

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.)
)
HACHETTE BOOK GROUP, INC., et al.,)
)
Defendants.)
_____)

Civil Action No. 12-cv-6625(DLC)

**PLAINTIFF STATES' STATUS UPDATE
REGARDING SETTLEMENT NOTICE AND DISTRIBUTION PLANS**

Liaison Counsel for Plaintiff States respectfully submit this status update regarding the settlement notice and distribution plans that were preliminarily approved by this Court by Order dated September 13, 2012 (and subsequently corrected on September 17, 2012). As noted in our Memorandum in Support of Plaintiff States' Motion for Preliminary Approval of Settlements and Proposed Consumer Notice and Distribution Plans ("Memorandum in Support"), dated August 29, 2012 (and subsequently supplemented), both the calculation of payments to consumers and the mechanics of crediting payments to consumers were the subject of ongoing discussion with the E-book retailers. The original Distribution Plan¹ specifically contemplated that changes

¹ The Distribution Plan was attached as Appendix F to the Memorandum in Support, as supplemented.

might be required in response to legal, business and technological constraints of particular retailers who are assisting with the notice of the settlements and distribution of settlement funds. During recent discussions between Liaison Counsel and retailers regarding the implementation of the Distribution Plan, it has become evident that two modifications will need to be implemented to facilitate distribution and maximize consumer participation in the Settlements: (1) modification of payment tiers by book category, and; (2) modifications to the initiation of credits by crediting retailers other than Amazon.

The first modification involves the calculation of the amount to be paid for each eligible E-book. The current plan contemplates that consumers would receive an estimated \$1.32 per book for purchase of New York Times bestsellers, \$0.36 per book for frontlist titles, and \$0.25 for backlist titles. These amounts were determined in consultation with Plaintiff States' expert, Professor Wickelgren. However, Liaison Counsel have been informed by several participating retailers that the retailers will be unable to provide the degree of precision needed to accurately separate and identify frontlist and backlist purchases. Anticipating this possible problem, Liaison Counsel had requested that Professor Wickelgren provide alternative calculations based on only two categories of books that would also provide for a fair and reasonable distribution. Professor Wickelgren concluded payments of \$1.32 for each New York Times bestsellers and a blended payment of \$0.30 for all other titles would be fair and reasonable.² In order to avoid disparity or inaccuracies in payment calculations, Plaintiff States will use these previously identified, alternative payment amounts for the two categories.

² See Memorandum in Support (Section V.A), and Appendix E, thereto (¶¶ 34-36).

The second necessary modification involves the process for providing credits. As originally contemplated, if the Court approves the settlements, the Crediting Retailers (identified as Amazon, Barnes & Nobles, Apple, and Kobo) would automatically deposit the calculated credit amount in eligible consumers' accounts and would send a notice to consumers telling them that the credit is available for use. As credits are used, the retailer would bill the settlement escrow account for reimbursement. At the end of one year, unused credits would expire. The one-year expiration period was chosen to provide a cutoff beyond which there will be no additional claims against the settlement escrow account, so that Plaintiff States and Settling Publishers could wind up the settlement process and close the escrow account. Amazon can and will use this crediting process.

However, other Crediting Retailers have now informed Liaison Counsel that they would be unable to track the amount of the specific settlement credit within a customer's account if that customer has other sources of credit in the account, such as a refund for a returned book or a gift certificate. As a consequence, they would be unable to implement a termination of the credit after the one-year period ends. The inability of the retailer to track specific funds in the commingled account also would make it impossible to determine when the credit is actually "used" such that the retailer could properly submit a bill to the settlement escrow account. Retailers have also expressed concern that their particular method of crediting accounts might be viewed as a gift card and could run afoul of certain state laws that require that gift cards have no expiration date.

In response to these concerns and technical limitations, Plaintiff States will modify the Distribution Plan to provide that customers of the other Crediting Retailers (Barnes & Noble,

Apple, and Kobo) will receive an email notice informing them that their credit is available, just as in the original plan. However, the email will provide instructions for the customer to activate their account credit. For some, it will require them to click a “click to activate” button in the email; for others, it may require them to open their account and provide a code. The customers will have an entire year to activate their credits. However, once activated the credit will be available in the customer’s account for use at any time, and will not expire. Additionally, the retailer may bill the settlement escrow account upon activation.

Plaintiff States believe that, with respect to consumers, this change is functionally equivalent to the prior methodology contemplated in the Distribution Plan, and solves a number of problems for certain Crediting Retailers. Without this modification, several of the retailers could not provide credits and all of their customers would be required to file Claim Forms to receive payments. This modification is a much better alternative for these customers.

A revised Distribution Plan which reflects these expected modifications is attached hereto as Exhibit A. Making these modifications also requires wording changes to the various notices that will be provided to consumers. Those changes are reflected in the revised Notice Plan, attached hereto as Exhibit B.

Dated: October 1, 2012.


Respectfully submitted,

**LIAISON COUNSEL
TO THE PLAINTIFF STATES**


STATE OF TEXAS
GREG ABBOTT, ATTORNEY GENERAL

BY: 
Rebecca Fisher
Senior Assistant Attorney General
P.O. Box 12548
Austin, Texas 78711-2548
Phone (512) 463-1265
Rebecca.Fisher@texasattorneygeneral.gov

STATE OF CONNECTICUT
GEORGE JEPSEN, ATTORNEY GENERAL

BY: 
Gary M. Becker (GB8259) w/ permission R7
Assistant Attorney General
55 Elm Street
Hartford, CT 06106
PH: (860) 808-5040
Gary.Becker@ct.gov

STATE OF OHIO
R. MICHAEL DEWINE,
ATTORNEY GENERAL

BY: 
DOREEN JOHNSON w/ permission R7
Assistant Chief, Antitrust Section
Office of the Ohio Attorney General, Antitrust
Section
150 E. Gay St. – 23rd Floor
Columbus, OH 43215
Tel: (614) 466-4328
Doreen.Johnson@ohioattorneygeneral.gov

Certificate of Service

The undersigned hereby certifies that a copy of the foregoing Plaintiff States' Status Update Regarding the Settlement Notice and Distribution Plans was served this 1st day of October, 2012, via the Court's Electronic Case Filing system, on the following:

For Defendant HarperCollins Publishers, LLC:

Clifford H. Aronson
Skadden, Arps, Slate, Meagher & Flom LLP
Four Times Square
New York, NY 10036-6522

For Defendant Hachette Book Group, Inc.:

Walter Stuart
Freshfields Bruckhaus Deringer US LLP
601 Lexington Avenue
New York, NY 10022

**For Defendants Simon & Schuster, Inc.
and Simon & Schuster Digital Sales, Inc.:**

Helene D. Joffe
Alan Kusnitz
Proskauer Rose LLP
Eleven Times Square
New York, NY 10036

Dated: October 1, 2012



Rebecca Fisher
Senior Assistant Attorney General, Antitrust Section
Office of the Attorney General of Texas