BOOKS·A·MILLION

June 20, 2012

John R. Read
Chief, Litigation III Section
Antitrust Division
U.S Department of Justice
450 5th Street, NW, Suite 4000
Washington, DC 20530

Re: *U. S. v. Apple, Inc., et al.*, Civil Action No. 1:12-CV-2826 Proposed Final Judgment as to Defendants Hachette, HarperCollins, and Simon & Schuster

Dear Mr. Read:

Books-A-Million, Inc. ("Books-A-Million") is a book retailer founded in 1917 that operates bookstores and sells books and e-books on its website. Books-A-Million respectfully submits these comments in accordance with Section 2(b) and 2(d) of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)-(h) (the "Tunney Act") in response to the Proposed Final Judgment (the "Settlement") between the United States and defendants Hachette Book Group, Inc., HarperCollins Publishers L.L.C. and Simon & Schuster, Inc. (together, "Settling Defendants"), filed with the U.S. District Court for the Southern District of New York (the "Court") on April 11, 2012. Pursuant to the Tunney Act, the Court must determine if the Settlement is in the public interest including, as noted in the Government's Competitive Impact Statement, consideration of whether the proposed decree "may positively harm third parties" and whether "there is a factual foundation for the government's decision." Competitive Impact Statement, at 19. The Court must also consider "the relationship between the remedy secured and the specific allegations set forth in the United States' complaint." *Id.*

From its position as a substantial retailer of both print and e-books, Books-A-Million respectfully asserts that the prospective restrictions in the Settlement, which impact participants in segments of the market beyond those publishers whose conduct is at issue, do not meet these standards. Such vertical restrictions would necessarily harm innocent third parties by restricting the business freedom of the third-party retailers downstream from the defendant publishers. Furthermore, the Settlement fails to demonstrate that the vertical measures it proposes are necessary to remedy the horizontal collusion that is the basis for the antitrust violations alleged in the Government's Complaint. Thus, the vertical features of the Settlement have not been shown to be in the best interest of the public. To the contrary, they will cause significant harm to consumers by reducing competition in the book industry.

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I. The Settlement will impose unnecessary conditions on third parties that are not in the public interest.

The alleged anticompetitive conduct on which the Complaint rests is horizontal collusion among publishers, the upstream segment of the industry. *See* Complaint at ¶ 5 ("This change in business [to the agency] model would not have occurred without the conspiracy among the Defendants."); *see also* Complaint at ¶ 102 (linking the asserted anticompetitive effects to "Defendants' agreement"). Assuming the Settling Defendants' actions meet the legal standard for collusion, Books-A-Million supports the Government taking enforcement action against such conduct, and its imposition of the protections in the Settlement against any future collusion. Under the Settlement, these include a prohibition against any such collusive agreements, as well as against exchanges of competitively sensitive information, that could facilitate such agreements, and extensive antitrust compliance requirements. Settlement §§ V.E and V.F.

The Settlement, however, reaches over and above these remedies for the Settling Defendants' alleged anticompetitive horizontal conduct to impose prospective vertical restrictions that go well beyond the horizontal collusion allegations giving rise to the Complaint. Settlement §§ V.A., V.B., V.C., V.D. and VI.B. These provisions of the Settlement, by their nature, would necessarily restrict third-party retailers as the counterparties to the Settling Defendant's vertical distribution arrangements and result in harm to these third parties. Furthermore, these provisions effectively presume that, notwithstanding fast changing conditions in the industry, for certain periods, certain vertical restrictions are anticompetitive. It is now well-established, however, that vertical restrictions, even vertical price restrictions, are not necessarily anticompetitive. *See Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007). Indeed, the potential for these provisions to be unduly restrictive is clearly recognized by the time limits for such restrictions set forth in the Settlement, and the specification in § V.D. that, after the expiration of the Settlement restrictions, the Settling Defendants should be completely free to enter into distribution arrangements with vertical price and non-price restrictions. The time limits, however, are essentially arbitrary and unsubstantiated, with no link to market conditions. *See Leegin* 551 U.S. at 894 ("Vertical agreements establishing minimum resale prices can have either procompetitive or anticompetitive effects, depending upon the circumstances in which they are formed."). Moreover, provisions such as those in § VI.B of the Settlement would effectively impose a form of regulatory oversight on the relations between the retailers and the settling publishers, a form of relief the Government would be very unlikely to obtain if it litigated the case.

The potential for unintended adverse market consequences from the Settlement's restrictions on the commercial freedom of third parties is particularly high given the well-known turmoil and flux in the industry. Whatever may be the merits of Amazon's effects on the industry, the fact remains that Amazon has a 60% share of the e-book market, while the Settling Defendants account for well under 50% of that market. All segments of the industry, but in particular brick-and-mortar retailers, are engaged in a competitive struggle that will determine the future of the industry. Under these precarious market conditions and given the impact this industry has on the American consumer and culture, the burden on the Government to justify

restrictions on third parties that played no role in the collusion alleged in the Complaint should be particularly high.

The Government's Competitive Impact Statement, at 10, states, and Books-A-Million agrees, that the Settlement "will ensure that the new contracts will not be set under the collusive conditions that produced the [contracts at issue in the Complaint]." If this is true, the Government has not shown that it is necessary to impose additional prospective vertical provisions that will necessarily restrict the business arrangements of third-parties. Accordingly, the Court should not approve the remedies in §§ V.A., V.B., V.C., V.D. and VI.B. of the Settlement.

II. The Settlement will result in harm to Books-A-Million.

Books-A-Million operates 255 brick-and-mortar book retail stores and sells books and e-books over the internet at Booksamillion.com. The Settlement will harm Books-A-Million by forcing it to terminate existing vertical distribution, or agency, agreements with the Settling Defendants and by restricting its freedom to enter into such agreements post-settlement. Furthermore, such restrictions will provide Amazon the opportunity to revert to its anti-competitive e-book pricing strategy, which will place additional pressure on brick-and-mortar retailers. Given the extensive protections against collusion in the Settlement set forth in §§ V.E and V.F., further vertical restrictions can only be harmful, or at best neutral, in their effects on third-party retailers such as Books-A-Million. Unnecessary restrictions on Books-A-Million and other retailers will only impair the ability of consumers to reap the competitive market benefits that resulted from the introduction of the agency model.

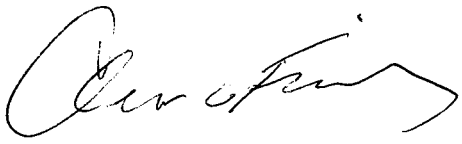
III. Other Effects of the Settlement.

Although the Settlement specifically targets the e-book industry, if adopted in its current form, it would have sweeping negative effects on the book industry as a whole. The Settlement, as drafted, essentially prohibits publishers from operating under the agency model. The adoption of the agency model by the publishers in 2010 allowed publishers to more effectively compete with Amazon by setting e-book prices that corresponded with retail prices for print versions of the same books. Since publishers adopted the agency model, Amazon's e-book market share decreased from 90% to 60%. This decrease in Amazon's dominance in the e-book market has allowed other e-book retailers to enter the market and compete with Amazon, which afforded the consumer with an increase in the selection of e-book retailers and book titles. The adoption of the agency model also improved competition among publishers with respect to e-book and hardcover prices, which has resulted in a reduction in e-book and hardcover prices. If the Settlement is adopted as drafted, the significant restrictions placed on publishers' ability to operate under the agency model will impair their ability to effectively compete in the e-book market, which will result in an increase in e-book and hardcover book prices and a decrease in selection of book titles. Consumers, as well as all vertical participants in the book industry, will be negatively impacted by the effects of the Settlement, and the long-term results could be devastating to the book industry as a whole.

IV. Conclusion.

Ultimately, consumers will be harmed by the unjustified third-party restrictions included in the Settlement. Given the potential for competitive harm to consumers likely to result from unwarranted restrictions on e-book distribution, the Settlement as proposed is not in the public interest and, thus, should not be adopted by the Court without modification to limit the remedies to the collusive conduct alleged in the Complaint.

Sincerely,



Terrance G. Finley, President and Chief Executive Officer of Books-A-Million, Inc.