

UNITED STATES DISTRICT COURT  
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,

v.

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

Defendants

Civil Action  
No. 12-cv-03394

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY  
APPROVAL OF SETTLEMENT WITH APPLE INC.

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## I. INTRODUCTION

Plaintiff States<sup>1</sup> and the Certified Class<sup>2</sup> (“Plaintiffs”) respectfully submit this Memorandum in Support of their Motion for Preliminary Approval of their settlement with Apple Inc. (“Apple”). Plaintiffs strongly believe this Court’s liability finding against Apple should, and will, be affirmed. If it is affirmed and if this settlement is approved, compensation for E-book purchasers will total \$566 million: \$400 million from Apple and \$166 million already recovered from the publishers in earlier settlements.<sup>3</sup> This outcome would represent a consumer recovery of more than 200 percent of the maximum estimated consumer damages,<sup>4</sup> placing this case among the exceedingly rare cases that provide consumers nationwide with double the amount of their estimated damages.

Recognizing the effect of this Court’s finding that Apple conspired to restrain trade in violation of Section 1 of the Sherman Act<sup>5</sup> (“Liability Finding”) and Apple’s appeal therefrom, the parties have fashioned a settlement that provides for three outcomes, depending on the resolution of the appeal. First, if the Court’s Liability Finding is ultimately affirmed, Apple will pay \$400 million to consumers (and \$50 million more in attorneys’ fees and payment to States). Second, if the Liability Finding is either vacated and remanded or reversed and remanded for

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<sup>1</sup> “Plaintiff States” are the States and Commonwealths of Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, District of Columbia, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Maryland, Massachusetts, Michigan, Missouri, Nebraska, New Mexico, New York, North Dakota, Ohio, Pennsylvania, Puerto Rico, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, West Virginia, and Wisconsin.

<sup>2</sup> “Certified Class” means Consumers in any State, Commonwealth or Territory of the United States, other than Plaintiff States, at the time of their E-book purchase as defined in the Order certifying class which was entered on March 28, 2014 (*In re Electronic Books Antitrust Litigation*, No. 11-md-02293 (S.D.N.Y.), ECF No. 585) (“Class Certification Order”).

<sup>3</sup> This amount does not include payment of attorneys’ fees and costs and payment to the States, all of which are being paid in addition to the consumer compensation and all of which represent an additional benefit Plaintiffs have secured on consumers’ behalf.

<sup>4</sup> Plaintiffs’ expert economist, Dr. Roger Noll, estimates consumers’ damages to be \$280,254,374. *See* Reply Declaration of Roger G. Noll, No. 11-md-02293, ECF No. 555 at 87.

<sup>5</sup> *United States v. Apple Inc.*, 952 F. Supp. 2d 638 (S.D.N.Y. 2013).

reconsideration or retrial on the merits, Apple will pay \$50 million to consumers (and \$20 million more in attorneys' fees and payment to States). Third, if the Liability Finding is reversed, Apple will make no payments for consumer compensation, for attorneys' fees or to Plaintiff States.

This settlement potentially provides for exceptional consumer recovery and ensures an efficient use of judicial resources. It allows Apple to press its positions regarding liability while obviating the need to expend significant Court resources to proceed with a jury trial on damages in these civil actions. And, by focusing on the Liability Finding and Apple's appeal, the parties have fashioned a settlement that accounts for the fact that the viability of any damages award would be dependent on the outcome of the appeal of the Liability Finding. The proposed settlement addresses this important procedural posture while weighing the potential outcomes and risks involved in further proceedings.

The Plaintiffs, in conjunction with Apple, also request the Court to defer notice to consumers of the settlement until resolution of Apple's appeal of the Liability Finding. Deferring notice guarantees that when consumers receive notice of this settlement, the total recovery will be known. Rather than being presented with a list of hypothetical alternative settlement amounts, a consumer will be able to make the informed decision whether to remain an Eligible Consumer or exclude himself or herself from the settlement based on a known recovery.

This pragmatic settlement is the result of hard-fought litigation between the parties and months of negotiations among sophisticated counsel, as well as multiple mediation sessions, both with an officer of this Court and a highly respected private mediator. Plaintiffs respectfully request that this Court preliminarily approve the settlement, and order that notice to consumers be deferred until the applicable settlement amount is known.



## II. PROCEDURAL HISTORY

### A. Plaintiffs' Investigations

As was previously detailed for this Court,<sup>6</sup> the States of Texas and Connecticut, beginning in April 2010, conducted a two-year investigation to determine if Apple Inc. and E-book publishers had entered into an unlawful conspiracy in violation of state and federal antitrust laws. The investigation was coordinated with a separate investigation simultaneously conducted by the United States Department of Justice ("DOJ").

Class Counsel also began its investigation in April 2010, after market prices for the publisher defendants' E-books increased 30 to 50 percent nearly simultaneously. This highly suspicious pricing behavior caused Class Counsel to retain experts and investigators to analyze the market and defendants' pricing behavior.

### B. Litigation to Date

Class Counsel first filed civil litigation in this matter as *Petru, et al. v. Apple Inc., et al.*, No. 11-cv-03892-EMC (N.D. Cal.). On December 9, 2011, the United States Judicial Panel on Multidistrict Litigation transferred all related class actions to the Southern District of New York as *In re Electronic Books Antitrust Litigation*, No. 11-md-02293 (S.D.N.Y.) ("Class Action"). Thereafter, this Court appointed Hagens Berman Sobol Shapiro LLP and Cohen Milstein Sellers & Toll PLLC as co-lead counsel for the plaintiff classes. Plaintiff States' Original Complaint was filed on April 11, 2012, in the U.S. District Court for the Western District of Texas and then transferred to the Southern District of New York as *Texas, et al., v. Penguin Group (USA) Inc., et al.*, No. 12-cv-003394 (S.D.N.Y.) on April 30, 2012 ("Plaintiff

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<sup>6</sup> See *Texas, et al. v. Hachette Book Group, Inc. et al.*, No.12-cv-6625 (S.D.N.Y.), States' Memoranda for Preliminary and Final Approval of the Hachette, HarperCollins and Simon and Schuster settlements (ECF Nos.11 and 68) and *Texas, et al., v. Penguin Group (USA) Inc., et al.*, No. 12-cv-3394, Plaintiffs' Memoranda for Preliminary and Final Approval of Macmillan and Penguin settlements (ECF Nos. 235 and 452).

States' Action").<sup>7</sup> Both Plaintiff States' and Class's Complaints allege that Apple and five major E-book publishers entered into a successful and unlawful conspiracy to raise and fix the prices of E-books to consumers.

In conjunction with the DOJ, the parties began several months of coordinated discovery. Plaintiffs obtained and analyzed more than 1.6 million documents and detailed transactional data from the defendants and third parties, conducted more than 50 depositions, and engaged expert economists to analyze economic evidence of a conspiracy and calculate damages therefrom. On July 10, 2013, following a three-week bench trial in the DOJ and Plaintiff States' Actions, the Court issued its Liability Finding, concluding 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."<sup>8</sup>

On September 5, 2013, the Court entered injunctions against Apple in the DOJ and Plaintiffs States' actions.<sup>9</sup> On October 14, 2013, Apple filed notices of appeal of the Liability Finding and the entry of the injunctions. These appeals have been consolidated in the Second Circuit Court of Appeals as *United States v. Apple Inc.*, No 13-3741 ("Liability Appeal").

Beginning in the fall of 2013, the Parties engaged in extensive additional discovery on the appropriate measure of damages suffered by consumers as a result of Apple's illegal conduct and on issues raised as to whether the class should be certified. The Court granted class certification on March 28, 2014, and ordered that notice of the litigation against Apple be sent to consumers. A jury trial to assess the amount of damages was scheduled to begin August 25, 2014, in the Plaintiff States and Class Actions. Both the dissemination of consumer notices and

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<sup>7</sup> DOJ also filed suit on April 11, 2012, against these same defendants for injunctive relief in *United States v. Apple Inc., et al.*, No. 12-cv-2826 (S.D.N.Y.) ("DOJ Action").

<sup>8</sup> *United States v. Apple Inc.*, 952 F. Supp. 2d at 709.

<sup>9</sup> *United States v. Apple Inc., et al.*, No. 12-cv-2826, ECF No. 374.

the damages trial have been suspended pending the Court's review and approval of the Apple Settlement.

**C. Settlement Negotiations**

The Attorneys General of 55 jurisdictions reached settlements with Hachette Book Group, Inc., HarperCollins Publishers LLC, and Simon & Schuster, Inc., which were approved by the Court on February 8, 2013.<sup>10</sup> Settlements among Plaintiffs, Holtzbrinck Publishers, LLC d/b/a Macmillan and Penguin Group (USA) Inc., were approved by the Court on December 6, 2013.<sup>11</sup> An additional settlement between Class Counsel representing residents of Minnesota and Hachette, HarperCollins, and Simon & Schuster was also approved on December 6, 2013. (Collectively, "Prior Settlements").

Settlement discussions among Plaintiffs and Apple did not occur until both sides had fully developed their factual understanding of the case. Although Plaintiff States offered to discuss settlement with Apple before and after the filing of their Complaint, no substantive negotiations occurred. The Court ordered Plaintiff States, DOJ, and Apple into mediation with the Honorable Kimba M. Wood, U.S. District Judge for the Southern District of New York, a month before the June 2013 trial was scheduled to begin. Class Plaintiffs also participated in this May 21, 2013, mediation but no settlement was reached.

After the Court issued its Liability Finding, the Court again directed the parties to mediate on the remaining issues. The parties agreed to mediation and retained the widely respected and experienced mediator, Antonio Piazza. This mediation, scheduled for two days in November 2013, was terminated after one day when the Parties were unable to reach an agreement. While preparing the scheduling Order for the damages trial, the Court asked the

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<sup>10</sup> *Texas v. Hachette*, ECF No. 71.

<sup>11</sup> *Texas v. Penguin*, ECF No. 365.

parties to return to mediation and they did so with Mr. Piazza in May 2014. While the parties did not reach agreement during the May mediation, the session provided the foundation for additional, serious negotiations resulting in the execution of a Memorandum of Understanding on June 16, 2014. Counsel for Plaintiff States, Settlement Class, and Apple immediately began work to finalize the Apple Settlement, using the Prior Settlements as a template. Counsel for the parties executed the Apple Settlement Agreement on July 10, 2014.<sup>12</sup>

### III. THE PROPOSED SETTLEMENT

The Settlement Agreement with Apple contemplates compensation payments to consumers, as well as separate payments to Plaintiff States and to Class Counsel. However, as more fully described below, these payments are contingent upon the final outcome of Apple's appeal of the Court's Liability Finding. Apple will also pay the administration costs incurred to finalize the settlement and will receive releases of claims.

#### A. Payment Contingencies Defined

Depending on the outcome of the pending appeal of the Liability Finding, settlement payments by Apple will be as follows:

1. Affirmance of Liability Finding. If the Court's Liability Finding is affirmed, and that decision is final,<sup>13</sup> Apple will pay \$400 million into a consumer compensation escrow account established by Plaintiffs' Escrow Agent.<sup>14</sup> Apple will also pay \$20 million to Plaintiff States, and \$30 million to Class Counsel.
2. Remand of Liability Finding. If the Liability Finding is either vacated and remanded, or reversed and remanded with instructions for reconsideration or for retrial, and that decision is final, Apple will pay \$50 million into the

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<sup>12</sup> The Settlement Agreement is attached hereto as Exhibit A ("Apple Settlement"). Unless otherwise defined herein, definitions in the Apple Settlement Agreement are adopted and incorporated herein.

<sup>13</sup> All parties will have the right to appeal a decision related to the Liability Finding. Such decisions will be final as delineated in the Apple Settlement Agreement. (See Paragraph I.M).

<sup>14</sup> The Ohio Attorney General contracted with Fifth Third Bank to act as Escrow Agent in the Prior Settlements and will execute an addendum to incorporate the Apple Settlement Agreement funds.

consumer compensation escrow account. Apple will also pay \$10 million to Plaintiff States and \$10 million to Class Counsel. This contingency is not triggered by a remand on administrative or non-substantive grounds that could not implicate the Liability Finding. Under those circumstances, Apple is to make the payments described in Paragraph III.A.1, above.

3. Reversal of Liability Finding. If the Liability Finding is reversed, and that decision is final, Apple will make no payments for consumer compensation or to Plaintiff States or Class Counsel.

**B. Distribution of Consumer Compensation**

If payment is made for consumer compensation as set forth in A.1 or A.2, above, such monies will be distributed to natural-person consumers who purchased qualifying E-books from any settling publisher from April 1, 2010, to May 21, 2012 (“Eligible Consumers”). These funds, together with any accrued interest, will be distributed according to a Consumer Distribution Plan, as discussed in Section VI. The escrow funds are intended to be qualified settlement funds within the meaning of Treas. Reg. Sections 1.468B-1, *et seq.*

**C. Payment to Plaintiff States**

If payment is made to Plaintiff States as set forth in A.1 or A.2, above, for attorneys’ fees, investigation and litigation costs and for release of enforcement claims, such funds will be divided among the Plaintiff States as agreed among themselves for several delineated purposes as listed in the Apple Settlement Agreement.

**D. Payment to Class Counsel**

If payment to Class Counsel for attorneys’ fees and expenses is triggered under A.1 or A.2, above, Class Counsel will submit a fee petition for Court approval.

**E. Payment of Settlement Notice and Administration Costs**

Apple will pay all reasonable costs to administer the Apple Settlement including costs of the consumer notice and distribution program. Within ten (10) business days of the execution of the Apple Settlement, Apple will make a payment of \$2 million into an administrative costs

escrow account at Fifth Third Bank. Apple will make a supplemental deposit upon notice by counsel for Plaintiffs that additional funds are necessary for settlement administration costs. Any funds not ultimately expended from this account will be returned to Apple.

**F. Release of Claims**

After Apple has made the required payments, if any, and after the Effective Date of the Settlement has passed, Apple will be released from all Claims (as defined in the Settlement Agreement) that were asserted or could have been asserted on behalf of all Eligible Consumers who have not excluded themselves from the Apple Settlement. At that time, each Plaintiff State shall be deemed to have also released all Claims that were asserted or could have been asserted in the Second Amended Complaint by each Attorney General in his or her sovereign capacity as chief law enforcement officer of the state, except for Plaintiff States' claims for injunctive relief against Apple, which are currently under appeal in the Liability Appeal.

**IV. THE SETTLEMENT MEETS THE STANDARDS FOR PRELIMINARY APPROVAL**

Attorneys General of Plaintiff States brought their lawsuit in their capacities as *parens patriae* under Section 4C of the Clayton Act, 15 U.S.C. § 15c. Class Counsel brought their action under the authority of Section 4 of the Clayton Act, 15 U.S.C. § 15, and as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure. Settlements in such actions require judicial approval, which will be given if the Court concludes the settlements are fair, reasonable and adequate.<sup>15</sup>

This approval process begins with the Court granting preliminary approval. Preliminary approval does not require a full fairness hearing. Rather, “[w]here the proposed settlement

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<sup>15</sup> See, e.g., *In re Toys “R” Us Antitrust Litig.*, 191 F.R.D. 347, 351 (E.D.N.Y. 2000); *Weinberger v. Kendrick*, 698 F.2d 61, 73 (2d Cir. 1982).

appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class, and falls within the range of possible approval, preliminary approval is granted.”<sup>16</sup> “Preliminary approval of such settlements, in contrast to final approval, ‘is at most a determination that there is what might be termed “probable cause” to submit the proposal to class members and hold a full-scale hearing as to its fairness.’”<sup>17</sup>

The Apple Settlement clearly meets these requirements for preliminary approval. All counsel are extremely well-informed, particularly given the fact that a trial on liability and on related claims for injunctive relief was conducted in 2013. The parties have been heavily engaged in preparing for a damages trial to occur in the summer of 2014, including thorough discovery of each other’s damages experts. Settlement negotiations and mediation were conducted before the liability trial and continued subsequent to the Liability Finding. Each side has fully articulated its positions on numerous occasions.

This Settlement has no “obvious deficiencies” nor does it grant preferential treatment. Consumers will be compensated using the same formula approved in the Prior Settlements: a modified *pro rata* distribution depending on whether a consumer purchased a New York Times Bestseller, or non-New York Times Bestseller book title. All Eligible Consumers will be reimbursed the same per-book amounts. Consumer benefit from consumer compensation is maximized because such funds will be used solely to pay Eligible Consumers throughout the United States. Any payment to Plaintiff States or Class Counsel will be paid in addition to any

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<sup>16</sup> *In re Currency Conversion Fee Antitrust Litig.*, No. 1409, 2006 U.S. Dist. LEXIS 81440, at \*13 (S.D.N.Y. Nov. 8, 2006) (quoting *In re NASDAQ Market-Makers Antitrust Litig.*, 176 F.R.D. 99, 102 (S.D.N.Y. 1997)).

<sup>17</sup> *Nieves v. Cmty. Choice Health Plan of Westchester, Inc.*, No. 08 CV 321 (VB)(PED), 2012 U.S. Dist. LEXIS 37720, at \*12 (S.D.N.Y. Feb. 24, 2012) (quoting *Menkes v. Stolt-Nielsen S.A.*, 270 F.R.D. 80, 101 (D. Conn. 2010)).

consumer compensation payment.<sup>18</sup> Apple will also separately bear the administrative costs of settlement.

Importantly, the potential payments all fall well within the range of possible approval. The parties – each represented by experienced antitrust counsel – agreed upon a set of contingencies which takes into account the litigation risks associated with the appeal of the Court’s Liability Finding, as well as the risks associated with continuing to litigate damages through a jury trial and probable appeal.

The unique posture of this multi-faceted litigation (civil actions by the DOJ, by the State Attorneys General and by Class Plaintiffs), combined with the various procedural complexities of the litigation, supports the proposed settlement. Plaintiffs firmly believe in the merits of their case, and in each of the legal positions they have advocated. They believe the evidence clearly established Apple’s liability under Section 1 of the Sherman Act and that the Court’s Liability Finding is correct. Plaintiffs further believe that a final damages award against Apple would be significant - in the range of \$500 to \$625 million, after a jury award has been trebled and offset by the \$166 million from the Prior Settlements.

But Plaintiffs also recognize litigation outcomes are uncertain and risks exist associated with:

- the amount of damages a jury would ultimately award;
- any appeal of the jury damages award; and
- the numerous additional grounds for appeal asserted by Apple in connection with the Court’s rulings on class certification, exclusion of expert opinions, limitations

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<sup>18</sup> A separate fund for payment of attorneys’ fees provides the beneficiaries of the settlement greater certainty because the amount of money each will receive is not reduced by an award of attorneys’ fees. *In re Vitamins Antitrust Litig.*, No. 99-197 (TFH), 2000 U.S. Dist. LEXIS 8931, at \*21 n.3 (D.D.C. Mar. 31, 2000).



on discovery, the scope of *parens patriae* authority, and disputes regarding venue for trial.

Given these risks, the settlement terms are very favorable for consumers. If the Court's Liability Finding is affirmed, as Plaintiffs believe will happen, Apple's \$400 million consumer payment will represent more than 140 percent of maximum estimated single damages and, when combined with the consumer payments from the Prior Settlements, return consumers more than two times their damages. This is an extraordinary outcome rarely seen in antitrust cases.

If the Liability Finding is reversed and remanded or vacated and remanded with instructions, for retrial or for reconsideration, Apple will pay \$50 million to consumers, representing more than 17 percent of maximum estimated single damages. Combined with monies already received from Prior Settlements with publisher defendants, consumers will recover slightly more than 77 percent of single damages. This payment contingency is a reasonable appraisal of the possible consequences of a negative ruling from the Second Circuit or the Supreme Court. Such a ruling could put Plaintiffs in a more difficult litigation posture and significantly alter both the nature of the evidence to be considered and the legal standard to be applied thereto. These additional litigation risks, as well as the risk of a jury determination of damages, render this contingent consumer payment also well within the range for possible approval. Finally, if the Liability Finding is reversed and the case dismissed, consumers will receive nothing from this settlement, just as they would if no settlement were reached or approved.

As set forth above, the settlement negotiations and substantive terms of the Apple Settlement meet all requirements necessary for the Settlement Agreement to receive preliminary approval.

## V. CONSUMER NOTICE

### A. Recommendation to Provide Notice to Consumers After the Outcome of the Liability Finding Appeal is Known

Typically, after preliminary approval is granted, notice to affected consumers is provided relatively quickly and according to a Court-approved Notice Plan. However, Plaintiffs and Apple jointly recommend that consumer notices in this case be distributed after the Final Liability Decision has issued. By deferring the notice until then, Eligible Consumers will be provided with more precise information that should substantially reduce the possibility of consumer confusion. If Apple is required to make a payment, deferred notice would allow Eligible Consumers to know the total amount of consumer compensation to be paid by Apple (whether \$400 million, or \$50 million), as well as the amount of the per-book compensation. Equipped with these facts, Eligible Consumers will be better able to make a fully-informed decision whether to remain a part of, or opt out of, the settlement. In contrast, if consumers receive notice now, when the outcome is uncertain, they will not have the same clarity as to their expected compensation. Counsel negotiated this proposed timing of notice on behalf of consumers as the preferred way to educate Eligible Consumers.

In addition, distributing notice after the outcome of the Final Liability Decision is known may allow Plaintiffs to aggregate undistributed consumer compensation from the Prior Settlements with any consumer compensation amount paid by Apple, thereby maximizing the consumer distributions.<sup>19</sup>

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<sup>19</sup> The residue amount from the Prior Settlements will not be known until after the expiration date for redemption of credits and checks on March 25, 2015.

Scheduling the distribution of notice of this settlement as proposed above is well within the discretion of this Court.<sup>20</sup> In general, settlement notice, like class certification notice, “should be sent as soon as practicable...”<sup>21</sup> But “the court may decide to postpone giving formal notice under Rule 23(c)(2) if there is a reason for the delay and it would not prejudice those class members who are not before the court.”<sup>22</sup> Courts may defer giving notice until after discovery has taken place,<sup>23</sup> where “one party may be harmed by the notice,”<sup>24</sup> or, potentially, where “[d]eferred notice will allow [settlement] negotiations a full and fair opportunity to proceed.”<sup>25</sup> While acknowledging that a court can combine class certification notice and settlement notice where settlement came after certification, the Rule 23 advisory committee notes point out that a “decision to remain in the class is likely to be more carefully considered and is better informed when settlement terms are known.”<sup>26</sup> Similarly, pursuant to Section 4c of the Clayton Act, the timing of the notice to be given in a *parens patriae* case is subject to the court’s discretion.<sup>27</sup> Here, Eligible Consumers will be best informed after the Final Liability Decision is rendered.

#### **B. Description of Anticipated Notice Plan**

Plaintiffs anticipate that notice for the Apple Settlement will conform, in large measure, to the Notice Plans used in the Prior Settlements. Plaintiffs also intend to continue using the

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<sup>20</sup> See *McBean v. City of New York*, 228 F.R.D. 487, 504-05 (S.D.N.Y. 2005) (“Under Rule 23(c)(2)(B), the Court must “direct to class members the best notice practicable under the circumstances for any class certified under Rule 23(b)(3), but the timing of that notice is committed to its discretion.”).

<sup>21</sup> 7AA Wright & Miller, Federal Practice & Procedure § 1788 (3d ed.).

<sup>22</sup> *Id.*

<sup>23</sup> See, e.g., *Wolfson v. Solomon*, 54 F.R.D. 584, 593 (S.D.N.Y. 1972).

<sup>24</sup> See, e.g., *Tylka v. Gerber Prods. Co.*, 182 F.R.D. 573, 579 (N.D. Ill. 1998).

<sup>25</sup> *Harman v. Lyphomed, Inc.*, No. 88 C 0476, 1989 WL 6558, at \*1 (N.D. Ill. Jan. 25, 1989) (noting that effect of settlement discussions on timing of notice was a “legitimate concern” but declining to defer notice on facts before the court).

<sup>26</sup> Federal Rule of Civil Procedure 23, Notes of Advisory Committee on 2003 amendments.

<sup>27</sup> 15 U.S.C. §15c(b)(1).

same notice and claims administrators – Rust Consulting, Inc. and Kinsella Media LLC – to disseminate notice of the Apple Settlement. However, because timing of deferred notice is unknown and could be more than a year in the future, Plaintiffs believe a Notice Plan (and the accompanying notices), should be submitted for Court approval only after the Final Liability Decision has issued. Plaintiffs can then update the Notice Plans used in the Prior Settlements to ensure that the most inclusive, informative notice can be provided, using the then-best means available.

The Notice Plans of the Prior Settlements were found by this Court to meet the requirements of due process, 15 U.S.C. §15, and Rule 23. They provided for direct email notice from retailers which accounted for more than 95% of eligible E-Book purchases. In the Prior Settlements, six retailers (Amazon, Barnes & Noble, Apple, Kobo, Sony, and Google) assisted in providing notice emails to the 23.27 million individual customers who purchased qualifying E-books. To assist with effective future notice of the Apple Settlement, four of these retailers (Amazon, Barnes & Noble, Kobo, and Google) have agreed to either maintain the contact information for Eligible Consumers in their own internal systems, or, should circumstances change, they will provide Counsel for Plaintiffs with notice and the opportunity to determine an alternative method of maintaining the information. For the two remaining retailers (Apple and Sony), the Claims Administrator has and will retain all necessary contact information for Eligible Consumers during the pendency of this litigation. Plaintiffs will also direct the Claims Administrator to allow Eligible Consumers to update their contact information through the settlement website during the pendency of this litigation to assure the best practicable notice to

Eligible Consumers.<sup>28</sup> These procedures assure that direct notice will remain a viable option regardless of the length of time required for the exhaustion of appeals.

In the Prior Settlements, direct notice was supplemented with publication and internet notices, as well as a call center and a settlement website. The various notices informed Eligible Consumers of the proposed settlements and their rights thereunder, including the right to exclude themselves and the opportunity to be heard.<sup>29</sup> Plaintiffs believe a slightly modified version of the same Notice Plan and notices will similarly meet all necessary requirements for this Court's approval. Plaintiffs propose submitting a notice plan and draft notices for this Court's approval within 30 days of the Final Liability Decision.

## **VI. CONSUMER COMPENSATION DISTRIBUTION PLAN**

### **A. Recommendation to Defer Submission of Distribution Plan**

As with the Notice Plan, Plaintiffs believe submission of the Distribution Plan in this matter would best be postponed until after the contingencies have been decided. At that time, the Distribution Plan can include more complete and updated information. At the very least, a later-prepared Plan would allow for inclusion of the per-book amounts to be paid to consumers; a calculation that cannot be made before the Final Liability Decision is known. In addition, the Plan could potentially take advantage of technology not currently available for more efficient distribution for some or all of the participating retailers (including the automatic crediting of consumer accounts).

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<sup>28</sup> See Exhibit B, Declaration of Kim Schmidt for Rust Consulting.

<sup>29</sup> See 15 U.S.C. § 15c(b)-(c); *In re Lloyd's Am. Trust Fund Litig.*, No. 96 Civ. 1262 (RWS), 2002 U.S. Dist. LEXIS 22663 (S.D.N.Y. Nov. 26, 2002).

**B. Description of Anticipated Distribution Plan**

Plaintiffs will use the Distribution Plans approved by the Court and used in the Prior Settlements as the template for the Distribution Plan for the Apple Settlement.

The previous Distribution Plans required that all Eligible Consumers were treated equally, applying the same calculations, terms, conditions and limitations to all consumers. The prior Distribution Plans also provided for compensation on purchases of New York Times Bestseller E-books and non-New York Times Bestseller E-books proportionate to the estimated harm for each, a type of apportionment that has been repeatedly been deemed fair and reasonable by courts.<sup>30</sup> Plaintiffs expect the anticipated Distribution Plan, which will update the prior Distribution Plans to reflect the realities of the market at the time of distribution, will also meet with the Court's approval.

**VII. THE CLASS SHOULD REMAIN CERTIFIED FOR SETTLEMENT PURPOSES**

This Court has already exhaustively addressed the propriety of certifying a class, not only in its Class Certification Order, to which Apple objected, but also in its previous orders approving the Prior Settlements. As this Court noted, the decision to certify a class here was not a close call: "If certification were not appropriate here, no antitrust class action could be certified."<sup>31</sup> Notably, the Second Circuit denied Apple's petition for interlocutory appeal of the Class Certification Order.<sup>32</sup> None of the facts underlying these previous decisions have changed.

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<sup>30</sup> *Vitamins Antitrust Litig.*, 2000 U.S. Dist. LEXIS 8931, at \*32 (citing *Beecher v. Able*, 575 F.2d 1010, 1013-14 (2d Cir. 1978)); see also Herbert B. Newberg & Alba Conte, *Newberg on Class Actions* § 12.10 (3d ed. 1992) (noting that settlement agreements may provide for pro rata distributions based on the fraction of a claimant's loss to the total aggregate recognized loss); Fed. Judicial Ctr., *Manual for Complex Litig.*, 246-48 (3d ed. 1995).

<sup>31</sup> Class Cert. Order at 2.

<sup>32</sup> Order, *In re Electronic Books Antitrust Litig.*, No. 14-1092 (2d Cir. May 29, 2014), ECF No. 61.

**A. Definition of the Proposed Apple Settlement Class**

The proposed settlement class is the same as the class certified by the Court in the litigation, and in the Prior Settlements: all natural persons who purchased E-books published by Hachette, HarperCollins, Macmillan, Penguin, or Simon & Schuster, from April 1, 2010 through May 21, 2012, who resided in one of the following states, territories or commonwealths at the time of their E-book purchase: American Samoa, California, Florida, Georgia, Guam, Hawaii, Kentucky, Maine, Minnesota, Mississippi, Montana, Nevada, New Hampshire, New Jersey, North Carolina, Northern Mariana Islands, Oklahoma, Oregon, Rhode Island, South Carolina, U.S. Virgin Islands, Washington, and Wyoming. Excluded from the Class are Defendants, their employees, co-conspirators, officers, directors, legal representatives, heirs, successors, and wholly or partly owned subsidiaries of affiliated companies, as well as the Honorable Denise Cote and persons described in 28 U.S.C. § 455(b)(4)-(5). Except for geographical distinctions, this Class mirrors the Eligible Consumers of the *parens patriae* action.

**B. The Class Meets the Prerequisites of Rule 23(a)**

As already determined by this Court, the class meets the four requirements of Rule 23(a) – numerosity, commonality, typicality and adequacy.

**1. Numerosity**

The class here contains millions of consumers, easily meeting the first requirement of Rule 23(a). Apple has never disputed that numerosity exists here.<sup>33</sup>

**2. Commonality**

The Rule 23(a)(2) requirement of common questions of law or fact is “not a demanding standard” and “is established so long as the plaintiffs can identify some unifying thread among

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<sup>33</sup> Class Cert. Order at 30.

the [class] members' claims."<sup>34</sup> Here, "a host of common issues [exist] that will generate common answers in this litigation," including the impact of the Liability Opinion on issues to be litigated in the damages trial and the applicability of Dr. Noll's damages model.<sup>35</sup>

### 3. Typicality

Rule 23(a)(3) requires that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Typicality "does not require 'that the factual background of each named plaintiff's claim be identical to that of all class members.'"<sup>36</sup> Rather, the named plaintiff's claims must "arise from the same course of events."<sup>37</sup> Here, the claims of the three class representatives arise from the same conduct as that of the class: "Apple's conspiracy with the Publisher Defendants to fix e-book prices, which caused the prices of e-books to rise."<sup>38</sup> Each class member will make similar arguments as to liability and damages. And each class member will make similar legal arguments regarding the extent to which collateral estoppel applies. Apple has not disputed the existence of typicality in this class.<sup>39</sup>

### 4. Adequacy

Rule 23(a)(4) requires that the "representative parties will fairly and adequately protect the interests of the class."<sup>40</sup> This Court has previously found both the three representatives and class counsel to be qualified, experienced, and able to conduct this litigation.<sup>41</sup> Nothing has

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<sup>34</sup> *Menkes v. Stolt-Nielsen S.A.*, 270 F.R.D. 80, 90 (D. Conn. 2010) (alteration in original).

<sup>35</sup> Class Cert. Order at 31.

<sup>36</sup> *In re J.P. Morgan Chase Cash Balance Litig.*, 242 F.R.D. 265, 272-73 (S.D.N.Y. 2007). *See also In re Playmobil Antitrust Litig.*, 35 F. Supp. 2d 231, 242 (E.D.N.Y. 1998) ("Typicality refers to the nature of the claims of the representative, not the individual characteristics of the plaintiff[s]. Personal traits or variables . . . are irrelevant to the typicality criterion.").

<sup>37</sup> *In re Vitamin C Antitrust Litig.*, 279 F.R.D. 90, 105 (E.D.N.Y. 2012).

<sup>38</sup> Class Cert. Order at 32.

<sup>39</sup> *Id.* at 33.

<sup>40</sup> Fed. R. Civ. P. 23(a)(4).

<sup>41</sup> Class Cert. Order at 34.



changed to undermine this finding. Plaintiffs therefore request that this Court again appoint Anthony Petru, Thomas Friedman, and Shane S. Davis as the class representatives and confirm the appointment of Hagens Berman Sobol Shapiro LLP and Cohen Milstein Sellers & Toll PLLC as class counsel.

**C. The Requirements of Rule 23(b)(3) Are Satisfied**

The proposed class's claims also meet the standards of Rule 23(b)(3), which requires the plaintiff to show that questions of law or fact common to the members of the class predominate and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

**1. Predominance**

“In order to meet the predominance requirement of Rule 23(b)(3), a plaintiff must establish that the issues in the class action that are subject to generalized proof, and thus applicable to the class as a whole, . . . predominate over those issues that are subject only to individualized proof.”<sup>42</sup> Predominance is readily shown “in certain cases alleging . . . violations of the antitrust laws.”<sup>43</sup> And as this Court noted, this is precisely such a case where a single policy by the defendant has led to a commonality of the violation and the harm.<sup>44</sup> Here, “Apple conspired with the five Publisher Defendants to fix national e-book prices. Working together, the e-book prices of the Publisher Defendants rose precipitously and with one exception, simultaneously, after their adoption of Apple’s Agreements.”<sup>45</sup>

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<sup>42</sup> *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 136 (2d Cir. 2001) (alterations in original; internal citations omitted).

<sup>43</sup> *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625 (1997).

<sup>44</sup> Class Cert. Order at 35.

<sup>45</sup> Class Cert. Order at 35-36 (footnote omitted).

## 2. Superiority and Ascertainability

Rule 23(b)(3) also requires a finding that “a class action is superior to other available methods for the fair and efficient adjudication of the controversy.” Where individual class members’ possible recoveries are so small that no other practical method of adjudication exists, superiority is often satisfied.<sup>46</sup> Here, as this Court has already found, where millions of class members have suffered injury, on average, of less than \$7, a class action is the superior method for adjudicating these claims.<sup>47</sup>

The class is also readily ascertainable. Detailed transaction records exist for class members – records already used to notify and distribute funds from the settlements with the Publisher Defendants. Due to the existence of these digital transaction records, class members in this lawsuit are readily ascertainable.<sup>48</sup>

## VIII. CONCLUSION

Plaintiffs respectfully request that the Court (1) find that the Apple Settlement Agreement satisfies the requirements for preliminary approval; (2) grant preliminary approval of the Apple Settlement Agreement; (3) grant conditional class certification for settlement purposes; and (4) approve Plaintiffs’ request that notification to Eligible Consumers of the Apple Settlement be deferred until further order of the Court. A proposed Preliminary Approval Order for the Court’s consideration is appended as Exhibit C.

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<sup>46</sup> *Amchem*, 521 U.S. at 617.

<sup>47</sup> Class Cert. Order at 61.

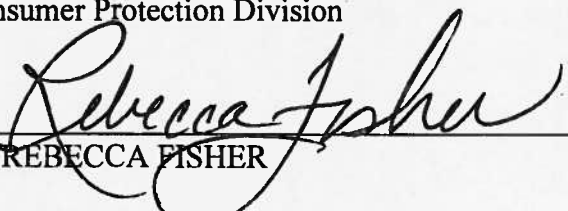
<sup>48</sup> *Id.* at 63.

DATED: July 16, 2014

Respectfully submitted,

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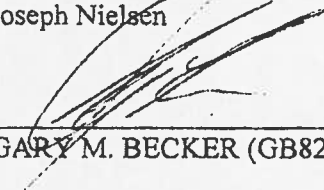
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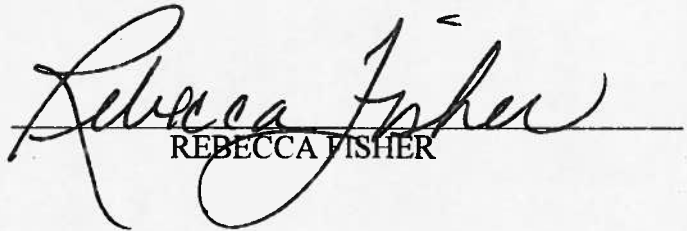
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**ATTORNEYS FOR SETTLEMENT CLASS**

**CERTIFICATE OF SERVICE**

I hereby certify that on July 16, 2014, I electronically filed the foregoing document using the CM/ECF system which will send notification of such filing to the e-mail addresses registered in the CM/ECF system, as denoted on the Electronic Mail Notice List.

  
REBECCA FISHER

***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 APPLE SETTLEMENT AGREEMENT**

**EXHIBIT A**

**APPLE SETTLEMENT AGREEMENT**

**SETTLEMENT AGREEMENT BY AND AMONG APPLE INC.,  
PLAINTIFF STATES AND CLASS PLAINTIFFS**

This Settlement Agreement is made and entered into on July 10, 2014, by and among Plaintiff States, by and through their respective Attorneys General (“Plaintiff States”), Class Plaintiffs, on behalf of themselves and in their respective capacities as representatives of the Settlement Class, and Apple Inc. (“Apple”), by and through its undersigned counsel, (collectively “Parties”).

WHEREAS, a subset of Plaintiff States filed a complaint against Apple and others in the United States District Court for the Western District of Texas on April 11, 2012, which action was transferred to the United States District Court for the Southern District of New York (“the District Court”) on April 30, 2012 as *Texas, et al. v. Penguin Group (USA) Inc., et al.*, No. 12-cv-03394 (DLC) (“Plaintiff States Action”); and the complaint was twice amended, with the current complaint (“Second Amended Complaint”) being filed on May 21, 2012 by all Plaintiff States in their sovereign capacity and as *parens patriae*, on behalf of natural persons in a Plaintiff State at the time of eligible E-book purchase(s);

WHEREAS, the United States Department of Justice (“DOJ”) filed a complaint against Apple and others in the District Court on April 11, 2012 as *United States v. Apple Inc., et al.*, No. 12-cv-2826 (the “DOJ Action”);

WHEREAS, Class Plaintiffs filed a First Amended Consolidated Class Action Complaint on behalf of themselves and as representatives of Eligible Consumers in non-Plaintiff State jurisdictions against Apple and others on October 11, 2013 in the District Court as *In re Electronic Books Antitrust Litigation*, No. 11-md-02293 (DLC) (“Class Action”);



**WHEREAS, both Plaintiff States and Class Plaintiffs have alleged an unlawful agreement to fix, maintain or stabilize prices of E-books in violation of federal and state antitrust laws, and sought, among other relief, damages, injunctive relief, and costs of investigation and litigation and Plaintiff States have additionally sought civil penalties;**

**WHEREAS, a bench trial was held before the District Court on claims for injunctive relief in the Plaintiff States Action and all claims in the DOJ Action from June 3 until June 20, 2013;**

**WHEREAS, the District Court issued an Opinion and Order on July 10, 2013 on DOJ's and Plaintiff States' claims for injunctive relief, 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";**

**WHEREAS, Apple appealed the District Court's Opinion and Order of July 10, 2013 in the DOJ and Plaintiff States Actions to the United States Court of Appeals for the Second Circuit ("Second Circuit"). These appeals have been consolidated in *United States v. Apple Inc., et al.*, No.13-3741 (collectively the "Liability Appeal");**

**WHEREAS, Apple also appealed the appointment of an External Compliance Monitor and that appeal is pending in the Second Circuit as *State of Texas, et al. v. Apple Inc.*, No. 14-61 ("Monitor Appeal");**

**WHEREAS, the District Court granted Class Plaintiffs' Motion for Class Certification on March 28, 2014, certifying a class consisting of Eligible Consumers in non-Plaintiff State jurisdictions who purchased E-books between April 1, 2010 and May 21, 2012, published by Named Publishers ("Class Certification Order");**

**WHEREAS, Apple has agreed to class action treatment of claims by the Settlement Class solely for the purpose of effecting the compromise and settlement of those claims on a class basis as set forth herein and does not consent to certification of Settlement Class for any purpose other than to effectuate the settlement of the Class Action;**

**WHEREAS, a jury trial was scheduled with the District Court to begin on August 25, 2014 to resolve all claims against Apple in the Class Action and the outstanding claims against Apple for monetary relief in the Plaintiff States Action;**

**WHEREAS, Apple has denied and continues to deny: (1) each and all of the claims and allegations of wrongdoing made in the Class Action and the Plaintiff States Action, and maintains furthermore that it has meritorious defenses, (2) all charges of wrongdoing or liability against it arising out of any of the conduct, statements, acts or omissions alleged, or that could have been alleged, in the Class Action and Plaintiff States Action, and (3) the allegations that consumers were harmed by any conduct by Apple alleged in the Class and Plaintiff States Actions or otherwise;**

**WHEREAS, this Settlement Agreement does not constitute any admission by Apple of any violation of law or of any issue of fact or law, other than that the jurisdictional facts as alleged in the complaints in the Class and Plaintiff States Actions (collectively "Complaints") are true; and**

**WHEREAS, Plaintiff States, Class Plaintiffs and Apple have determined it to be in their best interests to resolve this dispute and enter into this Settlement Agreement;**

**NOW, THEREFORE, IT IS HEREBY STIPULATED AND AGREED:**

## I. DEFINITIONS

As used herein:

A. “Apple” means Apple Inc., a California corporation with its principal place of business in Cupertino, California, its successors and assigns, and its subsidiaries, and divisions.

B. “Claims” means all claims, counterclaims, set-offs, demands, actions, rights, liabilities, costs, debts, expenses, attorneys’ fees, and causes of action of any type, whether or not accrued in whole or in part, including, without limitation, past, present, and future claims arising under federal or state antitrust, unfair competition or consumer protections laws, or state common or equitable law, and that were asserted or that could have been asserted, known or unknown, against Apple, and/or its officers, directors, employees and attorneys, arising from any of the facts, matters, transactions, events, occurrences, acts, disclosures, statements, omissions, or failures to act set forth or alleged in Plaintiffs’ Complaints. Notwithstanding the foregoing, “Claims” does not include Plaintiff States’ claims for injunctive relief against Apple currently under appeal in the Liability Appeal.

C. “Claims Administrator” means Rust Consulting, Inc.

D. “Class Plaintiffs” means Anthony Petru, Thomas Friedman, and Shane S. Davis.

E. “Counsel for Settlement Class” means Hagens Berman Sobol Shapiro LLP and Cohen Milstein Sellers & Toll PLLC.

F. “Distribution Plan” means the plan or method of allocation of the Apple Consumer Compensation Account among Eligible Consumers who have not filed valid and timely requests for exclusion from this Settlement Agreement with the District Court. The Distribution Plan will be submitted to the District Court separately from the Settlement Agreement and is not part of this Settlement Agreement.

G. “Effective Date” means the date when all of the following conditions have been satisfied, unless one or more of such conditions is modified in a writing signed by the Parties: (1) this Settlement Agreement has been executed; (2) the District Court has entered a Preliminary Approval Order; (3) the Notice Plan has been approved and effectuated; (4) the period within which Eligible Consumers must exercise their rights to be excluded from *parens patriae* or class representation has expired; (5) the Final Liability Decision has been rendered; (6) the District Court has given final approval of the settlement embodied herein; (7) the Final Approval Order has been entered by the District Court; and (8) the Final Approval Order is Final.

H. “Eligible Consumers” mean natural persons who have purchased E-books published by Named Publishers during the period from April 1, 2010 until May 21, 2012;

I. “Escrow Agent” means Fifth Third Bank. Plaintiffs may appoint a different Escrow Agent subject to any pending contracts and upon reasonable notice to Apple.

J. “E-book” means an electronically formatted book designed to be read on a computer, a handheld device, or other electronic devices capable of visually displaying E-books. For purposes of this Settlement Agreement, the term E-book does not include (1) an audio book, even if delivered and stored digitally; (2) a standalone specialized software application or “app” sold through an “app store” rather than through an E-book store (*e.g.*, through Apple Inc.’s “App Store” rather than through its “iBookstore” or “iTunes”) and not designed to be executed or read by or through a dedicated E-book reading device; (3) a media file containing an electronically formatted book for which most of the value to consumers is derived from audio or video content contained in the file that is not included in the print version of the book; or (4) the electronically formatted version of a book marketed solely for use in connection with academic coursework.

**K. “Final” as to the Final Approval Order means: (1) the District Court has entered a Final Approval Order and (2) the time for appeal or to seek permission to appeal from the District Court’s Final Approval Order has expired or, if appealed, the Final Approval Order has been affirmed in its entirety by the court of last resort to which such appeal has been taken and such affirmance has become no longer subject to further appeal or review.**

**L. “Final Approval Order” means the order to be entered by the District Court in the Class Action and the Plaintiff States Action which gives final approval of this Settlement Agreement. It is intended by the Parties that the Final Approval Order will include the following provisions: (1) an affirmance by the District Court that the Notice Plan was completed; (2) a determination by the District Court that the Settlement Agreement is approved finally as fair, reasonable and adequate pursuant to the requirements of Rule 23 of the Federal Rules of Civil Procedure, 15 U.S.C. § 15c, and due process; and, if Apple is to make payments pursuant to Paragraphs III.A or III.B, below, (3) a directive that the monies in the Apple Consumer Compensation Account are to be disbursed pursuant to a Court-approved Distribution Plan; (4) a directive that monies in the States’ Compensation Account are to be paid to Liaison Counsel for disbursement to Plaintiff States for use pursuant to Paragraph V.B, below; and (5) that an award of attorneys’ fees and expenses should be made to Counsel for Settlement Class pursuant to Paragraphs III.A.3 or III.B.3, below.**

**M. “Final Liability Decision” means a final decision by the Second Circuit on the merits of the Liability Finding and, if a petition for writ of certiorari is filed by any Party on the merits of the Liability Finding, (a) a final decision by the Supreme Court of the United States denying the certiorari petition or (b) if the Supreme Court grants the certiorari petition, a final decision by the United States Supreme Court on the merits of the Liability Finding. If the**

time for filing a certiorari petition passes and no party has filed a petition and the Second Circuit's mandate has issued, then the Second Circuit's final decision on the merits on the Liability Finding shall be deemed the "Final Liability Decision."

N. "Including" means including, but not limited to.

O. "Liability Appeal" means the appeal by Apple that is pending in the Second Circuit consolidated under *United States, et al. v Apple Inc.*, No. 13-3741 (L).

P. "Liability Finding" means the holding of the Opinion and Order issued by the District Court on July 10, 2013 that Apple violated Section 1 of the Sherman Act (15 U.S.C. §1).

Q. "Liaison Counsel for Plaintiff States" mean the designated representatives for the Attorneys General of the States of Texas, Connecticut, and Ohio.

R. "Named Publishers" means Hachette Book Group, Inc. and Hachette Livre SA, ("Hachette"), HarperCollins Publishers LLC ("HarperCollins"), Simon & Schuster, Inc. and Simon & Schuster Digital Sales, Inc. ("Simon & Schuster"), Holtzbrinck Publishers, LLC, d/b/a Macmillan ("Macmillan"), and Penguin Group (USA), Inc. ("Penguin").

S. "Notice Period" means the period during which notice shall be disseminated to Eligible Consumers. The Notice Period shall be forty-five (45) days or such other time period set by the District Court.

T. "Notice Plan" means the plan specifying the manner and content of the program whereby Eligible Consumers are notified of this Settlement Agreement and informed of their rights to object to or exclude themselves from the settlement. The Notice Plan shall specify the manner in which Eligible Consumers are to be notified of this settlement, and shall consist, at a minimum, of direct notice to each Eligible Consumer whose e-mail address can be voluntarily obtained by Plaintiffs from E-book retailers.

U. “Plaintiffs” means collectively Plaintiff States and Class Plaintiffs.

V. “Plaintiff States” means the following States, Commonwealths and Territories of the United States, by and through their Attorneys General, in their sovereign capacity and as *parens patriae* on behalf of Eligible Consumers in such Plaintiff States: Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, District of Columbia, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Maryland, Massachusetts, Michigan, Missouri, Nebraska, New Mexico, New York, North Dakota, Ohio, Pennsylvania, Puerto Rico, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, West Virginia, and Wisconsin.

W. “Preliminary Approval Order” means an order to be entered by the District Court which the parties intend will include the following provisions: (1) preliminary approval of this Settlement Agreement as fair, reasonable and adequate and in the best interests of Eligible Consumers; (2) conditional certification of the Settlement Class for settlement purposes; and (3) a schedule for the dissemination of consumer notice or approval for deferral thereof.

X. “Prior Settlements” means (1) the Settlement Agreements between Attorneys Generals of 55 jurisdictions and Hachette, Simon & Schuster, and HarperCollins which were approved by the District Court on February 8, 2013 in the related case, *Texas, et al. v. Hachette Book Group, Inc. et al*, No.12 cv 6625; (2) the Settlement Agreements between Attorneys General for 33 jurisdictions, Settlement Class and Macmillan and Penguin which were approved by the District Court on December 9, 2013, in both the Plaintiff States Action and the Class Action; and (3) the Settlement Agreement between Settlement Class for Minnesota residents and Hachette, Simon & Schuster, and HarperCollins which was also approved by the District Court on December 9, 2013, in the Class Action.

Y. “Purchase” means an Eligible Consumer’s acquisition of one or more E-books as a result of a Sale.

Z. “Released Claims” means all Claims as described in Section IX.

AA. “Sale” means delivery of access to an Eligible Consumer of one or more E-books (purchased alone, or in combination with other goods or services) in exchange for payment.

BB. “Settlement Accounts” mean the Apple Consumer Compensation Account and the States’ Compensation Account as described in Section IV. The Settlement Accounts shall be administered by Fifth Third Bank, as Escrow Agent, pursuant to Paragraph VII.A, below.

CC. “Settlement Administration Account” means that account described in Sections VI. and VII., below.

DD. “Settlement Administration Costs” means costs to be paid from the Settlement Administration Account for all actual, customary and reasonable costs and fees incurred in the administration of this Settlement Agreement, which includes costs and fees incurred for the purpose of (1) compiling necessary Eligible Consumer information and providing direct notice as well as such notice by publication or paid media as may be needed to effectuate adequate notice, (2) completing administrative tasks, (3) processing and paying claims, including distributing credits and/or checks to Eligible Consumers, and (4) securing court approval of the Settlement Agreement, such as expert affidavits. Such Settlement Administration Costs expressly include those fees or costs payable to the Escrow Agent and Claims Administrator appointed by Plaintiffs pursuant to Section VII, below. Settlement Administration Costs will not include any fees or costs payable to any Plaintiffs’ attorneys.

EE. “Settlement Class” means the class of Eligible Consumers certified by the District Court in the Class Certification Order (*see* Case No. 11-md-2293, Dkt. 585 at 19).



**FF. “Written Direction” means a written notification directed to the Escrow Agent and/or Claims Administrator directing disbursements from the Settlement Accounts or the Settlement Administration Account and signed by at least two Liaison Counsel for Plaintiff States and counsel for Apple. Liaison Counsel for Plaintiff States will forward a copy of any Written Direction to Counsel for the Settlement Class contemporaneously with such notification being sent to the Escrow Agent and/or Claims Administrator.**

## **II. STIPULATIONS**

**A. Counsel for the Parties stipulate and agree that a bona fide justiciable dispute remains as to the findings and conclusions on liability and injunctive relief in the District Court’s July 10, 2013 Opinion and Order. Except as expressly set forth herein, Apple and Plaintiff States retain all procedural and substantive rights to continue litigating the Liability Appeal in the Second Circuit and/or the United States Supreme Court.**

**B. Counsel for the Parties stipulate and agree that the litigation and/or resolution of the Monitor Appeal will have no bearing on the Parties’ obligations pursuant to this Settlement Agreement.**

**C. Counsel for the Parties stipulate and agree that the negotiations leading to this Settlement Agreement were conducted in good faith and at arm’s length by experienced attorneys who were well-informed concerning the pending issues of the litigation.**

**D. Counsel for the Parties stipulate and agree that, after both the Effective Date has occurred and Apple has paid the monies required pursuant to this Settlement Agreement, the litigation initiated by the Complaints and the Released Claims shall be finally and fully compromised, settled and released, upon and subject to the terms and conditions of this Settlement Agreement.**

### **III. SETTLEMENT PAYMENTS**

**A. In the event the Final Liability Decision affirms the Liability Finding, Apple agrees to pay and shall pay the following amounts:**

- 1. The total sum of \$400 million for Eligible Consumer compensation;**
- 2. The total sum of \$20 million to Plaintiff States for their attorneys' fees, costs related to the investigation, litigation and appeal of the present matter, and for release of state enforcement claims; and**
- 3. The total sum of \$30 million to Counsel for the Settlement Class for their attorneys' fees, and costs related to the investigation, litigation and appeal of the present matter. ("Fee and Expense Award"). Counsel for the Settlement Class agree not to seek a Fee and Expense Award in excess of this amount.**

**B. In the event the Final Liability Decision vacates and remands, or reverses and remands with instructions, for reconsideration, or for retrial of the Liability Finding, Apple agrees to pay and shall pay the following amounts:**

- 1. The total sum of \$50 million for Eligible Consumer compensation;**
- 2. The total sum of \$10 million to Plaintiff States for their attorneys' fees, costs related to the investigation, litigation and appeal of the present matter, and for release of state enforcement claims; and**
- 3. The total sum of \$10 million to Counsel for the Settlement Class for their attorneys' fees, and costs related to the investigation, litigation and appeal of the present matter (the "Fee and Expense Award"). Counsel for the Settlement Class agree not to seek a Fee and Expense Award in excess of this amount.**

C. Paragraph III.B shall not apply in the event of a remand to the District Court on administrative or non-substantive grounds that do not, or could not, affect the Liability Finding.

D. In the event the Final Liability Decision reverses the Liability Finding, Apple will pay nothing pursuant to this Settlement Agreement, except for Settlement Administration Costs as noted in Section VI, below, and Plaintiffs will move to dismiss their Claims with prejudice.

#### **IV. SETTLEMENT ACCOUNTS**

A. Apple shall pay any Eligible Consumer compensation required under either Paragraph III.A.1 or B.1, above, to the Plaintiffs, c/o Fifth Third Bank, Escrow Agent, within thirty (30) days of the Effective Date of the Settlement Agreement. The Escrow Agent shall establish the Apple Consumer Compensation Account from such monies. These monies, plus any accrued interest, shall be used to fund the Eligible Consumer distribution as described in Paragraph V.A, below. The Escrow Agent shall only distribute funds in the Apple Consumer Compensation Account pursuant to a court-approved Distribution Plan.

B. Any payments made by Apple for Eligible Consumer compensation pursuant to III.A.1, above, do not constitute, nor shall they be treated as, payments in lieu of fines, penalties, punitive recoveries or forfeitures. Any payments made by Apple for Eligible Consumer compensation pursuant to III.B.1, above, do not constitute, nor shall they be treated as, payments in lieu of treble damages, fines, penalties, punitive recoveries or forfeitures.

C. Apple shall make any payment required under either Paragraph III.A.2 or B.2, above, to Plaintiff States, c/o Fifth Third Bank, Escrow Agent, within thirty (30) days of the Effective Date of the Settlement Agreement. The Escrow Agent shall establish the States' Compensation Account from such monies. These monies, plus any accrued interest, shall be

apportioned among Plaintiff States in a manner to be determined solely by Plaintiff States and will be used for the purposes set forth in Paragraph V.B, below.

D. Apple shall pay Counsel for the Settlement Class any payment required under either Paragraph III.A.3 or B.3, above, and as awarded by the District Court, to an account designated by Counsel for the Settlement Class within thirty (30) days after the Effective Date of the Settlement Agreement.

## V. SETTLEMENT DISBURSEMENTS

A. Distribution to Consumers: All funds in the Apple Consumer Compensation Account, if any, shall be distributed, according to a Court-approved Distribution Plan, for the benefit of Eligible Consumers who have not filed valid and timely requests for exclusion from this settlement with the District Court. Parties agree that the funds in this Account on or after the Effective Date of the Settlement Agreement may be transferred to an escrow account which will combine all consumer monies from this settlement and any remaining consumer compensation funds from Prior Settlements for the purpose of consumer distribution.

1. The Distribution Plan shall be submitted to the District Court for approval within thirty (30) days of the Final Liability Decision being issued or as the District Court orders otherwise. Plaintiffs shall provide Apple a reasonable opportunity to review and comment on the proposed Distribution Plan before its submission to the District Court. The Distribution Plans used in the Prior Settlements will be the template for the Apple Settlement Distribution Plan, but may be revised as needed to maximize direct consumer distribution or efficiency of distribution. The Distribution Plan will provide that, to the extent practicable, all credits provided to Eligible Consumers may be used for the purchase of any product or service sold by the crediting retailer.

2. Any funds not initially distributed will be distributed pursuant to subsequent consumer distributions, if feasible or, if approved by the District Court, will be distributed *cy pres* to one or more charitable organizations whose purposes relate to reading, literacy or access by the public to electronic books. Plaintiffs will propose specific *cy pres* recipients to the District Court prior to the time for objections or requests for exclusion from class members.

3. Funds remaining due to uncashed checks or unused or inactivated credits will similarly be used for additional consumer distributions to the fullest extent possible. To the extent state law prohibits any portion of such distributions, Plaintiffs will submit proposed plans for alternative distributions for court approval.

4. The Parties agree and understand that any proposed Distribution Plan is to be considered by the District Court separately from the District Court's consideration of the fairness, reasonableness and adequacy of the settlement set forth in the Settlement Agreement, and any order or proceedings relating to the Distribution Plan shall not operate to terminate or cancel the Settlement Agreement or affect the finality of the Final Approval Order, or any other orders entered pursuant to the Settlement Agreement.

B. Distribution of Compensation to Plaintiff States: The States' Compensation Account shall be apportioned among Plaintiff States at their sole discretion. Such apportionments shall then be used collectively or individually by Plaintiff States' Attorneys General for one or more of the following purposes:

1. Reimbursement for Plaintiff States' consultation or expert fees, including reimbursement of any grants paid to Plaintiff States in connection with the National Association

of Attorneys General Milk Fund Account (“Fund”) for consultant and expert fees expended from the Fund;

2. Reimbursement of attorneys’ fees, and investigation, litigation and settlement administration cost expenses incurred by any Plaintiff State;
3. Payment for any ongoing litigation and/or appeals involving the E-books market;
4. Antitrust or consumer protection enforcement by the Attorney General of such State;
5. Deposit into a state antitrust or consumer protection account, (e.g., revolving account, trust account), for use in accordance with the state laws governing that account;
6. Deposit into a fund exclusively dedicated to assisting state Attorneys General to defray the cost of experts, economists, and consultants, and/or document management, in multistate antitrust investigations and litigations; or
7. As otherwise required or provided by the applicable state law enacted as of the Effective Date of this Settlement Agreement.<sup>1</sup>

## **VI. SETTLEMENT ADMINISTRATION ACCOUNT**

A. Apple will also pay for Settlement Administration Costs in accordance with this Section and Section VII, below. The Escrow Agent shall establish the Settlement Administration Account from the monies received from Apple under this Section. These monies, plus any accrued interest, shall be used to pay the Settlement Administration Costs pursuant to the terms

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<sup>1</sup> With respect to the State of Colorado, its apportionment shall be used first for reimbursement of Colorado’s actual costs and attorneys’ fees, and second, to be held along with any interest thereon, in trust by the Attorney General for future consumer education, consumer fraud, or antitrust enforcement efforts.

of this Settlement Agreement. The Escrow Agent shall pay such Settlement Administration Costs only as provided by an order of the District Court, or pursuant to Written Direction.

**B. Payments for the Settlement Administration Account will be made as follows:**

**1. An initial deposit of \$2 million shall be paid by Apple to the Plaintiffs c/o Fifth Third Bank, Escrow Agent, within ten (10) business days after the execution of this Settlement Agreement by counsel for Liaison States, Settlement Class and Apple.**

**2. Upon notice by counsel for the Plaintiffs that additional funds are necessary to pay Settlement Administration Costs, Apple shall make a supplemental deposit of such additional reasonable amount into the Settlement Cost Account within ten (10) business days after such notice.**

**3. After counsel for the Liaison States and Settlement Class have confirmed in writing that all incurred, committed or anticipated Settlement Administration Costs have been paid or accounted for, the Escrow Agent shall refund to Apple all unused funds in the Settlement Administration Account, if any, within twenty (20) business days after such confirmation.**

**C. If Apple wishes to challenge any Settlement Administration Costs as being unreasonable or not customary, it shall first notify Counsel for Plaintiffs and, if such challenge is not resolved within 10 (ten) business days of notice, Apple may file an application with the District Court and any such challenged Settlement Administration Costs will not be due and payable unless and until the District Court rules upon the application.**

**D. If Apple pays nothing, pursuant to Paragraph III.D, above, or if this Settlement Agreement is not approved or fails to become effective, all monies paid by Apple into the Settlement Accounts or the Settlement Administration Account, including any interest accrued thereon, shall be refunded to Apple, reduced by the amount of costs and expenses incurred or**

committed for Settlement Administration Costs as of the Effective Date of the Settlement Agreement, the date of disapproval, or the date of failure to become effective. In the case of disapproval by the District Court, refund shall occur within five (5) business days of the Final Approval Order becoming Final. In all other cases, refund shall occur within five (5) business days after the occurrence of the event triggering the right to a refund.

## **VII. SETTLEMENT ADMINISTRATION**

A. The Escrow Agent for the Settlement Accounts and the Settlement Administration Account shall be Fifth Third Bank.

1. Other than maintaining an account to meet short-term obligations, the Escrow Agent shall invest the funds in the Settlement Accounts in obligations of, or obligations guaranteed by, the United States of America or any of its departments or agencies, to obtain the highest available return on investment, and shall reinvest the proceeds of these instruments as they mature in similar instruments at their then current market rates. The Escrow Agent shall bear all risks related to the investment of the escrow funds.

2. The Escrow Agent shall not disburse the funds of the Settlement Accounts or the Settlement Administration Account except by an order of the District Court or pursuant to Written Direction.

3. All funds held by the Escrow Agent shall be deemed to be *in custodia legis* of the District Court, and shall remain subject to the jurisdiction of the District Court, until the funds shall be distributed pursuant to the Settlement Agreement and/or further order(s) of the District Court.

B. In addition to the Escrow Agent, Counsel for Plaintiffs have employed Rust Consulting, Inc., as the Claims Administrator, to facilitate the provision of notice and to



distribute and/or administer the distribution of the funds in the Apple Consumer Compensation Account in accordance with the terms of this Settlement Agreement. Upon approval of Plaintiffs' counsel (which approval shall not be unreasonably withheld), Apple may communicate directly with the Claims Administrator as necessary to facilitate the provision of notice to Apple Customers and to distribute and/or administer the distribution of the funds in the Apple Consumer Compensation Account to Apple Customers in accordance with the terms of this Settlement Agreement and an approved Distribution Plan.

**C. Tax Treatment of Settlement Accounts:**

1. Parties and Escrow Agent agree to treat the Settlement Accounts as being, at all times, a "qualified settlement fund" within the meaning of Treas. Reg. § 1.468B-1(a). In addition, the Escrow Agent and, as required, Parties shall jointly and timely make such reasonable elections that are requested by Apple or that are necessary or advisable to carry out the provisions of this Section, including the "relation-back election" (as defined in Treas. Reg. § 1.468B-1(j)(2)(ii)), back to the earliest permitted date. Such elections shall be made in compliance with the procedures and requirements contained in such regulation. It shall be the responsibility of the Escrow Agent to timely and properly prepare and deliver the necessary documentation for signature by all necessary Parties, and thereafter to cause the appropriate filing to occur.

2. For the purpose of § 468B of the Internal Revenue Code of 1986, as amended, and the regulations promulgated thereunder, the "administrator" shall be the Escrow Agent. The Escrow Agent shall timely and properly file all informational and other tax returns necessary or advisable with respect to the Settlement Accounts (including without limitation the returns described in Treas. Reg. § 1.468B-2(k) and (l)). Such returns (as well as the election

described in Paragraph C.1 above, shall be consistent with this Section VII.C, and in all events shall reflect that all taxes (including any estimated taxes, interest or penalties) on the income earned by the Settlement Accounts shall be paid out of the Settlement Accounts.

3. All taxes (including any estimated taxes, interest or penalties) arising with respect to the income earned by the Settlement Accounts, including any taxes that may be imposed upon Apple with respect to any income earned by the Settlement Accounts for any period during which the Settlement Accounts do not qualify as a “qualified settlement fund” for federal, state, or local income tax purposes (“Taxes”) shall be paid out of the Settlement Accounts and in all events Apple and its insurers shall have no liability or responsibility for such Taxes or the filing of any tax returns or other documents with the Internal Revenue Service or any other state or local taxing authority in respect of such Taxes. Taxes shall be treated as, and considered to be, a cost of administration of the Settlement Agreement and shall be timely paid by the Escrow Agent out of the Settlement Accounts without prior order from the District Court and the Escrow Agent shall be obligated (notwithstanding anything herein to the contrary) to withhold from distribution to Plaintiff States any funds necessary to pay such amounts including the establishment for adequate reserves for any Taxes (as well as any amounts that may be required to be withheld under Treas. Reg. § 1.468B-2(l)(2)); Apple and its insurers are not responsible and shall have no liability therefor or for any reporting requirements that may relate thereto. The Parties agree to cooperate with the Escrow Agent, each other, and their tax attorneys and accountants to the extent reasonably necessary to carry out the provisions of this Section VII.C. For purposes of this Section, references to the Settlement Accounts shall include the Settlement Accounts and any earnings thereon. In no event will any Taxes be treated as

Settlement Administration Costs, and no Taxes will be paid out of the Settlement Administration Account.

**D. Effect of Bankruptcy:**

1. Apple warrants that, as of the date of this Settlement Agreement, it is not insolvent, nor will its payment to the Settlement Accounts and/or the Settlement Administration Account render it insolvent within the meaning of and/or for the purposes of the United States Bankruptcy Code.

2. If a case is commenced with respect to Apple under Title 11 of the United States Code (Bankruptcy), or a trustee, receiver or conservator is appointed under any similar law, and in the event of the entry of a final order of a court of competent jurisdiction determining the payment of the principal amount of the Settlement Accounts and/or the Settlement Administration Account and any accrued interest, or any portion thereof, by or on behalf of Apple, to be a preference, voidable transfer, fraudulent transfer or similar transaction, and if pursuant to an order of a court of competent jurisdiction monies paid by Apple pursuant to this Settlement Agreement are either not delivered or are returned to Apple or the trustee, receiver, or conservator appointed by a court in any bankruptcy proceeding with respect to Apple, any releases given to Apple pursuant to this Settlement Agreement shall be null and void.

**VIII. REQUESTS FOR APPROVAL, NOTICE AND SETTLEMENT HEARING**

A. Unless otherwise agreed to by Plaintiffs and Apple and approved by the District Court, Plaintiffs shall file a Motion seeking a Preliminary Approval Order with the District Court by July 16, 2014. At least seven (7) days prior to filing their Motion for entry of a Preliminary Approval Order, Plaintiffs shall provide a copy of such motion (including all exhibits and attachments to such motion) to Apple for review and comment.

**B. Plaintiffs shall disseminate Notice of the Settlement Agreement to potentially affected Eligible Consumers in the manner and within the time directed by the District Court. The Parties contemplate a Notice Period of forty-five (45) days, unless another time period is set by the District Court.**

**C. Within thirty (30) days following the conclusion of the Notice Period or as otherwise directed by the District Court, Plaintiffs shall file with the District Court a Motion for a Final Approval Order. At least seven (7) days prior to filing their Motion for a Final Approval Order, Plaintiffs shall provide a copy of such motion (including all exhibits and attachments to such motion) to Apple for review and comment.**

#### **IX. RELEASED CLAIMS**

**A. In consideration of the monetary provisions contained in this Settlement Agreement, and after both the Effective Date has occurred and Apple has paid the monies required pursuant to this Settlement Agreement, then each Plaintiff State will be deemed to have, fully, finally, and forever released Apple, its successors and assigns, and their officers, directors, employees, and attorneys (collectively "Releasees") from all Claims that were asserted or could have been asserted by or on behalf of any Eligible Consumer in a Plaintiff State, at the time of his or her E-book purchase(s), who did not timely and validly exclude themselves from this settlement.**

**B. In further consideration of the monetary provisions contained in this Settlement Agreement, and after both the Effective Date has occurred and Apple has paid all monies required pursuant to this Settlement Agreement, then all Settlement Class members who have not timely and validly excluded themselves from this settlement will be deemed to have fully,**

finally, and forever released the Releasees from all Claims that were asserted or could have been asserted by any such Settlement Class member.

C. In further consideration of the monetary provisions contained in this Settlement Agreement, and after both the Effective Date has occurred and Apple has paid all monies required pursuant to this Settlement Agreement, then each Plaintiff State will be deemed to have released the Releasees from all Claims that were asserted or could have been asserted by each Plaintiff State's Attorney General in his or her sovereign capacity as chief law enforcement officer of his or her respective state.

D. In further consideration of the monetary provisions contained in this Settlement Agreement, and after both the Effective Date has occurred and Apple has paid all monies required pursuant to this Settlement Agreement, then each Plaintiff State's Attorney General covenants and agrees, to the fullest extent permitted by law, that he or she shall not hereafter seek to establish liability of Claims or assert Claims, in whole or in part, on behalf of the Attorney General or any other person or entity or class thereof, against the Releasees.

E. In further consideration of the monetary provisions contained in this Settlement Agreement, the Final Approval Order shall be deemed *res judicata* as to any such released Claim.

F. Plaintiffs and Apple expressly agree that they do not intend this Settlement Agreement nor any documents executed or submitted pursuant to this Settlement Agreement to be construed as a release or otherwise affect any rights Plaintiffs have or may have against any other entity whatsoever. The Final Approval Order shall include a provision that this Settlement Agreement and anything done pursuant thereto shall not constitute a release except as to Releasees. Plaintiffs and Eligible Consumers reserve their rights as aforesaid.

**G. The payments made by Apple to the Settlement Accounts, to the Settlement Class Counsel, to Plaintiff States, and to the Settlement Administration Account (including the additional payments contemplated pursuant to Paragraph VI.B.2, above) shall be the total amount to be paid by Apple under this Settlement Agreement or in connection with Released Claims. In no event will the payments made by Apple exceed the amount specified in (1) Paragraphs III.A, III.B, or III.D, as applicable, and (2) Paragraph VI.B.1, excluding any additional payments required pursuant to Paragraph VI.B.**

**H. To the fullest extent permitted by law, the Parties each expressly waive any right or benefit available to them under Section 1542 of the California Civil Code, which provides as follows: "A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor," and all provisions, rights and benefits conferred by any law of any state or territory of the United States, or principle of common law or foreign law, that is similar, comparable or equivalent in effect to Section 1542 of the California Civil Code.**

#### **X. AGREEMENT VOIDABLE**

**A. If this Settlement Agreement is not approved, or fails to become effective, the Settlement Agreement will be null and void.**

**B. If, during the Notice Period, Eligible Consumers who otherwise would be represented by Plaintiffs have filed with the Court valid and timely requests for exclusion from this settlement, counsel for Plaintiffs shall promptly provide Apple with notice of all the requests for exclusion. Apple has the option to void this Settlement Agreement if the percentage of the total Named Publishers' E-book sales volume for the period from April 1, 2010 to May 21, 2012**

represented by Eligible Consumers requesting exclusion from this settlement exceeds 10%. Apple must exercise its option to void this Settlement Agreement, as set forth in this Paragraph, no later than ten (10) business days after receiving the information about the Consumers requesting exclusion from this settlement.

C. In the event the Settlement is void pursuant to Paragraph X.A or B, above, Plaintiffs shall retain full rights to assert any and all causes of action against Apple, including the right to amend the Complaints to include additional allegations, claims, causes of action and requests for relief and Apple shall retain any and all defenses thereto.

## **XI. COOPERATION AND IMPLEMENTATION**

A. The Parties, and their respective counsel, agree to cooperate fully to implement the terms and conditions of this Settlement Agreement.

B. If a Plaintiff determines that Apple is not in compliance with the terms of the Settlement Agreement, it shall give Apple written notice of such non-compliance and Apple shall have fifteen (15) business days to respond in writing. If the Plaintiff is not satisfied with Apple's response, it shall notify Apple in writing and Apple shall have fifteen (15) business days to cure such non-compliance. If, after such time, the Plaintiff shall determine that Apple is still not in compliance, such Plaintiff may seek the civil remedies available to it under the terms of the Final Approval Order.

C. This Settlement Agreement shall not be used or construed by any person as an admission of liability by Apple to any party or person, or be deemed evidence of any violation of any statute or law or admission of any liability or wrongdoing by Apple or of the truth of any of the claims or allegations contained in the Complaints.

## **XII. BENEFIT AND BINDING EFFECT**

A. The terms of this Settlement Agreement shall be binding on, and shall inure to the benefit of the Parties and their successors. The Parties expressly disclaim any intention to create rights under this Settlement Agreement which may be enforced by any other person under any circumstances whatsoever.

B. After both the Effective Date has occurred and Apple has paid all monies required pursuant to this Settlement Agreement, all remaining interest or right of Apple in or to the funds in the Settlement Accounts shall be absolutely and forever extinguished.

## **XIII. MISCELLANEOUS**

A. Apple may file the Settlement Agreement and/or the Final Approval Order in any action that may be brought against it in order to support a defense or counterclaim based on principles of *res judicata*, collateral estoppel, release, good faith settlement, judgment, bar or reduction or any other theory of claim preclusion or issue preclusion or similar defense or counterclaim.

B. Liaison Counsel for Plaintiff States are expressly authorized by Plaintiff States to take all appropriate action required or permitted to be taken pursuant to the Settlement Agreement to effectuate its terms.

C. Each counsel or other person executing the Settlement Agreement on behalf of any party hereto warrants that such person has full authority to do so.

D. This Settlement Agreement contains the entire agreement and understanding of the Parties. There are no additional promises or terms of the Settlement Agreement other than those contained herein. This Settlement Agreement shall not be modified except in writing



signed by counsel for Liaison States, Settlement Class and Apple or by their authorized representatives.

E. All dates and time periods in this Settlement Agreement shall be calculated pursuant to the Federal Rules of Civil Procedure. All such dates and time periods may be modified if mutually agreed upon, in writing, signed by counsel for Liaison States, Settlement Class, and Apple or by their authorized representatives.

F. The Settlement Agreement shall be deemed to have been mutually prepared by the Parties hereto and shall not be construed against any of them solely by reason of authorship.

G. The captions contained in this Settlement Agreement are inserted only as a matter of convenience and in no way define, limit, extend, or describe the scope of this Settlement Agreement or the intent of any provision hereof.

H. The Settlement Agreement may be executed in one or more counterparts. Scanned signatures, digital signatures or signatures received by facsimile shall be treated the same as originals for the Settlement Agreement and any written, agreed modification thereof. All executed counterparts and each of them shall be deemed to be one and the same instrument. A complete set of executed counterparts shall be filed with the District Court.

I. The terms of the Settlement Agreement shall control in the event there are any conflicting terms in any related document.

J. The Settlement Agreement and any related documents shall be subject to, governed by and construed, interpreted and enforced pursuant to the internal laws of the State of New York.

K. The District Court shall retain jurisdiction with respect to the implementation and enforcement of the terms of the Settlement Agreement and all Parties hereby submit to the

exclusive jurisdiction of the District Court for purposes of implementing and enforcing the Settlement Agreement.

L. Any and all notices, requests, consents, directives, or communications by any party intended for any other party shall be in writing and shall, unless expressly provided otherwise herein, be given personally, by express courier, or by postage prepaid mail, or by facsimile or electronic transmission followed by postage prepaid mail, and shall be addressed as follows:

**For Plaintiff States:**

**Office of the Attorney General of Texas  
Chief, Antitrust Section  
300 W. 15<sup>th</sup> St., 7<sup>th</sup> Floor  
Austin, TX 78701**

**Office of the Attorney General of Connecticut  
Chief, Antitrust Department  
55 Elm Street  
PO Box 120  
Hartford, CT 06141-0120**

**Office of the Attorney General of Ohio  
Chief, Antitrust Section  
150 E. Gay St., 23<sup>rd</sup> Floor  
Columbus, OH 43215-3428**

**For Settlement Class:**

**Jeff D. Friedman  
Hagens Berman Sobol Shapiro LLP  
715 Hearst Avenue, Suite 202  
Berkeley, California 94710**

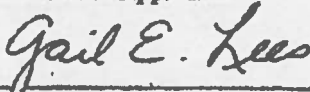
**For Apple:**

**Gail E. Lees  
Gibson, Dunn & Crutcher LLP  
333 South Grand Avenue  
Los Angeles, California 90071**

**Any one of the Parties may, from time to time, change the address to which such notices, requests, consents, directives, or communications are to be delivered, by giving the other Parties prior written notice of the changed address, in the manner herein above provided, ten (10) calendar days before the change is effective.**

Agreed to by:

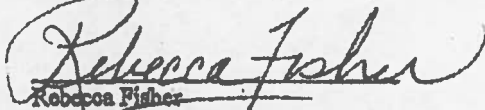
**Counsel for Apple Inc.**



Gail E. Lees  
Gibson, Dunn & Crutcher LLP  
333 South Grand Avenue  
Los Angeles, California 900071

**Counsel for Liaison States**

State of Texas  
Greg Abbott  
Attorney General



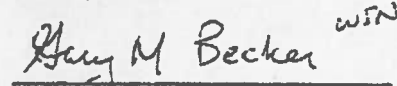
Rebecca Fisher  
Assistant Attorney General  
Office of the Attorney General of Texas  
Antitrust Section  
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Austin, TX 78701

**Counsel for the Settlement Class**



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Seattle, Washington 98101

State of Connecticut  
George Jepsen  
Attorney General



Gary M. Becker  
Assistant Attorney General  
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55 Elm Street  
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Hartford, CT 06141-0120



Jeff D. Friedman  
Hagens Berman Sobol Shapiro LLP  
715 Hearst Avenue, Suite 202  
Berkeley, California 94710

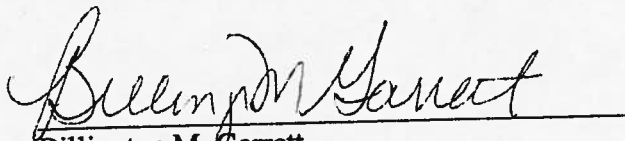
State of Ohio  
Mike DeWine  
Attorney General



Doreen C. Johnson  
Assistant Chief, Antitrust Section  
Office of the Attorney General of Ohio  
150 East Gay Street, 23<sup>rd</sup> Floor  
Columbus, Ohio 43215

**E-BOOKS SETTLEMENT WITH APPLE INC.**

**STATE OF ALABAMA  
LUTHER STRANGE  
ATTORNEY GENERAL**

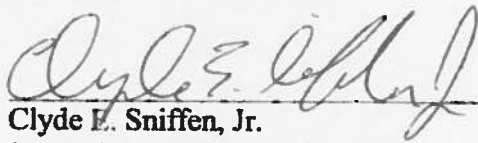
A handwritten signature in cursive script, reading "Billington M. Garrett", is written over a horizontal line.

**Billington M. Garrett  
Assistant Attorney General  
State of Alabama  
501 Washington Avenue  
Montgomery, AL 36130  
(334) 242-7555**

**ATTORNEY FOR THE STATE OF ALABAMA**

**E-BOOKS SETTLEMENT WITH APPLE INC.**

**STATE OF ALASKA  
MICHAEL C. GERAGHTY  
ATTORNEY GENERAL**



Clyde E. Sniffen, Jr.  
Sr. Assistant Attorney General  
Alaska Department of Law  
1031 W. 4<sup>th</sup> Ave., #200  
Anchorage, AK 99501  
(907) 269-5200

**ATTORNEY FOR THE STATE OF ALASKA**

**E-BOOKS SETTLEMENT WITH APPLE INC.**

**STATE OF ARIZONA  
THOMAS C. HORNE  
ATTORNEY GENERAL**

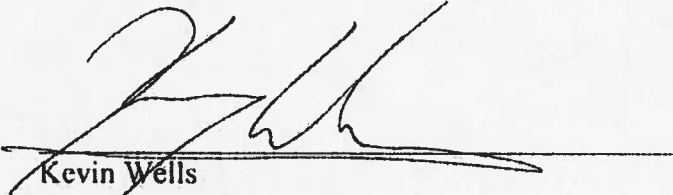


Nancy M. Bonnell  
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**ATTORNEY FOR THE STATE OF ARIZONA**

**E-BOOKS SETTLEMENT WITH APPLE INC.**

**STATE OF ARKANSAS**  
DUSTIN McDANIEL  
ATTORNEY GENERAL

A handwritten signature in black ink, appearing to read 'Kevin Wells', is written over a horizontal line.

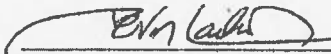
Kevin Wells  
Assistant Attorney General  
Consumer Protection Division  
Arkansas Attorney General's Office  
323 Center Street, Suite 500  
Little Rock, AR 72201  
(501) 682-8063

**ATTORNEY FOR THE STATE OF ARKANSAS**



**E-BOOKS SETTLEMENT WITH APPLE INC.**

**STATE OF COLORADO**  
**JOHN W. SUTHERS**  
**ATTORNEY GENERAL**



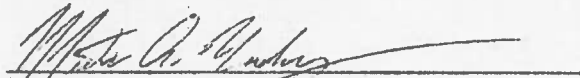
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Devin Laiho  
Assistant Attorney General  
1300 Broadway, Seventh Floor  
Denver, CO 80203  
(720) 508-6219

**ATTORNEY FOR THE STATE OF COLORADO**

**E-BOOKS SETTLEMENT WITH APPLE INC.**

**STATE OF DELAWARE**  
**JOSEPH R. BIDEN, III**  
**ATTORNEY GENERAL**



---

**Michael A. Undorf**  
**Deputy Attorney General**  
**Carvel State Office Building**  
**820 N. French Street, 5<sup>th</sup> Floor**  
**Wilmington, DE 19801**  
**(302) 577-8924**

**ATTORNEY FOR THE STATE OF DELAWARE**

**E-BOOKS SETTLEMENT WITH APPLE INC.**

**DISTRICT OF COLUMBIA  
IRVIN B. NATHAN  
ATTORNEY GENERAL**

**ELLEN S. EFROS  
DEPUTY ATTORNEY GENERAL, PUBLIC INTEREST DIVISION**

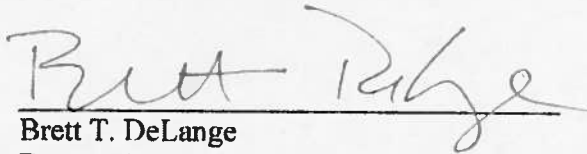


\_\_\_\_\_  
**Bennett Rushkoff  
Chief, Public Advocacy Section  
Catherine A. Jackson  
Assistant Attorney General  
441 Fourth St., N.W., Suite 600-S  
Washington, DC 20001  
(202) 442-9864**

**ATTORNEYS FOR THE DISTRICT OF COLUMBIA**

**E-BOOKS SETTLEMENT WITH APPLE INC.**

**STATE OF IDAHO**  
**LAWRENCE G. WARDEN**  
**ATTORNEY GENERAL**

A handwritten signature in black ink, appearing to read "Brett DeLange", is written over a horizontal line.

Brett T. DeLange  
Deputy Attorney General  
954 W. Jefferson, 2nd Floor  
P.O. Box 83720  
Boise, ID 83720-0010  
(208) 334-4114

**ATTORNEY FOR THE STATE OF IDAHO**

**E-BOOKS SETTLEMENT WITH APPLE INC.**

**STATE OF ILLINOIS  
LISA MADIGAN  
ATTORNEY GENERAL**

*Chadwick O. Brooker*

---

**Chadwick O. Brooker  
Assistant Attorney General  
James R. Thompson Center  
100 W Randolph Street  
Chicago, IL 60601  
(312) 793-3891**

**ATTORNEY FOR THE STATE OF ILLINOIS**

**E-BOOKS SETTLEMENT WITH APPLE INC.**

**STATE OF INDIANA  
GREGORY F. ZOELLER  
ATTORNEY GENERAL**

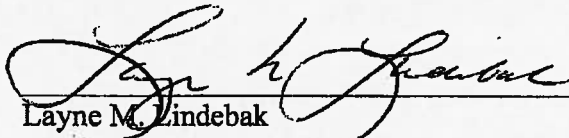
A handwritten signature in black ink, appearing to read "Jeremy R. Comeau", is written over a horizontal line.

**Jeremy R. Comeau  
Deputy Attorney General  
302 West Washington St., 5<sup>th</sup> Floor  
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(317) 232-6317**

**ATTORNEY FOR THE STATE OF INDIANA**

**E-BOOKS SETTLEMENT WITH APPLE INC.**

**STATE OF IOWA  
THOMAS J. MILLER  
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A handwritten signature in black ink, appearing to read "Layne M. Lindebak", is written over a horizontal line.

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Special Litigation Division  
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Hoover Office Building, Second Floor  
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**ATTORNEY FOR THE STATE OF IOWA**

**E-BOOKS SETTLEMENT WITH APPLE INC.**

**STATE OF KANSAS  
DEREK SCHMIDT  
ATTORNEY GENERAL**



---

Lynette R. Bakker  
Assistant Attorney General  
120 SW Tenth Ave., 2nd Floor  
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**ATTORNEY FOR THE STATE OF KANSAS**



**E-BOOKS SETTLEMENT WITH APPLE INC.**

**STATE OF LOUISIANA  
JAMES D. "BUDDY" CALDWELL  
ATTORNEY GENERAL**



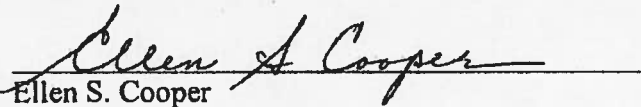
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**Stacie Lambert deBlieux  
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(225) 326-6458**

**ATTORNEY FOR THE STATE OF LOUISIANA**

**E-BOOKS SETTLEMENT WITH APPLE INC.**

**STATE OF MARYLAND  
DOUGLAS F. GANSLER  
ATTORNEY GENERAL**

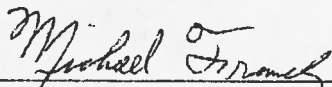


Ellen S. Cooper  
Chief, Antitrust Section  
Antitrust Division  
200 St. Paul Place, 19th Floor  
Baltimore, MD 21202-2021  
(410) 576-6470

**ATTORNEY FOR THE STATE OF MARYLAND**

**E-BOOKS SETTLEMENT WITH APPLE INC.**

**COMMONWEALTH OF MASSACHUSETTS  
MARTHA COAKLEY  
ATTORNEY GENERAL**



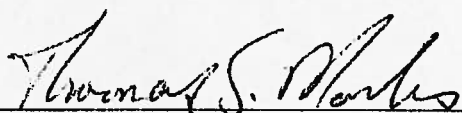
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Michael Franck  
Assistant Attorney General  
Antitrust Division  
1 Ashburton Place  
Boston, MA 02108  
(617) 727-2200

**ATTORNEY FOR THE COMMONWEALTH OF MASSACHUSETTS**

**E-BOOKS SETTLEMENT WITH APPLE INC.**

**STATE OF MICHIGAN  
BILL SCHUETTE  
ATTORNEY GENERAL**

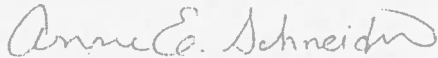
A handwritten signature in cursive script, reading "Thomas S. Marks", is written over a horizontal line.

**Thomas S. Marks  
Assistant Attorney General  
Corporate Oversight Division  
525 West Ottawa Street, 6<sup>th</sup> Floor  
Lansing, MI 48933  
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**ATTORNEY FOR THE STATE OF MICHIGAN**

**E-BOOKS SETTLEMENT WITH APPLE INC.**

**STATE OF MISSOURI  
CHRIS KOSTER  
ATTORNEY GENERAL**



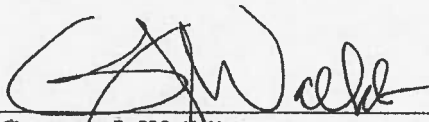
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**Anne E. Schneider**  
Assistant Attorney General  
PO Box 899  
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(573) 751-3376

**ATTORNEY FOR THE STATE OF MISSOURI**

**E-BOOKS SETTLEMENT WITH APPLE INC.**

**STATE OF NEBRASKA  
JON BRUNING  
ATTORNEY GENERAL**

A handwritten signature in black ink, appearing to read 'G. Walklin', is written over a horizontal line.

Gregory J. Walklin  
Assistant Attorney General  
2115 State Capitol  
Lincoln, NE 68509-8920  
(402) 471-3840

**ATTORNEY FOR THE STATE OF NEBRASKA**

**E-BOOKS SETTLEMENT WITH APPLE INC.**

**STATE OF NEW MEXICO**  
**GARY K. KING**  
**ATTORNEY GENERAL**



---

Nicholas M. Sydow  
Assistant Attorney General  
408 Galisteo St.  
Santa Fe, NM 87501  
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**ATTORNEY FOR THE STATE OF NEW MEXICO**

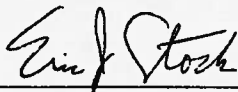
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**Apple Settlement Agreement**

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**APPLE INC. E-BOOK SETTLEMENT**

**STATE OF NEW YORK  
ERIC T. SCHNEIDERMAN  
ATTORNEY GENERAL**



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Eric J. Stock  
Bureau Chief  
Robert L. Hubbard  
Linda J. Gargiulo  
Assistant Attorneys General  
Antitrust Bureau  
120 Broadway, 26<sup>th</sup> Floor  
New York, NY 10271-0332  
(212) 416-8282  
[eric.stock@ag.ny.gov](mailto:eric.stock@ag.ny.gov)  
[robert.hubbard@ag.ny.gov](mailto:robert.hubbard@ag.ny.gov)  
[linda.gargiulo@ag.ny.gov](mailto:linda.gargiulo@ag.ny.gov)

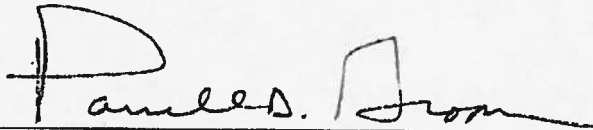
**ATTORNEYS FOR THE STATE OF NEW YORK**

**Apple Settlement Agreement**



**E-BOOKS SETTLEMENT WITH APPLE INC.**

**STATE OF NORTH DAKOTA  
WAYNE STENEHJEM  
ATTORNEY GENERAL**

A handwritten signature in black ink, appearing to read "Parrell D. Grossman", written over a horizontal line.

Parrell D. Grossman  
Director, Consumer Protection and Antitrust Division  
Gateway Professional Center  
1050 E Interstate Ave., Suite 200  
Bismarck, ND 58503-5574  
(701) 328-5570

**ATTORNEY FOR THE STATE OF NORTH DAKOTA**

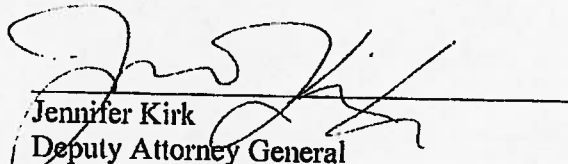
**E-BOOKS SETTLEMENT WITH APPLE INC.**

**COMMONWEALTH OF PENNSYLVANIA**

**KATHLEEN G. KANE**  
**ATTORNEY GENERAL**

**JAMES DONAHUE, III**  
**Executive Deputy Attorney General**

**TRACY WERTZ**  
**Chief Deputy Attorney General**

  
Jennifer Kirk  
Deputy Attorney General  
Attorney ID No.: 90544

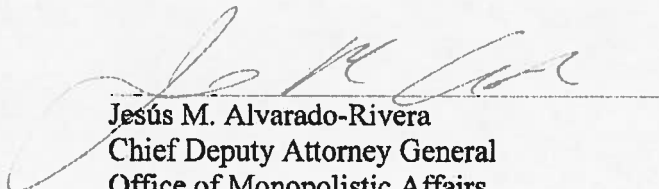
Dated: 6/26/2014

Office of Attorney General  
Antitrust Section  
14<sup>th</sup> Floor, Strawberry Square  
Harrisburg, PA 17120  
(717) 787-4530  
(717) 787-1190 (Fax)

**ATTORNEYS FOR THE COMMONWEALTH OF PENNSYLVANIA**

**E-BOOKS SETTLEMENT WITH APPLE INC.**

**COMMONWEALTH OF PUERTO RICO  
HON. CESAR MIRANDA RODRIGUEZ  
ATTORNEY GENERAL**

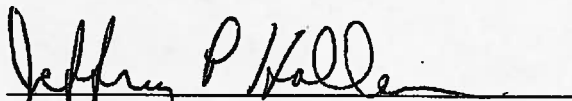


\_\_\_\_\_  
Jesús M. Alvarado-Rivera  
Chief Deputy Attorney General  
Office of Monopolistic Affairs  
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**ATTORNEY FOR THE COMMONWEALTH OF PUERTO RICO**

**E-BOOKS SETTLEMENT WITH APPLE INC.**

**STATE OF SOUTH DAKOTA**  
**MARTY J. JACKLEY**  
**ATTORNEY GENERAL**



Jeffrey P. Hallem  
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**ATTORNEY FOR THE STATE OF SOUTH DAKOTA**

**E-BOOKS SETTLEMENT WITH APPLE INC.**

**STATE OF TENNESSEE  
ROBERT E. COOPER, JR.  
ATTORNEY GENERAL & REPORTER**

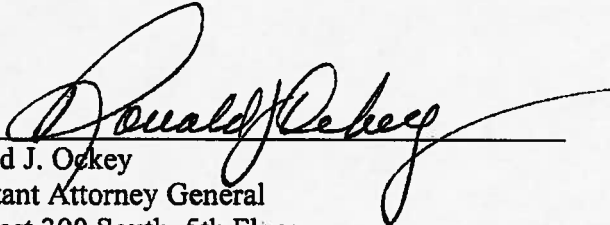
A handwritten signature in black ink, appearing to read "Victor J. Doman, Jr.", is written over a horizontal line.

Victor J. Doman, Jr.  
Senior Antitrust Counsel  
500 Charlotte Avenue  
P. O. Box 20207  
Nashville, TN 37202  
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**ATTORNEY FOR THE STATE OF TENNESSEE**

**E-BOOKS SETTLEMENT WITH APPLE INC.**

**STATE OF UTAH  
SEAN D. REYES  
ATTORNEY GENERAL**


A handwritten signature in black ink, appearing to read "Ronald J. Ozkey", is written over a horizontal line. The signature is fluid and cursive.

Ronald J. Ozkey  
Assistant Attorney General  
160 East 300 South, 5th Floor  
PO Box 140872  
Salt Lake City, UT 84114-0872  
(801) 366-0359

**ATTORNEY FOR THE STATE OF UTAH**

**E-BOOKS SETTLEMENT WITH APPLE INC.**

**STATE OF VERMONT  
WILLIAM H. SORRELL  
ATTORNEY GENERAL**



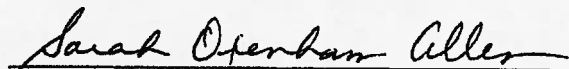
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**Jill S. Abrams  
Assistant Attorney General  
109 State Street  
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(802) 828-5479**

**ATTORNEYS FOR THE STATE OF VERMONT**

**E-BOOKS SETTLEMENT WITH APPLE INC.**

**COMMONWEALTH OF VIRGINIA  
MARK R. HERRING  
ATTORNEY GENERAL**



Sarah Oxenham Allen  
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**ATTORNEYS FOR THE COMMONWEALTH OF VIRGINIA**



**E-BOOKS SETTLEMENT WITH APPLE INC.**

**STATE OF WEST VIRGINIA  
PATRICK MORRISFY  
ATTORNEY GENERAL**



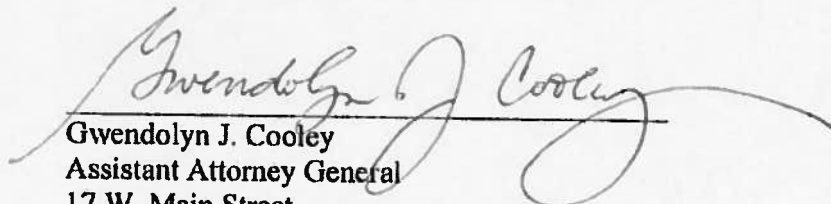
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Douglas L. Davis  
Assistant Attorney General  
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(304) 558-8986

**ATTORNEYS FOR THE STATE OF WEST VIRGINIA**

**E-BOOKS SETTLEMENT WITH APPLE INC.**

**STATE OF WISCONSIN  
J.B. VAN HOLLEN  
ATTORNEY GENERAL**

  
Gwendolyn J. Cooley  
Assistant Attorney General  
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(608) 261-5810

**ATTORNEYS FOR THE STATE OF WISCONSIN**

***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 APPLE SETTLEMENT AGREEMENT**

**EXHIBIT B**

**DECLARATION OF KIM SCHMIDT  
FOR RUST CONSULTING**

**UNITED STATES DISTRICT COURT  
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.,**

**Civil Action  
No. 12-cv-03394**

**Plaintiffs,**

**v.**

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

**Defendants**

**DECLARATION OF KIM SCHMIDT**

**KIM SCHMIDT deposes and says:**

1. I am a Senior Vice President for Rust Consulting, Inc. ("Rust Consulting"), which has been retained by the Plaintiff States Attorneys General and Class Counsel (collectively, "Plaintiffs") to serve as the Claims Administrator for the settlement with Plaintiffs and Apple Inc. ("Settlement"). I am responsible for supervising the claims administration services provided by Rust Consulting for the parties in this action. My business address is 201 S. Lyndale Avenue, Faribault, MN 55021. My telephone number is (612) 359-2872. I am authorized and qualified to make this declaration on behalf of Rust Consulting and myself.

2. I submit this declaration in connection with the above-captioned civil action at the request of Counsel for Plaintiffs.
3. Rust Consulting, Inc. is a national leader in the class action settlement administration industry. Rust is a wholly-owned subsidiary of SourceHOV Holdings, Inc. and administers settlements and projects within the legal, public, and business sectors. Rust Consulting has provided claims administration services for class actions in cases involving antitrust, consumer, finance, insurance and healthcare, labor and employment, property, securities, and telecom related settlements, as well as mass tort matters.
4. Rust Consulting specializes in class action notification and claims administration, including direct mail notification, published media campaigns, telephone support services, claim processing, and monetary distribution. In its 35-year history, Rust has provided services for more than 3,500 projects and distributed billions of dollars in settlement assets.
5. Our experience includes the administration of large and complex cases such as *Authors' Guild v. Google, Inc.*, No. 1:05-CV-08136 (S.D.N.Y.); *In re Dynamic Random Access Memory (DRAM) Antitrust Litigation*, No. M-02-1486 & MDL 1486 (N.D. Cal.); *Microsoft I-V Cases* No. J.C.C.P. 4106 (Cal. Super. Ct. S.F. County); *Naef v. Masonite Corp.*, No. CV 94-4033 (Ala. Cir. Ct. Mobile County); *SEC v. Federal National Mortgage Association*, No. 1:06-CV-00959 (D.D.C.); *Sullivan v. DB Investments, Inc.*, No. 04-2819 (D.N.J.); and *In re Motorola Securities Litigation*, No. 03-C-00287 (N.D. Ill.). Attached as Exhibit A is additional information on Rust Consulting.

### Consulting Services

6. Rust Consulting was engaged to consult and coordinate on the administration process for the Settlement. We will provide notice and claims administration services in order to facilitate the provision of notice and to distribute and/or administer the distribution of any settlement funds paid to Plaintiffs in connection with the Settlement. This work will include consulting and coordination with the e-book retailers for electronic notification and the distribution of credit payments, consulting and coordination with Kinsella Media LLC (“Kinsella”) regarding the Notice Plan and Notices, noticing, designing and programming systems, toll-free IVR telephone support, website administration, exclusion and objection tracking, claimant correspondence, claims processing, validation, and quality control, payment calculation and distribution, reporting, and computer operations.
7. Rust Consulting, as Claims Administrator, and Kinsella, as Notice Provider, worked together in the Prior Settlements reached between the Attorneys General of 49 states, the District of Columbia, and five U.S. territories and commonwealths, and the following publishers: Hachette Book Group, Inc., HarperCollins Publishers LLC, Simon & Schuster, Inc. and Simon & Schuster Digital Sales, Inc.
8. Rust Consulting and Kinsella also worked together in the Prior Settlements reached between the Plaintiff States<sup>1</sup>, the Settlement Class<sup>2</sup>, and the publishers Holtzbrinck Publishers, LLC, d/b/a Macmillan and Penguin Group (USA), Inc.

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<sup>1</sup> “Plaintiff States” are the States and Commonwealths of Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, District of Columbia, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Maryland, Massachusetts, Michigan, Missouri, Nebraska, New Mexico, New York, North Dakota, Ohio, Pennsylvania, Puerto Rico, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, West Virginia, and Wisconsin.

<sup>2</sup> “Settlement Class” includes all persons who purchased E-books published by the named Publishers during the period from April 1, 2010 until May 21, 2012, who resided in any U.S. State, Commonwealth or Territory, other than Plaintiff States, at the time of their purchase.

9. Rust Consulting and Kinsella will work cooperatively with Plaintiffs to create and implement a Notice Plan that is the same as or similar to those approved in the Prior Settlements, including direct notice supplemented with paid media notice and earned media outreach.
10. Given the ongoing appeals, Plaintiffs and Apple recommend that the form and content of all the Notices proposed herein be presented to the Court for review and approval after the Final Liability Decision has been issued. Rust Consulting and Kinsella are available to assist with the drafting of the notices in a clear and concise form once the relevant appeals have been resolved or upon instruction from Plaintiffs or the Court.

#### **E-book Retailer Coordination**

11. Most E-book retailers require customers to create accounts and provide a valid email address before one can purchase an E-book. In addition, most E-book retailers track each and every E-book purchase. This information provides an unusual opportunity to deliver direct notice to approximately 95% or more of eligible consumers.
12. Rust Consulting will work cooperatively with Plaintiffs to coordinate with leading e-book retailers to implement the Settlement. The e-book retailers maintain the customer records and to the extent these are available, notice will be provided directly to customers via email.
13. Six retailers (Amazon, Barnes & Noble, Apple, Kobo, Sony, and Google) assisted in providing notice email to the 23.27 million individual customers who purchased qualifying E-books. Four of these retailers (Amazon, Barnes & Noble, Kobo, and Google) have agreed to identify and maintain in their own internal system, during the pendency of this litigation, the information for customers who are eligible to receive Apple Settlement funds ("Eligible Customers"). Or, if they no longer service their Eligible Customers or are

unable to maintain this customer information, they will provide Counsel for Plaintiffs with notice of the changed circumstances and they will work with Rust Consulting and Counsel for Plaintiffs to determine a plan by which their customers will be noticed and receive an award (if any). These four retailers (Amazon, Barnes & Noble, Kobo, and Google) have also agreed to send an initial notice email to Eligible Customers when directed by this Court. Apple and Sony have provided the Claims Administrator all necessary contact information so it can send a similar notice email to all Eligible Customers identified by Apple and Sony. The Claims Administrator will ensure that the contact information for the Apple and Sony Eligible Customers is maintained during the pendency of this litigation.

14. Based on the request of Counsel for Plaintiffs, Rust Consulting will make it possible for Eligible Consumers to update their contact information during the pendency of this litigation through the settlement website at [www.ebookagsettlements.com](http://www.ebookagsettlements.com).
15. The Retailer Email will describe, in plain, easily understood language, the basic elements of Plaintiffs' lawsuits, including important deadlines, and give notice of the proposed Settlement and Eligible Consumers' right to opt-out. The Retailer Email will also identify the website and toll-free phone number that Eligible Consumers can go to or call in order to receive the Detailed Notice, which will contain more detail about the Settlement and Eligible Consumers' rights.
16. To supplement the Retailer Email notice, where possible, Rust will send postcard notices to Eligible Consumers for whom a correct email address could not be identified in the Prior Settlements.



### **Telephone Support**

17. As part of the notification process, Rust Consulting will obtain a toll-free telephone number for callers to obtain information from an automated, interactive voice recording system. The line will allow callers the ability to listen to commonly asked questions and answers related to the settlements, request a Claim Form or speak to a Customer Service Representative.
18. The toll-free settlement information line will:
- a) Be staffed by live customer service representatives during normal business hours.
  - b) Become operational commencing with the start of the electronic email notification period.
  - c) Be included in any press releases, Notices, and Claim Forms that are distributed and prominently featured on the settlement website.

### **Settlement Website**

19. Rust Consulting will maintain the existing settlement website, and add any additional information or documents upon the request of Plaintiffs or the Court. Settlement notifications will direct customers to the settlement website where potentially Eligible Consumers will be able to change their payment option from a credit to a check, file a Claim Form and provide supporting documentation online, and/or obtain general information regarding the settlement. The website will include (at a minimum):
- a) Court settlement documents,
  - b) the Detailed Notice once finalized and approved by the Court,
  - c) answers to commonly asked questions,

- d) toll-free number and email address for additional questions,
- e) other settlement related documents,
- f) important dates, and
- g) procedures for submission of requests for exclusion, objections, or notices of appearance for the Settlement Hearing.

### **Requests for Exclusions and Claimant Correspondence**

20. Rust Consulting will receive and process all requests for exclusions to the Settlement. Exclusion requests received by Rust will be date stamped, processed, and distributed to Counsel for Plaintiffs for review.
21. Rust Consulting will receive, process, and respond where necessary, to all paper and email correspondence received from potentially eligible consumers. This will include requests for a Claim Form, notification for changes in names and addresses, and any other general correspondence regarding the settlements.

### **Claim Forms**

22. Rust Consulting will mail Claim Forms upon request to potentially Eligible Consumers. Consumers will also have the option to submit their Claim Form by mail or electronically through the settlement website.
23. Rust Consulting will be responsible for receiving and processing all Claim Forms filed by potentially Eligible Consumers.
24. Claimants with an incomplete or deficient Claim Form will be mailed a letter describing the deficiency and if appropriate, requesting additional information. Rust will process

deficiency letter responses from potentially Eligible Consumers. Claims resolved by a deficiency response will be included in the distribution. Claims not resolved in the deficiency process will not be included in the distribution.

#### **Distribution of Settlement Awards**

25. At the close of the notice and claim period, and if a distribution is to be made, Rust Consulting will coordinate the *pro rata* allocation of the Consumer Fund to Eligible Consumers.
26. Rust will work cooperatively with the Escrow Agent to provide information for tax filing and tax reporting.

I declare that the foregoing is true and correct to the best of my knowledge.

Executed this 15th day of July, 2014 in Faribault, Minnesota.



---

Kim Schmidt, Senior Vice President

***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 APPLE SETTLEMENT AGREEMENT**

# **EXHIBIT C**

**PROPOSED ORDER PRELIMINARILY  
APPROVING APPLE SETTLEMENT**

**UNITED STATES DISTRICT COURT  
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,**

**v.**

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

**Defendants**

**Civil Action  
No. 12-cv-03394**

**[PROPOSED] ORDER PRELIMINARILY APPROVING APPLE SETTLEMENT**

Plaintiff States<sup>1</sup> and Settlement Class (“Plaintiffs”) and Apple Inc. (“Apple”) entered into a Settlement Agreement dated July 10, 2014 (“Apple Settlement Agreement”). This Apple Settlement Agreement has been presented to the Court for Preliminary Approval pursuant to Sections 4, 4C, 15 and 16 of the Clayton Act, 15 U.S.C. §§ 15, 15c, 25 and 26. Upon review and consideration of the Apple Settlement Agreement, Plaintiffs’ Motion and Plaintiffs’ Memorandum in Support of Motion for Preliminary Approval of Settlements, and the attachments thereto, all of which have been filed with the Court, and for good cause appearing therein;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

**I. GENERAL FINDINGS**

1. The Court has jurisdiction over this action and each of the Parties.
2. The Court, for purposes of this Order, adopts the definitions set forth in the Apple Settlement Agreement.
3. The Court, for purposes of this Order, finds that the Attorneys General are representatives of natural persons in Plaintiff States and have authority to settle and release the Claims of the natural persons who are Eligible Consumers in Plaintiff States.
4. The Court, for purposes of this Order, conditionally certifies the following class pending final approval of the Apple Settlement Agreement, and finds that it meets all the prerequisites of Rule 23 of the Federal Rules of Civil Procedure:

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<sup>1</sup> “Plaintiff States” means the following States, Commonwealths and Territories of the United States, by and through their Attorneys General, in their sovereign capacity and as *parens patriae* on behalf of Consumers in such Plaintiff States: Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, District of Columbia, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Maryland, Massachusetts, Michigan, Missouri, Nebraska, New Mexico, New York, North Dakota, Ohio, Pennsylvania, Puerto Rico, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, West Virginia, and Wisconsin.

All persons in the Non-Litigating Jurisdictions who purchased eBooks between April 1, 2010 and May 21, 2012, published by Hachette Book Group, Inc. (“Hachette”), HarperCollins Publishers L.L.C. (“HarperCollins”), Holtzbrinck Publishers, LLC d/b/a Macmillan (“Macmillan”), Penguin Group (USA) Inc. (“Penguin”), or Simon & Schuster, Inc. (“Simon & Schuster”) directly from that publisher (including any of its imprints) after the adoption of the agency model by that publisher. The “Non-Litigating Jurisdictions” are American Samoa, California, Florida, Georgia, Guam, Hawaii, Kentucky, Maine, Minnesota, Mississippi, Montana, Nevada, New Hampshire, New Jersey, North Carolina, Northern Mariana Islands, Oklahoma, Oregon, Rhode Island, South Carolina, U.S. Virgin Islands, Washington, and Wyoming. Excluded from the Class are Defendants, their employees, co-conspirators, officers, directors, legal representatives, heirs, successors, and wholly or partly owned subsidiaries of affiliated companies, as well as the Honorable Denise L. Cote and persons described in 28 U.S.C. § 455(b)(4)-(5).

5. The Court, for purposes relating to the Apple Settlement Agreement, confirms the Attorneys General of the States of Texas, Connecticut and Ohio as Liaison Counsel for Plaintiff States.

6. The Court designates Hagens Berman Sobol Shapiro LLP and Cohen Milstein Sellers & Toll PLLC as Counsel for the Settlement Class.

7. The Court designates Anthony Petru, Thomas Friedman, and Shane S. Davis as the Class Plaintiffs.

8. The Court confirms the appointment of Fifth Third Bank as Escrow Agent, and Kinsella Communications and Rust Consulting as the Notice and Claims Administrators for purposes of the implementation of the Apple Settlement Agreement.

## **II. PRELIMINARY APPROVAL OF SETTLEMENT**

9. The Court finds that the Apple Settlement Agreement appears to be the product of serious, informed, non-collusive negotiations, have no obvious deficiencies, and fall within the range of possible approval.

10. The Court finds that the settlement encompassed by the Apple Settlement Agreement is entitled to preliminary approval.

11. The Court finds the Apple Settlement Agreement satisfies the requirements of 15 U.S.C. 15, 15c and due process.

12. The terms of the Apple Settlement Agreement are hereby preliminarily approved.

### **III. NOTICE OF SETTLEMENT**

13. The Parties have requested that notice to Eligible Consumers be deferred until after the Final Liability Decision has been issued. The Court finds that delaying notice of this settlement is within the discretion of this Court and finds that Eligible Consumers will be best informed if notice is deferred. The Court approves the Parties' request.

14. Accordingly, this Court orders that within thirty (30) days of the Final Liability Decision, Plaintiffs shall submit to this Court:

- a) A proposed notice plan;
- b) Proposed forms of notice;
- c) A distribution plan for settlement monies which shall address both: (1) the distribution of the settlement funds to be paid by Apple, if any, to consumers; and (2) distribution of any remaining settlement funds paid by the Publisher Defendants (Hachette, HarperCollins, Macmillan, Penguin and Simon & Schuster) to consumers which were unable to be paid to consumers in the initial distribution; and
- d) A proposed schedule for all events up to and including the fairness hearing.



#### **IV. REQUESTS FOR EXCLUSION**

15. All Eligible Consumers who submit valid and timely requests for exclusion from the Apple Settlement during the Notice Period pursuant to, and complying with, instructions contained in the Notice, shall not have any rights under the Apple Settlement Agreement and shall not be bound by the Apple Settlement Agreement or the final judgment as it relates to the Apple Settlement.

16. All eligible Consumers who do not submit valid and timely requests for exclusion from the Apple Settlement during the Notice Period pursuant to, and complying with, instructions contained in the Notice shall be bound by the Apple Settlement and by the final judgment, in the event that the Apple Settlement Agreement is finally approved by the Court.

#### **V. CONFIDENTIALITY**

17. No information received by the Notice and Claims Administrator in connection with the Apple Settlement that pertains to a particular Eligible Consumer, other than information contained in a request for exclusion or in an objection, shall be disclosed to any person or entity other than as directed by the Court.

#### **VI. OTHER PROVISIONS**

18. The Apple Settlement Agreement, subject to this Court's final approval, fully and finally compromise, settle and resolve Plaintiffs' Claims subject to the terms and conditions set forth in the Apple Settlement Agreement.

19. If the Apple Settlement Agreement is terminated or otherwise does not become effective in accordance with the provisions of the Apple Settlement Agreement, the Apple Settlement and all proceedings had in connection therewith shall be null and void, except insofar

as expressly provided to the contrary in the Apple Settlement Agreement, and without prejudice to the status quo ante rights of Plaintiffs and Apple.

20. Neither this Order nor the Apple Settlement Agreement shall constitute any evidence or admission of liability by Apple nor shall it be offered in evidence in this or any other proceeding except to consummate or enforce the Apple Settlement Agreement or the terms of this Order, or by Apple in connection with any action asserting claims that are released by the terms of the Apple Settlement Agreement.

**SO ORDERED.**

DATED: \_\_\_\_\_, 2014

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HON. DENISE L. COTE  
UNITED STATES DISTRICT COURT JUDGE