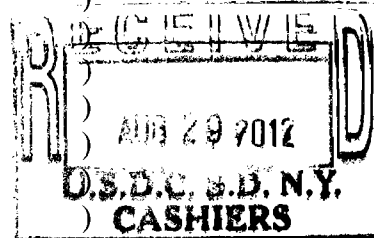


UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

THE STATE OF TEXAS;  
THE STATE OF CONNECTICUT;  
THE STATE OF OHIO;  
THE STATE OF ALABAMA;  
THE STATE OF ALASKA;  
THE TERRITORY OF AMERICAN SAMOA;  
THE STATE OF ARIZONA;  
THE STATE OF ARKANSAS;  
THE STATE OF CALIFORNIA;  
THE STATE OF COLORADO;  
THE STATE OF DELAWARE;  
THE DISTRICT OF COLUMBIA;  
THE STATE OF FLORIDA;  
THE STATE OF GEORGIA;  
THE TERRITORY OF GUAM;  
THE STATE OF HAWAII;  
THE STATE OF IDAHO;  
THE STATE OF ILLINOIS;  
THE STATE OF INDIANA;  
THE STATE OF IOWA;  
THE STATE OF KANSAS;  
THE COMMONWEALTH OF KENTUCKY;  
THE STATE OF LOUISIANA;  
THE STATE OF MAINE;  
THE STATE OF MARYLAND;  
THE COMMONWEALTH OF MASSACHUSETTS;  
THE STATE OF MICHIGAN;  
THE STATE OF MISSISSIPPI;  
THE STATE OF MISSOURI;  
THE STATE OF MONTANA;  
THE STATE OF NEBRASKA;  
THE STATE OF NEVADA;  
THE STATE OF NEW HAMPSHIRE;  
THE STATE OF NEW JERSEY;  
THE STATE OF NEW MEXICO;  
THE STATE OF NEW YORK;  
THE STATE OF NORTH CAROLINA;  
THE STATE OF NORTH DAKOTA;  
THE COMMONWEALTH OF THE NORTHERN  
MARIANA ISLANDS;  
THE STATE OF OKLAHOMA;  
THE STATE OF OREGON;  
THE COMMONWEALTH OF PENNSYLVANIA;

12 CIV 6625



<b>THE COMMONWEALTH OF PUERTO RICO;</b>	)	
<b>THE STATE OF RHODE ISLAND;</b>	)	
<b>THE STATE OF SOUTH CAROLINA;</b>	)	
<b>THE STATE OF SOUTH DAKOTA;</b>	)	
<b>THE STATE OF TENNESSEE;</b>	)	
<b>THE STATE OF UTAH;</b>	)	
<b>THE STATE OF VERMONT;</b>	)	
<b>THE COMMONWEALTH OF VIRGINIA;</b>	)	
<b>THE TERRITORY OF THE VIRGIN ISLANDS;</b>	)	
<b>THE STATE OF WASHINGTON;</b>	)	
<b>THE STATE OF WEST VIRGINIA;</b>	)	
<b>THE STATE OF WISCONSIN;</b>	)	
<b>THE STATE OF WYOMING</b>	)	Civil Action No.
	)	
	)	
<b>Plaintiffs,</b>	)	
	)	
	)	
	)	
<b>HACHETTE BOOK GROUP, INC.;</b>	)	
<b>HARPERCOLLINS PUBLISHERS, LLC.;</b>	)	
<b>SIMON &amp; SCHUSTER, INC.; and</b>	)	
<b>SIMON &amp; SCHUSTER DIGITAL SALES, INC.</b>	)	
	)	
<b>Defendants.</b>	)	
	)	

**COMPLAINT**

The above-captioned States, Commonwealths, Territories and Possessions (the “Plaintiff States”), by and through their Attorneys General, bring this action in their sovereign capacity against Hachette Book Group, Inc. (“Hachette”), HarperCollins Publishers, LLC (“HarperCollins”), Simon & Schuster, Inc. and Simon & Schuster Digital Sales, Inc. (“the Defendants”) for injunctive relief and for damages as *parens patriae* on behalf of natural persons who purchased E-books from Defendants and other co-conspirators known to the Plaintiff States and allege as follows:

## **I. SUMMARY OF COMPLAINT**

1. As a result of facts learned during a non-public investigation begun by the States of Texas and Connecticut in 2010, the Plaintiff States charge the Defendants with entering into contracts, combinations, and conspiracies that restrain trade.

2. Specifically, by the end of summer 2009 at the latest, the Defendants, together with other co-conspirators known to the Plaintiff States, entered into an agreement to raise the retail price of electronic books (“E-books”). In furtherance of this conspiracy, by mid-December 2009, the Defendants and other co-conspirators known to the Plaintiff States agreed to delay publication of certain frontlist E-books for several months following each book’s first printed release. In the publishing industry, this practice is known as “Windowing.” The Defendants and others viewed this collective Windowing as providing them with enhanced bargaining power with which they could negotiate higher retail prices from Amazon and other distribution outlets (“E-book Outlets or Outlets”).

3. No later than January 2010, seizing an opportunity that arose in connection with the entry of Apple, Inc. (“Apple”) into the E-book market, the Defendants and other co-conspirators known to the Plaintiff States conspired and agreed to increase retail E-book prices for all consumers. The conspirators’ plan had two components. First, the Defendants and other co-conspirators known to the Plaintiff States would shift their market-wide distribution model for E-books from a distribution model under which E-book Outlets such as Amazon or Barnes & Noble would set retail E-book prices and sell E-books directly to consumers (the “Wholesale-Retail Model”) to a model in which publishers would set retail E-book prices and sell E-books directly to consumers (the “Agency Model”). Second, the Defendants and other co-conspirators known to the Plaintiff States would then raise E-book retail prices.

4. As a result of their conspiracy, the Defendants and other co-conspirators known to the Plaintiff States agreed to eliminate E-book retail price competition between E-book Outlets, such that retail prices to consumers would be the same regardless of the Outlet patronized by the consumer. The Defendants and other co-conspirators known to the Plaintiff States increased E-book retail prices pursuant to this illegal agreement beginning on April 1, 2010.

5. As a result of the conspiracy, consumers nationwide, in aggregate, paid millions of dollars in overcharges on E-books.

## **II. JURISDICTION AND VENUE**

6. The Court has jurisdiction over this action under Section 1 of the Sherman Act, 15 U.S.C. § 1, Sections 4c and 16 of the Clayton Act, 15 U.S.C. §§ 15c and 26, and under 28 U.S.C. §§ 1331 and 1337. This case is related to MDL litigation currently pending before this Court captioned *The State of Texas et al. v. Penguin Group (USA) Inc., et al., (In Re Electronic Books Antitrust Litigation)*, 1:12-CV-03394 (DLC).

7. This Court may exercise personal jurisdiction over the Defendants because they have principal places of business within the Southern District of New York and sell E-books to consumers residing in the Southern District of New York.

8. Venue is proper in this district under Section 12 of the Clayton Act, 15 U.S.C. § 22, and 28 U.S.C. § 1391(b)-(c). The Defendants may be found and transact business within the Southern District of New York.

## **III. THE PARTIES**

9. The Attorneys General of the Plaintiff States are the chief legal officers for their respective states and commonwealths. They are granted authority under federal antitrust law to bring actions for injunctive relief and as *parens patriae* on behalf of consumers, and under the laws of their respective states to bring actions to ensure compliance with their state laws and to

enjoin violations of state law.

10. Defendant Hachette Book Group, Inc. is a Delaware corporation with its principal place of business at 237 Park Avenue, New York, NY 10017.

11. Defendant HarperCollins Publishers LLC is a Delaware limited liability company with its principal place of business at 10 East 53<sup>rd</sup> Street, New York, NY 10022.

12. Defendant Simon & Schuster, Inc. is a New York corporation with its principal place of business at 1230 Avenue of the Americas, New York, New York, 10020. Defendant Simon & Schuster Digital Sales, Inc. is a Delaware corporation and a wholly-owned subsidiary of Simon & Schuster, Inc., with its principal place of business at the same address as its parent. For purposes of the Complaint, Simon & Schuster, Inc. and Simon & Schuster Digital Sales, Inc. are referred to collectively as “Simon & Schuster.”

#### **IV. FACTS SUPPORTING THE LEGAL CLAIMS**

##### **A. Book Sales: An Overview**

13. Publishers work with authors to bring books to market in a variety of printed and other formats, including hardcover, trade paperback and mass market paperback.

14. The American publishing industry is dominated by six Manhattan-based publishers: Hachette, HarperCollins, Simon & Schuster, Penguin Group, Holtzbrinck Publishers LLC, (which does business as Macmillan) and Random House, Inc. (the “Big Six”). For decades, the Big Six or their predecessors have served as authors’ primary intermediaries to secure widespread retail print distribution and marketing.

15. Publishers generally sell printed books to retailers on a Wholesale-Retail Model. In the Wholesale-Retail Model, publishers set a list price for the printed book and a discount percentage from the list price for a particular Outlet. The list price minus the amount discounted is the wholesale price of the printed book. For example, a hardcover book with a list price of

\$30.00 that has a discount off list of 50% has a wholesale price of \$15.00.

16. Once the books are received by the Outlets, the Outlets place printed books into their inventories for storage, set retail prices for these books, and sell them directly to consumers.

17. Publishers divide their catalogues between frontlist and backlist titles. Frontlist titles refer to the publishers' most recently released titles. Depending on the publisher, it usually refers to titles released within the past seven months to the past year. Backlist titles comprise the remainder of the publishers' catalogues.

18. E-books are electronic versions of books. Generally, the Big Six provide a printed edition of a title simultaneously with the E-book. Consumers can read E-books on a variety of electronic devices, including cellular phones, personal computers, tablet computers, and devices dedicated solely to reading E-books.

19. Despite their availability for approximately two decades, E-books have only recently become a commercially-viable mainstream market. Between 2007 and 2011, E-books' share of all titles sold in the United States grew from under 2% to approximately 25%. In 2010, approximately 114 million E-books were sold, and E-book sales hit \$441.3 million.

20. Historically, as with printed book distribution, an E-book Outlet would pay the publisher a wholesale price for each E-book sold. The wholesale price was calculated by subtracting a discounted amount from the digital list price. For example, if an E-book had a digital list price of \$26.00 and a discount of 50%, the wholesale price was \$13.00. The Outlet, functioning as a retailer, would then set the retail price of the E-book.

21. By 2009, Amazon accounted for the vast majority of the publishers' E-book sales. In the fall of 2007, shortly after releasing the Kindle, Amazon publicly committed to sell New York Times ("NYT") bestseller E-books to consumers for \$9.99, a retail price point popular with consumers. This low price point helped make it attractive for consumers to switch from

purchasing print books to purchasing E-books.

22. As the leading E-book retailer, Amazon's \$9.99 pricing policy for NYT bestseller E-books stoked intense competition among E-book retailers as its rivals priced at or near Amazon's price point to remain competitive. As a result, prior to January 2010, consumers could generally purchase NYT bestseller E-books for \$9.99 contemporaneously with hardcover releases.

**B. The Defendants and Co-conspirators known to the Plaintiff States Agree that NYT Bestseller E-book Prices Must Rise from \$9.99**

23. Amazon's low retail pricing and leading position among E-book retailers gave rise to serious concerns for the Defendants and co-conspirators known to the Plaintiff States. First, the Defendants and co-conspirators known to the Plaintiff States feared that, as E-books sales grew larger in the future, Amazon would utilize its significant bargaining clout as the leading E-book retailer to seek lower wholesale E-book prices.

24. In a robust E-books market, E-book only publishers could compete without relying on the long-established distribution systems. E-book only publishers could enhance consumer choice, meet consumer demand, and provide innovative distribution. Because of this, the Defendants and other co-conspirators known to the Plaintiff States also feared that Amazon would emerge as a direct competitor by contracting directly with authors to publish its own E-books.

25. The Defendants and other co-conspirators known to the Plaintiff States were concerned that increased sales of E-books would reduce sales of higher-priced printed editions of the same books.

26. Because of these concerns, the Defendants and other co-conspirators known to the Plaintiff States, individually and collectively, began searching for a path to higher prices for

NYT bestseller -E-books.

27. Starting no later than summer 2008 and continuing throughout 2009 on a regular basis, CEOs representing the Big Six began having regular meetings to discuss sensitive business matters, including concerns related to E-books and Amazon. No antitrust counsel attended any of the meetings.

28. Beginning in early 2009, some of the Defendants and other co-conspirators known to the Plaintiff States considered, but did not adopt, alternative distribution models to restrain retailers from discounting the price for sales of their E-book titles, including resale price maintenance and minimum advertised price. None of the publishers were ultimately willing to adopt such strategies unilaterally, because of the substantial risks to individual publishers of acting alone.

29. By the summer of 2009, it was clear to all of the Defendants and other co-conspirators known to the Plaintiff States that only by working together could they successfully force Amazon and other E-book retailers to raise their prices for NYT bestsellers. In the absence of such collective bargaining power, Amazon could retaliate against individual publishers by delisting their E-books and print books from its website. And if the Defendants and other co-conspirators known to the Plaintiff States failed to implement their new pricing structure contemporaneously, each publisher would lose sales to lower-priced E-books because the retail prices of its books would rise too high relative to the retail prices of the others.

30. On information and belief, by no later than the end of summer 2009, the Defendants and other co-conspirators known to the Plaintiff States reached an agreement that something had to be done to end Amazon's \$9.99 pricing of NYT bestsellers, and they were collectively searching for the means to effectuate a price increase.



**C. Windowing: The First Collective Attempt to Raise Prices**

31. In 2009, certain E-book publishers shared information among one another about which titles they would Window and their anticipated delay period for E-book publication. In the fall 2009, the Defendants began experimenting with Windowing certain frontlist E-books. And, by early December 2009, the Defendants agreed to Window a broad number of titles as a means of gaining bargaining leverage over Amazon. By December 15, 2009, an additional conspirator publisher agreed to join the Defendants in Windowing certain frontlist titles.

32. Windowing unilaterally would have been against each publisher's economic self-interest, because it would introduce substantial economic risks. But by agreeing to act together, these risks were substantially reduced.

33. The Defendants and another co-conspirator known to the Plaintiff States broadly Windowed E-book titles roughly from December 26, 2009 through April 1, 2010. The delay in publication constituted an illegal restriction on output to the detriment of consumers.

34. As set forth below, the agreement among the Defendants and other co-conspirators known to the Plaintiff States to raise prices via the Agency Model made Windowing unnecessary.

**D. The Defendants and Other Co-conspirators Known to the Plaintiff States Agree to Raise E-book Prices Using the Agency Model**

35. In mid-December 2009, Apple approached the Big Six about becoming an E-book Outlet. Apple planned to release its iPad tablet computer in early 2010 and wanted to supply E-books to iPad customers in its iBookstore.

36. The entry of Apple into the E-book market provided the Defendants and other co-conspirator publishers known to Plaintiff States with a better means of implementing their agreement to force up retail prices. Specifically, the Defendants and other co-conspirators

known to the Plaintiff States saw the opportunity to employ a distribution strategy known as the “Agency Model.” Under the Agency Model, a publisher would be the direct seller of E-books to consumers, setting the retail price for each E-book sold. Under that model, the Outlet would act as an agent to facilitate the sale and would receive a commission on each E-book sold through the Outlet.

37. In January 2010, the Defendants and other co-conspirators known to the Plaintiff States collectively agreed to enter into materially identical Agency Contracts with Apple, which enabled the Defendants and other co-conspirators known to the Plaintiff States to establish the retail price of books sold through the Apple iBookstore. Each of the Agency Contracts contained what is colloquially known as a “most favored nation” clause (an “MFN”). The MFNs provided that if a co-conspirator publisher allowed any other retailer to sell an E-book for a lower price than the price set for Apple customers, it must also afford that price to Apple customers.

38. The ineluctable result of the MFN was to require that any publisher who was a party to the MFN convert all of its retailers to the Agency Model, so that none of them (especially Amazon) would be able to discount retail prices below those specified in the Apple Agency Contracts.

39. A move by a single publisher to convert all of its Outlets to the Agency Model would have been against that publisher’s unilateral self-interest. Any single publisher would have faced potential retaliation from Amazon. And, even if a single publisher succeeded in adopting the Agency Model, it would not be able to raise prices without concern that consumers would turn to other publishers’ E-books that the Outlets priced lower under a Wholesale-Retail Model. The Defendants and other co-conspirators known to the Plaintiff States would not have agreed to the adoption of the Agency Model to raise prices but for the assurances that a sufficient number of the other publishers would participate.

40. Each of the Agency Contracts also contained an Exhibit A, which was focused on customer pricing. Exhibit A provided an agreed-upon breakdown of what prices should be offered to U.S. purchasers for all of the Defendants and other co-conspirators known to the Plaintiff States' frontlist titles, including specifically NYT bestsellers. Through their conversations with the conspirators, the Defendants and other co-conspirators known to the Plaintiff States knew that they were all entering into Agency Contracts with materially identical terms, including identical price bands, and that collectively, they would be able to raise retail E-book prices to the levels specified in the price bands.

41. As the date for the iPad launch approached in January 2010, the communications among and between the Defendants and other co-conspirators known to the Plaintiff States intensified. By January 27, 2010, the Defendants and other co-conspirators known to the Plaintiff States had, through a series of communications among and between executives at the highest levels of the companies who were parties to the contracts, agreed to the Agency Model.

42. Between January 27, 2010 and April 1, 2010, the Defendants and other co-conspirators known to the Plaintiff States converted the largest Outlets, including Amazon, to the Agency Model. Starting in April 2010 and pursuant to their illegal agreement, the Defendants and other co-conspirators known to the Plaintiff States generally raised retail prices of NYT bestseller E-books from \$9.99 to the \$12.99 - \$14.99 level. Contemporaneously, the Defendants and other co-conspirators known to the Plaintiff States also, on average, raised retail E-book prices across frontlist and backlist books.

**E. The Defendants and Others Known to the Plaintiff States Police and Enforce Their Agreement**

43. Over the next four months, the Defendants and other co-conspirators known to the Plaintiff States took steps to ensure that the anticompetitive agreement was implemented, providing necessary material support and encouragement to a co-conspirator known to the Plaintiff States, in its ultimately successful negotiations with Amazon. Subsequent to their own shift to the Agency Model, the Defendants and other co-conspirators known to the Plaintiff States also worked together to pressure non-conspirator Random House to move to the Agency Model, as it ultimately did.

44. As a result of their illegal agreement, the Defendants and other co-conspirators known to the Plaintiff States restricted output of E-books by charging consumers artificially high retail prices. As a result, consumers have suffered millions of dollars in overcharges nationwide.

45. The Defendants withdrew from the conspiracy by no later than May 21, 2012, the time at which the actions taken pursuant to the Proposed Final Judgment entered into with the United States Department of Justice on April 11, 2012, relating to the conduct alleged in this Complaint, became effective.

**V. RELEVANT MARKETS**

46. The relevant product market is the market for the sale of E-books. Hachette, HarperCollins, Macmillan, Penguin, and Simon & Schuster are competitors in this product market.

47. The relevant geographic market is the United States. Hachette, HarperCollins, Macmillan, Penguin, and Simon & Schuster are competitors in this geographic market.

## **VI. TRADE & COMMERCE**

48. The activities of the Defendants and other co-conspirators known to the Plaintiff States, including the production, sale and distribution of E-books, were in the regular, continuous and substantial flow of interstate trade and commerce and have had, and continue to have, a substantial effect upon interstate commerce. The activities of the Defendants and other co-conspirators known to the Plaintiff States also had, and continue to have, a substantial effect upon the trade and commerce within each of the Plaintiff States.

## **VII. MARKET EFFECTS**

49. The acts and practices of the Defendants and other co-conspirators known to the Plaintiff States have had the purpose or effect, or the tendency or capacity, of restraining competition unreasonably and injuring competition by preventing the competitive retail pricing of E-books, and have directly resulted in an increase in retail E-book prices across both the frontlist and backlist titles of the Defendants and other co-conspirator publishers known to the Plaintiff States.

50. By preventing the competitive retail pricing of E-books, Defendants and other co-conspirators known to the Plaintiff States have deprived the Plaintiff States and their consumers of the benefits of the competition that the federal and state antitrust laws, consumer protection laws and/or unfair competition statutes and related state laws are designed to promote, preserve, and protect.

## **COUNT I** **HORIZONTAL CONSPIRACY TO RAISE E-BOOK RETAIL PRICES** **IN VIOLATION OF SECTION I OF THE SHERMAN ACT**

51. Plaintiff States repeat and reallege every preceding allegation as if fully set forth herein.

52. By no later than the end of summer 2009, Defendants and others known to the

Plaintiff States entered into an agreement to work together to raise the NYT bestseller E-book retail prices from the \$9.99 price point.

53. This agreement among and between horizontal competitors and others known to the Plaintiff States to raise E-book prices constitutes a per se violation of Section 1 of the Sherman Act.

54. In the alternative, the agreement between and among the Defendants and other co-conspirators known to the Plaintiff States caused anticompetitive effects that substantially outweigh any procompetitive justifications, if any exist. For this reason, under a rule of reason analysis, the agreement is a violation of Section 1 of the Sherman Act.

**COUNT II**  
**HORIZONTAL CONSPIRACY TO RAISE E-BOOK RETAIL PRICES USING**  
**WINDOWING IN VIOLATION OF SECTION 1 OF THE SHERMAN ACT**

55. Plaintiff States repeat and reallege every preceding allegation as if fully set forth herein.

56. In December 2009, Defendants and other co-conspirators known to the Plaintiff States entered into an agreement to Window their frontlist E-books. The goal of this agreement was to restrict frontlist E-book output in an attempt to cause retail E-book Outlets to raise frontlist E-book prices. For this reason, the agreement among and between horizontal competitors to raise E-book prices constitutes a per se violation of Section 1 of the Sherman Act.

57. In the alternative, the agreement to Window among Defendants and other co-conspirators known to the Plaintiff States caused anticompetitive effects that substantially outweigh any procompetitive justifications, if any exist. For this reason, under a rule of reason analysis, the agreement is a violation of Section 1 of the Sherman Act.

**COUNT III**  
**HORIZONTAL CONSPIRACY TO RAISE E-BOOK RETAIL PRICES**  
**USING THE AGENCY MODEL IN VIOLATION OF THE SHERMAN ACT**

58. Plaintiff States repeat and reallege every preceding allegation as if fully set forth herein.

59. By no later than the end of January 2010, Defendants and other co-conspirators known to the Plaintiff States entered into a horizontal agreement to use the Agency Model as a mechanism to raise the retail prices for frontlist E-books. This agreement to raise E-book prices among and between horizontal competitors and others known to the Plaintiff States constitutes a per se violation of Section 1 of the Sherman Act.

60. In the alternative, the purpose and effect of the agreement between and among the Defendants and others known to the Plaintiff States to use the Agency Model to raise E-book prices was to restrain competition between and among publishers in the market for direct E-book retail sales to consumers. The agreement has caused anticompetitive effects that substantially outweigh procompetitive justifications, if any exist. For this reason, under a rule of reason analysis, the agreement is a violation of Section 1 of the Sherman Act.

**PRAYER FOR RELIEF**

Accordingly, the Plaintiff States request that the Court:

1. Adjudge and decree that the Defendants have committed violations of Section 1 of the Sherman Act, 15 U.S.C. § 1;
2. Enjoin and restrain, pursuant to federal law, the Defendants, their affiliates, assignees, subsidiaries, successors and transferees, and their officers, directors, partners, agents, and employees, and all persons acting or claiming to act on their behalf or in concert with them, from continuing to engage in any anticompetitive conduct (including the conspiracies described herein) and from adopting in the future any practice, plan, program or device having a similar purpose or effect to the anticompetitive actions set forth above; and
3. Award treble damages for injury to natural persons under Section 4c of the Clayton Act;

4. Award the Plaintiff States the costs of this action, including reasonable attorneys' fees and costs, as provided in Section 4c of the Clayton Act; and
5. Direct such other and further relief as the Court deems just and proper.

Dated: August 29, 2012

Respectfully submitted:

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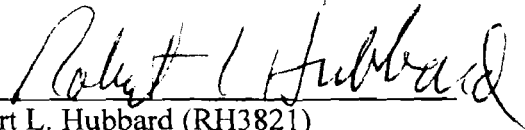
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## CERTIFICATE OF SERVICE

I the undersigned hereby certify that the Plaintiff States' Memorandum In Support of Plaintiff States' Motion for Preliminary Approval of Settlements and Proposed Consumer Notice and Distribution Plans has been served by U.S.P. S. mail on Counsel for Defendants as follows:

**For Defendant HarperCollins Publishers, LLC:**

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

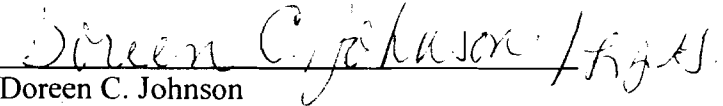
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**For Defendants Simon & Schuster, Inc.  
and Simon & Schuster Digital Sales, Inc.:**

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

Dated: August 29, 2012

  
Doreen C. Johnson  
Assistant Section Chief, Antitrust Section  
Ohio Attorney General's Office

UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

IN RE ELECTRONIC BOOKS ANTITRUST  
LITIGATION

No. 11-md-02293  
(DLC) ECF Case

This Document Relates to:

THE STATE OF TEXAS, et al.,

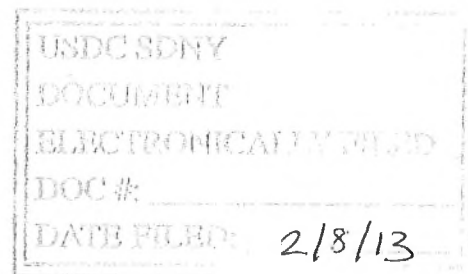
Plaintiffs,

v.

HACHETTE BOOK GROUP, INC., et al.,

Defendants.

Civil Action  
No.12-cv-6625



~~PROPOSED~~ FINAL JUDGMENT

WHEREAS Plaintiff States filed a complaint in this Court on August 29, 2012 against E-book publishers Simon & Schuster, Inc., Simon & Schuster Digital Sales, Inc., HarperCollins Publishers, L.L.C, and Hachette Book Group, Inc. (individually a “Defendant”, collectively “Defendants”) alleging an unlawful agreement to fix, maintain or stabilize prices of E-books in violation of federal antitrust laws (“Settlement Complaint”);

WHEREAS Plaintiff States seek damages and injunctive relief in their sovereign capacity and as *parens patriae* on behalf of Consumers residing in Plaintiff States who have purchased E-books from a Named Publisher;

WHEREAS, in order to resolve any and all disputes arising from the Complaint, Plaintiff States and each Defendant executed a Settlement Agreement (the "Settlement Agreements") which were filed with the Court on August 29, 2012 and are incorporated by reference herein;

WHEREAS, the Settlement Agreements do not constitute an admission of liability or of any issue of fact or law by any Defendant;

WHEREAS, in full and final settlement of the claims set forth in the Settlement Complaint, Defendants have paid compensatory damages, costs of notice and settlement administration and payments to Plaintiff States;

WHEREAS, Defendants' payments do not constitute nor will be treated as payments in lieu of treble damages, fines, penalties, punitive recoveries or forfeitures;

WHEREAS, pursuant to this Court's Preliminary Approval Order, notice of the Settlement Agreements was given in accordance with 15 U.S.C. § 15c and the requirements of due process. An opportunity to be heard was given to all persons requesting to be heard in accordance with this Court's orders. The Court has reviewed the terms of the Settlement Agreements, the submissions of the parties in support of them, and the comments received in response to the notice. A hearing regarding the fairness of the Settlement Agreements and Revised Distribution Plan was held on February 8, 2013;

NOW, THEREFORE, without trial or adjudication of any issue of law or fact, before the taking of any testimony at trial, without the admission of liability or wrongdoing by any Defendant and upon the consent of the parties hereto, this Court finds as follows:

#### **I. DEFINITIONS**

All capitalized terms in this Final Judgment shall have the same meaning as defined in the Settlement Agreements between Plaintiff States and each Defendant, dated June 11, 2012.

## **II. JURISDICTION**

This Court has jurisdiction over the subject matter of this action and over the Defendants. The Complaint states a claim upon which relief may be granted against Defendants under Section 1 of the Sherman Act, as amended, 15 U.S.C. § 1, Section 4c of the Clayton Act, 15 U.S.C. § 15c, and Section 16 of the Clayton Act, 15 U.S.C. § 26. Jurisdiction lies in this Court pursuant to 28 U.S.C. § 15.

## **III. APPLICABILITY**

A. This Final Judgment shall apply to Plaintiff States, Defendants and Consumers in the Plaintiff States who did not file with the Court valid and timely requests for exclusion from the Settlement Agreements. The Court finds that the persons listed on Attachment 1 to this Final Judgment submitted valid and timely exclusion requests.

B. Except with respect to Defendants (“Releasees”), this Final Judgment does not constitute a release or otherwise affect any rights Plaintiff States and Consumers have or may have against any other entity whatsoever, including Apple Inc., Holtzbrinck Publishers, LLC, d/b/a Macmillan, Penguin Group (USA), Inc., or any of their parents, affiliated entities, officers, directors, employees or attorneys.

## **IV. SETTLEMENT AGREEMENT APPROVAL**

The Court has determined that the Settlement Agreements are, in all respects fair, reasonable, and adequate and in the best interests of Consumers in the Plaintiff States, and that notice thereof comports in all respects with 15 U.S.C. § 15c and due process, and hereby approves the Settlement Agreements.

## **V. CONSUMER DISTRIBUTION PLAN**

The Revised Consumer Distribution Plan (“Revised Distribution Plan”), set forth as Exhibit 12 in Plaintiff States’ Memorandum in Support of Motion for Final Approval, is fair, reasonable and adequate and is hereby approved. Plaintiff States are directed to cause the Consumer Compensation funds to be distributed in accordance with said Revised Distribution Plan as soon as practicable after this Final Judgment becomes final. Notwithstanding the foregoing, Liaison Counsel for Plaintiff States are authorized, but not required, to hold the Consumer Compensation funds for a period of up to six months in order to accommodate possible additional settlement agreements.

## **VI. INJUNCTION**

The Court approves the injunctive relief as set forth in the Order and Stipulated Injunction, attached as Exhibit 14 to Plaintiff States’ Memorandum in Support of Motion for Final Approval and is incorporated herein by reference.

## **VII. STATE PAYMENTS**

The Court hereby approves the distribution to Plaintiff States of the State Compensation funds provided by Defendants pursuant to Section IV.B of the Settlement Agreements. Plaintiff States may allocate and distribute these funds at their discretion as set out in Section VI.B of the Settlement Agreements any time after this Final Judgment becomes final, and without further order of this Court.<sup>1</sup>

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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.

### **VIII. NO ADMISSION OF LIABILITY**

Neither this Final Judgment nor the Settlement Agreements shall be used or construed by any person as an admission of liability by any Defendant 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 a Defendant or of the truth of any of the claims or allegations contained in the Complaint. Neither this Final Judgment nor the Settlement Agreements shall be offered in evidence or used for any other purpose in this or any other matter or proceeding other than as may be necessary to consummate or enforce the Settlement Agreements or the terms of this Final Judgment, or by Defendants in connection with any action asserting Released Claims.

### **IX. DISMISSAL OF ACTIONS AND RELEASE**

Upon the Effective Date, and subject to the provisions of Section X of this Final Judgment, Plaintiff States' Complaint is dismissed with prejudice. Plaintiff States, and Consumers in the Plaintiff States who did not file with the Court valid and timely requests for exclusion from the Settlement Agreements, are barred from further prosecution of the Released Claims, and Releasees are released and forever discharged from liability for the Released Claims.

### **X. FINALITY OF JUDGMENT**

The Court finds that this Final Judgment adjudicates all the claims, rights and liabilities of the parties, and is final and shall be immediately appealable.

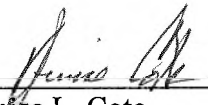
### **XI. RETENTION OF JURISDICTION**

Without affecting the finality of this Final Judgment, the Court retains jurisdiction for the purpose of enforcing the terms of the Settlement Agreements and enabling any party hereto to apply for such further orders and directions as may be necessary or appropriate for the



construction or carrying out of this Final Judgment, the modification of any of the provisions hereto to the extent such modification is permitted, and to remedy of a violation of any of the provisions contained herein. This Court shall have the authority to specifically enforce the provisions of this Final Judgment.

So ordered this 8<sup>th</sup> day of February, 2013.

  
\_\_\_\_\_  
Hon. Denise L. Cote  
United States District Court  
Southern District of New York

## Attachment 1

### Requests for Exclusion

**Requests For Exclusion**

	<b>Claimant Name</b>	<b>Postmark Date</b>
1	Ron Diel	10/13/2012
2	Jason Kichline	10/14/2012
3	Marcia Williams	10/14/2012
4	Carol E Richards	10/16/2012
5	Carson Alexander Cone	10/16/2012
6	Christopher Ron Salzman	10/16/2012
7	Danielle Stockley	10/16/2012
8	Denise Cote	10/16/2012
9	John Wissenbach	10/16/2012
10	Jordan G Smith	10/16/2012
11	Karen A Sherman	10/16/2012
12	Kenneth G Hagler	10/16/2012
13	Landya B McCafferty	10/16/2012
14	Margaret E Jones	10/16/2012
15	Michael Linebach	10/16/2012
16	Michael Whitacre	10/16/2012
17	Russell Madsen	10/16/2012
18	Teresa Barker	10/16/2012
19	Thomas Friedman	10/16/2012
20	Toni Burnham	10/16/2012
21	James L Nesmith	10/19/2012
22	Harriett Wehrheim	10/20/2012
23	George Yunaev	10/22/2012
24	Jeanne M Nohalty	10/22/2012
25	Rita Chubarova	10/22/2012
26	Aloysius J Brown III	10/23/2012
27	Daniel Flynn	10/23/2012
28	Samuel Vesa	10/23/2012
29	Shane Davis	10/23/2012
30	Myriam Puga (Eric)	10/24/2012
31	Carl A Gallozzi	10/26/2012
32	Pamela Berwick	10/26/2012
33	David Endahl	10/29/2012
34	Jennifer L Adams	10/29/2012
35	James O Browning	10/30/2012
36	Shelly Martin	10/30/2012

**Requests For Exclusion**

	<b>Claimant Name</b>	<b>Postmark Date</b>
37	Matthew Roe	11/1/2012
38	Anthony Petru	11/5/2012
39	Laura Warner	11/5/2012
40	Lauren Albert	11/5/2012
41	Susan Roberts	11/5/2012
42	Denise Jones	11/8/2012
43	Adam Kushner	11/10/2012
44	William G Charest	11/10/2012
45	Cindy Fryer	11/15/2012
46	Kathy Christian	11/15/2012
47	Lisa Mills	11/17/2012
48	Randy Shine	11/17/2012
49	David Akin	11/19/2012
50	Shelby Sinkhorn	11/19/2012
51	David Taniguchi	11/23/2012
52	Amanda Millet Buchanan	11/24/2012
53	Sean Webb	11/24/2012
54	Victoria Vice	11/27/2012
55	Margot Reges	12/1/2012
56	Cynthia Tyler	12/7/2012
57	Kathleen Pitlock	12/7/2012
58	Aubrey Cummings	12/10/2012
59	Lea Winston	12/10/2012
60	Linda Winston	12/10/2012
61	Sue Gordon	12/10/2012
62	Adam Speegle	12/11/2012
63	Kristine Enderle	12/11/2012
64	Laura Collins	12/11/2012
65	Owen Kendler	12/11/2012
66	Stephanie Fleming	12/11/2012
67	Thomas McCormick	12/11/2012
68	Carrie A Syme	12/11/2012
69	Andrew Hannemann	12/12/2012
70	Binh Wu	12/12/2012
71	Carla Patat	12/12/2012
72	Carrie Higo	12/12/2012

**Requests For Exclusion**

	<b>Claimant Name</b>	<b>Postmark Date</b>
73	Christina Kepplinger Johansen	12/12/2012
74	Fiona Scott Morton	12/12/2012
75	Frank Patrick Hallagan	12/12/2012
76	Jay David Owen	12/12/2012
77	Jessica B Stewart	12/12/2012
78	Jim Ratliff	12/12/2012
79	Jodi DeYoung	12/12/2012
80	John P Ireland	12/12/2012
81	Kelly Ann Riley	12/12/2012
82	Kimberly J Tan Majure	12/12/2012
83	Kimberly Linkous	12/12/2012
84	Kun Huang	12/12/2012
85	Linda Winston	12/12/2012
86	Mary Beth McGee	12/12/2012
87	Milly Pichardo	12/12/2012
88	NC State University	12/12/2012
89	Portia Brown	12/12/2012
90	Renata Hesse	12/12/2012
91	Richard Gilbert	12/12/2012
92	W Robert Majure	12/12/2012
93	Julie Slocum Bennani	12/12/2012
94	David Kully	12/13/2012
95	John Read	12/13/2012
96	Stephen T Fairchild	12/13/2012
97	Sharona Jepson	12/13/2012
98	Jack Mawdsley	12/13/2012
99	Aaron Goldblum	12/13/2012
100	John R Kramer II	12/13/2012

**SETTLEMENT AGREEMENT BETWEEN HARPERCOLLINS PUBLISHERS, L.L.C.  
AND PLAINTIFF STATES**

This Settlement Agreement is made and entered into this 11th day of June, 2012, by and between the States of Texas, Connecticut and Ohio, plus any other State, Commonwealth, Territory or Possession that has elected, or elects, to participate in the terms of this Settlement Agreement (“Plaintiff States”) through their respective Attorneys General, and HarperCollins Publishers, L.L.C. (“HarperCollins”) (collectively “Parties”). The terms of this Settlement Agreement shall be available to all States, the District of Columbia, Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Northern Mariana Islands as provided under the terms of Section XI. Any State electing to join the Settlement Agreement shall do so by executing a signature page that shall be annexed to this Agreement.

WHEREAS, the Plaintiff States will file a complaint against HarperCollins in the United States District Court for the Southern District of New York (the “Court”), both in their sovereign capacity and as *parens patriae*, on behalf of Consumers residing in such States who have purchased E-books from a Named Publisher, alleging an unlawful agreement to fix, maintain or stabilize prices of E-books in violation of federal and state antitrust laws and seeking, among other relief, damages, injunctive relief and costs of investigation and litigation (“Complaint”);

WHEREAS, this Settlement Agreement does not constitute any admission by HarperCollins that the law has been violated or of any issue of fact or law, other than that the jurisdictional facts as alleged in the Complaint are true;

WHEREAS, the Plaintiff States and HarperCollins have determined it to be in their best interests to resolve this dispute and enter into this Settlement Agreement;

NOW, THEREFORE, **WITNESSETH:**

## I. DEFINITIONS

As used herein:

A. “Plaintiff States” means any State, Commonwealth, the District of Columbia, Puerto Rico, the Virgin Islands, Guam, American Samoa and the Northern Mariana Islands, which originally signs on to or opts to enter into the terms of this Settlement Agreement as provided in Section XI.B in its sovereign capacity and as *parens patriae* on behalf of Consumers residing in such Plaintiff State.

B. “Hachette” means Hachette Book Group, Inc., a Delaware corporation with its principal place of business in New York, New York, its successors and assigns, and its subsidiaries, and divisions, including its wholly-owned subsidiary, Hachette Digital, Inc.

C. “HarperCollins” means HarperCollins Publishers L.L.C., a Delaware limited liability company with its principal place of business in New York, New York, its successors and assigns, and its subsidiaries, and divisions.

D. “Simon & Schuster” means Simon & Schuster, Inc., a New York corporation with its principal place of business in New York, New York, its successors and assigns, and its subsidiaries, and divisions, including its wholly-owned subsidiary, Simon & Schuster Digital Sales, Inc.

E. “Claims” means all claims, counterclaims, set-offs, demands, actions, rights, liabilities, costs, debts, expenses, attorneys’ fees, and causes of action of any type, whether 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 HarperCollins, HarperCollins’ parent and affiliated entities and their officers,

directors, employees and attorneys, arising from the facts, matters, transactions, events, occurrences, acts, disclosures, statements, omissions, or failures to act set forth or alleged in the Plaintiff States' Complaint. For purposes of this paragraph, "affiliated entities" shall mean entities that are currently or were formerly controlling, controlled by or under common control with HarperCollins.

F. "Consumers" mean natural persons in the Plaintiff States who have purchased E-books published by Named Publishers during the period from April 1, 2010 until May 21, 2012.

G. "Distribution Plan" means the plan or method of allocation of the HarperCollins Consumer Compensation Account among Consumers who have not filed with the Court valid and timely requests for exclusion from this Settlement. The Distribution Plan will be submitted to the Court separate from the Settlement Agreement and is not part of this Settlement Agreement.

H. "Effective Date" means the date on which this Settlement Agreement becomes effective. The Effective Date shall occur 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. Execution of this Settlement Agreement;
2. Entry by the Court of a Preliminary Approval Order;
3. Expiration of the period within which Consumers must exercise their rights to be excluded from *parens patriae* representation;
4. HarperCollins has not availed itself of the right to void this Settlement Agreement pursuant to Section X;
5. Final approval by the Court of the settlement embodied herein;
6. Entry by the Court of the Final Judgment;



7. Entry by the Court of the Order and Stipulated Injunction (as required in Section III); and

8. The Final Judgment shall have become Final (as defined in K, below).

I. “Escrow Agent” means the entity selected pursuant to Section V below.

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; or (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.

K. “Final” means: (1) final affirmance on an appeal of the Final Judgment, the expiration of the time for a petition for, or a denial of, a writ of certiorari to review the Final Judgment and, if certiorari is granted, the date of final affirmance for the Final Judgment following review pursuant to that grant; or (2) final dismissal of any appeal from the Final Judgment or the final dismissal of any proceedings on certiorari to review the Final Judgment; or (3) if no appeal is filed, the time for the filing or noticing of any appeal from the Court’s Final Judgment approving the Settlement Agreement has expired (*i.e.*, thirty (30) days after entry of the Final Judgment). Any proceeding or order, or any appeal or petition for a writ of certiorari pertaining solely to the Distribution Plan and/or application for attorneys’ fees, costs or expenses, shall not in any way delay or preclude the Final Judgment from becoming Final.

L. “Final Judgment” means the judgment to be rendered by the Court in this matter, substantially in the form attached hereto as Attachment A.

M. “Including” means including, but not limited to.

N. “Named Publishers” means Hachette, HarperCollins, Simon & Schuster, Holtzbrinck Publishers, LLC, d/b/a MacMillan, and Penguin Group (USA), Inc.

O. “Notice Period” means the period during which notice shall be disseminated to Consumers. The Notice Period shall be a minimum of sixty (60) days or such other time period set by the Court.

P. “Notice Plan” means the plan specifying the manner and content of the program whereby 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 Consumers are to be notified of this settlement, which shall consist, at a minimum, of direct notice to each Consumer whose e-mail address can be obtained voluntarily from E-book retailers.

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

R. “Released Claims” shall mean all Claims as defined in Section VIII.

S. “Sale” means delivery of access to a Consumer to read one or more E-books (purchased alone, or in combination with other goods or services) in exchange for payment; “Sold” means to make or to have made a Sale of an E-book to a Consumer.

T. “Settlement Accounts” mean the HarperCollins Consumer Compensation Settlement Account, the States’ Compensation Settlement Account, and the Settlement Cost Account described in Section IV. The Settlement Accounts shall be held in interest-bearing

escrow accounts established by Plaintiff States and administered by an Escrow Agent appointed pursuant to Section V.A. for the purpose of implementing this Settlement Agreement.

U. “Settlement Administration Costs” means all customary and reasonable costs to be paid from the Settlement Cost Account in connection with the administration of this Settlement Agreement, including all reasonable costs and fees incurred (1) in compiling necessary Consumer information for direct notice as well as such notice by publication as may be needed to effectuate adequate notice, (2) in completing administrative tasks, (3) in processing and paying claims, including distributing credits and/or cash to Consumers, (4) for the employment of a Escrow Agent and/or claims administrator, and (5) to secure Court approval of the Settlement agreement, such as expert affidavits.

V. “State Liaison Counsel” or “Liaison Counsel for Plaintiff States” means the designated representatives for the Attorneys General of the States of Texas, Connecticut, and Ohio.

W. “Written Direction” means a written notification directed to the Escrow Agent and/or claims administrator relating to disbursements from the Settlement Accounts, signed by at least two Liaison Counsel for Plaintiff States and counsel for HarperCollins. Each Written Direction shall include a certification by Liaison Counsel for Plaintiff States and counsel for HarperCollins that the instructions in the notification are being made pursuant to the Settlement Agreement.

## **II. AGREEMENT**

It is stipulated and agreed by and among counsel for the Plaintiff States and HarperCollins that, subject to Final Approval by the Court, the litigation initiated by the

Complaint 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. ORDER AND STIPULATED INJUNCTION**

As part of this Settlement Agreement, the Plaintiff States and HarperCollins have agreed to the entry of an Order and Stipulated Injunction in the form of Attachment B, the terms and conditions of which are incorporated into this Settlement Agreement as though set forth in this Section III in full. The Order and Stipulated Injunction shall be modified to take into account any changes made to the language of the United States Department of Justice's Propose Final Judgment as entered in *United States of America v. Apple, Inc., et al.*, Case No. 12-cv-2826, in the United States District Court for the Southern District of New York. The terms set forth in the Order and Stipulated Injunction shall govern the enforcement of this Section III.

### **IV. MONETARY PAYMENTS**

A. HarperCollins agrees to pay to the Plaintiff States the sum of \$19.93 million for Consumer compensation for alleged actual losses arising from the acts alleged in the Complaint. This amount shall be paid to the Plaintiff States, c/o the Escrow Agent appointed pursuant to Section V.A. within thirty (30) days of the Court entering the Preliminary Approval Order. The Escrow Agent shall establish the HarperCollins Consumer Compensation Settlement Account from the monies received from HarperCollins under this Paragraph. These monies, plus any accrued interest, shall be used to fund the Consumer distribution as described in Section VI.A. The Escrow Agent shall only distribute funds in the HarperCollins Consumer Compensation Settlement Account pursuant to a Court-approved Distribution Plan which has become Final within the meaning of Section I.K.

B. The \$19.93 million to be paid by HarperCollins for Consumer compensation shall be reduced proportionately by the percentage of HarperCollins' E-book sales for 2011 attributable to each State, Commonwealth, or Territory that does not exercise its option to participate in this Settlement Agreement.

C. HarperCollins further agrees to pay to the Plaintiff States the sum of \$2,541,666.66 for their costs of investigation and litigation and other related costs as provided in Section VI.B. This amount shall be paid to the Plaintiff States, c/o the Escrow Agent appointed pursuant to Section V.A. herein within thirty (30) days of the Court entering the Preliminary Approval Order. The Escrow Agent shall establish the States' Compensation Settlement Account from the monies received from HarperCollins under this Paragraph, in addition to the funds received from Hachette and Simon & Schuster. These monies, plus any accrued interest, shall be apportioned among the Plaintiff States in a manner to be determined among and between them as set forth in Section VI.B. HarperCollins shall pay this amount in full, regardless of the percentage of States and Territories participating in the Settlement Agreement, and there shall be no reduction for non-participating States.

D. HarperCollins will also pay its per capita share of all reasonable Settlement Administration Costs. The per capita share will be determined by the number of settling parties that have executed an agreement with Plaintiff States that is substantially similar to this Settlement Agreement by June 11, 2012. The Escrow Agent shall establish the Settlement Cost Account from the monies received from settling parties pursuant to this Paragraph and Paragraph E. These monies, plus any accrued interest, shall be used to pay the Settlement Administration Costs pursuant to Section VI.C. The Escrow Agent shall pay invoices only as provided in this Settlement Agreement, by an order of the Court, or pursuant to Written Direction.

E. Payments for the Settlement Cost Account will be made as follows:

1. \$100,000 shall be paid by HarperCollins to the Plaintiff States, c/o the Escrow Agent within five (5) business days of the execution of this Settlement Agreement by Liaison Counsel for the States and HarperCollins.

2. \$650,000 shall be paid by HarperCollins to the Plaintiff States, c/o the Escrow Agent within five (5) business days of the filing of the Motion for Preliminary Approval.

3. Upon notice that additional funds are necessary to pay Settlement Administration Costs, HarperCollins shall make a supplemental deposit of its per capita share into the Settlement Cost Account within ten (10) business days of such notice.

4. After counsel for the Liaison States 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 HarperCollins its per capita share of the unused funds in the Settlement Cost Account within a reasonable period of time.

F. HarperCollins warrants that, as of the date of this Settlement Agreement, it is not insolvent, nor will its payment to the Settlement Accounts render it insolvent within the meaning of and/or for the purposes of the United States Bankruptcy Code. If a case is commenced with respect to HarperCollins 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 any accrued interest, or any portion thereof, by or on behalf of HarperCollins, 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 HarperCollins pursuant to this Settlement Agreement are either not delivered or are returned to HarperCollins

or the trustee, receiver, or conservator appointed by a court in any bankruptcy proceeding with respect to HarperCollins, the releases given and judgment entered in favor of HarperCollins pursuant to this Settlement Agreement shall be null and void.

G. The payments hereunder do not constitute nor shall they be treated as payments in lieu of treble damages, fines, penalties, punitive recoveries or forfeitures.

H. The payments made by HarperCollins to the Settlement Accounts (including the additional payments contemplated pursuant to Paragraph E.3) shall be the total amount to be paid by HarperCollins under this Settlement Agreement or in connection with Released Claims.

I. Except as otherwise provided in this Settlement Agreement, upon the Effective Date all remaining interest or right of HarperCollins in or to the Settlement Accounts shall be absolutely and forever extinguished.

## **V. SETTLEMENT ADMINISTRATION**

A. The Escrow Agent for the Settlement Accounts shall be determined by the Plaintiff States, after consultation with HarperCollins, by separate written agreement. The costs of the Escrow Agent shall be borne by HarperCollins, pursuant to Sections IV.D and E. 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.

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

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

D. In addition to the Escrow Agent, the Plaintiff States, after consultation with HarperCollins, may employ a claims administrator in order to facilitate the provision of notice and to distribute and/or administer the distribution of the funds in the HarperCollins Consumer Compensation Settlement Account in accordance with the terms of this Settlement Agreement. The costs of such claims administrator shall be borne by HarperCollins, pursuant to Sections IV.D and E.

E. If this Settlement Agreement is not approved or is terminated, canceled, voided or fails to become effective, all monies paid into the Settlement Accounts, including any interest accrued thereon, shall be refunded to HarperCollins, reduced by the amount of actual out-of-pocket costs and expenses incurred or committed for Settlement Administration Costs as of the date of disapproval, cancellation, termination or voiding. In such event, the refund shall occur within twenty (20) business days of the cancellation, termination or voiding. In the case of disapproval by the Court, refund shall occur within five (5) business days of the Court's decision becoming Final, as defined in Section I.K.

F. If this Settlement Agreement is not approved or is terminated, canceled, voided or fails to become effective, Plaintiff States shall retain full rights to assert any and all causes of action against HarperCollins, including the right to amend the Complaint to include additional allegations, claims, causes of action and requests for relief and HarperCollins shall retain any and all defenses thereto.



G. Tax Treatment of Settlement Accounts

1. Settling Parties and Escrow Agent agree to treat the Settlement Accounts as being, at all times from and after expiration or waiver of the period within which HarperCollins may void this Settlement Agreement under Section X, a “qualified settlement fund” within the meaning of Treas. Reg. § 1.468B-1(a). In addition, the Escrow Agent and, as required, settling Parties shall jointly and timely make such elections as necessary or advisable to carry out the provisions of this Section V.G., 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 Section V.G.1.) shall be consistent with this Section V.G 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 HarperCollins 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 HarperCollins 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 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)); HarperCollins and its insurers are not responsible and shall have no liability therefore 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 V.G. For purposes of this Section V.G., references to the Settlement Accounts shall include the Settlement Accounts and any earnings thereon.

## **VI. SETTLEMENT DISBURSEMENTS**

A. Distribution to Consumers: All funds in the HarperCollins Consumer Compensation Settlement Account shall be distributed, according to a Court-approved Distribution Plan, for the benefit of Consumers who have not filed with the Court valid and timely requests for exclusion from this settlement.

1. Plaintiff States will strive to devise a Distribution Plan that will maximize direct Consumer recovery, minimize any residue, and minimize administrative expenses

consistent with the provision of fair, adequate and reasonable notice to Consumers. The Distribution Plan shall be devised by the Plaintiff States, after consultation with HarperCollins, and shall, at minimum and to the extent practicable, provide Consumers with the option of receiving payment in the form of a check or a credit for the purchase of either print books or E-books. The Distribution Plan shall provide that credits may be used for any print book or E-book purchase, regardless of publisher. Unless otherwise ordered by the Court, credits may be applied to purchases for a period of one (1) year from the date they are made available to Consumers. The Distribution Plan may also contain provisions for multiple distributions, or a single, later distribution to Consumers if appropriate.

2. Any amount remaining in the HarperCollins Consumer Compensation Settlement Account after redemption of all cash and credits within the time period approved by the Court will be subject to any applicable Plaintiff State's unclaimed property laws. If any residual amount thereafter remains in the HarperCollins Consumer Compensation Settlement Account, subject to any other applicable state law prohibiting *cy pres* distribution and mandating a different distribution by a particular Plaintiff State of its share of any residual amount, it shall be distributed by the Plaintiff States for *cy pres* purposes to one or more charitable organizations whose purposes relate to reading, literacy, or access by the public to electronic books.

3. The Parties agree and understand that any proposed Distribution Plan is to be considered by the Court separately from the 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 Court's Final Judgment approving the

Settlement Agreement and the settlement set forth herein, or any other orders entered pursuant to the Settlement Agreement.

4. The Distribution Plan shall be submitted to the Court for approval in connection with the Plaintiff States' Motion for Preliminary Approval of the Settlement ("Motion for Preliminary Approval").

B. Distribution of Compensation to Plaintiff States: The States' Compensation Settlement Account shall be used to reimburse counsel for the Plaintiff States for payment of attorneys' fees, costs, administrative expenses incurred by Plaintiff States, and as other payments. Such Account shall be apportioned among the Plaintiff States at their sole discretion. Such apportionments shall then be used collectively or individually by the 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 the Plaintiff States in connection with the National Association of Attorneys General Milk Fund Account ("NAAG Milk Fund" or "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 the ongoing investigation and litigation involving the E-books market;
4. Antitrust or consumer protection enforcement by the Attorney General of such State, provided that, with respect to the State of Washington, these funds shall only be used for antitrust enforcement;

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, provided that, with respect to the State of Washington, these funds shall only be used for antitrust enforcement;
6. Deposit into a fund exclusively dedicated to assisting the state Attorney General to defray the cost of experts, economists, and consultants 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.

C. Disbursement for Payment of Administrative Costs: Upon Written Direction or Court Order, the Settlement Cost Account shall be used by the Escrow Agent to pay the Settlement Administration Costs.

## **VII. NOTICE AND SETTLEMENT HEARING**

A. Within sixty-eight (68) days after execution of this Settlement Agreement by Liaison Counsel for the Plaintiff States and HarperCollins, Liaison Counsel for Plaintiff States shall file the Motion for Preliminary Approval with the Court. The motion shall request entry of a preliminary approval order (the "Preliminary Approval Order"). Such Preliminary Approval Order shall include, among other things: (1) the preliminary approval of the settlement set forth in this Settlement Agreement as fair, reasonable and adequate and in the best interests of Consumers in the Plaintiff States, (2) a finding that the State Attorneys General are the superior representatives of natural persons in the Plaintiff States, (3) approval of a Notice Plan, including when the Notice shall be disseminated and the length of the Notice Period, (4) approval of a Distribution Plan that includes the time period during which eligible Consumers can object,

exclude themselves, and/or obtain credits and/or a check, and (5) a schedule for a hearing by the Court after notice is given (the “Settlement Hearing”) to approve the settlement of the litigation initiated by the Complaint, as set forth herein. At least five (5) days prior to filing their Motion for Preliminary Approval, the Plaintiff States shall provide a copy of such motion (including all exhibits and attachments of such motion) to HarperCollins for review and comment.

B. Liaison Counsel for Plaintiff States will provide HarperCollins a substantially final copy of the Notice Plan, including the Notice, at least five (5) business days prior to filing the Motion for Preliminary Approval.

C. Liaison Counsel for the Plaintiff States shall disseminate Notice of the Settlement Agreement to potentially affected Consumers as soon as practicable after entry of the Preliminary Approval Order. The Parties contemplate a Notice Period of at least sixty (60) days, unless another time period is set by the Court.

D. Within forty-five (45) days following the conclusion of the Notice Period, Liaison Counsel for Plaintiff States shall file with this Court a motion seeking final approval of the Settlement Agreement, including a determination by the Court (1) that the Settlement Agreement is approved finally as fair, reasonable and adequate, (2) that a Final Judgment approving the Settlement Agreement, substantially in the form of Attachment A, should be entered, (3) that the Order and Stipulated Injunction, substantially in the form of Attachment B, should be entered, and (4) that an award of attorneys’ fees, expenses and other payments should be made from the States’ Compensation Settlement Account to counsel for the Plaintiff States pursuant to Section VI.B.

## VIII. RELEASED CLAIMS

A. In consideration of the monetary and injunctive provisions contained in this Settlement Agreement, each Plaintiff State will be deemed, upon the Effective Date, to have (and by operation of the Final Judgment shall have), fully, finally, and forever released HarperCollins, HarperCollins' parent and affiliated entities and their officers, directors, employees, and attorneys (collectively "Releasees") from all Claims that were asserted or could have been asserted by any Consumers who did not timely file with the Court a valid request for exclusion from this settlement. The Final Judgment shall be deemed *res judicata* as to any such released Claim.

B. In further consideration of the monetary and injunctive provisions contained in this Settlement Agreement, each Plaintiff State will be deemed, upon the Effective Date, 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.

C. In further consideration of the monetary and injunctive provisions contained in this Settlement Agreement, each Plaintiff State's Attorney General covenants and agrees, to the fullest extent permitted by law, that it shall not hereafter seek to establish liability or assert Claims, in whole or in part, on behalf of itself or any other person or entity or class thereof, against the Releasees.

D. The Plaintiff States and HarperCollins 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 Plaintiff States have or may have against any other entity whosoever, including Hachette, Simon & Schuster, Holtzbrinck

Publishers, LLC, d/b/a MacMillan, Penguin Group (USA), Inc., Apple, Inc., or any of their parents, affiliated entities, officers, directors, employees, or attorneys. The Final Judgment approving this Settlement Agreement shall include a provision that this Settlement Agreement and anything done pursuant thereto shall not constitute a release except as to Releasees, and the Plaintiff States and Consumers reserve their rights as aforesaid.

E. 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 favor at the time of executing the release, which if known by him must have materially affected his 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.

## **IX. 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 State determines that HarperCollins is not in compliance with the terms of the Settlement Agreement, it shall give HarperCollins written notice of such non-compliance and HarperCollins shall have fifteen (15) working days to respond in writing. If Plaintiff State is not satisfied with HarperCollins’ response, it shall notify HarperCollins in writing and HarperCollins shall have fifteen (15) working days to cure such non-compliance. If after such time a Plaintiff State shall determine that HarperCollins is still not in compliance, such



Plaintiff State may seek the civil remedies available to it under the terms of the Final Judgment and Order and Stipulated Injunction.

C. This Settlement Agreement shall not be used or construed by any person as an admission of liability by HarperCollins 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 HarperCollins or of the truth of any of the claims or allegations contained in the Complaint.

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

A. This Settlement Agreement shall only be voidable pursuant to this Section X.

B. This Settlement Agreement is voidable at the option of HarperCollins if, after sixty (60) days following the execution of this Settlement Agreement by the Liaison States and HarperCollins, the Attorneys General of a number of states accounting for ninety percent (90%) of HarperCollins' 2011 national dollar-weighted sales volume of E-books have not elected to participate in the Settlement Agreement.

C. HarperCollins must exercise its option to void this Settlement Agreement pursuant to Paragraph B by notifying the Liaison Counsel for Plaintiff States in writing within five (5) days of the expiration of the sixty (60) day time frame specified in Paragraph B. This Settlement Agreement shall not be voidable pursuant to Paragraph B after that date.

D. This Agreement is void if the settlement embodied herein is not approved by the Court.

E. If, during the Notice Period, Consumers who otherwise would be represented by the Plaintiff States have filed with the Court valid and timely requests for exclusion from this settlement, Liaison Counsel for Plaintiff States shall promptly provide HarperCollins with all the requests for exclusion. HarperCollins has the option to void this Settlement Agreement if the

following two percentages exceed 10%, combined: (1) the percentage of HarperCollins' 2011 national dollar-weighted sales volume of E-books represented by states that have elected not to participate in the Settlement Agreement, and (2) the percentage of the total Named Publisher E-book sales volume for the period from April 1, 2010 to May 21, 2012 represented by Consumers requesting exclusion from this settlement. HarperCollins 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.

## **XI. 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. The terms of this Settlement Agreement may be entered into by the Attorney General of any State, Commonwealth, and Territory, who takes the following actions prior to the date that is sixty (60) days after the execution of this Settlement Agreement by Liaison Counsel for the Plaintiff States and HarperCollins:

1. Signs a signature page which will be appended onto the body of the Settlement Agreement which will be filed with the Court; and

2. Designates the Liaison Counsel for Plaintiff States to represent such State, Commonwealth, or Territory and agrees to be named as a plaintiff in the Complaint to be filed by the Plaintiff States in the United States District Court for the Southern District of New York alleging an unlawful agreement to fix, maintain or stabilize retail prices of E-books in violation of federal antitrust laws.

## **XII. MISCELLANEOUS**

A. HarperCollins may file the Settlement Agreement and/or the Final Judgment 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 the 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 or any of its Attachments on behalf of any party hereto warrants that such person has full authority to do so.

D. This Settlement Agreement and the Attachments contain 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 State Liaison Counsel and HarperCollins 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 State Liaison Counsel and HarperCollins 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 Court.

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

J. The 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 Court for purposes of implementing and enforcing the Settlement Agreement.

K. 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 HarperCollins Publishers, L.L.C.:

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

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:

HarperCollins Publishers, L.L.C.



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

State of Connecticut

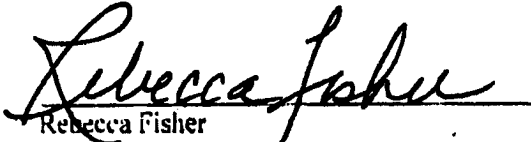
George Jepsen  
Attorney General



Gary M. Becker  
Assistant Attorney General  
Office of the Attorney General of  
Connecticut  
55 Elm Street  
PO Box 120  
Hartford, CT 06141-0120

State of Texas

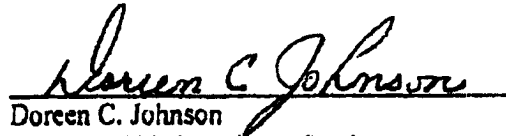
Greg Abbott  
Attorney General



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

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

**SETTLEMENT AGREEMENT BETWEEN SIMON & SCHUSTER, INC.**  
**AND PLAINTIFF STATES**

This Settlement Agreement is made and entered into this 11th day of June, 2012, by and between the States of Texas, Connecticut and Ohio, plus any other State, Commonwealth, Territory or Possession that has elected, or elects, to participate in the terms of this Settlement Agreement (“Plaintiff States”) through their respective Attorneys General, and Simon & Schuster, Inc. (“Simon & Schuster”) (collectively “Parties”). The terms of this Settlement Agreement shall be available to all States, the District of Columbia, Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Northern Mariana Islands as provided under the terms of Section XI. Any State electing to join the Settlement Agreement shall do so by executing a signature page that shall be annexed to this Agreement.

WHEREAS, the Plaintiff States will file a complaint against Simon & Schuster in the United States District Court for the Southern District of New York (the “Court”), both in their sovereign capacity and as *parens patriae*, on behalf of Consumers residing in such States who have purchased E-books from a Named Publisher, alleging an unlawful agreement to fix, maintain or stabilize prices of E-books in violation of federal and state antitrust laws and seeking, among other relief, damages, injunctive relief and costs of investigation and litigation (“Complaint”);

WHEREAS, this Settlement Agreement does not constitute any admission by Simon & Schuster that the law has been violated or of any issue of fact or law, other than that the jurisdictional facts as alleged in the Complaint are true;

WHEREAS, the Plaintiff States and Simon & Schuster have determined it to be in their best interests to resolve this dispute and enter into this Settlement Agreement;

NOW, THEREFORE, **WITNESSETH:**

## I. DEFINITIONS

As used herein:

A. “Plaintiff States” means any State, Commonwealth, the District of Columbia, Puerto Rico, the Virgin Islands, Guam, American Samoa and the Northern Mariana Islands, which originally signs on to or opts to enter into the terms of this Settlement Agreement as provided in Section XI.B in its sovereign capacity and as *parens patriae* on behalf of Consumers residing in such Plaintiff State.

B. “Hachette” means Hachette Book Group, Inc., a Delaware corporation with its principal place of business in New York, New York, its successors and assigns, and its subsidiaries, and divisions, including its wholly-owned subsidiary, Hachette Digital, Inc.

C. “HarperCollins” means HarperCollins Publishers L.L.C., a Delaware limited liability company with its principal place of business in New York, New York, its successors and assigns, and its subsidiaries, and divisions.

D. “Simon & Schuster” means Simon & Schuster, Inc., a New York corporation with its principal place of business in New York, New York, its successors and assigns, and its subsidiaries, and divisions, including its wholly-owned subsidiary, Simon & Schuster Digital Sales, Inc.

E. “Claims” means all claims, counterclaims, set-offs, demands, actions, rights, liabilities, costs, debts, expenses, attorneys’ fees, and causes of action of any type, whether 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 Simon & Schuster, Simon & Schuster’s parent and affiliated entities and their



officers, directors, employees and attorneys, arising from the facts, matters, transactions, events, occurrences, acts, disclosures, statements, omissions, or failures to act set forth or alleged in the Plaintiff States' Complaint. For purposes of this paragraph, "affiliated entities" shall mean entities that are currently or were formerly controlling, controlled by or under common control with Simon & Schuster.

F. "Consumers" mean natural persons in the Plaintiff States who have purchased E-books published by Named Publishers during the period from April 1, 2010 until May 21, 2012.

G. "Distribution Plan" means the plan or method of allocation of the Simon & Schuster Consumer Compensation Account among Consumers who have not filed with the Court valid and timely requests for exclusion from this Settlement. The Distribution Plan will be submitted to the Court separate from the Settlement Agreement and is not part of this Settlement Agreement.

H. "Effective Date" means the date on which this Settlement Agreement becomes effective. The Effective Date shall occur 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. Execution of this Settlement Agreement;
2. Entry by the Court of a Preliminary Approval Order;
3. Expiration of the period within which Consumers must exercise their rights to be excluded from *parens patriae* representation;
4. Simon & Schuster has not availed itself of the right to void this Settlement Agreement pursuant to Section X;
5. Final approval by the Court of the settlement embodied herein;
6. Entry by the Court of the Final Judgment;

7. Entry by the Court of the Order and Stipulated Injunction (as required in Section III); and

8. The Final Judgment shall have become Final (as defined in K, below).

I. “Escrow Agent” means the entity selected pursuant to Section V below.

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; or (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.

K. “Final” means: (1) final affirmance on an appeal of the Final Judgment, the expiration of the time for a petition for, or a denial of, a writ of certiorari to review the Final Judgment and, if certiorari is granted, the date of final affirmance for the Final Judgment following review pursuant to that grant; or (2) final dismissal of any appeal from the Final Judgment or the final dismissal of any proceedings on certiorari to review the Final Judgment; or (3) if no appeal is filed, the time for the filing or noticing of any appeal from the Court’s Final Judgment approving the Settlement Agreement has expired (*i.e.*, thirty (30) days after entry of the Final Judgment). Any proceeding or order, or any appeal or petition for a writ of certiorari pertaining solely to the Distribution Plan and/or application for attorneys’ fees, costs or expenses, shall not in any way delay or preclude the Final Judgment from becoming Final.

L. “Final Judgment” means the judgment to be rendered by the Court in this matter, substantially in the form attached hereto as Attachment A.

M. “Including” means including, but not limited to.

N. “Named Publishers” means Hachette, HarperCollins, Simon & Schuster, Holtzbrinck Publishers, LLC, d/b/a MacMillan, and Penguin Group (USA), Inc.

O. “Notice Period” means the period during which notice shall be disseminated to Consumers. The Notice Period shall be a minimum of sixty (60) days or such other time period set by the Court.

P. “Notice Plan” means the plan specifying the manner and content of the program whereby 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 Consumers are to be notified of this settlement, which shall consist, at a minimum, of direct notice to each Consumer whose e-mail address can be obtained voluntarily from E-book retailers.

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

R. “Released Claims” shall mean all Claims as defined in Section VIII.

S. “Sale” means delivery of access to a Consumer to read one or more E-books (purchased alone, or in combination with other goods or services) in exchange for payment; “Sold” means to make or to have made a Sale of an E-book to a Consumer.

T. “Settlement Accounts” mean the Simon & Schuster Consumer Compensation Settlement Account, the States’ Compensation Settlement Account, and the Settlement Cost Account described in Section IV. The Settlement Accounts shall be held in interest-bearing

escrow accounts established by Plaintiff States and administered by an Escrow Agent appointed pursuant to Section V.A. for the purpose of implementing this Settlement Agreement.

U. “Settlement Administration Costs” means all customary and reasonable costs to be paid from the Settlement Cost Account in connection with the administration of this Settlement Agreement, including all reasonable costs and fees incurred (1) in compiling necessary Consumer information for direct notice as well as such notice by publication as may be needed to effectuate adequate notice, (2) in completing administrative tasks, (3) in processing and paying claims, including distributing credits and/or cash to Consumers, (4) for the employment of a Escrow Agent and/or claims administrator, and (5) to secure Court approval of the Settlement agreement, such as expert affidavits.

V. “State Liaison Counsel” or “Liaison Counsel for Plaintiff States” means the designated representatives for the Attorneys General of the States of Texas, Connecticut, and Ohio.

W. “Written Direction” means a written notification directed to the Escrow Agent and/or claims administrator relating to disbursements from the Settlement Accounts, signed by at least two Liaison Counsel for Plaintiff States and counsel for Simon & Schuster. Each Written Direction shall include a certification by Liaison Counsel for Plaintiff States and counsel for Simon & Schuster that the instructions in the notification are being made pursuant to the Settlement Agreement.

## **II. AGREEMENT**

It is stipulated and agreed by and among counsel for the Plaintiff States and Simon & Schuster that, subject to Final Approval by the Court, the litigation initiated by the Complaint

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. ORDER AND STIPULATED INJUNCTION**

As part of this Settlement Agreement, the Plaintiff States and Simon & Schuster have agreed to the entry of an Order and Stipulated Injunction in the form of Attachment B, the terms and conditions of which are incorporated into this Settlement Agreement as though set forth in this Section III in full. The Order and Stipulated Injunction shall be modified to take into account any changes made to the language of the United States Department of Justice's Proposed Final Judgment, as entered in *United States of America v. Apple, Inc., et al.*, Case No. 12-cv-2826, in the United States District Court for the Southern District of New York. The terms set forth in the Order and Stipulated Injunction shall govern the enforcement of this Section III.

### **IV. MONETARY PAYMENTS**

A. Simon & Schuster agrees to pay to the Plaintiff States the sum of \$18.1 million for Consumer compensation for alleged actual losses arising from the acts alleged in the Complaint. This amount shall be paid to the Plaintiff States, c/o the Escrow Agent appointed pursuant to Section V.A. within thirty (30) days of the Court entering the Preliminary Approval Order. The Escrow Agent shall establish the Simon & Schuster Consumer Compensation Settlement Account from the monies received from Simon & Schuster under this Paragraph. These monies, plus any accrued interest, shall be used to fund the Consumer distribution as described in Section VI.A. The Escrow Agent shall only distribute funds in the Simon & Schuster Consumer Compensation Settlement Account pursuant to a Court-approved Distribution Plan which has become Final within the meaning of Section I.K.

B. The \$18.1 million to be paid by Simon & Schuster for Consumer compensation shall be reduced proportionately by the percentage of Simon & Schuster's E-book sales for 2011 attributable to each State, Commonwealth, or Territory that does not exercise its option to participate in this Settlement Agreement.

C. Simon & Schuster further agrees to pay to the Plaintiff States the sum of \$2,541,666.66 for their costs of investigation and litigation and other related costs as provided in Section VI.B. This amount shall be paid to the Plaintiff States, c/o the Escrow Agent appointed pursuant to Section V.A. herein within thirty (30) days of the Court entering the Preliminary Approval Order. The Escrow Agent shall establish the States' Compensation Settlement Account from the monies received from Simon & Schuster under this Paragraph, in addition to the funds received from Hachette and HarperCollins. These monies, plus any accrued interest, shall be apportioned among the Plaintiff States in a manner to be determined among and between them as set forth in Section VI.B. Simon & Schuster shall pay this amount in full, regardless of the percentage of States and Territories participating in the Settlement Agreement, and there shall be no reduction for non-participating States.

D. Simon & Schuster will also pay its per capita share of all reasonable Settlement Administration Costs. The per capita share will be determined by the number of settling parties that have executed an agreement with Plaintiff States that is substantially similar to this Settlement Agreement by June 11, 2012. The Escrow Agent shall establish the Settlement Cost Account from the monies received from settling parties pursuant to this Paragraph and Paragraph E. These monies, plus any accrued interest, shall be used to pay the Settlement Administration Costs pursuant to Section VI.C. The Escrow Agent shall pay invoices only as provided in this Settlement Agreement, by an order of the Court, or pursuant to Written Direction.

E. Payments for the Settlement Cost Account will be made as follows:

1. \$100,000 shall be paid by Simon & Schuster to the Plaintiff States, c/o the Escrow Agent within five (5) business days of the execution of this Settlement Agreement by Liaison Counsel for the States and Simon & Schuster.
2. \$650,000 shall be paid by Simon & Schuster to the Plaintiff States, c/o the Escrow Agent within five (5) business days of the filing of the Motion for Preliminary Approval.
3. Upon notice that additional funds are necessary to pay Settlement Administration Costs, Simon & Schuster shall make a supplemental deposit of its per capita share into the Settlement Cost Account within ten (10) business days of such notice.
4. After counsel for the Liaison States 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 Simon & Schuster its per capita share of the unused funds in the Settlement Cost Account within a reasonable period of time.

F. Simon & Schuster warrants that, as of the date of this Settlement Agreement, it is not insolvent, nor will its payment to the Settlement Accounts render it insolvent within the meaning of and/or for the purposes of the United States Bankruptcy Code. If a case is commenced with respect to Simon & Schuster 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 any accrued interest, or any portion thereof, by or on behalf of Simon & Schuster, 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 Simon & Schuster pursuant to this Settlement Agreement are either not delivered or are

returned to Simon & Schuster or the trustee, receiver, or conservator appointed by a court in any bankruptcy proceeding with respect to Simon & Schuster, the releases given and judgment entered in favor of Simon & Schuster pursuant to this Settlement Agreement shall be null and void.

G. The payments hereunder do not constitute nor shall they be treated as payments in lieu of treble damages, fines, penalties, punitive recoveries or forfeitures.

H. The payments made by Simon & Schuster to the Settlement Accounts (including the additional payments contemplated pursuant to Paragraph E.3) shall be the total amount to be paid by Simon & Schuster under this Settlement Agreement or in connection with Released Claims.

I. Except as otherwise provided in this Settlement Agreement, upon the Effective Date all remaining interest or right of Simon & Schuster in or to the Settlement Accounts shall be absolutely and forever extinguished.

## **V. SETTLEMENT ADMINISTRATION**

A. The Escrow Agent for the Settlement Accounts shall be determined by the Plaintiff States, after consultation with Simon & Schuster, by separate written agreement. The costs of the Escrow Agent shall be borne by Simon & Schuster, pursuant to Sections IV.D and E. 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.



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

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

D. In addition to the Escrow Agent, the Plaintiff States, after consultation with Simon & Schuster, may employ a claims administrator in order to facilitate the provision of notice and to distribute and/or administer the distribution of the funds in the Simon & Schuster Consumer Compensation Settlement Account in accordance with the terms of this Settlement Agreement. The costs of such claims administrator shall be borne by Simon & Schuster, pursuant to Sections IV.D and E.

E. If this Settlement Agreement is not approved or is terminated, canceled, voided or fails to become effective, all monies paid into the Settlement Accounts, including any interest accrued thereon, shall be refunded to Simon & Schuster, reduced by the amount of actual out-of-pocket costs and expenses incurred or committed for Settlement Administration Costs as of the date of disapproval, cancellation, termination or voiding. In such event, the refund shall occur within twenty (20) business days of the cancellation, termination or voiding. In the case of disapproval by the Court, refund shall occur within five (5) business days of the Court's decision becoming Final, as defined in Section I.K.

F. If this Settlement Agreement is not approved or is terminated, canceled, voided or fails to become effective, Plaintiff States shall retain full rights to assert any and all causes of action against Simon & Schuster, including the right to amend the Complaint to include

additional allegations, claims, causes of action and requests for relief and Simon & Schuster shall retain any and all defenses thereto.

G. Tax Treatment of Settlement Accounts

1. Settling Parties and Escrow Agent agree to treat the Settlement Accounts as being, at all times from and after expiration or waiver of the period within which Simon & Schuster may void this Settlement Agreement under Section X, a “qualified settlement fund” within the meaning of Treas. Reg. § 1.468B-1(a). In addition, the Escrow Agent and, as required, settling Parties shall jointly and timely make such elections as necessary or advisable to carry out the provisions of this Section V.G., 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 Section V.G.1.) shall be consistent with this Section V.G 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 Simon & Schuster 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 Simon & Schuster 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 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)); Simon & Schuster and its insurers are not responsible and shall have no liability therefore 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 V.G. For purposes of this Section V.G., references to the Settlement Accounts shall include the Settlement Accounts and any earnings thereon.

## **VI. SETTLEMENT DISBURSEMENTS**

A. Distribution to Consumers: All funds in the Simon & Schuster Consumer Compensation Settlement Account shall be distributed, according to a Court-approved

Distribution Plan, for the benefit of Consumers who have not filed with the Court valid and timely requests for exclusion from this settlement.

1. Plaintiff States will strive to devise a Distribution Plan that will maximize direct Consumer recovery, minimize any residue, and minimize administrative expenses consistent with the provision of fair, adequate and reasonable notice to Consumers. The Distribution Plan shall be devised by the Plaintiff States, after consultation with Simon & Schuster, and shall, at minimum and to the extent practicable, provide Consumers with the option of receiving payment in the form of a check or a credit for the purchase of either print books or E-books. The Distribution Plan shall provide that credits may be used for any print book or E-book purchase, regardless of publisher. Unless otherwise ordered by the Court, credits may be applied to purchases for a period of one (1) year from the date they are made available to Consumers. The Distribution Plan may also contain provisions for multiple distributions, or a single, later distribution to Consumers if appropriate.

2. Any amount remaining in the Simon & Schuster Consumer Compensation Settlement Account after redemption of all cash and credits within the time period approved by the Court will be subject to any applicable Plaintiff State's unclaimed property laws. If any residual amount thereafter remains in the Simon & Schuster Consumer Compensation Settlement Account, subject to any other applicable state law prohibiting *cy pres* distribution and mandating a different distribution by a particular Plaintiff State of its share of any residual amount, it shall be distributed by the Plaintiff States for *cy pres* purposes to one or more charitable organizations whose purposes relate to reading, literacy, or access by the public to electronic books.

3. The Parties agree and understand that any proposed Distribution Plan is to be considered by the Court separately from the 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 Court's Final Judgment approving the Settlement Agreement and the settlement set forth herein, or any other orders entered pursuant to the Settlement Agreement.

4. The Distribution Plan shall be submitted to the Court for approval in connection with the Plaintiff States' Motion for Preliminary Approval of the Settlement ("Motion for Preliminary Approval").

B. Distribution of Compensation to Plaintiff States: The States' Compensation Settlement Account shall be used to reimburse counsel for the Plaintiff States for payment of attorneys' fees, costs, administrative expenses incurred by Plaintiff States, and as other payments. Such Account shall be apportioned among the Plaintiff States at their sole discretion. Such apportionments shall then be used collectively or individually by the 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 the Plaintiff States in connection with the National Association of Attorneys General Milk Fund Account ("NAAG Milk Fund" or "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 the ongoing investigation and litigation involving the E-books market;

4. Antitrust or consumer protection enforcement by the Attorney General of such State, provided that, with respect to the State of Washington, these funds shall only be used for antitrust enforcement;
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, provided that, with respect to the State of Washington, these funds shall only be used for antitrust enforcement;
6. Deposit into a fund exclusively dedicated to assisting the state Attorney General to defray the cost of experts, economists, and consultants 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.

C. Disbursement for Payment of Administrative Costs: Upon Written Direction or Court Order, the Settlement Cost Account shall be used by the Escrow Agent to pay the Settlement Administration Costs.

## **VII. NOTICE AND SETTLEMENT HEARING**

A. Within sixty-eight (68) days after execution of this Settlement Agreement by Liaison Counsel for the Plaintiff States and Simon & Schuster, Liaison Counsel for Plaintiff States shall file the Motion for Preliminary Approval with the Court. The motion shall request entry of a preliminary approval order (the “Preliminary Approval Order”). Such Preliminary Approval Order shall include, among other things: (1) the preliminary approval of the settlement set forth in this Settlement Agreement as fair, reasonable and adequate and in the best interests of Consumers in the Plaintiff States, (2) a finding that the State Attorneys General are the superior

representatives of natural persons in the Plaintiff States, (3) approval of a Notice Plan, including when the Notice shall be disseminated and the length of the Notice Period, (4) approval of a Distribution Plan that includes the time period during which eligible Consumers can object, exclude themselves, and/or obtain credits and/or a check, and (5) a schedule for a hearing by the Court after notice is given (the “Settlement Hearing”) to approve the settlement of the litigation initiated by the Complaint, as set forth herein. At least five (5) days prior to filing their Motion for Preliminary Approval, the Plaintiff States shall provide a copy of such motion (including all exhibits and attachments of such motion) to Simon & Schuster for review and comment.

B. Liaison Counsel for Plaintiff States will provide Simon & Schuster a substantially final copy of the Notice Plan, including the Notice, at least five (5) business days prior to filing the Motion for Preliminary Approval.

C. Liaison Counsel for the Plaintiff States shall disseminate Notice of the Settlement Agreement to potentially affected Consumers as soon as practicable after entry of the Preliminary Approval Order. The Parties contemplate a Notice Period of at least sixty (60) days, unless another time period is set by the Court.

D. Within forty-five (45) days following the conclusion of the Notice Period, Liaison Counsel for Plaintiff States shall file with this Court a motion seeking final approval of the Settlement Agreement, including a determination by the Court (1) that the Settlement Agreement is approved finally as fair, reasonable and adequate, (2) that a Final Judgment approving the Settlement Agreement, substantially in the form of Attachment A, should be entered, (3) that the Order and Stipulated Injunction, substantially in the form of Attachment B, should be entered, and (4) that an award of attorneys’ fees, expenses and other payments should be made from the

States' Compensation Settlement Account to counsel for the Plaintiff States pursuant to Section VI.B.

### **VIII. RELEASED CLAIMS**

A. In consideration of the monetary and injunctive provisions contained in this Settlement Agreement, each Plaintiff State will be deemed, upon the Effective Date, to have (and by operation of the Final Judgment shall have), fully, finally, and forever released Simon & Schuster, Simon & Schuster's parent and affiliated entities and their officers, directors, employees, and attorneys (collectively "Releasees") from all Claims that were asserted or could have been asserted by any Consumers who did not timely file with the Court a valid request for exclusion from this settlement. The Final Judgment shall be deemed *res judicata* as to any such released Claim.

B. In further consideration of the monetary and injunctive provisions contained in this Settlement Agreement, each Plaintiff State will be deemed, upon the Effective Date, 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.

C. In further consideration of the monetary and injunctive provisions contained in this Settlement Agreement, each Plaintiff State's Attorney General covenants and agrees, to the fullest extent permitted by law, that it shall not hereafter seek to establish liability or assert Claims, in whole or in part, on behalf of itself or any other person or entity or class thereof, against the Releasees.

D. The Plaintiff States and Simon & Schuster 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 Plaintiff States have or may have against any other entity whosoever, including Hachette, HarperCollins, Holtzbrinck Publishers, LLC, d/b/a MacMillan, Penguin Group (USA), Inc., Apple, Inc., or any of their parents, affiliated entities, officers, directors, employees, or attorneys. The Final Judgment approving this Settlement Agreement shall include a provision that this Settlement Agreement and anything done pursuant thereto shall not constitute a release except as to Releasees, and the Plaintiff States and Consumers reserve their rights as aforesaid.

E. 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 favor at the time of executing the release, which if known by him must have materially affected his 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.

## **IX. 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 State determines that Simon & Schuster is not in compliance with the terms of the Settlement Agreement, it shall give Simon & Schuster written notice of such non-compliance and Simon & Schuster shall have fifteen (15) working days to respond in writing. If Plaintiff State is not satisfied with Simon & Schuster’s response, it shall notify Simon & Schuster in writing and Simon & Schuster shall have fifteen (15) working days to cure such non-

compliance. If after such time a Plaintiff State shall determine that Simon & Schuster is still not in compliance, such Plaintiff State may seek the civil remedies available to it under the terms of the Final Judgment and Order and Stipulated Injunction.

C. This Settlement Agreement shall not be used or construed by any person as an admission of liability by Simon & Schuster 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 Simon & Schuster or of the truth of any of the claims or allegations contained in the Complaint.

## **X. AGREEMENT VOIDABLE**

A. This Settlement Agreement shall only be voidable pursuant to this Section X.

B. This Settlement Agreement is voidable at the option of Simon & Schuster if, after sixty (60) days following the execution of this Settlement Agreement by the Liaison States and Simon & Schuster, the Attorneys General of a number of states accounting for ninety percent (90%) of Simon & Schuster's 2011 national dollar-weighted sales volume of E-books have not elected to participate in the Settlement Agreement.

C. Simon & Schuster must exercise its option to void this Settlement Agreement pursuant to Paragraph B by notifying the Liaison Counsel for Plaintiff States in writing within five (5) days of the expiration of the sixty (60) day time frame specified in Paragraph B. This Settlement Agreement shall not be voidable pursuant to Paragraph B after that date.

D. This Agreement is void if the settlement embodied herein is not approved by the Court.

E. If, during the Notice Period, Consumers who otherwise would be represented by the Plaintiff States have filed with the Court valid and timely requests for exclusion from this settlement, Liaison Counsel for Plaintiff States shall promptly provide Simon & Schuster with all

the requests for exclusion. Simon & Schuster's has the option to void this Settlement Agreement if the following two percentages exceed 10%, combined: (1) the percentage of Simon & Schuster's 2011 national dollar-weighted sales volume of E-books represented by states that have elected not to participate in the Settlement Agreement, and (2) the percentage of the total Named Publisher E-book sales volume for the period from April 1, 2010 to May 21, 2012 represented by Consumers requesting exclusion from this settlement. Simon & Schuster 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.

## **XI. 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. The terms of this Settlement Agreement may be entered into by the Attorney General of any State, Commonwealth, and Territory, who takes the following actions prior to the date that is sixty (60) days after the execution of this Settlement Agreement by Liaison Counsel for the Plaintiff States and Simon & Schuster:

1. Signs a signature page which will be appended onto the body of the Settlement Agreement which will be filed with the Court; and
2. Designates the Liaison Counsel for Plaintiff States to represent such State, Commonwealth, or Territory and agrees to be named as a plaintiff in the Complaint to be filed by the Plaintiff States in the United States District Court for the Southern District of New York

alleging an unlawful agreement to fix, maintain or stabilize retail prices of E-books in violation of federal antitrust laws.

## **XII. MISCELLANEOUS**

A. Simon & Schuster may file the Settlement Agreement and/or the Final Judgment 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 the 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 or any of its Attachments on behalf of any party hereto warrants that such person has full authority to do so.

D. This Settlement Agreement and the Attachments contain 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 State Liaison Counsel and Simon & Schuster 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 State Liaison Counsel and Simon & Schuster 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 Court.

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

J. The 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 Court for purposes of implementing and enforcing the Settlement Agreement.

K. 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 Simon & Schuster, Inc.:

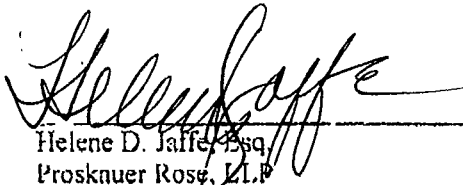
Helene D. Jaffe, Esq.  
Proskauer Rose, LLP  
Eleven Times Square  
New York, NY, 10036-8299

David Hillman, Executive VP & General Counsel  
Simon & Schuster, Inc.  
1230 Avenue of Americas  
New York, NY 10020

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:

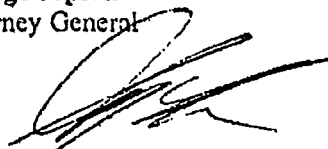
Simon & Schuster, Inc.



Helene D. Jaffe, Esq.  
Proskauer Rose, LLP  
Eleven Times Square  
New York, NY, 10036-8299

State of Connecticut

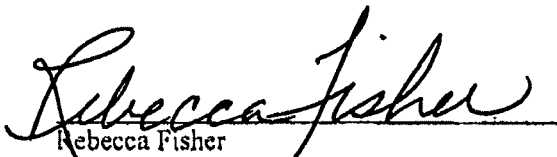
George Jepsen  
Attorney General



Gary M. Becker  
Assistant Attorney General  
Office of the Attorney General of  
Connecticut  
55 Elm Street  
PO Box 120  
Hartford, CT 06141-0120

State of Texas

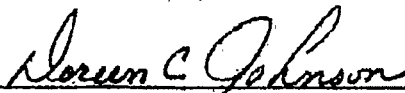
Greg Abbott  
Attorney General



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

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

**SETTLEMENT AGREEMENT BETWEEN HACHETTE BOOK GROUP, INC.**  
**AND PLAINTIFF STATES**

This Settlement Agreement is made and entered into this 11th day of June, 2012, by and between the States of Texas, Connecticut and Ohio, plus any other State, Commonwealth, Territory or Possession that has elected, or elects, to participate in the terms of this Settlement Agreement (“Plaintiff States”) through their respective Attorneys General, and Hachette Book Group, Inc. (“Hachette”) (collectively “Parties”). The terms of this Settlement Agreement shall be available to all States, the District of Columbia, Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Northern Mariana Islands as provided under the terms of Section XI. Any State electing to join the Settlement Agreement shall do so by executing a signature page that shall be annexed to this Agreement.

WHEREAS, the Plaintiff States will file a complaint against Hachette in the United States District Court for the Southern District of New York (the “Court”), both in their sovereign capacity and as *parens patriae*, on behalf of Consumers residing in such States who have purchased E-books from a Named Publisher, alleging an unlawful agreement to fix, maintain or stabilize prices of E-books in violation of federal and state antitrust laws and seeking, among other relief, damages, injunctive relief and costs of investigation and litigation (“Complaint”);

WHEREAS, this Settlement Agreement does not constitute any admission by Hachette that the law has been violated or of any issue of fact or law, other than that the jurisdictional facts as alleged in the Complaint are true;

WHEREAS, the Plaintiff States and Hachette have determined it to be in their best interests to resolve this dispute and enter into this Settlement Agreement;

NOW, THEREFORE, **WITNESSETH:**



## **I. DEFINITIONS**

As used herein:

A. “Plaintiff States” means any State, Commonwealth, the District of Columbia, Puerto Rico, the Virgin Islands, Guam, American Samoa and the Northern Mariana Islands, which originally signs on to or opts to enter into the terms of this Settlement Agreement as provided in Section XI.B in its sovereign capacity and as *parens patriae* on behalf of Consumers residing in such Plaintiff State.

B. “Hachette” means Hachette Book Group, Inc., a Delaware corporation with its principal place of business in New York, New York, its successors and assigns, and its subsidiaries, and divisions, including its wholly-owned subsidiary, Hachette Digital, Inc.

C. “HarperCollins” means HarperCollins Publishers L.L.C., a Delaware limited liability company with its principal place of business in New York, New York, its successors and assigns, and its subsidiaries, and divisions.

D. “Simon & Schuster” means Simon & Schuster, Inc., a New York corporation with its principal place of business in New York, New York, its successors and assigns, and its subsidiaries, and divisions, including its wholly-owned subsidiary, Simon & Schuster Digital Sales, Inc.

E. “Claims” means all claims, counterclaims, set-offs, demands, actions, rights, liabilities, costs, debts, expenses, attorneys’ fees, and causes of action of any type, whether 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 Hachette, Hachette’s parent and affiliated entities and their officers, directors,

employees and attorneys, arising from the facts, matters, transactions, events, occurrences, acts, disclosures, statements, omissions, or failures to act set forth or alleged in the Plaintiff States' Complaint. For purposes of this paragraph, "affiliated entities" shall mean entities that are currently or were formerly controlling, controlled by or under common control with Hachette.

F. "Consumers" mean natural persons in the Plaintiff States who have purchased E-books published by Named Publishers during the period from April 1, 2010 until May 21, 2012.

G. "Distribution Plan" means the plan or method of allocation of the Hachette Consumer Compensation Account among Consumers who have not filed with the Court valid and timely requests for exclusion from this Settlement. The Distribution Plan will be submitted to the Court separate from the Settlement Agreement and is not part of this Settlement Agreement.

H. "Effective Date" means the date on which this Settlement Agreement becomes effective. The Effective Date shall occur 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. Execution of this Settlement Agreement;
2. Entry by the Court of a Preliminary Approval Order;
3. Expiration of the period within which Consumers must exercise their rights to be excluded from *parens patriae* representation;
4. Hachette has not availed itself of the right to void this Settlement Agreement pursuant to Section X;
5. Final approval by the Court of the settlement embodied herein;
6. Entry by the Court of the Final Judgment;

7. Entry by the Court of the Order and Stipulated Injunction (as required in Section III); and

8. The Final Judgment shall have become Final (as defined in K, below).

I. “Escrow Agent” means the entity selected pursuant to Section V below.

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; or (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.

K. “Final” means: (1) final affirmance on an appeal of the Final Judgment, the expiration of the time for a petition for, or a denial of, a writ of certiorari to review the Final Judgment and, if certiorari is granted, the date of final affirmance for the Final Judgment following review pursuant to that grant; or (2) final dismissal of any appeal from the Final Judgment or the final dismissal of any proceedings on certiorari to review the Final Judgment; or (3) if no appeal is filed, the time for the filing or noticing of any appeal from the Court’s Final Judgment approving the Settlement Agreement has expired (*i.e.*, thirty (30) days after entry of the Final Judgment). Any proceeding or order, or any appeal or petition for a writ of certiorari pertaining solely to the Distribution Plan and/or application for attorneys’ fees, costs or expenses, shall not in any way delay or preclude the Final Judgment from becoming Final.

L. “Final Judgment” means the judgment to be rendered by the Court in this matter, substantially in the form attached hereto as Attachment A.

M. “Including” means including, but not limited to.

N. “Named Publishers” means Hachette, HarperCollins, Simon & Schuster, Holtzbrinck Publishers, LLC, d/b/a MacMillan, and Penguin Group (USA), Inc.

O. “Notice Period” means the period during which notice shall be disseminated to Consumers. The Notice Period shall be a minimum of sixty (60) days or such other time period set by the Court.

P. “Notice Plan” means the plan specifying the manner and content of the program whereby 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 Consumers are to be notified of this settlement, which shall consist, at a minimum, of direct notice to each Consumer whose e-mail address can be obtained voluntarily from E-book retailers.

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

R. “Released Claims” shall mean all Claims as defined in Section VIII.

S. “Sale” means delivery of access to a Consumer to read one or more E-books (purchased alone, or in combination with other goods or services) in exchange for payment; “Sold” means to make or to have made a Sale of an E-book to a Consumer.

T. “Settlement Accounts” mean the Hachette Consumer Compensation Settlement Account, the States’ Compensation Settlement Account, and the Settlement Cost Account described in Section IV. The Settlement Accounts shall be held in interest-bearing escrow

accounts established by Plaintiff States and administered by an Escrow Agent appointed pursuant to Section V.A. for the purpose of implementing this Settlement Agreement.

U. “Settlement Administration Costs” means all customary and reasonable costs to be paid from the Settlement Cost Account in connection with the administration of this Settlement Agreement, including all reasonable costs and fees incurred (1) in compiling necessary Consumer information for direct notice as well as such notice by publication as may be needed to effectuate adequate notice, (2) in completing administrative tasks, (3) in processing and paying claims, including distributing credits and/or cash to Consumers, (4) for the employment of a Escrow Agent and/or claims administrator, and (5) to secure Court approval of the Settlement agreement, such as expert affidavits.

V. “State Liaison Counsel” or “Liaison Counsel for Plaintiff States” means the designated representatives for the Attorneys General of the States of Texas, Connecticut, and Ohio.

W. “Written Direction” means a written notification directed to the Escrow Agent and/or claims administrator relating to disbursements from the Settlement Accounts, signed by at least two Liaison Counsel for Plaintiff States and counsel for Hachette. Each Written Direction shall include a certification by Liaison Counsel for Plaintiff States and counsel for Hachette that the instructions in the notification are being made pursuant to the Settlement Agreement.

## **II. AGREEMENT**

It is stipulated and agreed by and among counsel for the Plaintiff States and Hachette that, subject to Final Approval by the Court, the litigation initiated by the Complaint 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. ORDER AND STIPULATED INJUNCTION**

As part of this Settlement Agreement, the Plaintiff States and Hachette have agreed to the entry of an Order and Stipulated Injunction in the form of Attachment B, the terms and conditions of which are incorporated into this Settlement Agreement as though set forth in this Section III in full. The Order and Stipulated Injunction shall be modified to take into account any changes made to the language of the United States Department of Justice's Proposed Final Judgment as entered in *United States of America v. Apple, Inc., et al.*, Case No. 12-cv-2826, in the United States District Court for the Southern District of New York. The terms set forth in the Order and Stipulated Injunction shall govern the enforcement of this Section III.

### **IV. MONETARY PAYMENTS**

A. Hachette agrees to pay to the Plaintiff States the sum of \$32.25 million for Consumer compensation for alleged actual losses arising from the acts alleged in the Complaint. This amount shall be paid to the Plaintiff States, c/o the Escrow Agent appointed pursuant to Section V.A. within thirty (30) days of the Court entering the Preliminary Approval Order. The Escrow Agent shall establish the Hachette Consumer Compensation Settlement Account from the monies received from Hachette under this Paragraph. These monies, plus any accrued interest, shall be used to fund the Consumer distribution as described in Section VI.A. The Escrow Agent shall only distribute funds in the Hachette Consumer Compensation Settlement Account pursuant to a Court-approved Distribution Plan which has become Final within the meaning of Section I.K.

B. The \$32.25 million to be paid by Hachette for Consumer compensation shall be reduced proportionately by the percentage of Hachette's E-book sales for 2011 attributable to

each State, Commonwealth, or Territory that does not exercise its option to participate in this Settlement Agreement.

C. Hachette further agrees to pay to the Plaintiff States the sum of \$2,541,666.66 for their costs of investigation and litigation and other related costs as provided in Section VI.B. This amount shall be paid to the Plaintiff States, c/o the Escrow Agent appointed pursuant to Section V.A. herein within thirty (30) days of the Court entering the Preliminary Approval Order. The Escrow Agent shall establish the States' Compensation Settlement Account from the monies received from Hachette under this Paragraph, in addition to the funds received from HarperCollins and Simon & Schuster. These monies, plus any accrued interest, shall be apportioned among the Plaintiff States in a manner to be determined among and between them as set forth in Section VI.B. Hachette shall pay this amount in full, regardless of the percentage of States and Territories participating in the Settlement Agreement, and there shall be no reduction for non-participating States.

D. Hachette will also pay its per capita share of all reasonable Settlement Administration Costs. The per capita share will be determined by the number of settling parties that have executed an agreement with Plaintiff States that is substantially similar to this Settlement Agreement by June 11, 2012. The Escrow Agent shall establish the Settlement Cost Account from the monies received from settling parties pursuant to this Paragraph and Paragraph E. These monies, plus any accrued interest, shall be used to pay the Settlement Administration Costs pursuant to Section VI.C. The Escrow Agent shall pay invoices only as provided in this Settlement Agreement, by an order of the Court, or pursuant to Written Direction.

E. Payments for the Settlement Cost Account will be made as follows:

1. \$100,000 shall be paid by Hachette to the Plaintiff States, c/o the Escrow Agent within five (5) business days of the execution of this Settlement Agreement by Liaison Counsel for the States and Hachette.
2. \$650,000 shall be paid by Hachette to the Plaintiff States, c/o the Escrow Agent within five (5) business days of the filing of the Motion for Preliminary Approval.
3. Upon notice that additional funds are necessary to pay Settlement Administration Costs, Hachette shall make a supplemental deposit of its per capita share into the Settlement Cost Account within ten (10) business days of such notice.
4. After counsel for the Liaison States 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 Hachette its per capita share of the unused funds in the Settlement Cost Account within a reasonable period of time.

F. Hachette warrants that, as of the date of this Settlement Agreement, it is not insolvent, nor will its payment to the Settlement Accounts render it insolvent within the meaning of and/or for the purposes of the United States Bankruptcy Code. If a case is commenced with respect to Hachette 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 any accrued interest, or any portion thereof, by or on behalf of Hachette, 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 Hachette pursuant to this Settlement Agreement are either not delivered or are returned to Hachette or the trustee, receiver,



or conservator appointed by a court in any bankruptcy proceeding with respect to Hachette, the releases given and judgment entered in favor of Hachette pursuant to this Settlement Agreement shall be null and void.

G. The payments hereunder do not constitute nor shall they be treated as payments in lieu of treble damages, fines, penalties, punitive recoveries or forfeitures.

H. The payments made by Hachette to the Settlement Accounts (including the additional payments contemplated pursuant to Paragraph E.3) shall be the total amount to be paid by Hachette under this Settlement Agreement or in connection with Released Claims.

I. Except as otherwise provided in this Settlement Agreement, upon the Effective Date all remaining interest or right of Hachette in or to the Settlement Accounts shall be absolutely and forever extinguished.

## **V. SETTLEMENT ADMINISTRATION**

A. The Escrow Agent for the Settlement Accounts shall be determined by the Plaintiff States, after consultation with Hachette, by separate written agreement. The costs of the Escrow Agent shall be borne by Hachette, pursuant to Sections IV.D and E. 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.

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

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

D. In addition to the Escrow Agent, the Plaintiff States, after consultation with Hachette, may employ a claims administrator in order to facilitate the provision of notice and to distribute and/or administer the distribution of the funds in the Hachette Consumer Compensation Settlement Account in accordance with the terms of this Settlement Agreement. The costs of such claims administrator shall be borne by Hachette, pursuant to Sections IV.D and E.

E. If this Settlement Agreement is not approved or is terminated, canceled, voided or fails to become effective, all monies paid into the Settlement Accounts, including any interest accrued thereon, shall be refunded to Hachette, reduced by the amount of actual out-of-pocket costs and expenses incurred or committed for Settlement Administration Costs as of the date of disapproval, cancellation, termination or voiding. In such event, the refund shall occur within twenty (20) business days of the cancellation, termination or voiding. In the case of disapproval by the Court, refund shall occur within five (5) business days of the Court's decision becoming Final, as defined in Section I.K.

F. If this Settlement Agreement is not approved or is terminated, canceled, voided or fails to become effective, Plaintiff States shall retain full rights to assert any and all causes of action against Hachette, including the right to amend the Complaint to include additional allegations, claims, causes of action and requests for relief and Hachette shall retain any and all defenses thereto.

G. Tax Treatment of Settlement Accounts

1. Settling Parties and Escrow Agent agree to treat the Settlement Accounts as being, at all times from and after expiration or waiver of the period within which Hachette may void this Settlement Agreement under Section X, a “qualified settlement fund” within the meaning of Treas. Reg. § 1.468B-1(a). In addition, the Escrow Agent and, as required, settling Parties shall jointly and timely make such elections as necessary or advisable to carry out the provisions of this Section V.G., 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 Section V.G.1.) shall be consistent with this Section V.G 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 Hachette 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 Hachette 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 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)); Hachette and its insurers are not responsible and shall have no liability therefore 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 V.G. For purposes of this Section V.G., references to the Settlement Accounts shall include the Settlement Accounts and any earnings thereon.

## **VI. SETTLEMENT DISBURSEMENTS**

A. Distribution to Consumers: All funds in the Hachette Consumer Compensation Settlement Account shall be distributed, according to a Court-approved Distribution Plan, for the benefit of Consumers who have not filed with the Court valid and timely requests for exclusion from this settlement.

1. Plaintiff States will strive to devise a Distribution Plan that will maximize direct Consumer recovery, minimize any residue, and minimize administrative expenses

consistent with the provision of fair, adequate and reasonable notice to Consumers. The Distribution Plan shall be devised by the Plaintiff States, after consultation with Hachette, and shall, at minimum and to the extent practicable, provide Consumers with the option of receiving payment in the form of a check or a credit for the purchase of either print books or E-books. The Distribution Plan shall provide that credits may be used for any print book or E-book purchase, regardless of publisher. Unless otherwise ordered by the Court, credits may be applied to purchases for a period of one (1) year from the date they are made available to Consumers. The Distribution Plan may also contain provisions for multiple distributions, or a single, later distribution to Consumers if appropriate.

2. Any amount remaining in the Hachette Consumer Compensation Settlement Account after redemption of all cash and credits within the time period approved by the Court will be subject to any applicable Plaintiff State's unclaimed property laws. If any residual amount thereafter remains in the Hachette Consumer Compensation Settlement Account, subject to any other applicable state law prohibiting *cy pres* distribution and mandating a different distribution by a particular Plaintiff State of its share of any residual amount, it shall be distributed by the Plaintiff States for *cy pres* purposes to one or more charitable organizations whose purposes relate to reading, literacy, or access by the public to electronic books.

3. The Parties agree and understand that any proposed Distribution Plan is to be considered by the Court separately from the 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 Court's Final Judgment approving the

Settlement Agreement and the settlement set forth herein, or any other orders entered pursuant to the Settlement Agreement.

4. The Distribution Plan shall be submitted to the Court for approval in connection with the Plaintiff States' Motion for Preliminary Approval of the Settlement ("Motion for Preliminary Approval").

B. Distribution of Compensation to Plaintiff States: The States' Compensation Settlement Account shall be used to reimburse counsel for the Plaintiff States for payment of attorneys' fees, costs, administrative expenses incurred by Plaintiff States, and as other payments. Such Account shall be apportioned among the Plaintiff States at their sole discretion. Such apportionments shall then be used collectively or individually by the 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 the Plaintiff States in connection with the National Association of Attorneys General Milk Fund Account ("NAAG Milk Fund" or "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 the ongoing investigation and litigation involving the E-books market;
4. Antitrust or consumer protection enforcement by the Attorney General of such State, provided that, with respect to the State of Washington, these funds shall only be used for antitrust enforcement;

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, provided that, with respect to the State of Washington, these funds shall only be used for antitrust enforcement;
6. Deposit into a fund exclusively dedicated to assisting the state Attorney General to defray the cost of experts, economists, and consultants 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.

C. Disbursement for Payment of Administrative Costs: Upon Written Direction or Court Order, the Settlement Cost Account shall be used by the Escrow Agent to pay the Settlement Administration Costs.

## **VII. NOTICE AND SETTLEMENT HEARING**

A. Within sixty-eight (68) days after execution of this Settlement Agreement by Liaison Counsel for the Plaintiff States and Hachette, Liaison Counsel for Plaintiff States shall file the Motion for Preliminary Approval with the Court. The motion shall request entry of a preliminary approval order (the “Preliminary Approval Order”). Such Preliminary Approval Order shall include, among other things: (1) the preliminary approval of the settlement set forth in this Settlement Agreement as fair, reasonable and adequate and in the best interests of Consumers in the Plaintiff States, (2) a finding that the State Attorneys General are the superior representatives of natural persons in the Plaintiff States, (3) approval of a Notice Plan, including when the Notice shall be disseminated and the length of the Notice Period, (4) approval of a Distribution Plan that includes the time period during which eligible Consumers can object,

exclude themselves, and/or obtain credits and/or a check, and (5) a schedule for a hearing by the Court after notice is given (the “Settlement Hearing”) to approve the settlement of the litigation initiated by the Complaint, as set forth herein. At least five (5) days prior to filing their Motion for Preliminary Approval, the Plaintiff States shall provide a copy of such motion (including all exhibits and attachments of such motion) to Hachette for review and comment.

B. Liaison Counsel for Plaintiff States will provide Hachette a substantially final copy of the Notice Plan, including the Notice, at least five (5) business days prior to filing the Motion for Preliminary Approval.

C. Liaison Counsel for the Plaintiff States shall disseminate Notice of the Settlement Agreement to potentially affected Consumers as soon as practicable after entry of the Preliminary Approval Order. The Parties contemplate a Notice Period of at least sixty (60) days, unless another time period is set by the Court.

D. Within forty-five (45) days following the conclusion of the Notice Period, Liaison Counsel for Plaintiff States shall file with this Court a motion seeking final approval of the Settlement Agreement, including a determination by the Court (1) that the Settlement Agreement is approved finally as fair, reasonable and adequate, (2) that a Final Judgment approving the Settlement Agreement, substantially in the form of Attachment A, should be entered, (3) that the Order and Stipulated Injunction, substantially in the form of Attachment B, should be entered, and (4) that an award of attorneys’ fees, expenses and other payments should be made from the States’ Compensation Settlement Account to counsel for the Plaintiff States pursuant to Section VI.B.



## VIII. RELEASED CLAIMS

A. In consideration of the monetary and injunctive provisions contained in this Settlement Agreement, each Plaintiff State will be deemed, upon the Effective Date, to have (and by operation of the Final Judgment shall have), fully, finally, and forever released Hachette, Hachette's parent and affiliated entities and their officers, directors, employees, and attorneys (collectively "Releasees") from all Claims that were asserted or could have been asserted by any Consumers who did not timely file with the Court a valid request for exclusion from this settlement. The Final Judgment shall be deemed *res judicata* as to any such released Claim.

B. In further consideration of the monetary and injunctive provisions contained in this Settlement Agreement, each Plaintiff State will be deemed, upon the Effective Date, 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.

C. In further consideration of the monetary and injunctive provisions contained in this Settlement Agreement, each Plaintiff State's Attorney General covenants and agrees, to the fullest extent permitted by law, that it shall not hereafter seek to establish liability or assert Claims, in whole or in part, on behalf of itself or any other person or entity or class thereof, against the Releasees.

D. The Plaintiff States and Hachette 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 Plaintiff States have or may have against any other entity whosoever, including HarperCollins, Simon & Schuster,

Holtzbrinck Publishers, LLC, d/b/a MacMillan, Penguin Group (USA), Inc., Apple, Inc., or any of their parents, affiliated entities, officers, directors, employees, or attorneys. The Final Judgment approving this Settlement Agreement shall include a provision that this Settlement Agreement and anything done pursuant thereto shall not constitute a release except as to Releasees, and the Plaintiff States and Consumers reserve their rights as aforesaid.

E. 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 favor at the time of executing the release, which if known by him must have materially affected his 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.

## **IX. 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 State determines that Hachette is not in compliance with the terms of the Settlement Agreement, it shall give Hachette written notice of such non-compliance and Hachette shall have fifteen (15) working days to respond in writing. If Plaintiff State is not satisfied with Hachette’s response, it shall notify Hachette in writing and Hachette shall have fifteen (15) working days to cure such non-compliance. If after such time a Plaintiff State shall determine that Hachette is still not in compliance, such Plaintiff State may seek the civil

remedies available to it under the terms of the Final Judgment and Order and Stipulated Injunction.

C. This Settlement Agreement shall not be used or construed by any person as an admission of liability by Hachette 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 Hachette or of the truth of any of the claims or allegations contained in the Complaint.

## **X. AGREEMENT VOIDABLE**

A. This Settlement Agreement shall only be voidable pursuant to this Section X.

B. This Settlement Agreement is voidable at the option of Hachette if, after sixty (60) days following the execution of this Settlement Agreement by the Liaison States and Hachette, the Attorneys General of a number of states accounting for ninety percent (90%) of Hachette's 2011 national dollar-weighted sales volume of E-books have not elected to participate in the Settlement Agreement.

C. Hachette must exercise its option to void this Settlement Agreement pursuant to Paragraph B by notifying the Liaison Counsel for Plaintiff States in writing within five (5) days of the expiration of the sixty (60) day time frame specified in Paragraph B. This Settlement Agreement shall not be voidable pursuant to Paragraph B after that date.

D. This Agreement is void if the settlement embodied herein is not approved by the Court.

E. If, during the Notice Period, Consumers who otherwise would be represented by the Plaintiff States have filed with the Court valid and timely requests for exclusion from this settlement, Liaison Counsel for Plaintiff States shall promptly provide Hachette with all the requests for exclusion. Hachette has the option to void this Settlement Agreement if the

following two percentages exceed 10%, combined: (1) the percentage of Hachette's 2011 national dollar-weighted sales volume of E-books represented by states that have elected not to participate in the Settlement Agreement, and (2) the percentage of the total Named Publisher E-book sales volume for the period from April 1, 2010 to May 21, 2012 represented by Consumers requesting exclusion from this settlement. Hachette 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.

## **XI. 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. The terms of this Settlement Agreement may be entered into by the Attorney General of any State, Commonwealth, and Territory, who takes the following actions prior to the date that is sixty (60) days after the execution of this Settlement Agreement by Liaison Counsel for the Plaintiff States and Hachette:

1. Signs a signature page which will be appended onto the body of the Settlement Agreement which will be filed with the Court; and
2. Designates the Liaison Counsel for Plaintiff States to represent such State, Commonwealth, or Territory and agrees to be named as a plaintiff in the Complaint to be filed by the Plaintiff States in the United States District Court for the Southern District of New York alleging an unlawful agreement to fix, maintain or stabilize retail prices of E-books in violation of federal antitrust laws.

## **XII. MISCELLANEOUS**

A. Hachette may file the Settlement Agreement and/or the Final Judgment 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 the 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 or any of its Attachments on behalf of any party hereto warrants that such person has full authority to do so.

D. This Settlement Agreement and the Attachments contain 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 State Liaison Counsel and Hachette 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 State Liaison Counsel and Hachette 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 Court.

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

J. The 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 Court for purposes of implementing and enforcing the Settlement Agreement.

K. 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

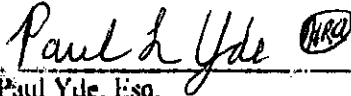
For Hachette Book Group, Inc.:

Paul Yde, Esq.  
Freshfields Bruckhaus Deringer US LLP  
701 Pennsylvania Avenue, NW  
Washington, DC 20004-2692

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:

Hachette Book Group, Inc.

 (WR)

Paul Yde, Esq.  
Freshfields Bruckhaus Deringer US LLP  
701 Pennsylvania Avenue, NW  
Washington, DC 20004-2692

State of Connecticut  
George Jepsen  
Attorney General



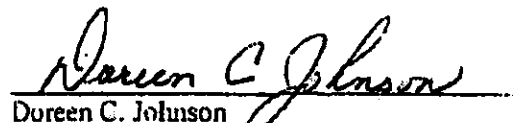
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Hartford, CT 06141-0120

State of Texas  
Greg Abbott  
Attorney General

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Mike DeWine  
Attorney General



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



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