

U.S. Department of Justice

Antitrust Division

Mark W. Ryan
Director of Litigation
Direct Dial: (202) 532-4753
e-mail: mark.w.ryan@usdoj.gov

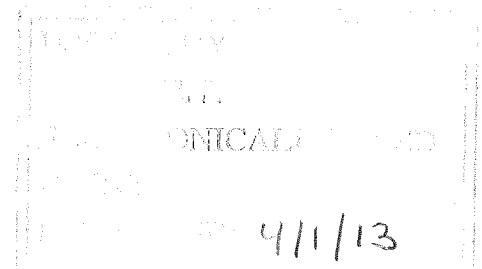
950 Pennsylvania Avenue, NW
Suite 3109
Washington, DC 20530

MEMO ENDORSED

March 29, 2013

SENT ELECTRONICALLY

Honorable Denise L. Cote
United States District Court
Southern District of New York
500 Pearl Street, Room 1610
New York, NY 10007



Re: *United States, et al. v. Apple, Inc., et al.*, Case No. 12-CIV-2826 (DLC)

Dear Judge Cote:

The United States asks that the Court excuse costly *Federal Register* publication of the latest set of public comments submitted in this matter, as it did with respect to the initial set of comments (Docket No. 60), and instead authorize electronic publication for good cause, pursuant to 15 U.S.C. § 16(d). The United States proposes to meet its statutory obligations by posting public comments on the Antitrust Division’s website, and publishing the relevant internet address in the *Federal Register*. The United States conferred with counsel for the litigating defendants and none opposes this motion.

On December 18, 2012, the United States filed a proposed Final Judgment as to Defendants The Penguin Group, a division of Pearson PLC, and Penguin Group (USA), Inc. (collectively “Penguin”) (Docket No. 162). As required by the Antitrust Procedures and Penalties Act, 15 U.S.C. § (b)-(h) (the “Tunney Act”), the United States caused notices to be published in the *Federal Register*, the *Washington Post*, and the *New York Post*, providing instructions for public comment on the proposed Final Judgment as to Penguin. Only three individuals or groups submitted comments on the proposed Final Judgment as to Penguin, each of which commented previously on the proposed Final Judgment as to the original settling defendants.

In compliance with the Tunney Act and the Court’s January 7, 2013 Order (Docket No. 169), the United States will, no later than April 5, file with the Court and serve on all parties to this action a Response to Comments, which will include copies of the comments submitted, as an attachment. The Response to Comments will be published in the *Federal Register* and will

appear, along with electronic versions of the public comments, on the Antitrust Division's website.

The Tunney Act, as amended in 2004, authorizes the United States to publish the public comments by "alternative means" pursuant to 15 U.S.C. § 16(d) when the costs of *Federal Register* publication exceed the benefits thereof. In connection with the proposed Final Judgment as to Penguin, the three commenters submitted, in total, 56 pages of comments, publication of which in the *Federal Register* will require photographic treatment at a rate of \$522 per page, generating publication costs of more than \$29,000.¹ The available alternative means of publication of these comments makes this significant expenditure of taxpayer funds unwarranted.

Publication of these public comments in the *Federal Register* does not confer any significant public interest benefit that cannot be better served by electronic publication. Indeed, at the time of passage of the 2004 Tunney Act amendment authorizing alternative publication, Senator Leahy of the Judiciary Committee noted that *Federal Register* publication can offer "little benefit, because those materials are, if anything, more accessible on the Web than in a library." 150 CONG. REC. 6,328 (2004). Likewise, Senator Kohl opined that alternatives such as "posting the proposed decrees electronically, [] are sufficient to inform interested persons of the proposed consent decree." 150 CONG. REC. 6,332 (2004).

This court recognized the benefits of electronic publication when it excused *Federal Register* publication of comments submitted here in connection with the initial Tunney Act process.² The United States intends to post the latest public comments in the same internet location, allowing convenient access to all public comments submitted in this case.

Accordingly, the United States asks that the Court excuse publication of the public comments in the *Federal Register* and, instead, allow comments to be posted on the Antitrust Division's website in conjunction with *Federal Register* publication of the internet address at which comments can be read and downloaded.

Respectfully Submitted,

s/Mark Ryan

Mark Ryan
Counsel for the United States

Granted.
Dariusz Gole
March 29, 2013

cc: Provided electronically to all parties in this action

¹ See Government Printing Office Circular Letter No. 851 (June 8, 2012), available at: <http://www.gpo.gov/pdfs/customers/cir851.pdf>.

² See Minute Order of June 11, 2012 (Docket No. 60). Other courts have reached the same conclusion. See *United States v. United Techs. Corp., et al.*, No. 1:12-cv-1230-RC (D.D.C. Mar. 25, 2013) (attached as Exhibit 1); *United States v. American Express Co., et al.*, No. 10-CV-4496-NGG (E.D.N.Y. Jun. 20, 2011) (attached as Exhibit 2); *United States v. KeySpan Corp.*, No. 1:10-cv-01415-WHP (S.D.N.Y. Jun. 28, 2010) (attached as Exhibit 3); *United States, et al. v. Ticketmaster Entertainment, Inc., et al.*, No. 1:10-cv-00139-RMC (D.D.C. Jun. 15, 2010) (attached as Exhibit 4).

EXHIBIT 1

**U.S. District Court
District of Columbia (Washington, DC)
CIVIL DOCKET FOR CASE #: 1:12-cv-01230-RC**

UNITED STATES OF AMERICA v. UNITED
TECHNOLOGIES CORPORATION et al
Assigned to: Judge Rudolph Contreras
Cause: 15:1 Antitrust Litigation

Date Filed: 07/26/2012
Jury Demand: None
Nature of Suit: 410 Anti-Trust
Jurisdiction: U.S. Government Plaintiff

Date Filed	#	Docket Text
03/25/2013		MINUTE ORDER Upon consideration of the plaintiff's consent motion to be excused from publishing in the Federal Register the attachments to the Comment of Mr. Jefferis <u>33</u> , it is hereby ORDERED that the motion is GRANTED. SO ORDERED. Signed by Judge Rudolph Contreras on 3/25/13. (TA) (Entered: 03/25/2013)
03/25/2013		MINUTE ORDER Upon consideration of the plaintiff's consent motion to file the public comments regarding the proposed final judgment in this matter under seal <u>34</u> , it is hereby ORDERED that the motion is GRANTED. It is FURTHER ORDERED that the redacted version of the public comments shall remain on the public docket. SO ORDERED. Signed by Judge Rudolph Contreras on 3/25/13. (TA) (Entered: 03/25/2013)

EXHIBIT 2

FILED

IN CLERK'S OFFICE
U S DISTRICT COURT E.D.N.Y.

★ JUN 22 2011 ★

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

BROOKLYN OFFICE
ORDER

10-CV-4496 (NGG) (RER)

-----X
UNITED STATES OF AMERICA, STATE OF
CONNECTICUT, STATE OF IOWA, STATE OF
MARYLAND, STATE OF MICHIGAN, STATE OF
MISSOURI, STATE OF OHIO, STATE OF TEXAS,
STATE OF ILLINOIS, STATE OF TENNESSEE,
STATE OF MONTANA, STATE OF NEBRASKA,
STATE OF IDAHO, STATE OF VERMONT,
STATE OF UTAH, STATE OF ARIZONA, STATE
OF RHODE ISLAND, STATE OF HAWAII, and
STATE OF NEW HAMPSHIRE,

Plaintiffs,

-against-

AMERICAN EXPRESS COMPANY, AMERICAN
EXPRESS TRAVEL RELATED SERVICES
COMPANY, INC., MASTERCARD
INTERNATIONAL INCORPORATED, and VISA
INC.,

Defendants.

-----X
NICHOLAS G. GARAUFGIS, United States District Judge.

On October 4, 2010, the United States of America and several states (the "State Plaintiffs") filed a Complaint against Defendants, alleging various violations of antitrust law under the Sherman Act, 15 U.S.C. § 1. (Compl. (Docket Entry # 1).) The same day, the United States and several State Plaintiffs filed a Notice of Settlement with respect to Defendants MasterCard International Incorporated and Visa Inc. ("MasterCard and Visa"), proposing a consent judgment. (Docket Entry # 4.) Pursuant to 15 U.S.C. § 16(d), the United States then solicited public comments regarding the proposed consent judgment against MasterCard and Visa. During this comment period, the United States received six comments, some with voluminous attachments, totaling over 400 pages. (Docket Entry # 119-1.) Under 15 U.S.C.

EXHIBIT 2

§ 16(d)(2), the United States is required to publish these comments in the Federal Register unless, “[u]pon application by the United States, the district court . . . find[s] that the expense of publication in the Federal Register exceeds the public interest benefits to be gained from such publication.”

The United States now seeks to excuse publication of the public comments in the Federal Register. (Docket Entry # 120.) The United States claims that it “would incur expenses of approximately \$200,000 to publish” all of the public comments in the Federal Register. (*Id.* at 2-3.) The United States has also stated that it “has filed all public comments, including the exhibits at issue, with this Court [and that the] United States will also post all comments and exhibits on the public website of the Antitrust Division of the United States Department of Justice.” (*Id.* at 2.) No party has objected to the United States’ request. (*Id.* at 1.)

Nonetheless, given the relative permanence of the Federal Register, it is desirable for the United States to at least identify the electronic location of the public comments by a notice in the Federal Register. Accordingly, the United States is excused from publishing the substance of the public comments in the Federal Register, see 15 U.S.C. § 16(d)(2), except for a notice stating that it received six public comments in this case, and that the comments and the United States’ responses are available on the DOJ’s website. In mentioning that this material is available on the DOJ’s website, the United States should also include an appropriate, permanent website address pointing to those comments online. The United States shall also certify to the court that it has published such notice by proof of publication filed on the court’s docket.

SO ORDERED.

Dated: Brooklyn, New York
June 20, 2011

NICHOLAS G. GARAUFI
United States District Judge

EXHIBIT 3

USDC SDNY
DOCUMENT
ELECTRONICALLY FILED
DOC #:
DATE FILED: 6/28/10

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,)
)
)
Plaintiff,)
)
v.)
)
KEYSPAN CORPORATION,)
)
Defendant.)

Civil Action No.: 1:10-cv-01415-WHP
Hon. William H. Pauley III

ORDER

The Court, having considered the application of the United States, finds that good cause exists pursuant to 15 U.S.C. § 16(d)(2) to excuse the publication of the attachments to the Comments of Mr. Nelson M. Stewart in the *Federal Register*,

GRANTS the United States's Unopposed Motion to Excuse *Federal Register* Publication of Attachments to the Stewart Comments, and

AUTHORIZES, as an alternative method of public dissemination, the publication in the *Federal Register* of the Stewart Comments with a link to the United States Department of Justice website where the attachments to those comments can be viewed and downloaded.

IT IS SO ORDERED by the Court, this 28 day of June 2010.



Hon. William H. Pauley, III

EXHIBIT 4

CLOSED,TYPE-A

**U.S. District Court
District of Columbia (Washington, DC)
CIVIL DOCKET FOR CASE #: 1:10-cv-00139-RMC**

UNITED STATES OF AMERICA et al v. TICKETMASTER
ENTERTAINMENT, INC. et al
Assigned to: Judge Rosemary M. Collyer
Cause: 15:25 Clayton Act

Date Filed: 01/25/2010
Date Terminated: 08/20/2010
Jury Demand: None
Nature of Suit: 410 Anti-Trust
Jurisdiction: U.S. Government Plaintiff

Date Filed	#	Docket Text
06/15/2010	<u>12</u>	Unopposed MOTION for Order <i>Excusing the Publication of the Attachments to the Comments in the Federal Register</i> by UNITED STATES OF AMERICA (Attachments: # <u>1</u> Text of Proposed Order, # <u>2</u> Certificate of Service)(Hoag, Aaron) (Entered: 06/15/2010)
06/15/2010		MINUTE ORDER granting <u>12</u> Unopposed Motion for Order Excusing the Publication of the Attachments to the Comments in the Federal Register. The United States shall ensure that the Federal Register indicate that these attachments are available, specifying the website address where these attachments can be located. Signed by Judge Rosemary M. Collyer on 6/15/10. (lcrmc1) (Entered: 06/15/2010)