

**MEMO ENDORSED**



U.S. Department of Justice

Antitrust Division

USDC SDNY  
DOCUMENT  
ELECTRONICALLY FILED  
DOC #:  
DATE FILED: 6/11/2012

*Liberty Square Building  
450 Fifth Street, N.W.  
Washington, DC 20530*

**HAND-DELIVERED**

June 7, 2012

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

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

Dear Judge Cote:

The United States asks that the Court excuse costly *Federal Register* publication of the voluminous public comments submitted in this matter, and instead authorize electronic publication for good cause, pursuant to 15 U.S.C. § 16(d). The United States has conferred with all parties to this action and this motion is unopposed. Attached as "Exhibit 1" is a Proposed Order permitting the United States to satisfy its statutory publication obligations by posting public comments on the Antitrust Division's website, in tandem with *Federal Register* publication of the relevant internet address.

The United States filed its complaint in this case on April 11, 2012, along with a proposed Final Judgment with respect to Hachette Book Group, Inc., HarperCollins Publishers L.L.C., and Simon & Schuster, Inc. As required by the Antitrust Procedures and Penalties Act, 15 U.S.C. § (b)-(h) (the "Tunney Act"), the United States caused notices to be published in the *Federal Register*, the *Washington Post* and the *New York Post*, providing instructions for public comment on the proposed Final Judgment. Although the 60-day comment period will not close until June 25, 2012, the United States already has received more than 150 comments.

As required by the Tunney Act, the United States will file with the Court and serve on all parties to this action a Response to Comments, which will include copies of all comments submitted, as an attachment.<sup>1</sup> The Response to Comments will be published in the *Federal Register*. The Tunney Act also requires that the comments be made available to the public, which, before the Tunney Act was amended in 2004, the United States was required to accomplish through publication in the *Federal Register*.

<sup>1</sup> Given the volume of public comments received and ECF restrictions on attachment file-size, the United States seeks to file and serve comments via digital files submitted on physical media.

However, the Tunney Act now authorizes the United States to publish comments by “alternative means” pursuant to 15 U.S.C. § 16(d) when the costs of *Federal Register* publication exceed the benefits thereof. In this case, the United States already has received over 200 pages of comments, most of which will require photographic treatment for *Federal Register* publication at a rate of \$522 per page,<sup>2</sup> generating publication costs of more than \$100,000. The United States anticipates the receipt of a similar or greater volume of comments before the closing of the public comment period, on June 25, 2012.

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

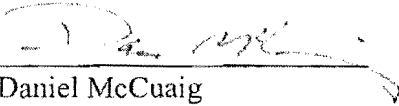
Recognizing the benefits of electronic publication, other courts have excused *Federal Register* publication of Tunney Act comments and/or attachments in favor of electronic publication in several recent cases. See *United States v. American Express Company, et al.*, No. 10-CV-4496-NGG (E.D.N.Y. June 20, 2011) (attached as Exhibit 2); *United States v. KeySpan Corp.*, No. 1:10-cv-01415-WHP (S.D.N.Y. June 28, 2010) (attached as Exhibit 3); *United States, et al. v. Ticketmaster Entertainment, Inc., et al.*, No. 1:10-cv-00139-RMC (D.D.C. June 15, 2010) (attached as Exhibit 4).

Finally, electronic publication also will ensure timely filing of the United States’ motion for entry of the proposed Final Judgment. Prior to filing its motion for entry, the United States must satisfy all of the Tunney Act procedures, including making comments available to the public. Relief from the obligation to publish comments in the *Federal Register*, a process not under the control of the United States and subject to delay, will ensure that the United States can meet the Court’s July 27, 2012 deadline.

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

Granted.  
Daniel C. McQuinn  
June 11, 2012

Respectfully Submitted,

  
Daniel McCuaig  
Counsel for the United States

cc: Provided electronically to all parties in this action.

<sup>2</sup> See Government Printing Office Circular Letter No. 777 (July 2, 2010), available at: <http://www.gpo.gov/customers/letters/777.htm>.

**EXHIBIT 1**

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

UNITED STATES OF AMERICA,

Plaintiff,

v.

APPLE, INC.,  
HACHETTE BOOK GROUP, INC.,  
HARPERCOLLINS PUBLISHERS, L.L.C.,  
VERLAGSGRUPPE GEORG VON  
HOLTZBRINCK GMBH,  
HOLTZBRINCK PUBLISHERS, LLC  
d/b/a MACMILLAN,  
THE PENGUIN PUBLISHING CO. LTD.  
d/b/a PENGUIN GROUP,  
PENGUIN GROUP (USA), INC., and  
SIMON & SCHUSTER, INC.,

Defendants.

Civil Action No. 12-CV-2826 (DLC)

**PROPOSED ORDER**

The Court, having considered the application of the United States, finds that good cause exists pursuant to 15 U.S.C. § 16(d) to excuse the publication Tunney Public Comments in the *Federal Register*;

GRANTS the United States' application to excuse *Federal Register* publication of Tunney Public Comments; and,

AUTHORIZES, as an alternative method of public dissemination, the publication in the *Federal Register* of a statement providing the location on the United States Department of Justice, Antitrust Division website where the Tunney Public Comments may be viewed and downloaded.

SO ORDERED, this \_\_\_\_ day of \_\_\_\_\_, 2012.

\_\_\_\_\_

D/F

**FILED**

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

★ JUN 22 2011 ★

**EXHIBIT 2**

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK**

**BROOKLYN OFFICE**

**ORDER**

**10-CV-4496 (NGG) (RER)**

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

Plaintiffs,

-against-

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

Defendants.

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

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

**EXHIBIT 2**

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

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

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

SO ORDERED.

Dated: Brooklyn, New York  
June 20, 2011

s/Nicholas G. Garaufis

NICHOLAS G. GARAUFIS  
United States District Judge

EXHIBIT 3

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

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

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

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


**ORDER**

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

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

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

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

  
Hon. William H. Pauley, III

**EXHIBIT 4**

**Evans, Amanda**

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**From:** DCD\_ECFNotice@dcd.uscourts.gov  
**Sent:** Tuesday, June 15, 2010 5:10 PM  
**To:** DCD\_ECFNotice@dcd.uscourts.gov  
**Subject:** Activity in Case 1:10-cv-00139-RMC UNITED STATES OF AMERICA et al v. TICKETMASTER ENTERTAINMENT, INC. et al Order on Motion for Order

This is an automatic e-mail message generated by the CM/ECF system. Please **DO NOT RESPOND** to this e-mail because the mail box is unattended.

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**U.S. District Court**

**District of Columbia**

**Notice of Electronic Filing**

The following transaction was entered on 6/15/2010 at 5:10 PM and filed on 6/15/2010

**Case Name:** UNITED STATES OF AMERICA et al v. TICKETMASTER ENTERTAINMENT, INC.  
et al  
**Case Number:** 1:10-cv-00139-RMC  
**Filer:**  
**Document**  
**Number:** No document attached

**Docket Text:**

**MINUTE ORDER** granting [12] Unopposed Motion for Order Excusing the Publication of the Attachments to the Comments in the Federal Register. The United States shall ensure that the Federal Register indicate that these attachments are available, specifying the website address where these attachments can be located. Signed by Judge Rosemary M. Collyer on 6/15/10. (lcrmc1)

**1:10-cv-00139-RMC Notice has been electronically mailed to:**

Michael G Egge [michael.egge@lw.com](mailto:michael.egge@lw.com), [amy.gibson@lw.com](mailto:amy.gibson@lw.com)

Aaron D. Hoag [aaron.hoag@usdoj.gov](mailto:aaron.hoag@usdoj.gov), [amanda.evans@usdoj.gov](mailto:amanda.evans@usdoj.gov), [andrew.ewalt@usdoj.gov](mailto:andrew.ewalt@usdoj.gov),  
[ann.blaylock@usdoj.gov](mailto:ann.blaylock@usdoj.gov), [ethan.glass@usdoj.gov](mailto:ethan.glass@usdoj.gov), [gina.talamona@usdoj.gov](mailto:gina.talamona@usdoj.gov), [john.read@usdoj.gov](mailto:john.read@usdoj.gov)

Jennifer Lynn Giordano [jennifer.giordano@lw.com](mailto:jennifer.giordano@lw.com), [amy.gibson@lw.com](mailto:amy.gibson@lw.com)

**1:10-cv-00139-RMC Notice will be delivered by other means to::**



Joshua N. Holian  
LATHAM & WATKINS  
505 Montgomery Street  
San Francisco, CA 94111-2562

**EXHIBIT 4**

Karen E. Silverman  
LATHAM & WATKINS  
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San Francisco, CA 94111-2562