RE ELECTRONIC BOOKS ANTITRUST LITIGATION, Case No.11-md-02293
and
Texas, et al. v. Penguin Group, et al, Case No. 12-cv-03394

PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY APPROVAL OF MACMILLAN AND PENGUIN SETTLEMENT AGREEMENTS AND OF THE CONSUMER NOTICE AND DISTRIBUTION PLANS

EXHIBIT C

DECLARATION OF PROFESSOR WICKELGREN

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

This Document Relates to:

IN RE ELECTRONIC BOOKS ANTITRUST) LITIGATION	No. 11-md-02293 (DLC)) ECF Case) CLASS ACTION

THE STATE OF TEXAS, et al.,	)
Plaintiffs,	) Civil Action) No.12-cv-03394
v.	)
PENGUIN GROUP (USA) INC., et al.,	)
Defendants.	)

DECLARATION OF ABRAHAM L. WICKELGREN, PH.D. REGARDING DAMAGES
TO ELIBLE CONSUMERS FROM SETTLEMENTS WITH MACMILLAN
AND PENGUIN AND THE PROPOSED PLAN OF ALLOCATION

Dated June 20, 2013

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Introduction

1. I previously submitted a Declaration in the related case of *Texas et al., v. Hachette Book Group, Inc.*, et al., ("Prior Declaration").[1]

2. As explained in detail in my Prior Declaration, three publishers—Hachette Book Group, Inc., Simon & Simon Inc. (and its subsidiary Simon & Schuster Digital Sales) and HarperCollins Publishers LLC—were accused of engaging in a conspiracy, among themselves and others, to fix prices and otherwise restrain trade with regard to their actions surrounding the introduction of the agency model for e-books. I determined the settlements reached between the States and those three settling publishers were fair, adequate, and reasonable. I further determined that the plan for the distribution of the settlement proceeds to consumers, pursuant to those settlements, was fair, adequate, and reasonable. This Court gave final approval to those settlements on February 8, 2013.

Assignment

3. In this current matter, Holtzbrinck Publishers, LLC, d/b/a Macmillan ("Macmillan") and Penguin Group (USA) Inc. ("Penguin") have been accused of being coconspirators with Hachette, Simon & Simon, HarperCollins and others in fixing prices and restraining trade in the e-books market. I have been asked by counsel for Plaintiffs (which, in this case, includes Plaintiff States and Settlement Class) to determine whether the settlements reached between Plaintiffs and Macmillan and between Plaintiffs and Penguin are fair, adequate and reasonable. I have further been asked to address whether the plan for the distribution of the settlement proceeds to consumers is fair, adequate, and reasonable.

Executive Summary

4. My analysis demonstrates that the settlement amounts of $20 million for Macmillan and $75 million for Penguin are fair, adequate, and reasonable. In coming to this conclusion, I conducted an analysis of e-book sales data that enabled me to estimate the overcharges that consumers paid as a result of the participation of Macmillan and Penguin in the conspiracy surrounding the introduction of the agency model. My analysis generated estimated total overcharges as well as estimated overcharges for three different categories of e-books, as explained in detail below. Comparing these calculations to the settlement proceeds, I find that the settlement amounts are extremely favorable to consumers.

5. I also reviewed the proposed plan for allocating the settlement proceeds to consumers. This plan follows the plan offered for the earlier settlements which I previously supported. As with the previous plan, the current plan accounts both for the differences in the estimated overcharges for different categories of e-books and the differences in the litigation risks associated with the different categories of e-books. The current plan provides the additional benefit of distributing consumer funds from all current settlements at one time which will provide consumers with larger, single payments from a retailer as opposed to smaller, multiple payments. As a result, I conclude this allocation plan is also fair, adequate, and reasonable.

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[1] My Prior Declaration was Appendix E to the Memorandum in Support of Plaintiff States' Motion for Preliminary Approval of Settlements filed in Case No 12-cv-6625 on September 13, 2012. See Doc. No. 11-5.

Data used in this Assessment

6. In arriving at these conclusions, I used the same data as I reviewed for the earlier settlements which included 1) weekly retail sales data for all e-books sold by Amazon and Barnes & Noble from January 1, 2008 (before the introduction of the agency model on April 1, 2010) until February 2011; 2) weekly sales data between March 2011 and early December 2011 from Amazon; 3) aggregate sales of e-books from Amazon and Barnes & Noble from April 1, 2010 until the end of the claims period, May 21, 2012, and 4) complete retail sales data from Apple's iBookstore from April 1, 2010 until February 2011.

7. This data included the weekly quantity sold and revenue for each e-book sold which allowed me to determine the average price each e-book was sold for during the week. This data also provided the total number of e-books sold and the total revenue received from the sale of e-books by each of the five defendant publishers, including Macmillan and Penguin, in each of three categories: New York Times Bestsellers, front-list e-books and back-list e-books.

8. For the purposes of my analysis, all sales of an e-book were included in the New York Times Bestseller category if the e-book was on the New York Times Bestseller list (fiction, non-fiction or advice) at any time between April 1, 2010 and the end of the claims period. Sales of an e-book were placed in the front-list category if the e-book was never on the New York Times Bestseller list between April 1, 2010 and the end of the claims period, and the sales took place within 12 months of the e-book's release. Sales of an e-book were categorized as back-list if the e-book was never on the New York Times Bestseller list between April 1, 2010 and the end of the claims period, and the sales took place more than 12 months after the e-book's release.

Methods used to Calculate Consumer Harm

9. I estimated the consumer loss due to consumers paying higher prices for the e-books that they continued to purchase after the introduction of the agency model.[2] To estimate this consumer loss, I determined the magnitude of the price increase caused by the introduction of the agency model and then multiplied this by the number of e-books that consumers purchased.

10. In order to provide a more precise estimate of the loss and to determine Macmillan's and Penguin's respective contributions to that loss, I calculated Macmillan's and Penguin's estimated price increase and the quantity of Macmillan and Penguin e-books purchased separately for three categories of sales (New York Times Bestsellers, front-list, and back-list). To determine the magnitude of each of these price increases, I engaged in a "but for" or "counterfactual" analysis. As explained in my Prior Declaration, this involved estimating the e-book prices that would have prevailed in the market absent the

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[2] As noted in my Prior Declaration, there is a second consumer loss from the conspiracy: consumers were harmed by not buying (or buying fewer) e-books than they would have bought had e-book prices not increased because of the conspiracy. For the reasons earlier stated, I did not calculate this harm. Prior Declaration, ¶¶12-13.

conspiracy, the "but for" prices.[3] I then compared these "but for" prices to the e-book prices that actually prevailed under the conspiracy.

11. As fully described in my Prior Declaration, I calculated the "but for" price for New York Times Bestsellers to be $10.11 based on the average price of e-books in this category prior to the introduction of the agency model.[4] Thus, I estimated the consumer loss for Macmillan e-books in the New York Times Bestseller category of e-books as the average price of Macmillan New York Times Bestsellers post-agency minus the average price of this category of e-books pre-agency ($10.11) times the total number of Macmillan e-books sold in this category during the claims period. I performed an identical calculation for New York Times Bestsellers published by Penguin.

12. For e-books that were not New York Times Bestsellers, I used the same process as in the previous settlement to determine the difference between the post-agency average price and the pre-agency average price for a given e-book.[5] I then calculated a weighted average of this price increase with the weights based on the unit sales of each e-book in the post-agency window. This was done separately for each of the five defendant publishers (including Macmillan and Penguin) and separately for front- and back-list e-books.

13. I used information reported by the Claims Administrator, Rust Consulting, in the earlier settlements to estimate the quantity of Macmillan and Penguin e-books sold under the agency model in each of the three categories. Rust aggregated information from retailers as to the number of identified eligible purchases and reported the number of identified eligible New York Times Bestsellers and the number of identified eligible non-New York Times Bestsellers. [6] While the Rust data is quite comprehensive, in order to allow for the possibility that additional claims will still be filed, I assumed that this covered approximately 99% of the total e-book market. Thus, I divided these totals by 0.99 to estimate the number of eligible e-books sold in each of these two categories.[7]

14. I estimated Macmillan's and Penguin's shares of the total e-book market using aggregate data from Amazon and Barnes and Noble for e-book sales during the Agency period. This data is broken down by publisher and by category (New York Times Bestseller, front-list, and back-list). Using this data, I calculated Macmillan's and Penguin's shares of Amazon and Barnes and Noble e-book sales during the agency period separately for New York Times Bestsellers and for non-New York Times Bestsellers. Using the Amazon and Barnes and Noble data, I was further able to estimate the shares of Macmillan's and Penguin's non-New York Times Bestsellers that were front-list versus those that were back-list.

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[3] Prior Declaration, ¶¶15-22.
[4] Prior Declaration, ¶¶16-19.
[5] Prior Declaration, ¶¶20-22.
[6] Rust Declaration filed as Exhibit 5 to Plaintiff States' Memorandum in Support of Motion for Final Approval of Settlements, Case No 12-cv-6625, Doc. No. 68-5, ¶18.
[7] Because this increases the total number of e-books sold, it may result in a slight over-estimate of the consumer harm from Penguin and Macmillan. Thus, if the settlement is fair, adequate, and reasonable given this estimate, it will clearly be fair, adequate and reasonable if there are no additional claims filed.

Estimated Damages and the Reasonableness of the Settlement Agreement

15. Using the methods described above, I estimated the consumer overcharges from the sales of e-books in all U.S. States, Commonwealths and Territories by Macmillan for each of the three categories of e-books during the claims period. I estimated the total consumer overcharges attributable to Macmillan and Penguin to be approximately $80.64 million. This is the sum of estimated consumer overcharges for each of the three categories:
    a. New York Times Bestsellers--$27.59 million;
    b. Front-list--$21.63 million;
    c. Back-list--$31.42 million.

16. Given that my estimate of the total consumer loss from Macmillan's and Penguin's overcharges on e-books during the agency period is less than the $95 million being paid pursuant to these two settlements, these settlements are very favorable to consumers. In fact, these settlements are even more favorable to consumers than it first appears based on these numbers because these unadjusted estimates do not take into account any discount for litigation risks. While the states' case is quite strong, no case is without litigation risk. These litigation risks are especially significant given the unpredictability of antitrust litigation.

17. Thus, a fair, adequate, and reasonable settlement will reflect a discount from the estimated consumer loss based on the fact that the settlement gives consumers a certain recovery whereas consumers run a substantial risk of receiving nothing if Macmillan and/or Penguin were to win at trial.

18. In my prior declaration, I used the following discounts for litigation risks: For NYT bestsellers, I assigned between 85 percent and 60 percent recovery; for non-NYT front-list e-books, between 75 percent and 50 percent; and for non-NYT backlist e-books, between 50 percent and 25 percent.[8]

19. More recent discussions with Liaison Counsel, however, reveal that they believe the case against the remaining defendants generally has gotten stronger over the last several months. Thus, the currently appropriate discounts for litigation risks are: For NYT bestsellers, between 90 percent and 75 percent recovery; for non-NYT front-list e-books, between 80 percent and 65 percent; and for non-NYT backlist e-books, between 60 percent and 40 percent.

20. These percentages suggest that the maximum combined expected recovery from Macmillan and Penguin would be $60.99 million; the minimum expected recovery would be $47.32 million. The Plaintiffs' combined recovery from Macmillan and Penguin is $95 million, which exceeds even the maximum expected recovery by over 55 percent.

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[8] Prior Declaration, ¶28.

This supports my conclusion that the Macmillan and Penguin settlements are fair, adequate, and reasonable.[9]

21. This conclusion is reinforced by the fact that it is even more favorable to consumers than the previous settlements that were approved by this Court as being fair, adequate, and reasonable. Consumers will recover from Macmillan and Penguin an amount that is approximately 55% more than the maximum estimate of estimated discounted damages and is almost 118% of estimated damages with no adjustment for litigation risk. By contrast, in the previous settlements, which were based on the same claims and subject to the same damages analysis, consumers recovered an amount which was approximately half way between the maximum and minimum estimates for discounted damages and was almost 51% of the estimated damages with no litigation risk adjustment.

22. Additionally, the monetary recovery for consumers does not fully capture the true measure of the consumer benefit from these settlements. As with the previous settlements, the Macmillan and Penguin settlements includes an injunction which helps restore competition.[10]

Consumer Allocation Methodology

23. Counsel has instructed me that consumers of e-books from all five publishers will receive compensation by aggregating the proceeds from the earlier settlements with the proceeds from these two settlements and a separate settlement between Class and Hachette, HarperCollins, and Simon & Schuster for Minnesota residents. In this section, I evaluate whether the Plaintiffs' Plan of Distribution is fair, adequate, and reasonable and provides an appropriate method to calculate the recoveries for each category of e-book to assist in this process.

24. Although I analyzed the data for three categories of books when calculating consumer damages, I grouped e-books into only two categories--New York Times Bestsellers and non-New York Times Bestsellers—when finalizing my evaluation of the Distribution Plan. Based on information received from retailers and Rust Consulting, it is not possible to separately compensate consumers for their purchases in three categories of e-books. This feasibility constraint requires that, for the purposes of analyzing the proposed allocation plan, I combine all non-New York Times Bestsellers into one category.

25. In aggregating each consumer's total compensation for their individual e-book purchases, I weighted each category by discounting non-New York Times Bestsellers by 39 percent relative to New York Times Bestsellers. As discussed above, I used this discount to reflect the greater litigation risk associated with the non-New York Times Bestseller

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[9] Note that the level and rank ordering of risk reflects the information available at the time of settlement. Further discovery in the ongoing litigation against the non-settling defendant could change the perceptions of success probability associated with each type of e-book.

[10] Prior Declaration, ¶30.

case.[11] As part of the damages analysis described above, I estimated price increases from the conspiracy separately for each of the five publishers and separately for New York Times Bestsellers and front-list and back-list titles. These price increases will serve as the baseline for determining how much each consumer should receive.

26. Once I determined the weighted estimated overcharges for each category of e-books, I calculated a baseline monetary compensation amount. It was then necessary to convert this monetary recovery per consumer into a percentage of the total consumer settlement amount. Calculating this percentage for every consumer will enable Plaintiffs to award each consumer this percentage of the total amount of the current settlements. For more details on this procedure, see Appendix B.

27. As Appendix B describes in detail, this approach yields compensation amounts per e-book for the two categories. And, because Minnesota consumers will not receive compensation from the three earlier settlements, but will receive compensation from the Macmillan, Penguin and Minnesota-only settlements, different compensation amounts need to be calculated for non-Minnesota consumers and for Minnesota consumers. These calculations result in the following per book compensation amounts:[12]

   a. New York Times Bestseller (non-Minnesota)--$3.06
   b. Non- New York Times Bestseller (non-Minnesota)--$0.73
   c. New York Times Bestseller (Minnesota)--$3.82
   d. Non-New York Times Bestseller (Minnesota)--$0.93

28. Because these compensation amounts are based on a slightly larger number of e-books sold than the number given by Rust Consulting (in case its current data do not reflect all of the claims that will ultimately be made), these compensation amounts may need to be revised slightly based on the final number of claims made during the Notice period.
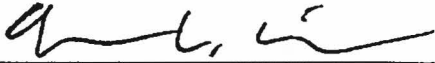
Conclusions

29. I have reviewed the proposed settlement agreements between Plaintiffs and Macmillan and Plaintiffs and Penguin and believe them to be fair, adequate, and reasonable. I also believe the proposed method of allocating the settlement amount of all settlements to date across consumers is fair, adequate, and reasonable.

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[11] This 39 percent figure reflects a weighted average of the relative litigation risks (discussed in ¶¶18-19) of the front-list case and the back-list case relative to the New York Times Bestseller case. The weights reflect the relative magnitude of the estimated consumer harm from the overcharges of front-list and back-list e-books in the Amazon and Barnes and Noble data across all five publishers.

[12] The compensation figures are rounded down to the nearest cent to ensure that the settlement funds are not exhausted before everyone is compensated.

Pursuant to 28 U.S.C. §1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 20, 2013.

Abraham L. Wickelgren

Appendix A:
Price Variation among New York Times Bestsellers

1. As demonstrated in the main body of my Prior Declaration (¶17-19), prior to the introduction of the agency model, there was almost no variation in the pricing of New York Times Bestsellers while these e-books were on the bestseller lists. While there was somewhat more variation in pricing for these e-books prior to their being on the bestseller list and after they came off the bestseller list, it was small. The 10th through 30th percentile prices for these e-books before they appear on the bestseller list were both $9.99. This means that at least 20 percent of these e-books sold at exactly $9.99. The median price (50th percentile) for New York Times Bestselling e-books prior to making it onto the Bestseller list is $12.03. The 90th percentile price is $14.16 (90 percent of the sales of e-books in this category occurred at a price of less than $14.16 prior to the time when these e-books first appeared on the New York Times Bestseller list).

2. After the e-books came off the best seller list, the 10th percentile price was $8.36, the 20th percentile price was $9.35, the median price was $9.98, and the 90th percentile price was $10.32.

3. While individually this variation between e-book prices before and after being on the bestseller list was not trivial, it was fairly small compared to the general variation in e-book prices. Furthermore, many of the sales of these e-books, about 40 percent, occurred while these e-books were on the New York Times Bestseller list. During this time there was almost no price variation. This is important because it suggests that the average pricing of e-books that (at some point) appear on the New York Times Bestseller list was not likely to vary that much with the particular e-books in question. Moreover, because the variation in the average price of a group of e-books will always be *much less* than the variation in the prices of individual e-books, this suggests that using the typical pre-agency price for New York Times Bestsellers was a very good approximation for what the price of post-agency New York Times Bestsellers would have been had there been no conspiracy.

Appendix B:
Explaining the Consumer Allocation

1.   As discussed in Appendix C, ¶1, of my Prior Declaration, the estimated overcharges must be discounted based on the relative litigation risks of the different categories of e-books. These discounts ensure that the consumer allocation fairly reflects the likely result of litigation.

2.   To see how the consumer allocation can be implemented, consider the following simple example. Say that consumer A was overcharged $10 for New York Times Bestsellers and $20 for non-New York Times Bestsellers, while consumer B's overcharges are $20 for New York Times Bestsellers and $10 for non-New York Times Bestsellers.[13] Both would have an un-weighted aggregate overcharge of $30. However, based on conversations with Liaison Counsel, my understanding is that the case for New York Times Bestsellers is stronger than the case for non-New York Times Bestsellers. Accordingly, it would not be appropriate to give these two consumers the same recovery. I discount consumer loss from non-New York Times bestsellers by approximately 39 percent relative to New York Times Bestsellers to correct for this. This discount reflects a weighted average of the appropriate discounts for front-list and back-list e-books, where the weights are given by the relative overcharges of each type (these weights are discussed in more detail in ¶5 below). Using this discount, Consumer A's discounted damages would be $10+$12.2=$22.20, and consumer B's aggregated damages should would be $20+$6.1=$26.10.

3.   I can then convert this dollar amount of recovery per consumer into a percentage of the total amount all consumers are entitled to. Once I have this percentage for every consumer, one can award each consumer this percentage of the total settlement amount. To use our simple example, if there are only these two consumers, then consumer A would receive 22.2/(22.2+26.1) (approximately 46 percent) of the settlement and consumer B would receive 26.1/(22.52+26.1) (approximately 54 percent). The total settlement will not reflect the full damages aggregated in this discounted way because consumer recovery is limited by the total available compensation from the settlements. Thus, if the total settlement were $30 in this example, consumer A would receive 0.46*30=$13.84, and consumer B would receive 0.54*30=$16.16.

4.   I applied this methodology to the actual settlement amounts from all six settlements to date and the total estimated damages consumers of all five agency publishers suffered. I calculated a weighted average price increase for all non-New York Times Bestsellers. This weighted average used the estimated price increases for each of the five publishers for front-list and back-list books. It weighed each price increase by the share of front-list and back-list books of each publisher among total sales of non-New York Times Bestsellers for these publishers using the Amazon and Barnes and Noble data which provide sales broken down separately by front-list and back-list.

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[13] Liaison Counsel has indicated it is not feasible to separately compensate consumers for front-list and back-list e-books. Thus, all these purchases are aggregated into non-New York Times Bestsellers.

This produced a weighted average price increase for non-New York Times Bestsellers of $1.18.[14]

5. Since the litigation risk is greater for non-New York Times Bestsellers than for New York Times Bestsellers, however, as I discussed in the simple example above, I further discounted this weighted average price increase to account for differences in litigation risk across different categories of e-books. In so doing, I applied separate discounts for front-list e-books and for back-list e-books to capture the greater litigation risk associated with the back-list case. The discounts I applied were discounts relative to the litigation risk associated with New York Times Bestsellers. It is not necessary to determine the absolute level of litigation risk in order to determine what the appropriate share of the final settlement should be for non-New York Times Bestsellers. Based on my discussions with Liaison Counsel, I determined that the estimated front-list price increase should be discounted by one-sixth and the estimated back-list price increase should be discounted by one-half to account for their greater litigation risks relative to New York Times Bestsellers.[15] Applying these weights, the discounted weighted average price increase for non-New York Times Bestsellers is approximately 61 percent of the original weighed average price increase or $0.72.

6. Applying this price increase to the estimated 123,527,576 eligible non-New York Times Bestsellers, yields a discounted consumer loss of $88.94 million. The average overcharge for New York Times Bestsellers across all five publishers is $2.99 per e-book (the difference between the average price of $13.10 for New York Times Bestsellers during the agency period and the average price of $10.11 for these e-books in the pre-agency period). Applying this to the estimated 24,233,420 eligible New York Times Bestsellers, yields a consumer loss of $72.46 million.[16] Thus, the consumers of the eligible New York Times Bestsellers should receive 44.89% of the total settlement proceeds, while the consumers of the eligible non-New York Times Bestsellers should receive 55.11% of the total settlement proceeds.

7. The allocation plan anticipates aggregating funds from the Prior Settlements with the funds from the Macmillan, Penguin and Minnesota-only settlements. However, because the earlier settlements with Hachette, HarperCollins and Simon & Schuster did not include Minnesota purchasers, but the Macmillan and Penguin settlements do include Minnesota purchasers, the compensation amounts from the combined settlement proceeds must be calculated separately for non-Minnesota and Minnesota purchasers. Thus, I need to determine what share of the Macmillan and Penguin

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[14] See Appendix C, ¶5-6 of the Prior Declaration for rationale for aggregating individual publisher price increases.

[15] This discount reflects an intermediate assessment of the relative litigation risks at the time the settlements were negotiated. Since we are distributing the settlement proceeds together, it is appropriate for the discounts to reflect the relative litigation risks that influenced each settlement negotiation. As mentioned in the simple example, this aggregate discount for non-New York Times Bestsellers works out to about 39 percent relative to New York Times Bestsellers.

[16] The book numbers are estimated since the data from Rust Consulting, though quite comprehensive, may not yet reflect the full number of claims. As a result, and to reduce the risk of running out of money to pay claimants, I have adjusted the number of e-books from the Rust numbers by assuming that their numbers only cover 99% of the total number of claims that will be received.

settlements should be distributed to Minnesota consumers and what share should be distributed to non-Minnesota consumers.

8. Fortunately, the data on the number of eligible e-books from Rust Consulting breaks down these e-books based on whether they were sold to Minnesota consumers or not. This data shows that approximately 98.105% of e-books during the claims period were sold to non-Minnesota consumers (leaving approximately 1.895% sold to Minnesota consumers). For non-New York Times Bestsellers, these percentages are approximately 98.136% for non-Minnesota and 1.864% for non-Minnesota.

9. While the Rust data does not differentiate by publisher, the publishers also supplied data on their share of sales going to Minnesota consumers. These data indicated that Macmillan's share of Minnesota consumers was slightly higher than the overall average (1.84% to 1.80%). Because the overall numbers from Rust are more accurate, I used the Rust percentages as a baseline, but adjusted Macmillan's Minnesota percentage by (1.84/1.80) to reflect the information that Macmillan may have had slightly more Minnesota consumers than the average.[17]

10. This provided the information necessary to determine that approximately $93.21 million of the $95 million from the Macmillan and Penguin settlements should be allocated to non-Minnesota consumers and the remaining $1.79 million should be allocated to Minnesota consumers.

11. The estimated number of e-books covered by the distribution must also be adjusted to reflect the share of e-books purchased by Minnesota consumers. Using the information from Rust Consulting on the percentage of e-books sold to Minnesota consumers, I estimated the number of e-books sold during the claims period to non-Minnesota consumers to be 23,774,292 New York Times Bestsellers and 121,224,764 non-New York Times Bestsellers. I then used these estimates to determine the per-book compensation amounts provided in the next paragraph.

12. This leaves a total settlement amount for this distribution plan of $69.04 million from the prior settlements plus $93.21 million from the Macmillan and Penguin settlements. Thus, the total amount of the settlement proceeds to distribute to non-Minnesota consumers is $162.25 million. Giving New York Times Bestsellers 44.89% of the settlement total and giving the non-New York Times Bestsellers 55.11% of the settlement total means that each non-Minnesota consumer should receive the following amounts for each book purchased during the claims period: $3.06 for each New York Times Bestseller and $0.73 for each non-New York Times Bestseller.[18]

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[17] The Rust numbers are more accurate because they come from the records of the retailer over the entire claims period, while the publishers simply provided estimates based on 2011 sales. I did not adjust the Penguin percentage from the overall average from the Rust data because Penguin did not provide any information about its share of sales going to Minnesota consumers.

[18] As noted above, these recoveries are rounded down to the nearest cent to ensure the settlement funds do not run out. A more precise calculation would award $3.06383 for each New York Times bestseller and $0.73755 for each non-New York Times bestseller. Thus, using the sales figures provided by Rust Consulting and adjusted upwards to

13.   I used the identical methodology to determine the consumer allocation for Minnesota consumers. The class action settlement with Hachette, HarperCollins, and Simon & Schuster provided $2.119 million for Minnesota consumers. The Minnesota portion of the Macmillan and Penguin settlements is $1.79 million. Thus, the total amount of the settlement proceeds to distribute to Minnesota consumers is $3.909 million.

14.   Subtracting the estimated total number of non-Minnesota e-books sold during the agency period from the estimated total number of e-books sold during the agency period yields an estimate for the total number of e-books sold to Minnesota consumers. This estimate is 459,128 New York Times Bestsellers and 2,302,812 non-New York Times Bestsellers.

15.   Giving New York Times Bestsellers 44.89% of the settlement total and giving the non-New York Times Bestsellers 55.11% of the settlement total means that each Minnesota consumer should receive the following amounts for each book purchased during the claims period: $3.82 for each New York Times Bestseller and $0.93 for each non-New York Times Bestseller.[19]

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reflect the fact that Rust's numbers may only account for 99% of the market, these proposed payments will exhaust slightly more than $161.24 of the $162.25 million available to be distributed to non-Minnesota consumers.

[19] Once again, these estimates are rounded down to reduce the risk of running out of the compensation fund due to uncertainties regarding the number of claims made. I project that these payments will exhaust $3.895 million of the $3.909 million available to be distributed to Minnesota consumers.

Appendix C: Curriculum Vitae of

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PROFESSIONAL POSITIONS

Yale Law School, Florence Rogatz Visiting Professor of Law, 2012-2013
University of Texas School of Law, Bernard J. Ward Centennial Professor, 2009-
Duke University School of Law, Visiting Professor, 2008-2009
Northwestern University, School of Law, Assistant Professor, 2006-2009
University of Texas at Austin, Dept. of Economics, Visiting Asst. Professor, 2004-2006
Federal Trade Commission, Bureau of Economics, Staff Economist, 1999-2004

EDUCATION

Harvard University, Ph.D. in Economics June 1999
Harvard Law School, J.D. Magna Cum Laude June 1994. Harvard Law Review 1993-1994
Harvard College, A.B. Cum Laude in Applied Mathematics/Economics June 1991

RESEARCH INTERESTS

Law and Economics, Antitrust, Contracts, Regulation, Settlement

BOOK CHAPTERS

"Option Contracts," in *Contract Law and Economics* volume of *Encyclopedia of Law and Economics*, B. Bouckaert and Gerrit De Gees eds., Edward Elgar Publishers, January 2011.

"Enforcement Issues in Antitrust", *Research Handbook on the Economics of Antitrust Law*, Einer Elhauge ed., Edward Elgar Publishers, February 2012.

"Law and Economics of Settlement", *Research Handbook on the Economics of Tort Law*, Jennifer Arlen ed., Edward Elgar Publishers, Forthcoming.

PUBLISHED AND FORTHCOMING PAPERS

Optimal Antitrust Enforcement: Competitor Suits, Entry, and Post-entry Competition (with Warren Schwartz), 95 **Journal of Public Economics** 967-972 (2011)

Ex Ante or Ex Post Competition Policy? A Progress Report (with Marco Ottaviani), 29 **International Journal of Industrial Organization** 356-359 (2011)

Standardization as a Solution to the Reading Costs of Form Contracts, 167 **Journal of Institutional and Theoretical Economics** 30-44 (2011)

Chilling, Settlement, and the Accuracy of the Legal Process (with Ezra Friedman), 26 **Journal of Law, Economics, & Organization** 144-157 (2010)

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14

Credible Discovery, Settlement, and Negative Expected Value Suits (with Warren Schwartz), 40 **RAND Journal of Economics** 636-657 (2009)

The Perverse Effect of Outside Options on Strategic Delay in Bargaining, 165 **Journal of Institutional and Theoretical Economics** 210-229 (2009)

Why Divorce Laws Matter: Incentives for Non-Contractible Marital Investments under Unilateral and Consent Divorce, 25 **Journal of Law, Economics, & Organization** 80-106 (2009)

Advantage Defendant: Why Sinking Litigation Costs Makes Negative Expected Value Defenses, but not Negative Expected Value Suits Credible (With Warren Schwartz), 38 **Journal of Legal Studies** 235-253 (2009)

No Free Lunch: How Settlement Can Reduce the Legal System's Ability to Induce Efficient Behavior (with Ezra Friedman), 61 **SMU Law Review** 1355 (2008)

Naked Exclusion, Efficient Breach, and Downstream Competition (with John Simpson), 97 **American Economic Review** 1305 (2007)

Bundled Discounts, Leverage Theory, and Downstream Competition (with John Simpson), 9 **American Law and Economics Review** 370 (2007).

Government and the Reverse-Holdup Problem, 9 **Journal of Public Economic Theory** 221 (2007)

The Limitations of Buyer-Option Contracts in Solving the Hold-up Problem, 23 **Journal of Law, Economics, & Organization** 127 (2007)

Bayesian Jurors and the Limits to Deterrence (with Ezra Friedman), 22 **Journal of Law, Economics, & Organization** 70 (2006)

The Inefficiency of Contractually-Based Liability with Rational Consumers, 22 **Journal of Law, Economics, & Organization** 168 (2006)

The Effect of Exit on Entry Deterrence Strategies, 54 **Games and Economic Behavior** 226 (2006)

Managerial Incentives and the Price Effects of Mergers, 53 **Journal of Industrial Economics** 327 (2005)

Affirmative Action: More Efficient than Color Blindness, 10 **Texas Journal on Civil Liberties and Civil Rights** 183 (2005)

Comment on 'Aligning the Interests of Lawyers and Clients', 6 **American Law and Economics Review** 434 (2004)

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A Model of Welfare-Reducing Settlement, 3 **Contributions to Economic and Policy Analysis** Article 4 (2004)

Innovation, Market Structure, and the Holdup Problem: Investment Incentives and Coordination, 22 **International Journal of Industrial Organization** 693 (2004)

The State of Critical Loss Analysis: A Reply to Scheffman and Simons (with Daniel O'Brien), 3 **Antitrust Source** (March 2004)

A Critical Analysis of Critical Loss Analysis (with Daniel O'Brien), 71 **Antitrust Law Journal** 161 (2003)

Justifying Imprisonment: On the Optimality of Excessively Costly Punishment, 5 **American Law and Economics Review** 377 (2003)

Damages for Breach of Contract: Should the Government Get Special Treatment?, 17 **Journal of Law, Economics, & Organization** 121 (2001)

WORKING PAPERS

A Simple Mechanism for Improving "Up or Down" Regulation, Revise and resubmit at **Journal of Law, Economics, & Organization**

Robust Exclusion Through Loyalty Discounts with Buyer Commitment (with Einer Elhauge)

Anti-Competitive Market Division Through Loyalty Discounts Without Buyer Commitment (with Einer Elhauge)

Approval Regulation with Learning (with Marco Ottaviani), awarded **Robert F. Lanzillotti Prize for best paper in antitrust economics at the 2009 International Industrial Organization Conference**

A New Angle on Rules versus Standards (with Ezra Friedman)

Economic epidemiology of avian influenza on smallholder poultry farms (with Maciej Boni, Alison Galvani, and Anup Malani)

Settlement and the Strict Liability-Negligence Comparison

Outside Options and the Misuse of the Nash Bargaining Solution in Law and Economics

Ideological Persuasion in the Media (with David Balan and Patrick DeGraba)

Exclusive Dealing and Entry, when Buyers Compete: Comment (with John Simpson)

The Economics of Constitutional Rights and Voting Rules

Unobservable Preparation and the Inevitable Risk of Conflict

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PRESENTATIONS

Berkeley Law School, Law and Economics Seminar, February 2012
University of Florida, Antitrust Law and Economics Workshop, February 2012
USC Law School, Law and Economics Seminar, January 2012
Washington University, Conference on Theoretical Law and Economics, November 2011
UCLA Law School, Law and Economics Seminar, October 2011
Northwestern Law School, Law and Economics Seminar, October 2011
Stanford Law School, Law and Economics Lunch Seminar, July 2011
American Law and Economics Annual Meeting, May 2011
International Industrial Organization Conference, April 2011
Center for Competition Policy Annual Conference, Norwich, UK, June 2010
28th Seminar on the New Institutional Economics, Budapest, Hungary, June 2010
American Law and Economics Association Annual Meeting, May 2010
Swiss Federal Institute of Technology, Lecture Series in Law and Economics, March 2010
University of Texas, Law and Economics Seminar, October 2009
American Law and Economics Association Annual Meeting, May 2009
Duke University Game Theory and the Law Conference, May 2009
NBER Mid-Year Meeting, Law and Economics, March 2009
USC, Law School Seminar, October 2008
UCLA, Law and Economics Seminar, October 2008
Duke University, Law School Seminar, October 2008
University of Texas, Law School Seminar, September 2008
Symposium on Antitrust Economics and Competition Policy, Northwestern Univ, Sept 2008
American Law and Economics Association Annual Meeting, May 2008
New York University, Law and Economics Seminar, April 2008
Symposium on Insurance Markets and Regulation, Northwestern University, April 2008
Stanford University, Law and Economics Seminar, March 2008
Yale University, Law, Economics, and Organization Seminar, December 2007
Georgetown University, Law and Economics Seminar, November 2007
University of Virginia, Law and Economics Seminar, October 2007
NBER Summer Institute, Law and Economics, July 2007
Chicago-Kent, Law School Seminar, March 2007
NBER Mid-Year Meeting, Law and Economics, March 2007
University of Chicago, Law and Economics Seminar, January 2007
NBER Summer Institute (Discussant), Law and Economics, July 2006
American Law and Economics Association Annual Meeting, May 2006
University of Texas, Law, Economics and Business Seminar, January 2006
University of Mayrland, IO/Theory workshop, October 2005
Northwestern University, Law School Seminar, August 2005
NBER Summer Institute, Law and Economics, July 2005
UBC Summer Conference on Industrial Organization, July 2005
American Law and Economics Association Annual Meeting, May 2005
University of Texas at Austin-ITAM Joint Conference, October 2004
IDEI/ZEI Conference on Regulation of Media Markets, October 2004
University of Texas, Department of Economics Seminar, September 2004
American Law and Economics Association Annual Meeting, May 2004
Stanford Conference on Media and Economic Performance, March 2004
Georgetown University, Department of Economics Seminar, February 2004

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University of Southern California, Law School Seminar, January 2004
North American Winter Meeting of the Econometric Society, January 2004
University of Texas, Law School Seminar, November 2003
NBER Summer Institute, Law and Economics, August 2003
North American Summer Meeting of the Econometric Society, June 2003
International Industrial Organization Conference, April 2003.
University of Michigan Law & Economics Seminar, March 2003.
North American Summer Meeting of the Econometric Society, June 2002
American Law and Economics Association Annual Meeting, May 2002
Department of Justice, Economic Analysis Group Seminar, March 2002
ITAM, Business School Seminar, February 20002
Rutgers University, Department of Economics Seminar, November 2001
European Economic Association Annual Meeting, September 2001
North American Summer Meeting of the Econometric Society, June 2001
American Law and Economics Association Annual Meeting, May 2001
Federal Trade Commission, Bureau of Economics Seminar, May 2001
International Atlantic Economic Society Spring Meeting, March 2001
Georgetown University, Department of Economics Seminar, October 2000
Federal Trade Commission, Bureau of Economics Seminar, October 2000
Department of Justice, Economic Analysis Group Seminar, July 2000
Federal Trade Commission, Bureau of Economics Seminar, May 2000
Harvard University, Department of Economics Seminar, October 1998
Harvard University, Department of Economics Seminar, October 1997

PROFESSIONAL SERVICE

Board of Directors, American Law and Economics Association, 2010-2013

Program Committee, American Law and Economics Association 2012 Annual Meeting

Associate Editor *Journal of Industrial Economics*, September 2008 – Present

Associate Editor *International Review of Law and Economics*, February 2012 – Present

Referee for: *American Economic Journal Micro, American Economic Journal Public Policy, American Economic Review, American Law and Economics Review, American Political Science Review, Antitrust Law Journal, BE Journals in Economic Analysis and Policy, BE Journals in Theoretical Economics, Canadian Journal of Economics, Economic Journal, Economica, Economics, Games and Economic Behavior, International Journal of Economic Theory, International Journal of Industrial Organization, International Review of Law and Economics, Journal of Economic Behavior and Organization, Journal of Economics, Journal of Economics and Management Strategy, Journal of the European Economic Association, Journal of Industrial Economics, Journal of Institutional and Theoretical Economics, Journal of Labor Economics, Journal of Law and Economics, Journal of Law, Economics, and Organization, Journal of Legal Analysis, Journal of Legal Studies, Journal of Policy Analysis and Management, Journal of Political Economy, National Science Foundation, Oxford University Press, Quarterly Journal of Economics, Quarterly Review of Economics and Finance, RAND Journal of Economics, Review of Economics Studies, Review of Industrial Organization*

"Excellence in Refereeing Award"—*American Economic Review,* 2007-2008.

TEACHING EXPERIENCE

UNIVERSITY OF TEXAS SCHOOL OF LAW
Contracts (1L), Spring 2010, Fall 2010, Fall 2011
Antitrust, Spring 2011, Spring 2012
Law and Economics Workshop, Fall 2010, Fall 2011

DUKE UNVERISTY SCHOOL OF LAW
Contracts (1L), Fall 2008
Antitrust, Spring 2009

NORTHWESTERN UNIVERSITY SCHOOL OF LAW
Contracts (1L), Fall 2006 and Fall 2007
Antitrust, Spring 2008
Law and Economics Workshop, Spring 2007 and Spring 2008

UNIVERSITY OF TEXAS AT AUSTIN
Law and Economics (advanced undergraduate), Fall 2004, Spring 2005, Fall 2005
Introduction to Microeconomics (undergraduate), Fall 2005

HARVARD UNIVERSITY—GRADUATE TEACHING FELLOW
Contract Theory (second year Ph.D. course), Fall 1997
Law and Economics (Sophomore Tutorial), Spring 1998