.13 (2010); *but see Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 433-34 (2001). The penalties sought by the States are not unconstitutionally excessive in any event, as set forth below.

[18] Civil penalties serve an important deterrent function, *see Hudson v. United States*, 522 U.S. 93, 102 (1997), but they also serve a punitive purpose. *See, e.g., SEC v. Haligiannis*, 470 F. Supp. 2d 373, 386 (S.D.N.Y. 2007). Courts have reviewed civil penalties under the Eighth Amendment. *See SEC v. Rosenthal*, 426 F. App'x 1, 4-5 (2d Cir. 2011) (analyzing civil penalties imposed for violations of securities laws); *Collins v. SEC*, 736 F.3d 521, 524-27 (D.C. Cir. 2013) (same).

legislature," *Bajakajian*, 524 U.S. at 336, courts have rejected constitutional challenges to civil penalties when they are within the range permitted by statute or regulation. *See, e.g., Newell Recycling Co. v. EPA*, 231 F.3d 204, 210 (5th Cir. 2000) ("if the fine does not exceed the limits prescribed by the statute authorizing it, the fine does not violate the Eighth Amendment"); *Combat Veterans for Cong. Political Action Comm. v. FEC*, __ F. Supp. 2d __, 2013 WL 5425098 at *11 (D.D.C. Sept. 30, 2013); *Sanders v. Szubin*, 828 F. Supp. 2d 542, 554 (E.D.N.Y. 2011). *See also United States ex rel. Bunk v. Gosselin World Wide Moving, N.V.*, __ F.3d __, 2013 WL 6671270 at *15 (4th Cir. Dec. 19, 2013) (affirming $24 million civil penalty under False Claims Act and noting that excessiveness analysis must "consider the award's deterrent effect on the defendant and on others perhaps contemplating a related course of fraudulent conduct"); *United States v. Emerson*, 107 F.3d 77, 80-81 (1st Cir. 1997).

Due process concerns also prohibit the imposition of excessive punishments. In the punitive damages context, the Supreme Court has instructed that courts, when assessing whether an award is so excessive as to violate due process, should "consider three guideposts: (1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized . . . in comparable cases." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 418 (2003) (citing *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575 (1996)). In assessing statutory damages or civil penalties, however, courts have held that such penalties violate due process only when they are "so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable." *St. Louis, I.M. & S. Ry. Co. v. Williams*, 251 U.S. 63, 66-67 (1919). *See also Zomba Enters., Inc. v. Panorama Records, Inc.*, 491 F.3d 574, 587 (6th Cir. 2007) (analyzing the

constitutionality of statutory damages under the Copyright Act); *United States ex rel. Tyson v. Amerigroup Ill., Inc.*, 488 F. Supp. 2d 719, 748 (N.D. Ill. 2007) (rejecting due process challenge to civil penalties imposed pursuant to the False Claims Act and Illinois Whistleblower Reward and Protection Act); *State v. WWJ Corp.*, 980 P.2d 1257, 1262-63 & n.8 (Wash. 1999) (holding penalty for violation of Washington Consumer Protection Act constitutional under *Gore*, though declining to decide whether punitive damages analysis should apply to statutory penalties).[19] Under both standards, the Supreme Court has instructed that deference should be given to the judgment of the legislature. *See Gore*, 517 U.S. at 583; *Williams*, 251 U.S. at 66 ("the States . . . possess a wide latitude of discretion" in prescribing penalties for violations of their laws). Any penalty assessed against Apple in this case will fall far short of anything that could be said to be "excessive" under either standard.

The Court has found that Apple committed a *per se* violation of the antitrust laws by knowingly and willfully facilitating and joining a horizontal conspiracy among the Defendant Publishers that eliminated price competition from the trade e-books market and harmed consumers in a number of ways. Apple's conduct clearly falls within the core prohibitions of the antitrust laws, and the reprehensibility of its conduct is high. Furthermore, the amount the States are seeking in this case is small in comparison with the actual damages sustained by consumers. The maximum the Court may award under the statutes that provide maximum dollar amounts,[20] in light of the Court's conclusion that Apple's conduct constituted a single violation of the relevant statutes, is $56,747,000. This amount is less than 37 percent of the estimated

[19] Greater deference to statutory penalty ranges is consistent with the courts' use of available civil penalties for similar violations as a benchmark for assessing the propriety of punitive damages awards. *See Campbell*, 538 U.S. at 418; *Motorola Credit Corp. v. Uzan*, 388 F.3d 39, 63 (2d Cir. 2004).

[20] As noted above, the Louisiana Unfair Trade Practices and Consumer Protection Act does not specify a maximum penalty amount. *See* La. Rev. Stat. § 51:1407. The State of Louisiana will request, after the damages trial, an award of the maximum amount, up to $1 million, that the Court deems appropriate, considering the factors enumerated in Section III.A. above.

overcharges to consumers in the Plaintiff States. Of the $56.7 million, $50 million is authorized as the maximum penalty under the Alaska Restraint of Trade Act. *See* Alaska Stat. § 45.50.578. While imposing Alaska's maximum statutory penalty might be appropriate in the circumstances of this case, Alaska seeks only a penalty in the amount equal to the next highest statutory maximum, $1 million. Thus, the total maximum penalties requested by the States, assuming $1 million under Alaska's Restraint of Trade Act and $1 million under Louisiana's Unfair Trade Practices and Consumer Protection Act, would be $8,747,000. This aggregate penalty amounts to less than six percent of overcharges to consumers in the Plaintiff States, and approximately three percent of nationwide overcharges. Given the reprehensibility of Apple's conduct, the extensive harm it caused, and the relatively modest amount the States seek as a civil penalty compared to the magnitude of the overcharges and other harms that Apple's conspiracy engendered, the imposition of civil penalties in this case will not be excessive and will not violate the Eighth Amendment or due process.

Apple has also argued that due process guarantees it the "right to have fair notice of what conduct is prohibited, and to present every available defense for every civil penalty sought." ECF No. 298. As set forth above, however, every element necessary for imposing liability on Apple pursuant to the civil penalty statutes was at issue during the liability phase of the trial. Apple had the "opportunity to present every available defense" to the state law claims at issue during the liability trial. *See Lindsey v. Normet*, 405 U.S. 56, 66 (1972). The Court's determination that Apple violated the state statutes at issue "followed a full and fair hearing before a federal judge," and thus Apple has been afforded all the process it was due. *See United States v. Gurley*, 384 F.3d 316, 326 (6th Cir. 2004). Moreover, Apple had constitutionally adequate notice of the potential civil penalties that would be imposed upon a finding that it violated the statutes at issue

by nature of the penalty ranges being set forth in the statutes themselves. *See, e.g., Pharaon v. Bd. of Governors of Fed. Reserve. Sys.*, 135 F.3d 148, 157 (D.C. Cir. 1998). Apple is not entitled to an opportunity to re-litigate its liability for violating the antitrust laws.[21]

D. Assessing Civil Penalties Against Apple Will Not Result in "Double Recovery"

Contrary to Apple's contention, if treble damages are awarded, the award of civil penalties would not be an impermissible "double recovery." Courts often award both treble damages and civil penalties where both are provided for in the relevant statutes. *See, e.g., United States v. Mastellone*, 2011 WL 4031199, at *3-*4 (S.D.N.Y. Sept. 12, 2011); *Tyson,* 488 F. Supp. 2d at 739-40. Treble damages and penalties are distinct remedies, each of which is authorized under the statutory schemes at issue in this case. Awarding both is especially appropriate here, where treble damages are to be distributed to injured consumers whereas civil penalties are payable to the States.

Apple asserts that courts have refused to allow plaintiffs to recover "two separate punitive awards . . . where the state and federal claims arise from the same operative facts and represent alternative theories of recovery," citing *Fineman v. Armstrong World Indus., Inc.*, 980 F.2d 171 (3d Cir. 1992). That case is inapposite. In *Fineman*, the plaintiffs, a business entity and its owner, relied on a number of legal theories, including a federal antitrust claim and a state tort claim, to recover the profits they allegedly lost as a result of the defendant's conduct. 980 F.2d at 176-77. The plaintiffs prevailed on both their antitrust and tort claims in the trial court, but, in order to prevent "an unwarranted windfall recovery," the court limited the plaintiffs to a single compensatory damages figure. *Id.* at 218. The court then held that "[t]he same principle applies

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[21] Apple waived any right it had to a jury determination of its liability under the state statutes at issue. *See Texas v. Penguin Group (USA) Inc.*, 2013 WL 1759567 at *7-*8 (S.D.N.Y. Apr. 24, 2013) ("it is clear that Penguin, *along with all other litigating parties*, knowingly and intentionally waived a jury determination of liability on the States' claims") (emphasis added).

to the alternate punitive damages awards," and therefore limited the plaintiffs to either an award of punitive damages under tort law or treble damages under antitrust law. *Id.* at 218-19.

The situation presented here is entirely different. First, unlike the plaintiffs in *Fineman*, the States are governmental plaintiffs, not private parties. Second, unlike the plaintiffs in *Fineman*, no State will receive multiple "punitive damages awards." Any treble damages awarded will be distributed exclusively to injured consumers. Only the modest civil penalties provided for under state law will remain with the States themselves. Moreover, unlike in *Fineman*, the States' state law claims are not mere "alternative theories of recovery." They are separate claims that provide relief in addition to what is available under federal law.[22] "Under principles of dual sovereignty, a state in furtherance of its public policy may punish an individual for conduct that also gives rise to punitive remedies for victims under a separate federal statute." *Maryland v. Dickson*, 717 F. Supp. 1090, 1106-07 (D. Md. 1989) (permitting the Maryland attorney general to recover both statutory damages under federal law and civil penalties under state law for claims under odometer tampering statutes). These principles have been applied in the antitrust context. *See New York v. Amfar Asphalt Corp.*, 1986 WL 27582, at *3-*4 (E.D.N.Y. Nov. 20, 1986) (allowing New York to seek both treble damages under federal antitrust law and civil penalties pursuant to state law); *see also California v. ARC Am. Corp.*, 490 U.S. 93, 105 (1989) (noting that there was no "federal policy against States imposing liability in addition to that imposed by federal law" and finding that state antitrust laws were not preempted by federal law solely because they impose greater liability). Assessing treble damages against Apple while

[22] The lack of merit in Apple's argument is highlighted by the fact that some of the state statutes expressly provide that the Attorney General may recover both treble damages on behalf of consumers and a civil penalty. *See, e.g.*, Alaska Stat. §§ 45.50.577(b), (d), 45.50.578(b); 740 Ill. Comp. Stat. 10/7(2), (4). While awarding treble damages under both federal law and state law might be a form of double recovery, an award of treble damages under federal law and a civil penalty under state law is not. *See, e.g.*, Tex. Bus. & Com. Code § 15.21(a)(2) (prohibiting plaintiff who recovers **damages** under federal law from recovering **damages** under state law for same conduct); *id.* § 15.02(a) (provisions of Texas Free Enterprise and Antitrust Act of 1983 are cumulative and "preserve the constitutional and common law authority of the attorney general to bring actions under state and federal law").

also imposing civil penalties on it will not, therefore, constitute a "double recovery."

Apple's contention that "at least one" statute, that of Virginia, expressly prohibits the recovery of both treble damages and civil penalties is mistaken. The statute provides, in relevant part, that "[n]o civil penalty shall be imposed in connection with any violation for which any *fine or penalty* is imposed pursuant to federal law." Va. Code Ann. § 59.1-9.11 (emphasis added). For Apple's argument to have merit, the treble damages the Plaintiff States seek under federal law must be considered a "fine or penalty." There is no statutory definition of either "fine" or "penalty." Where there is no express definition of a term, the term "must be 'given its ordinary meaning, given the context in which it is used.'" *Sansom v. Bd. of Supervisors*, 514 S.E.2d 345, 349 (Va. 1999) (quoting *Dep't of Taxation v. Orange-Madison Coop. Farm Serv.*, 261 S.E.2d 532, 533-34 (Va. 1980)). "Penalty" is defined, in relevant part, as "[p]unishment imposed on a wrongdoer, usu[ally] in the form of imprisonment or fine." Black's Law Dictionary 1247 (9th ed. 2009). "Fine," in the relevant sense, is defined as "[a] pecuniary criminal punishment or civil penalty *payable to the public treasury*." *Id.* at 708 (emphasis added). Because the usual, ordinary meaning of "penalty" is punishment in the form of imprisonment or fine, and "fine" is defined as a monetary payment to the public treasury, the award of treble damages, to be distributed to individual consumers, does not qualify as either. The Court may, therefore, appropriately award both treble damages under federal law and a civil penalty under Va. Code Ann. § 59.1-9.11.

Apple also argues that any "double recovery" problem could be solved by the Court designating a portion of the treble damages award as a civil penalty pursuant to 15 U.S.C. § 15e. This would be improper and inconsistent with the language and intent of the statute. That statute provides that monetary relief recovered in an action brought by a state attorney general under 15 U.S.C. § 15c(a)(1) shall be distributed as the district court authorizes or be deemed a civil

penalty and paid to the state "[s]ubject in either case to the requirement that any distribution procedure adopted afford each person a reasonable opportunity to secure his appropriate portion of the net monetary relief." 15 U.S.C. § 15e. The provision was part of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, 90 Stat. 1383. The Act addressed Congressional concern that then-existing federal antitrust laws did not provide an effective remedy for all injured consumers and that "[t]his lack of an effective remedy sometimes results in the unjust enrichment of antitrust violators." H.R. Rep. No. 94-499, pt. 1, at 4 (1975). To prevent such unjust enrichment, Congress enacted 15 U.S.C. § 15d (which allows recovery of aggregate damages without separately proving the individual damage to the consumers on whose behalf a *parens patriae* suit is brought) and 15 U.S.C. § 15e. *See* H.R. Rep. No. 94-499, pt. 1, at 13 (1975).

The purpose of Section 15e was to provide for the distribution of any funds that remained after the treble damages were distributed because not all consumers came forward to claim their share. *Id.* at 16; *see also Ill. Brick Co. v. Illinois*, 431 U.S. 720, 747 n.31 (1977) (recognizing that the statute provides for the distribution of the unclaimed treble damages award as a civil penalty or for some public purpose benefitting the class of injured consumers); *In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.*, 1978 WL 1294, at *3 (C.D. Cal. Jan. 25, 1978) ("[I]n passing the [HSR Act], Congress was not seeking primarily to delegate to state attorneys general the right to enforce federal penal laws; its aim, instead, was to establish its own system of escheat, in order that the portions of a recovery that are allocable to established damages not claimed by the persons injured may be diverted to the state, rather than be retained by the wrongdoer."). Congress did not, therefore, authorize the award of a portion of the treble damages to the States as a civil penalty in lieu of the penalties they may pursue under state law,

and the statute should not, and cannot properly, be used to deprive consumers of the recovery to which they are entitled.[23]

E. The States Have Not Impermissibly Revised Their Civil Penalty Requests

Apple's final contention is that some of the Plaintiff States, namely, Alaska, Nebraska, and Vermont, raised "never-before-seen" claims for civil penalties in our September 20 letter. Specifically, Apple argues that, in the Second Amended Complaint, Alaska only requested penalties pursuant to Alaska Stat. § 45.50.578, which is part of the Alaska Restraint of Trade Act, and did not request additional penalties under Alaska Stat. § 45.50.551(b), which is part of Alaska's Unfair Trade Practices and Consumer Protection Act.[24] It further argues that Nebraska only requested civil penalties of up to $2,000 per violation in the Complaint but now asks for penalties of up to $25,000 per violation, the maximum allowed under Neb. Rev. Stat. § 59-1614. Finally, it argues that Vermont has changed the statute pursuant to which it is requesting civil penalties from Vt. Stat. tit. 9, § 2461, which provides for a penalty against any person who violates an injunction issued pursuant to the Vermont Consumer Fraud Act, to Vt. Stat. tit. 9, § 2458(b)(1), which authorizes the imposition of a civil penalty for violating the Act. Apple's arguments, at best, depend on willful blindness and are simply disingenuous.

The Federal Rules of Civil Procedure allow the trial court to award any relief to which the prevailing party is entitled, regardless of what the party demanded in its pleadings. Fed. R. Civ. P. 54(c); *Powell v. Nat'l Bd. of Med. Exam'rs*, 364 F.3d 79, 86 (2d Cir. 2004). *See also SEC v. Goble*, 682 F.3d 934, 948 (11th Cir. 2012). The only exception to this rule is "when a court

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[23] In the 9/25 Order, the Court noted that state law penalties "shall be assessed as a portion of any treble damages." The States read that order as properly noting that, consistent with constitutional limitations, any penalties should be proportional to the amount of damages awarded. To the extent the Court was proposing that some amount of damages be segregated out from the funds designated for payment to injured consumers and awarded to the States as civil penalties, we respectfully submit that such a procedure would be improper.

[24] Apple does not contest that the claim under Alaska Stat. § 45.50.578(b)(2) was properly pleaded.

grants relief not requested and of which the opposing party has *no notice*, thereby prejudicing that party." *Powell*, 364 F.3d at 86 (emphasis added). Apple unquestionably had notice of the relief the States were entitled to under each statute. Count IV of the Second Amended Complaint clearly alleged that Apple violated both Alaska's Restraint of Trade Act and its Consumer Protection Act (¶ 132), the Nebraska Consumer Protection Act (¶ 171), and Vermont's Consumer Fraud Act (¶ 193). Apple therefore had notice that, if the Plaintiff States proved that it violated these statutes, the Court could order all remedies set forth therein. The fact that the Prayer for Relief mistakenly omitted a request for a penalty under Alaska's Unfair Trade Practices and Consumer Protection Act, requested an amount less than the maximum allowed under Neb. Rev. Stat. § 59-1614 due to a typographical error, and specified the incorrect Vermont civil penalty provision is of no consequence.[25] The Plaintiff States are entitled to civil penalties under each of the statutes enumerated in their September 20 letter, and Apple had notice that such relief was available.

IV. CONCLUSION

The Court should reject the myriad arguments presented by Apple. After the conclusion of the damages trial in May, the Court should assess, pursuant to the statutes enumerated in Exhibit 1 to the States' September 20, 2013 letter, appropriate civil penalties sufficient to punish Apple for its misconduct and deter it from similarly violating the law in the future.

[25] No award of civil penalties will be made before the conclusion of the damages trial in May. Therefore, to the extent the Court deems Apple's arguments to have any merit at all, the appropriate course would be to grant the States leave to amend their complaint pursuant to Fed. R. Civ. P. 15(a)(2) solely to correct these scrivener's errors.

Dated: January 8, 2014

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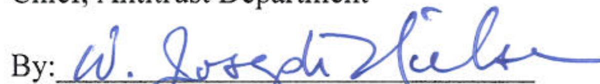
By: 
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