UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, Plaintiff, v. APPLE, INC., *et al.*, Defendants.	Civil Action No. 12-cv-2826 (DLC)

THE STATE OF TEXAS, *et al.*, Plaintiffs, v. PENGUIN GROUP (USA) INC., *et al.*, Defendants.	Civil Action No. 12-cv-03394 (DLC)

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF PROPOSED INJUNCTION

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INTRODUCTION

This Court found that Apple knowingly participated in an illegal price-fixing conspiracy with five book publishers to raise e-book prices and eliminate retail e-book price competition. The conspiracy caused substantial harm to consumers. "Some consumers had to pay more for e-books; others bought a cheaper e-book rather than the one they preferred to purchase; and it can be assumed that still others deferred a purchase altogether rather than pay the higher price" (Opinion at 98). Absent Apple's participation in the conspiracy, "it is unlikely" that any of these consumer harms would have occurred (Opinion at 118).

Apple's illegal conduct was orchestrated by the highest levels of management, and was aided and abetted by an Apple in-house lawyer. As this Court found, many of the Apple executives that testified at trial have not been candid about the events of the conspiracy. Several Apple employees "were noteworthy for their lack of credibility" (Opinion at 143 n.66), and, at times during the trial, their denials were "brazen" (Opinion at 84 n.47). Apple's willing embrace of *per se* unlawful price fixing demonstrates a callous disregard for U.S. consumers and the plain requirements of the U.S. antitrust laws.

Plaintiffs propose a Final Judgment (the "Proposed Final Judgment" or "PFJ"; attached as Exhibit 1) that will halt Apple's anticompetitive conduct, restore lost competition, and prevent recurrences of the same or similar violations of the antitrust laws. The PFJ takes into account Apple's pervasive disregard for the requirements of the antitrust laws. At the same time, the PFJ is not unduly burdensome, and allows Apple to compete vigorously and lawfully, thereby balancing the goal of minimal invasiveness with remedial objectives.

The Proposed Final Judgment incorporates key aspects of the consent decrees entered against the Publisher Defendants, and adds certain other requirements tied to the Court's specific

findings regarding Apple's misconduct. As such, the PFJ contains three general categories of provisions. First, Apple is prohibited from engaging in conduct similar to, or having the same result as, the conspiratorial conduct for which it has been found liable. This category includes provisions that preclude Apple from entering into contracts that would, in any way, fix the price that any of its competitors charge for content. It restricts Apple's ability to share with one publisher information that it learns from another publisher in order to prevent Apple from "facilitat[ing] . . . collective action" (Opinion at 152) by e-book publishers. Apple also is barred, for five years, from either enforcing its retail price MFNs against publishers or accepting limitations on its own ability to price-compete with respect to e-books. Apple also may not discriminate against rival e-books apps and may not agree with any other e-book retailer to fix retail e-book prices.

Second, the PFJ requires Apple to take proactive steps to ameliorate the harm its conspiracy caused to competition and consumers. In particular, Apple must terminate its existing agency agreements with each Publisher Defendant. Apple also must "reset" its treatment of competing e-bookstores on Apple platforms so that, for two years, it again allows its rivals to include hyperlinks to their own e-bookstores within their e-book apps. And Apple is required promptly to provide the United States and the Representative Plaintiff States any information Apple acquires that reasonably suggests collusion among content suppliers.

Finally, the PFJ seeks to ensure Apple's future compliance with the antitrust laws and the PFJ. Apple must hire a new full-time internal Antitrust Compliance Officer, responsible for ensuring adherence to the antitrust laws, who will be hired by and report directly and exclusively to the Audit Committee of Apple's Board of Directors. The PFJ also calls for an External Compliance Monitor, appointed by this Court, with the authority to oversee Apple's compliance

with the PFJ, and to oversee Apple's internal antitrust compliance provisions. Apple also will be required to provide to the United States and the Representative Plaintiff States reasonable access to Apple's documents, information, and personnel.

I. LEGAL STANDARD FOR EFFECTIVE SHERMAN ACT REMEDY

This Court is "invested with jurisdiction to prevent and restrain violations" of the Sherman Act. 15 U.S.C. § 4.[1] It also is "invested with large discretion to model [its] judgment[] to fit the exigencies of the particular case." *United States v. Int'l Salt Co.*, 332 U.S. 392, 400-01 (1947) (abrogated on other grounds).

Permanent injunctive relief ordered in a Sherman Act case must: (i) end the violation; (ii) prevent a recurrence of the same or a similar violation; and (iii) restore competition in the market. *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 697 (1978); *Ford Motor Co. v. United States*, 405 U.S. 562, 573 (1972); *United States v. E. I. du Pont de Nemours & Co.*, 366 U.S. 316, 326 (1961).

In preventing "a recurrence of the violation," the Court is not limited to imposing "a simple proscription against the precise conduct [the violator] previously pursued." *Nat'l Soc'y of Prof'l Eng'rs*, 435 U.S. at 698. Rather, "'[a] federal court has broad power to restrain acts which are of the same type or class as unlawful acts which the court has found to have been committed or whose commission in the future unless enjoined, may fairly be anticipated from the defendant's conduct in the past.'" *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 132 (1969) (quoting *NLRB v. Express Pub. Co.*, 312 U.S. 426, 435 (1941)); *see also United States v. U.S. Gypsum Co.*, 340 U.S. 76, 89 (1950) (relief "may range broadly through practices connected with acts actually found to be illegal"); *United States v. Bausch & Lomb Optical Co.*,

[1] Under Section 16 of the Clayton Act, 15 U.S.C. § 26, the Court also has jurisdiction to issue the requested injunction on behalf of the Plaintiff States.

321 U.S. 707, 727 (1944) ("Of course, a mere prohibition of the precise scheme would be ineffectual to prevent restraints.").

Thus, the Court may prohibit otherwise lawful conduct if it "represents a reasonable method of eliminating the consequences of the illegal conduct" or preventing its resumption. *Nat'l Soc'y of Prof'l Eng'rs*, 435 U.S. at 698. As the Supreme Court has explained:

> The District Court is not obliged to assume, contrary to common experience, that a violator of the antitrust laws will relinquish the fruits of his violation more completely than the court requires him to do. And advantages already in hand may be held by methods more subtle and informed, and more difficult to prove, than those which, in the first place, win a market. When the purpose to restrain trade appears from a clear violation of law, it is not necessary that all of the untraveled roads to that end be left open and that only the worn one be closed. The usual ways to the prohibited goal may be blocked against the proven transgressor and the burden put upon him to bring any proper claims for relief to the court's attention.

Int'l Salt, 332 U.S. at 400.

"A public interest served by [Sherman Act equity] suits [brought by the United States] is that they effectively pry open to competition a market that has been closed by defendants' illegal restraints. If th[e] decree accomplishes less than that, the Government has won a lawsuit and lost a cause." *Id.* at 401; *see also Ford*, 405 U.S. at 573 n.8 (rejecting contention that the court was entitled only to restore the status quo ante and explaining "[t]here is no power to turn back the clock"). The means a court uses to restore the competition eliminated by an antitrust violator's conduct depend on "the special needs of the individual case." *Ford*, 405 U.S. at 573. And, "'it is well settled that once the Government has successfully borne the considerable burden of establishing a violation of the law, all doubts as to remedy are to be resolved in its favor.'" *Id.* at 575 (quoting *du Pont*, 366 U.S. at 334).

II. THE RESTRICTIONS ON APPLE'S CONDUCT SET FORTH IN SECTION III OF THE PFJ ARE NECESSARY AND APPROPRIATE

Section III of the Proposed Final Judgment contains targeted prohibitions on certain conduct closely related to the conspiracy proved at trial. As the Court found, "Apple fully understood and intended" that its retail price MFN "would lead the Publisher Defendants inexorably to demand that Amazon switch to an agency relationship with each of them" (Opinion at 116). Accordingly, Sections III.A and III.B prohibit Apple, for five years, from enforcing any existing retail price MFNs relating to e-books or agreeing to any new ones. These provisions largely mirror provisions of the Publisher Defendant consent decrees, *see, e.g.*, Final J. as to Defs. The Penguin Group, a Division of Pearson PLC, and Penguin Group (USA), Inc. (Docket No. 259) § V.C ("Penguin Final Judgment"), except that the form of MFN prohibited here is more narrowly defined to track more closely the MFN Apple designed for e-books.

Section III.C prohibits Apple, for five years, from entering into e-book agreements with Publisher Defendants that limit Apple's ability to discount e-books. This provision is more modest than its analog in the Publisher Defendant consent decrees, *see, e.g.*, Penguin Final Judgment §§ V.B, VI.B, in that it constrains only the distribution relationships between each Publisher Defendant and Apple (rather than between each Publisher Defendant and every e-book retailer, as in the Publisher Defendant consent decrees). However, it also is broader in two respects: (i) it lasts for five years rather than two; and (ii) it contains no carve-out allowing Apple to agree that its gross margins must be at least zero across a Publisher Defendant's entire catalog.

These two "expansions" on Apple's ability to restrict its own pricing authority are appropriate. Unlike the prior Publisher Defendant settlements, the relief proposed here is based on a full, adjudicated record, where the Court has made detailed findings about the nature and

extent of Apple's misconduct. For that reason, Plaintiffs are entitled to bolstered relief that ensures Apple cannot evade its antitrust compliance obligations going forward.

Additionally, while the two-year prohibition against Publisher Defendant interference with retail price competition was intended to serve "as a means to ensure a cooling-off period and allow movement in the marketplace away from collusive conditions," United States' Resp. to Public Comments on the Proposed Final J. (Docket No. 81), at 13, there is reason to believe the Publisher Defendants may be positioning themselves to pick things back up where they left off as soon as their two-year clocks run. The e-book distribution contracts that the Publisher Defendants have entered into under their consent decrees are disappointingly similar to one another. And, multiple Publisher Defendant CEOs have come to court and offered non-credible testimony on Apple's behalf (*see, e.g.*, Opinion at 71 n.38, 143 n.66), with one even claiming that he was proud of his actions, both at the time he took them and still today. John Sargent Test., Trial Tr. 1141:4-9.[2] Ensuring that Apple can discount e-books and compete on retail price will make it more difficult for the Publisher Defendants to prohibit other retailers from doing so, and will help to ensure that the ongoing effective relief consumers are currently enjoying under the Publisher Defendant consent decrees does not prove entirely ephemeral.

Section III.D prohibits Apple from retaliating, threatening, or punishing any publisher for refusing to do business with Apple or for the terms on which the publisher does business with other e-book retailers. This section is intended to prevent Apple from again leveraging its power

[2] *See also* Letter from John Sargent to Authors, Illustrators and Agents, http://www.tor.com/blogs/2013/02/a-message-from-john-sargent (Feb. 8, 2013) (explaining that not settling would have meant that Macmillan's "business would have a pricing disadvantage for two years" and that settling ensured that, "[a]s with the other settling publishers, retailers will now be able to discount Macmillan e-books for a limited time," but promising that "this round will shortly be over"); Letter from John Sargent to Macmillan Trade Authors, Illustrators, and Agents, http://www.tor.com/blogs/2012/12/a-message-from-john-sargent (Dec. 19, 2012) (claiming the discounting provisions of the April 2012 consent decrees "would mean that retailers who felt they needed to match prices with Amazon would have no revenue from e-books from five of the big publishers (and possibly the sixth) for two years. Not no profit, no revenue. For two years.").

in its other content distribution stores to force publishers to accept e-book distribution terms that have the purpose and effect of raising retail prices at the e-bookstores of Apple's rivals (*see* Opinion at 101).

Section III.E prohibits Apple from serving as an information conduit among publishers. It largely mirrors the prohibition in the Publisher Defendant consent decrees against sharing competitively sensitive information with each other. *See, e.g.*, Penguin Final Judgment § V.F. The purpose of this section is to prevent Apple from once again providing the publishers sufficient information about each others' plans and concerns to assure them that they are moving as a group to accomplish something that no one publisher would risk attempting on its own (*see* Opinion at 75, 117-18).

Section III.F prohibits Apple from entering agreements with content suppliers that are likely to increase the price at which other retailers can acquire or sell the content—it is a prohibition against again raising rivals' costs or prices and leaving consumers to suffer the consequences.[3] As the Court observed, "competitive" behavior that is designed to hobble rivals rather than outperform them on the merits is "the opposite of competition"—it is "the eradication of retail price competition" (Opinion at 57 n.26).

The evidence at trial established that Apple aided the Publisher Defendants in forcing Amazon, its rival, to increase the prices at which it could sell content. (Opinion at 90 & n.52, 116-17). And Mr. Cue testified at trial that he takes the same approach in each of the digital content markets where he negotiates distribution deals. Eddy Cue Test., Trial Tr. 1761:10-21,

[3] *See generally* Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power over Price*, 96 Yale L.J. 209, 224 (1986) ("Raising rivals' costs can be a particularly effective method of anticompetitive exclusion. . . . By embedding a collusive agreement in a vertical contract that raises input prices by restraining sales to rivals, the firm reduces coordination costs, making it more efficient at preventing cheating and distributing the gains from collusion. Thus, these strategies involve creating additional horizontal market power through the mechanism of vertical contracts.").

1776:15-1777:8. Section III.F is thus an appropriate restraint on Apple's ability to orchestrate conduct in other markets, as it did in e-books, with anticompetitive results. *See generally U.S. Gypsum*, 340 U.S. at 90-91 (upholding "extension of the decree to include all gypsum products instead of patented gypsum board alone" and "enlargement of the geographical scope of the decree to include all interstate commerce"); *United States v. Capitol Service, Inc.*, 756 F.2d 502, 506-07 (7th Cir. 1985) (upholding nationwide injunction where "the complaint, discovery, and trial were all limited to the Milwaukee market").

Section III.F is sufficiently detailed to allow Apple to know what conduct is prohibited. *Schenck v. Pro-Choice Network of W. N.Y.*, 519 U.S. 357, 383 (1997) (an injunction when "read as a whole . . . [must provide] people 'of ordinary intelligence' . . . 'a reasonable opportunity to know what is prohibited'"). It is closely linked to the anticompetitive conduct that Apple has already engaged in, and simply prohibits Apple from engaging in that same conduct in other content markets. *See Express Pub. Co.*, 312 U.S. at 435 ("A federal court has broad power to restrain acts which are of the same type or class as unlawful acts which the court has found to have been committed or whose commission in the future unless enjoined, may fairly be anticipated from the defendant's conduct in the past."). Of course, if Apple is concerned about whether certain conduct is permissible, it has the right to seek clarification or modification of the injunction at any time.

Apple may protest that Section III.F is unduly burdensome and likely to chill procompetitive activity because it requires Apple to refrain from entering or maintaining agreements that are "likely" to raise its rivals' costs or prices without offering Apple sufficient guidance as to exactly what is forbidden. But the purpose of Section III.F is to prevent anticompetitive behavior rather than merely ameliorate it after the fact—a prospective and

probabilistic test is thus required. Such tests are commonplace and appropriate in antitrust law, where some uncertainty is inevitable and where the United States bears the burden of establishing the violation. For instance, when the United States sues to block a merger, it need not prove that anticompetitive effects are *certain* to flow from the challenged combination. Rather, it meets its burden by showing that those effects are *reasonably likely*. *United States v. H & R Block, Inc.*, 833 F. Supp. 2d 36, 49 (D.D.C. 2011); *see also United States v. Rockford Mem'l Corp.*, 898 F.2d 1278, 1283 (7th Cir. 1990) (Posner, J.) ("The defendants' argument that section 7 prevents *probable* restraints and section 1 *actual* ones is word play. Both statutes as currently understood prevent transactions likely to reduce competition substantially.") (emphases in original). Similarly, the Supreme Court has rejected the argument that the failure to find that a practice actually resulted in anticompetitive effects is a barrier to liability under Section One of the Sherman Act. *See FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 461-62 (1986) (holding a concerted effort to withhold information from consumers "is likely enough to disrupt the proper functioning of the price-setting mechanism of the market that it may be condemned even absent proof that it resulted in higher prices or, as here, the purchase of higher priced services, than would occur in its absence"). Here, in addition to showing the clear adverse effect of Defendants' agreement on trade e-book prices (Opinion at 94-95), the evidence at trial established that Apple aided the Publisher Defendants in presenting the agency model as an ultimatum to Amazon (Opinion at 90-91 & n.52). Section III.F accordingly is an entirely appropriate restraint on Apple's ability to orchestrate similar anticompetitive results in the future.

Finally, Section III.G prohibits Apple from agreeing with its e-book rivals to the terms on which they sell e-books to consumers. At trial, Mr. Cue admitted that he initially proposed that Apple allocate the trade e-books, music, and video markets with Amazon rather than competing

against Amazon to sell trade e-books. Eddy Cue Test., Trial Tr. 1719:13-24; Pls.' Ex. PX-0027. Now that Apple's other avenues for avoiding price competition against Amazon have been exposed and are being foreclosed by the PFJ, it is important that Apple not be permitted to fall back to schemes to fix or allocate the trade e-books market with other e-book retailers.

III. CONDUCT REQUIRED OF APPLE BY SECTION IV OF THE PFJ IS NECESSARY AND APPROPRIATE

Section IV.A requires Apple to terminate its agency agreements with the Publisher Defendants upon the Final Judgment taking effect. Those agreements contain limitations on Apple's retail price setting authority prohibited by Section III.C. Termination is thus necessary as part of any effective injunction.

Sections IV.B and IV.C address Apple's treatment of rival e-book app providers. Section IV.B requires Apple to permit these rivals to continue to offer their apps through Apple's App Store, and to update those apps, on terms and conditions no worse than Apple offers to any other app developer. In other words, Apple may not use its position as a powerful app distributor to stifle competition in the trade e-books market now that that market is freed from Apple and the Publisher Defendants' collusive activities.

Section IV.C requires Apple, for two years, to permit any e-book retailer to include in its e-book app a hyperlink to its own e-bookstore, without paying any fee or commission to Apple. This section thus requires Apple, for a relatively brief period of time, to return to its own pre-iBookstore policy of allowing Amazon, Barnes & Noble, and other e-book app providers to offer a simple, costless means for readers to purchase e-books directly from the third party. *See* Eddy Cue Test., Trial Tr. 2027:23-2029:21.

This provision is intended to reset competition among trade e-book retailers and deny Apple the benefits of its conspiracy. In 2011, shortly after adding Random House's titles to the

iBookstore, Apple forced its retailer rivals to remove the hyperlinks from their e-book apps (in order to avoid paying Apple a 30 percent commission on their sales). By doing so, Apple made it more difficult for consumers using Apple devices to compare e-book prices among different retailers, and for consumers to purchase e-books from other retailers on Apple's devices. At the time, as a result of Apple's collusive agreements, prices for the most popular e-books tended to be the same across retailers, and many consumers likely determined that shopping around for a better e-book price was a waste of time.

With the Publisher Defendant consent decrees now operative, price competition has returned to the marketplace, and consumers using Apple's devices should have an easy means to determine whether price shopping has become worth their while. Section IV.C accomplishes this by providing for greater price transparency. Without the costless hyperlinks mandated by Section IV.C, Apple likely would keep captive customers who incorrectly believe that prices are still all the same and, therefore, use the iBookstore just because Apple has made it so much harder to purchase e-books from any other retailer. Thus in essence, without the provision, Apple will continue to reap profits from its collusive behavior by capitalizing on its customers' lack of awareness of revitalized price competition among e-book retailers.

Finally, Section IV.D requires Apple to provide to the United States and the Representative Plaintiff States any evidence of unlawful coordination among content suppliers that Apple uncovers. This section does no more than require responsible corporate behavior on Apple's part, and the facts of this case make such a requirement highly appropriate. Specifically, Apple knew that the Publisher Defendants wanted to coordinate, unlawfully, to raise e-book prices. But instead of informing the government of its suspicions, Apple chose to join the

conspiracy. Requiring Apple to report such conduct will facilitate detection by Plaintiffs and discourage Apple from succumbing to the temptation to repeat its transgressions.

IV. THE ANTITRUST COMPLIANCE AND OVERSIGHT REQUIREMENTS OF SECTIONS V AND VI OF THE PFJ ARE NECESSARY AND APPROPRIATE

The Proposed Final Judgment contains provisions that require Apple to take steps to ensure compliance with other provisions of the PFJ and the antitrust laws. These compliance obligations are necessary to rectify the harm caused and threatened by Apple's illegal conduct. Specifically, implementing these compliance measures will fulfill the Court's "duty to compel action by the [wrongdoer] that will, so far as practicable, cure the ill effects of the illegal conduct, and assure the public freedom from its continuance." *U.S. Gypsum*, 340 U.S. at 88; *accord United States v. Glaxo Grp. Ltd.*, 410 U.S. 52, 64 (1973).

A. External Monitor

Under Section VI, the Court will appoint an External Compliance Monitor to oversee Apple's compliance with the other terms of the PFJ, including Apple's antitrust compliance programs. Appointment of an external monitor is appropriate here because Apple's executives refuse to accept responsibility for their wrongdoing: they have consistently held to the view that their conduct was appropriate, and that they intend to do nothing differently in the future. Further, Apple executives have been found to have failed their duty of candor with this Court. Accordingly, mere reliance on the word of those same executives that they are complying with the Court's remedy order is insufficient.

There is "considerable room" for appointing monitors when the purpose of doing so is "to enforce a judicial decree." *Cronin v. Browner*, 90 F. Supp. 2d 364, 377 (S.D.N.Y. 2000). The power of a federal court to appoint a monitor to supervise the implementation of its decrees has

long been established.[4] *E.g.*, *FTC v. John Beck Amazing Profits, LLC*, No. 2:09-CV-4719, 2009 WL 7844076, at *15 (C.D. Cal. Nov. 17, 2009). Indeed, the use of a court-imposed monitor to oversee aspects of corporate operations extends in this district back to the struggle for control of the Erie Railroad between Jay Gould and Cornelius Vanderbilt. *See Erie Ry. v. Heath*, 8 F. Cas. 761 (S.D.N.Y. 1871). More recently, courts have continued to exercise their equitable powers to appoint monitors to oversee the operations of corporate wrongdoers. *See, e.g.*, *U.S. Commodity Futures Trading Comm'n v. Kim*, No. 11-CV-1013 (DLC), 2011 WL 1642772 (S.D.N.Y. Apr. 15, 2011); *In re The Reserve Fund Sec. & Derivative Litig.*, 673 F. Supp. 2d 182, 210 (S.D.N.Y. 2009).[5]

This precedent for court-ordered outside oversight extends to corporations found to have violated the Sherman Act. Recently, defendant AU Optronics Corp. was convicted for price-fixing in violation of Section One of the Sherman Act. The court ordered the defendant to hire, at its expense, an "independent monitor . . . to monitor [its] antitrust compliance program." Exhibit 2 at 3. Similarly, the Final Judgment in *United States v. Microsoft Corp.*, No. 1:98-cv-01232-CKK (Docket No. 746) (D.D.C. Nov. 12, 2002), required the appointment of a three-person, independent technical committee "to assist in enforcement of and compliance with" the Final Judgment in that case. Exhibit 3 at 9. The *Microsoft* technical committee was "empowered broadly to monitor Microsoft's compliance with its obligations under the Final

[4] Such court-appointed agents have been identified by a "plethora of titles: 'receiver,' 'Master,' 'Special Master,' 'master hearing officer,' 'monitor,' 'human rights committee,' 'Ombudsman,' and others. The function is clear, whatever the title." *Ruiz v. Estelle*, 679 F.2d 1115, 1161 (5th Cir. 1982). This brief uses the term "monitor" when discussing case law that uses any such title.

[5] Federal enforcement of civil RICO violations—where the Court has narrower authority in crafting remedies than when addressing Sherman Act violations, *United States v. Keyspan Corp.*, 763 F. Supp. 2d 633, 641 (S.D.N.Y. 2011)—"provides the modern antecedents for ongoing supervisors or monitors after a court judgment." Vikramaditya Khanna & Timothy L. Dickinson, *The Corporate Monitor: The New Corporate Czar?*, 105 Mich. L. Rev. 1713, 1717 (2007). Second Circuit courts have recognized that the imposition of a monitor in RICO actions to prevent recurrence of wrongdoing is an appropriate equitable remedy. *See, e.g.*, *United States v. Sasso*, 215 F.3d 283, 288 (2d Cir. 2000); *United States v. Local 295 of Int'l Bhd. of Teamsters*, 784 F. Supp. 15, 22 (E.D.N.Y. 1992).

Judgment." *United States v. Microsoft Corp.*, 231 F. Supp. 2d 144, 196 (D.D.C. 2002) (quotation and brackets omitted).

An outside compliance monitor is similarly appropriate here. The appointment of a monitor is proper "'when a complex decree requires administration or complex policing, particularly when a party has proved resistant or intransigent or special skills are needed.'" *United States v. Vulcan Soc'y, Inc.*, No. 07-CV-2067 (NGG)(RLM), 2010 WL 2160057, at *4 (E.D.N.Y. May 26, 2010) (quoting 9C Wright & Miller, *Federal Practice & Procedure* § 2602.1 (3d ed. 2008)). Corporate monitors are particularly justifiable where, as here, there has been "wrongdoing that causes a great deal of harm." Khanna & Dickinson, 105 Mich. L. Rev. at 1729.

The above factors all counsel in favor of a corporate monitor to oversee Apple's compliance with the PFJ. The PFJ contains obligations on Apple's conduct that are essential to ensure appropriate relief. An external monitor, familiar with the antitrust laws, will help ensure that Apple complies with these obligations, without requiring significant costs on the part of Plaintiffs or this Court. Instead, those costs will be borne by Apple, who, as the wrongdoer, is the appropriate party to bear them. *See, e.g.*, *Alberti v. Klevenhagen*, 46 F.3d 1347, 1363-64 (5th Cir. 1995) (party that is the "primary cause" of harm should bear costs of monitor).

Apple executives have also demonstrated sufficient resistance and intransigence to support the appointment of a monitor. For example, Mr. Cue testified that in his recent negotiations with several music labels to supply content for iTunes Radio, he used the same negotiating tactics that facilitated collusion with the e-book publishers. Eddy Cue Test., Trial Tr. 1761:10-21, 1776:15-1777:8. Nor were Mr. Cue and his Apple colleagues willing to acknowledge their past behavior, even when confronted with documentary evidence that

contradicted their sworn testimony. For example, even after Mr. Cue was presented with a series of e-mails demonstrating that he was aware that Macmillan CEO John Sargent would be traveling to Seattle to negotiate with Amazon instead of attending the iPad launch event, Mr. Cue continued to insist that he was not aware of Mr. Sargent's Amazon negotiations, testifying that he would "keep answering" questions about his knowledge of those negotiations "the same way." Eddy Cue Test., Trial Tr. 1773:16-22. As the Court noted, Mr. Cue's denial was "brazen" (Opinion at 84 n.47).

Through the course of the trial, it became clear that Apple lacks sufficient internal controls to prevent the reoccurrence of the wrongdoing found here. Apple's *counsel*—Mr. Saul—was the creator of the MFN clause that Apple used to economically bind the publishers to move all of their other retailers to the agency model. And this Court found Mr. Saul's testimony—that of an officer of the Court—to be "noteworthy" for its "lack of credibility" (Opinion at 143 n.66).

The record here demonstrates the effect when a company as large as Apple knowingly violates the antitrust laws. Consumers suffer great harm. The appointment of an external monitor will ensure Apple implements the provisions of the PFJ, discourage senior management from orchestrating similar behavior, and provide its employees with sufficient training and oversight to minimize the risk of recurrence.

B. Internal Antitrust Compliance Officer

Section V of the PFJ requires Apple to hire an internal Antitrust Compliance Officer ("ACO"), who will report to Apple's Audit Committee. The ACO should be a new Apple employee dedicated full time to antitrust compliance. This person should be hired by and report

directly to Apple's outside directors, and not be supervised by the very people who orchestrated this illegal scheme.

Among the ACO's duties—which essentially mirror those assigned to the Publisher Defendants' ACOs under their consent decrees, *see, e.g.*, Penguin Final Judgment § VII—will be the institution of a robust antitrust training program, including training on the terms of the Final Judgment ultimately entered in this case, and the antitrust laws more generally. Such training is especially important for Apple, given that, when questioned, its executives were unable to recall having received any form of general or specific antitrust training. *E.g.*, Kevin Saul Dep., at 52:1-7 (Exhibit 4).

V. CUSTOMARY ACCESS AND JURISDICTION PROVISIONS ARE NECESSARY AND APPROPRIATE

Section VII includes inspection provisions that are customary in United States antitrust decrees. *See generally United States v. Grinnell Corp.*, 384 U.S. 563, 579 (1966) (directing district court to reconsider denial of "important and customary" inspection rights); *U.S. Gypsum*, 340 U.S. at 95. These provisions allow the United States or the Representative Plaintiff States to review documents and speak with individuals for the purpose of determining or securing compliance with the PFJ. There is no reason to omit these standard access provisions here.

Finally, under Section VIII, and as is customary in antitrust cases won by the government, the term of the PFJ is ten years, although as noted above some provisions would expire sooner. This Court would retain jurisdiction to enforce the Final Judgment.

Dated: August 2, 2013

Respectfully submitted,

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On Behalf of the Plaintiff States

EXHIBIT 1

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, Plaintiff, v. APPLE, INC., *et al.*, Defendants.	Civil Action No. 1:12-CV-2826 **PLAINTIFF UNITED STATES' FINAL JUDGMENT** and
THE STATE OF TEXAS, *et al.*, Plaintiffs, v. PENGUIN GROUP (USA) INC., *et al.*, Defendants.	**PLAINTIFF STATES' ORDER ENTERING PERMANENT INJUNCTION** Civil Action No. 1:12-CV-3394[1]

DENISE L. COTE,
UNITED STATES DISTRICT JUDGE

I. DEFINITIONS

As used in this Final Judgment and Order Entering Permanent Injunction:

A. "Agency Agreement" means an agreement between an E-book Publisher and an E-book Retailer under which the Retailer acts as an agent of the Publisher and is paid a commission (or a portion of the Retail Price) in connection with the sale of one or more of the Publisher's E-books.

[1] Pursuant to the agreement of the parties and Court order, the proceedings in *Texas et al. v. Penguin Group (USA) Inc. et al.*, Civ. A. No. 1:12-CV-3394, have been bifurcated. Issues related to non-injunctive relief, including damages and civil penalties, will be addressed in subsequent proceedings.

B. "Apple" means Apple, Inc.

C. "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.

D. "E-book App" means a software application sold or distributed through Apple's "App Store" relating to the reading, browsing, purchase, sale, recommendation, selection, or cataloging of any book or E-book.

E. "E-book Publisher" means any Person that, by virtue of a contract or other relationship with an E-book's author or other rights holder, owns or controls the necessary copyright or other authority (or asserts such ownership or control) over any E-book sufficient to distribute the E-book within the United States to E-book Retailers and to permit such E-book Retailers to sell the E-book to consumers in the United States. Publisher Defendants are E-book Publishers. For purposes of this Final Judgment, E-book Retailers are not E-book Publishers.

F. "E-book Retailer" means any Person that lawfully sells (or seeks to lawfully sell) E-books to consumers in the United States, or through which a Publisher Defendant, under an Agency Agreement, sells E-books to consumers. Apple is an E-book Retailer. For purposes of this Final Judgment, Publisher Defendants and all other Persons whose primary business is book publishing are not E-book Retailers.

G. "Effective Date" means the date, under Section VIII.A of this Final Judgment, on which this Final Judgment takes effect.

H. "External Compliance Monitor" means the person appointed by the Court to perform the duties described in Section VI of this Final Judgment.

I. "Final Judgment" means this document: the Final Judgment in *United States v. Apple, Inc., et al.*, Civil Action No. 1:12-CV-2826, and the Order Entering Permanent Injunction in *The State of Texas, et al. v. Penguin Group (USA) Inc., et al.*, Civil Action No. 1:12-CV-3394.

J. "Hachette" means Hachette Book Group, Inc.

K. "HarperCollins" means HarperCollins Publishers L.L.C.

L. "Macmillan" means Holtzbrinck Publishers, LLC d/b/a Macmillan and Verlagsgruppe Georg von Holtzbrinck GmbH.

M. "Penguin" means Penguin Group (USA), Inc., The Penguin Group, a division of U.K. corporation Pearson plc, The Penguin Publishing Company Ltd, Dorling Kindersley Holdings Limited, and Penguin Random House, a joint venture by and between Pearson plc and Bertelsmann SE & Co. KGaA, and any similar joint venture between Penguin and Random House Inc.

N. "Person" means any natural person, corporation, company, partnership, joint venture, firm, association, proprietorship, agency, board, authority, commission, office, or other business or legal entity, whether private or governmental.

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

P. "Publisher Defendants" means Hachette, HarperCollins, Macmillan, Penguin, and Simon & Schuster.

Q. "Representative Plaintiff States" means, as of the Effective Date of this Final Judgment, the States of Texas and Connecticut. The Plaintiff States may designate a different Plaintiff State as a substitute Representative Plaintiff State at any time by communicating the change in writing to Apple and the United States.

R. "Retail Price" means the price at which an E-book Retailer or, under an Agency Agreement, an E-book Publisher sells an E-book to a consumer.

S. "Retail Price MFN" means a term in an agreement between an E-book Publisher and an E-book Retailer under which the Retail Price at which an E-book Retailer or, under an Agency Agreement, an E-book Publisher sells one or more E-books to consumers depends in any way on the Retail Price, or discounts from the Retail Price, at which any other E-book Retailer or the E-book Publisher, under an Agency Agreement, through any other E-book Retailer sells the same E-book(s) to consumers.

T. "Simon & Schuster" means Simon & Schuster, Inc.

II. APPLICABILITY

This Final Judgment applies to Apple and each of its affiliates, subsidiaries, officers, directors, agents, employees, successors, and assigns, to any successor to any substantial part of the business, and to all other Persons acting in concert with Apple and having actual notice of this Final Judgment.

III. PROHIBITED CONDUCT

A. For five years after the Effective Date of this Final Judgment, Apple shall not enforce any Retail Price MFN in any agreement with an E-book Publisher relating to the sale of E-books.

B. For five years after the Effective Date of this Final Judgment, Apple shall not enter into any agreement with an E-book Publisher relating to the sale of E-books that contains a Retail Price MFN.

C. For five years after the Effective Date of this Final Judgment, Apple shall not enter into any agreement with a Publisher Defendant that restricts, limits, or impedes Apple's ability to set, alter, or reduce the Retail Price of any E-book or to offer price discounts or any other form of promotions to encourage consumers to purchase one or more E-books.

D. Apple shall not (1) retaliate against or punish, (2) threaten to retaliate against or punish, or (3) urge another Person to retaliate against or punish any E-book Publisher for refusing to enter into an agreement with Apple relating to the sale of E-books or for the terms on which the E-book Publisher sells E-books through any other E-book Retailer.

E. Apple shall not communicate, directly or indirectly, to any E-book Publisher (1) the status of its contractual negotiations with any other E-book Publisher; (2) the actual or proposed contractual terms or business plans or arrangements it has with any other E-book Publisher, or (3) any non-public competitively sensitive information it learns from any other E-book Publisher, including, but not limited to:

a. the E-book Publisher's business plans or strategies;

b. the E-book Publisher's past, present, or future wholesale or retail prices or pricing strategies for books licensed or sold in any format (*e.g.*, print books, E-books, or audio books);

c. any terms in the E-book Publisher's agreement(s) with any retailer of books licensed or sold in any format; or

d. any terms in the E-book Publisher's agreement(s) with any author.

Nothing in this Section III.E prohibits Apple from developing and offering to E-book Publishers a standard form contract containing the terms on which Apple would agree to sell the E-book Publishers' E-books.

F. Apple shall not enter into or maintain any agreement with any E-book Publisher or supplier of any other form of content (*e.g.*, music, other audio, movies, television shows, or apps) where such agreement likely will increase, fix, or set the price at which other E-book Retailers or retailers of other forms of content can acquire or sell E-books or other forms of content.

Nothing in this Section III.F prohibits Apple from entering into or maintaining an agreement with an E-book Publisher or supplier of any other form of content merely specifying prices that Apple must pay for the content.

G. Apple shall not enter into or maintain any agreement with any other E-book Retailer where such agreement likely will increase, fix, stabilize, or set the prices or establish other terms on which Apple or the other E-book Retailer sells E-books to consumers.

IV. REQUIRED CONDUCT

A. On the Effective Date of this Final Judgment, Apple shall terminate any Agency Agreement with a Publisher Defendant.

B. For any E-book App that any Person offered to consumers through Apple's App Store as of July 10, 2013, Apple shall continue to permit such Person to offer that E-book App, or updates to that E-book App, on the same terms and conditions between Apple and such Person or on terms and conditions that are more favorable to such Person.

C. Apple shall apply the same terms and conditions to the sale or distribution of an E-book App through Apple's App Store as Apple applies to all other apps sold or distributed through Apple's App Store, except that, for two years after the Effective Date of this Final Judgment, Apple shall allow any E-book Retailer to provide a hyperlink to its website or e-bookstore in or through its E-book App without either compensating Apple for any sales of E-books that follow consumers' use of such hyperlink or requiring the E-book Retailer to include functionality in the E-book App (*e.g.*, a "buy button") the use of which might impose an obligation on the E-book Retailer to compensate Apple.

D. Apple shall furnish to the United States and the Representative Plaintiff States, within ten business days of receiving such information, any information that reasonably suggests to Apple that its suppliers of any form of content (*e.g.*, books, music, other audio, movies, television shows, or apps) have impermissibly coordinated or are impermissibly coordinating on the terms on which they supply or offer their content to Apple or to any other Person.

V. ANTITRUST COMPLIANCE

To ensure its compliance with this Final Judgment and the antitrust laws, Apple shall perform the activities enumerated below in Sections V.A through V.J of this Final Judgment. Within thirty days after the Effective Date of this Final Judgment, Apple's Audit Committee, or another committee comprised entirely of outside directors (*i.e.*, directors not also employed by Apple), shall designate a person not employed by Apple as of the Effective Date of the Final Judgment to serve as Antitrust Compliance Officer, who shall report to the Audit Committee or equivalent committee of Apple's Board of Directors and shall be responsible for supervising Apple's performance of the following:

A. furnishing a copy of this Final Judgment, within thirty days of its Effective Date, to each of Apple's officers and directors and to each of Apple's employees engaged, in whole or in part, in activities relating to Apple's iBookstore;

B. furnishing a copy of this Final Judgment in a timely manner to each officer, director, or employee who succeeds to any position identified in Section V.A of this Final Judgment;

C. ensuring that each person identified in Sections V.A and V.B of this Final Judgment receives at least four hours of training annually on the meaning and requirements of this Final Judgment and the antitrust laws, such training to be delivered by an attorney with relevant experience in the field of antitrust law;

D. obtaining, within sixty days after the Effective Date of this Final Judgment and on each anniversary of the Effective Date of this Final Judgment, from each person identified in Sections V.A and V.B of this Final Judgment, and thereafter maintaining, a certification that each such person (a) has read, understands, and agrees to abide by the terms of this Final Judgment; and (b) is not aware of any violation of this Final Judgment or the antitrust laws or has reported any potential violation to the Antitrust Compliance Officer;

E. conducting, in consultation with the External Compliance Monitor, an annual antitrust compliance audit covering each person identified in Sections V.A and V.B of this Final Judgment, and maintaining all records pertaining to such audits;

F. communicating annually to Apple's employees that they may disclose to the Antitrust Compliance Officer, without reprisal, information concerning any potential violation of this Final Judgment or the antitrust laws;

G. taking appropriate action, within three business days of discovering or receiving credible information concerning an actual or potential violation of this Final Judgment, to terminate or modify Apple's conduct to assure compliance with this Final Judgment; and, within seven days of discovering or receiving such information, providing to the United States, the Representative Plaintiff States, and the External Compliance Monitor a description of the actual or potential violation of this Final Judgment and the corrective actions taken;

H. furnishing to the United States, the Representative Plaintiff States, and the External Compliance Monitor on a quarterly basis electronic copies of any non-privileged communications with any Person containing allegations of Apple's noncompliance with any provisions of this Final Judgment or the antitrust laws;

I. maintaining, and furnishing to the United States, the Representative Plaintiff States, and the External Compliance Monitor on a quarterly basis, a log of all oral and written communications, excluding privileged or public communications, between or among any person identified in Sections V.A or V.B of this Final Judgment and

1. any person employed by or associated with another E-book Retailer, relating, in whole or in part, to E-books, devices for reading E-books, or E-book Apps; or
2. employees or representatives of two or more E-book Publishers, relating, in whole or in part, to E-books, devices for reading E-books, or E-book Apps,

including, but not limited to, an identification (by name, employer, and job title) of the author and recipients of and all participants in the communication, the date, time, and duration of the communication, the medium of the communication, and a description of the subject matter of the communication; and

J. providing to the United States, the Representative Plaintiff States, and the External Compliance Monitor annually, on or before the anniversary of the Effective Date of this Final Judgment, a written statement as to the fact and manner of Apple's compliance with Sections III and IV of this Final Judgment.

VI. EXTERNAL COMPLIANCE MONITOR

A. The Court shall appoint an External Compliance Monitor to undertake the responsibilities and duties described in this Section VI. On or before the Effective Date of this Final Judgment, the United States and the Representative Plaintiff States jointly shall recommend to the Court one or more persons to serve as External Compliance Monitor.

B. The External Compliance Monitor shall have the power and authority to monitor Apple's compliance with the terms of this Final Judgment, to review and evaluate Apple's existing internal antitrust compliance policies and procedures, and to recommend to Apple changes to address any deficiencies in those policies and procedures.

C. The External Compliance Monitor shall conduct an initial review to assess whether Apple's internal antitrust compliance policies and procedures in existence at the time of his or her appointment are reasonably designed to detect and prevent violations of the antitrust laws. Within 180 days of his or her appointment by the Court, the External Compliance Monitor shall provide a written report to Apple, the United States, and the Representative Plaintiff States setting forth his or her assessment of Apple's internal antitrust compliance policies and procedures and, if appropriate, making recommendations reasonably designed to improve Apple's policies and procedures for ensuring antitrust compliance.

D. The External Compliance Monitor may, at any time prior to the expiration of this Final Judgment, provide one or more additional written reports to Apple, the United States, and the Representative Plaintiff States setting forth additional recommendations reasonably designed to improve Apple's policies and procedures for ensuring antitrust compliance. The External Compliance Monitor may provide such additional reports on his or her own initiative or at the request of the Court, the United States, or the Representative Plaintiff States.

E. Apple shall adopt, within 60 days after it receives a report from the External Compliance Monitor concerning its internal antitrust compliance policies and procedures, all recommendations to which it does not object as unduly burdensome, impractical, or costly. If Apple objects to any recommendation as unduly burdensome, impractical, or costly, it shall propose in writing to the External Compliance Monitor, the United States, and the Representative Plaintiff States, within 30 days after it receives the report, an alternative policy, procedure, or system designed to achieve the same objective or purpose. If Apple and the External Compliance Monitor fail, after good faith discussions, to agree on an alternative policy or procedure within 30 days of Apple's objection to a recommendation, Apple shall promptly adopt the External Compliance Monitor's initial recommendation or, after consultation with the United States and the Representative Plaintiff States, apply to this Court within 14 days for relief.

F. The External Compliance Monitor shall file quarterly reports with the United States, the Representative Plaintiff States, and the Court setting forth Apple's efforts to comply with the Final Judgment. To the extent such reports contain information that the External Compliance Monitor deems confidential, such reports shall not be filed in the public docket of the Court.

G. If the External Compliance Monitor in the exercise of his or her responsibilities under this Section VI discovers or receives evidence that suggests to the External Compliance Monitor that Apple is violating or has violated this Final Judgment or the antitrust laws, the External Compliance Monitor shall promptly provide that information to the United States and the Representative Plaintiff States.

H. Apple shall assist the External Compliance Monitor in performance of the responsibilities set forth in this Section VI. Apple shall take no action to interfere with or to impede the External Compliance Monitor's accomplishment of its responsibilities. The External Compliance Monitor may, on reasonable notice to Apple:

1. interview, either informally or on the record, any Apple personnel, who may have counsel present; any such interview to be subject to the reasonable convenience of such personnel and without restraint or interference by Apple;

2. inspect and copy any documents in the possession, custody, or control of Apple; and

3. require Apple to provide compilations of documents, data, or other information, and to submit reports to the External Compliance Monitor containing such material, in such form as the External Compliance Monitor may reasonably direct.

I. Any objections by Apple to actions by the External Compliance Monitor in fulfillment of the External Compliance Monitor's responsibilities must be conveyed in writing to the United States and the Representative Plaintiff States within ten calendar days after the action giving rise to the objection.

J. The External Compliance Monitor may hire, subject to the approval of the United States, after consultation with the Representative Plaintiff States, any consultants, accountants, attorneys, or other persons reasonably necessary to fulfilling the External Compliance Monitor's responsibilities. The External Compliance Monitor and any persons hired to assist the External Compliance Monitor shall serve at the cost and expense of Apple, on such terms and conditions as the United States, after consultation with the Representative Plaintiff States, approves, including, but not limited to, the execution of customary confidentiality agreements. The compensation of the External Compliance Monitor and any persons hired to assist the External Compliance Monitor shall be on reasonable and customary terms commensurate with the individuals' experience and responsibilities. The External Compliance Monitor shall submit a quarterly expense report to the United States and the Representative Plaintiff States.

K. If the United States, after consultation with the Representative Plaintiff States, or Apple determines that the External Compliance Monitor has ceased to act or failed to act diligently or in a cost-effective manner, it may recommend that the Court appoint a substitute External Compliance Monitor.

VII. PLAINTIFFS' ACCESS

A. For purposes of determining or securing compliance with this Final Judgment, or of determining whether the Final Judgment should be modified or vacated, and subject to any legally recognized privilege, from time to time duly authorized representatives of the United States Department of Justice Antitrust Division or the Representative Plaintiff States, including, but not limited to, consultants and other persons retained by the United States or the Representative Plaintiff States, shall, upon written request of an authorized representative of the Assistant

Attorney General in charge of the Antitrust Division or a joint written request by authorized representatives of each Representative Plaintiff State, and on reasonable notice to Apple, be permitted:

1. access during regular business hours to inspect and copy, or at the option of the United States or the Representative Plaintiff States, to require Apple to provide to the United States and the Representative Plaintiff States hard copy or electronic copies of all books, ledgers, accounts, records, data, and documents in the possession, custody, or control of Apple, relating to any matters contained in this Final Judgment; and

2. to interview, either informally or on the record, Apple's officers, employees, or agents, who may have their individual counsel present, regarding such matters. The interviews shall be subject to the reasonable convenience of the interviewee and without restraint or interference by Apple.

B. Upon the written request of an authorized representative of the Assistant Attorney General in charge of the Antitrust Division or a joint written request by authorized representatives of each Representative Plaintiff State, Apple shall submit written reports or respond to written interrogatories, under oath, relating to any of the matters contained in this Final Judgment. Written reports authorized under this paragraph may require Apple to conduct, at its cost, an independent audit or analysis relating to any of the matters contained in this Final Judgment.

C. No information or documents obtained by the means provided in this Section shall be divulged by the United States or any Plaintiff State to any person other than an authorized representative of the executive branch of the United States, the Attorney General's Office of any Plaintiff State, or the External Compliance Monitor, except in the course of legal proceedings to

which the United States or the relevant Plaintiff State(s) is a party (including, but not limited to, grand jury proceedings), or for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.

D. If at the time information or documents are furnished by Apple to the United States and the Representative Plaintiff States, Apple represents and identifies in writing the material in any such information or documents to which a claim of protection may be asserted under Rule 26(c)(1)(G) of the Federal Rules of Civil Procedure, and Apple marks each pertinent page of such material, "Subject to claim of protection under Rule 26(c)(1)(G) of the Federal Rules of Civil Procedure," then the United States and the Representative Plaintiff States shall give Apple ten calendar days notice prior to divulging such material in any civil or administrative proceeding.

VIII. ADDITIONAL PROVISIONS

A. This Final Judgment shall take effect 30 days after the date on which it is entered. If the Final Judgment is stayed, all time periods in the Final Judgment will be tolled during the stay.

B. This Court retains jurisdiction to enable the United States, the Representative Plaintiff States, any other Plaintiff State (after consultation with the United States and the Representative Plaintiff States), or Apple to apply to this Court at any time for, or to act *sua sponte* to issue, further orders and directions as may be necessary or appropriate to carry out or construe this Final Judgment, to modify any of its provisions, to enforce compliance, and to punish violations of its provisions.

C. Unless this Court grants an extension, this Final Judgment shall expire by its own terms and without further action of this Court ten years after its Effective Date.

SO ORDERED:

_____
DENISE L. COTE
UNITED STATES DISTRICT JUDGE

Dated:

EXHIBIT 2

AO 245E (Rev. 12/03) Judgment in a Criminal Case for Organizational Defendants
Sheet 1

UNITED STATES DISTRICT COURT

Northern District of California

UNITED STATES OF AMERICA
V.

AU OPTRONICS CORPORATION

JUDGMENT IN A CRIMINAL CASE
(For Organizational Defendants)

CASE NUMBER: CR 09-00110-10 SI

Dennis Riordan, Retained
Defendant Organization's Attorney

THE DEFENDANT ORGANIZATION:

☐ pleaded guilty to count(s) _____

☐ pleaded nolo contendere to count(s) _____
which was accepted by the court.

☒ was found guilty on count(s) One
after a plea of not guilty.

The organizational defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
15 U.S.C. § 1	Price Fixing	December 2006	One

The defendant organization is sentenced as provided in pages 2 5 of this judgment.

☐ The defendant organization has been found not guilty on count(s) _____

☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant organization must notify the United States attorney for this district within 30 days of any change of name, principal business address, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant organization must notify the court and United States attorney of material changes in economic circumstances.

Defendant Organization's
Federal Employer I.D. No.: Not available

Defendant Organization's Principal Business Address:

No. 1, Li-Hsin Road 2, Hsinchu Science Park
Hsinchu, Taiwan
Republic of China

Defendant Organization's Mailing Address:

No. 1, Li-Hsin Road 2, Hsinchu Science Park
Hsinchu, Taiwan
Republic of China

September 20, 2012
Date of Imposition of Judgment

Signature of Judge

Honorable Susan Illston, U.S. District Judge
Name and Title of Judge

10/1/12
Date

DEFENDANT ORGANIZATION: AU Optronics Corporation
CASE NUMBER: CR 09-00110-10 SI

PROBATION

The defendant organization is hereby sentenced to probation for a term of :

Three (3) years

The defendant organization shall not commit another federal, state or local crime.

If this judgment imposes a fine or a restitution obligation, it is a condition of probation that the defendant organization pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant organization must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page (if indicated below).

STANDARD CONDITIONS OF SUPERVISION

1) within thirty days from the date of this judgment, the defendant organization shall designate an official of the organization to act as the organizations's representative and to be the primary contact with the probation officer;

2) the defendant organization shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

3) the defendant organization shall notify the probation officer ten days prior to any change in principal business or mailing address;

4) the defendant organization shall permit a probation officer to visit the organization at any of its operating business sites;

5) the defendant organization shall notify the probation officer within seventy-two hours of any criminal prosecution, major civil litigation, or administrative proceeding against the organization;

6) the defendant organization shall not dissolve, change its name, or change the name under which it does business unless this judgment and all criminal monetary penalties imposed by this court are either fully satisfied or are equally enforceable against the defendant's successors or assignees; and

7) the defendant organization shall not waste, nor without permission of the probation officer, sell, assign, or transfer its assets.

DEFENDANT ORGANIZATION: AU Optronics Corporation
CASE NUMBER: CR 09-00110-10 SI

SPECIAL CONDITIONS OF SUPERVISION

1) AU Optronics Corporation shall develop, adopt, and implement an effective compliance and ethics program. Such a program shall establish standards and procedures to prevent and detect criminal conduct. AU Optronics Corporation shall notify its employees and shareholders of its conviction and its effective compliance and ethics program. All aspects of the program shall be reported to the probation officer as directed and quarterly reports detailing the organization's progress shall be submitted to ensure compliance.

2) AU Optronics Corporation shall, at its own expense, acknowledge the fact of conviction, the nature of the punishment imposed, and the steps that will be taken to prevent the recurrence of similar offenses, in three major trade publications in both the United States and Taiwan.

3) AUO/AUOA are required to hire, at their expense, an independent monitor within sixty (60) calendar days of the date of sentencing, to monitor AUO/AUOA's antitrust compliance program for the period of their probation supervision. Within thirty (30) calendar days after the date of sentencing, AUO/AUOA shall recommend to the Probation Office and the United States Department of Justice, Antitrust Division, San Francisco Field Office a pool of three qualified monitor candidates and provide to the Probation Office and the Antitrust Division a description of each candidate's qualifications and credentials. After consultation with the Antitrust Division, the Probation Office, in its sole discretion, shall either select one of the candidates nominated by AUO/AUOA to serve as the monitor, select an alternative-qualified monitor of its own choosing, or instruct AUO/AUOA to propose three additional candidates for selection pursuant to the process set forth above. The monitor shall not be an employee or agent of AUO/AUOA and shall not hold any interest in, or have any relationship with, AUO/AUOA or their directors, officers, employees, agents, or business partners. The monitor shall provide quarterly reports to the probation office regarding antitrust compliance.

DEFENDANT ORGANIZATION: AU Optronics Corporation
CASE NUMBER: CR 09-00110-10 SI

CRIMINAL MONETARY PENALTIES

The defendant organization must pay the following total criminal monetary penalties under the schedule of payments on Sheet 4.

	Assessment	Fine	Restitution
TOTALS	$ 400	$ 500,000,000	$ 0

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

☐ The defendant organization shall make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant organization makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage

TOTALS $ _____ $ _____

☐ Restitution amount ordered pursuant to plea agreement $ _____

☒ The defendant organization shall pay interest on restitution or a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 4 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant organization does not have the ability to pay interest, and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

DEFENDANT ORGANIZATION: AU Optronics Corporation
CASE NUMBER: CR 09-00110-10 SI

SCHEDULE OF PAYMENTS

Having assessed the organization's ability to pay, payment of the total criminal monetary penalties are due as follows:

A ☒ Lump sum payment of $ 500,000,400 due immediately, balance due

☐ not later than _____, or

☒ in accordance with ☐ C or ☒ D below; or

B ☐ Payment to begin immediately (may be combined with ☐ C or ☐ D below); or

C ☐ Payment in _____ (e.g., equal, weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or

D ☒ Special instructions regarding the payment of criminal monetary penalties:

The fine is payable as follows: $125 million within 120 days of sentencing, and $125 million per year for the next three years. Interest is not waived for the fine.

All criminal monetary penalties are made to the clerk of the court.

The defendant organization shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant organization shall pay the cost of prosecution.

☐ The defendant organization shall pay the following court cost(s):

☐ The defendant organization shall forfeit the defendant organization's interest in the following property to the United States:

EXHIBIT 3

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff v. MICROSOFT CORPORATION, Defendant.	Civil Action No. 98-1232 (CKK)

FINAL JUDGMENT
(November 12, 2002)

WHEREAS, plaintiffs United States of America ("United States") and the States of New York, Ohio, Illinois, Kentucky, Louisiana, Maryland, Michigan, North Carolina and Wisconsin and defendant Microsoft Corporation ("Microsoft"), by their respective attorneys, have consented to the entry of this Final Judgment;

AND WHEREAS, this Final Judgment does not constitute any admission by any party regarding any issue of fact or law;

AND WHEREAS, Microsoft agrees to be bound by the provisions of this Final Judgment pending its approval by the Court;

NOW THEREFORE, upon remand from the United States Court of Appeals for the District of Columbia Circuit, and upon the consent of the aforementioned parties, it is hereby ORDERED, ADJUDGED, AND DECREED:

I. Jurisdiction

This Court has jurisdiction of the subject matter of this action and of the person of Microsoft.

II. Applicability

This Final Judgment applies to Microsoft and to each of its officers, directors, agents, employees, subsidiaries, successors and assigns; and to all other persons in active concert or participation with any of them who shall have received actual notice of this Final Judgment by personal service or otherwise.

III. Prohibited Conduct

A. Microsoft shall not retaliate against an OEM by altering Microsoft's commercial relations with that OEM, or by withholding newly introduced forms of non-monetary Consideration (including but not limited to new versions of existing forms of non-monetary Consideration) from that OEM, because it is known to Microsoft that the OEM is or is contemplating:

1. developing, distributing, promoting, using, selling, or licensing any software that competes with Microsoft Platform Software or any product or service that distributes or promotes any Non-Microsoft Middleware;
2. shipping a Personal Computer that (a) includes both a Windows Operating System Product and a non-Microsoft Operating System, or (b) will boot with more than one Operating System; or
3. exercising any of the options or alternatives provided for under this Final Judgment.

Nothing in this provision shall prohibit Microsoft from enforcing any provision of any license with any OEM or any intellectual property right that is not inconsistent with this Final Judgment. Microsoft shall not terminate a Covered OEM's license for a Windows Operating System Product without having first given the Covered OEM written notice of the reasons for the proposed termination and not less than thirty days' opportunity to cure. Notwithstanding the foregoing, Microsoft shall have no obligation to provide such a termination notice and opportunity to cure to any Covered OEM that has received two or more such notices during the term of its Windows Operating System Product license.

Nothing in this provision shall prohibit Microsoft from providing Consideration to any OEM with respect to any Microsoft product or service where that Consideration is commensurate with the absolute level or amount of that OEM's development, distribution, promotion, or licensing of that Microsoft product or service.

B. Microsoft's provision of Windows Operating System Products to Covered OEMs shall be pursuant to uniform license agreements with uniform terms and conditions. Without limiting the foregoing, Microsoft shall charge each Covered OEM the applicable royalty for Windows Operating System Products as set forth on a schedule, to be established by Microsoft and published on a web site accessible to the Plaintiffs and all Covered OEMs, that provides for uniform royalties for Windows Operating System Products, except that:

1. the schedule may specify different royalties for different language versions;
2. the schedule may specify reasonable volume discounts based upon the actual volume of licenses of any Windows Operating System Product or any group of such products; and
3. the schedule may include market development allowances, programs, or other discounts in connection with Windows Operating System Products, provided that:

a. such discounts are offered and available uniformly to all Covered OEMs, except that Microsoft may establish one uniform discount schedule for the ten largest Covered OEMs and a second uniform discount schedule for the eleventh through twentieth largest Covered OEMs, where the size of the OEM is measured by volume of licenses;

b. such discounts are based on objective, verifiable criteria that shall be applied and enforced on a uniform basis for all Covered OEMs; and

c. such discounts or their award shall not be based on or impose any criterion or requirement that is otherwise inconsistent with any portion of this Final Judgment.

C. Microsoft shall not restrict by agreement any OEM licensee from exercising any of the following options or alternatives:

1. Installing, and displaying icons, shortcuts, or menu entries for, any Non-Microsoft Middleware or any product or service (including but not limited to IAP products or services) that distributes, uses, promotes, or supports any Non-Microsoft Middleware, on the desktop or Start menu, or anywhere else in a Windows Operating System Product where a list of icons, shortcuts, or menu entries for applications are generally displayed, except that Microsoft may restrict an OEM from displaying icons, shortcuts and menu entries for any product in any list of such icons, shortcuts, or menu entries specified in the Windows documentation as being limited to products that provide particular types of functionality, provided that the restrictions are non-discriminatory with respect to non-Microsoft and Microsoft products.

2. Distributing or promoting Non-Microsoft Middleware by installing and displaying on the desktop shortcuts of any size or shape so long as such shortcuts do not impair the functionality of the user interface.

3. Launching automatically, at the conclusion of the initial boot sequence or subsequent boot sequences, or upon connections to or disconnections from the Internet, any Non-Microsoft Middleware if a Microsoft Middleware Product that provides similar functionality would otherwise be launched automatically at that time, provided that any such Non-Microsoft Middleware displays on the desktop no user interface or a user interface of similar size and shape to the user interface displayed by the corresponding Microsoft Middleware Product.

4. Offering users the option of launching other Operating Systems from the Basic Input/Output System or a non-Microsoft boot-loader or similar program that launches prior to the start of the Windows Operating System Product.

5. Presenting in the initial boot sequence its own IAP offer provided that the OEM complies with reasonable technical specifications established by Microsoft, including a requirement that the end user be returned to the initial boot sequence upon the conclusion of any such offer.

6. Exercising any of the options provided in Section III.H of this Final Judgment.

D. Starting at the earlier of the release of Service Pack 1 for Windows XP or 12 months after the submission of this Final Judgment to the Court, Microsoft shall disclose to ISVs, IHVs, IAPs, ICPs, and OEMs, for the sole purpose of interoperating with a Windows Operating System Product, via the Microsoft Developer Network ("MSDN") or similar mechanisms, the APIs and related Documentation that are used by Microsoft Middleware to interoperate with a Windows Operating System Product. For purposes of this Section III.D, the term APIs means the interfaces, including any associated callback interfaces, that Microsoft Middleware running on a Windows Operating System Product uses to call upon that Windows Operating System Product in order to obtain any services from that Windows Operating System Product. In the case of a new major version of Microsoft Middleware, the disclosures required by this Section III.D shall occur no later than the last major beta test release of that Microsoft Middleware. In the case of a new version of a Windows Operating System Product, the obligations imposed by this Section III.D shall occur in a Timely Manner.

E. Starting nine months after the submission of this proposed Final Judgment to the Court, Microsoft shall make available for use by third parties, for the sole purpose of inter-operating or communicating with a Windows Operating System Product, on reasonable and non-discriminatory terms (consistent with Section III.I), any Communications Protocol that is, on or after the date this Final Judgment is submitted to the Court, (i) implemented in a Windows Operating System Product installed on a client computer, and (ii) used to interoperate, or communicate, natively (*i.e.*, without the addition of software code to the client operating system product) with a Microsoft server operating system product.

F. 1 Microsoft shall not retaliate against any ISV or IHV because of that ISV's or IHV's:

a. developing, using, distributing, promoting or supporting any software that competes with Microsoft Platform Software or any software that runs on any software that competes with Microsoft Platform Software, or

b. exercising any of the options or alternatives provided for under this Final Judgment.

2. Microsoft shall not enter into any agreement relating to a Windows Operating System Product that conditions the grant of any Consideration on an ISV's refraining from developing, using, distributing, or promoting any software that competes with Microsoft Platform Software or any software that runs on any software that competes with Microsoft Platform Software, except that Microsoft may enter into agreements that place limitations on an ISV's development, use, distribution or promotion of any such software if those limitations are reasonably necessary to and of reasonable scope and duration in relation to a bona fide contractual obligation of the ISV to use, distribute or promote any Microsoft software or to develop software for, or in conjunction with, Microsoft.

3. Nothing in this section shall prohibit Microsoft from enforcing any provision of any agreement with any ISV or IHV, or any intellectual property right, that is not inconsistent with this Final Judgment.

G. Microsoft shall not enter into any agreement with:

1. any IAP, ICP, ISV, IHV or OEM that grants Consideration on the condition that such entity distributes, promotes, uses, or supports, exclusively or in a fixed percentage, any Microsoft Platform Software, except that Microsoft may enter into agreements in which such an entity agrees to distribute, promote, use or support Microsoft Platform Software in a fixed percentage whenever Microsoft in good faith obtains a representation that it is commercially practicable for the entity to provide equal or greater distribution, promotion, use or support for software that competes with Microsoft Platform Software, or

2. any IAP or ICP that grants placement on the desktop or elsewhere in any Windows Operating System Product to that IAP or ICP on the condition that the IAP or ICP refrain from distributing, promoting or using any software that competes with Microsoft Middleware.

Nothing in this section shall prohibit Microsoft from entering into (a) any bona fide joint venture or (b) any joint development or joint services arrangement with any ISV, IHV, IAP, ICP, or OEM for a new product, technology or service, or any material value-add to an existing product, technology or service, in which both Microsoft and the ISV, IHV, IAP, ICP, or OEM contribute significant developer or other resources, that prohibits such entity from competing with the object of the joint venture or other arrangement for a reasonable period of time.

This Section does not apply to any agreements in which Microsoft licenses intellectual property in from a third party.

H. Starting at the earlier of the release of Service Pack 1 for Windows XP or 12 months after the submission of this Final Judgment to the Court, Microsoft shall:

1. Allow end users (via a mechanism readily accessible from the desktop or Start menu such as an Add/Remove icon) and OEMs (via standard preinstallation kits) to enable or remove access to each Microsoft Middleware Product or Non-Microsoft Middleware Product by (a) displaying or removing icons, shortcuts, or menu entries on the desktop or Start menu, or anywhere else in a Windows Operating System Product where a list of icons, shortcuts, or menu entries for applications are generally displayed, except that Microsoft may restrict the display of icons, shortcuts, or menu entries for any product in any list of such icons, shortcuts, or menu entries specified in the Windows documentation as being limited to products that provide particular types of functionality, provided that the restrictions are non-discriminatory with respect to non-Microsoft and Microsoft products; and (b) enabling or disabling automatic invocations pursuant to Section III.C.3 of this Final Judgment that are used to launch Non-Microsoft Middleware Products or Microsoft Middleware Pro-

ducts. The mechanism shall offer the end user a separate and unbiased choice with respect to enabling or removing access (as described in this subsection III.H.1) and altering default invocations (as described in the following subsection III.H.2) with regard to each such Microsoft Middleware Product or Non-Microsoft Middleware Product and may offer the end-user a separate and unbiased choice of enabling or removing access and altering default configurations as to all Microsoft Middleware Products as a group or all Non-Microsoft Middleware Products as a group.

2. Allow end users (via an unbiased mechanism readily available from the desktop or Start menu), OEMs (via standard OEM preinstallation kits), and Non-Microsoft Middleware Products (via a mechanism which may, at Microsoft's option, require confirmation from the end user in an unbiased manner) to designate a Non-Microsoft Middleware Product to be invoked in place of that Microsoft Middleware Product (or vice versa) in any case where the Windows Operating System Product would otherwise launch the Microsoft Middleware Product in a separate Top-Level Window and display either (i) all of the user interface elements or (ii) the Trademark of the Microsoft Middleware Product.

   Notwithstanding the foregoing Section III.H.2, the Windows Operating System Product may invoke a Microsoft Middleware Product in any instance in which:

   (a) that Microsoft Middleware Product would be invoked solely for use in interoperating with a server maintained by Microsoft (outside the context of general Web browsing), or

   (b) that designated Non-Microsoft Middleware Product fails to implement a reasonable technical requirement (*e.g.*, a requirement to be able to host a particular ActiveX control) that is necessary for valid technical reasons to supply the end user with functionality consistent with a Windows Operating System Product, provided that the technical reasons are described in a reasonably prompt manner to any ISV that requests them.

3. Ensure that a Windows Operating System Product does not (a) automatically alter an OEM's configuration of icons, shortcuts or menu entries installed or displayed by the OEM pursuant to Section III.C of this Final Judgment without first seeking confirmation from the user and (b) seek such confirmation from the end user for an automatic (as opposed to user-initiated) alteration of the OEM's configuration until 14 days after the initial boot up of a new Personal Computer. Any such automatic alteration and confirmation shall be unbiased with respect to Microsoft Middleware Products and Non-Microsoft Middleware. Microsoft shall not alter the manner in which a Windows Operating System Product automatically alters an OEM's configuration of icons, shortcuts or menu entries other than in a new version of a Windows Operating System Product.

Microsoft's obligations under this Section III.H as to any new Windows Operating System Product shall be determined based on the Microsoft Middleware Products which exist seven months prior to the last beta test version (*i.e.*, the one immediately preceding the first release candidate) of that Windows Operating System Product.

I. Microsoft shall offer to license to ISVs, IHVs, IAPs, ICPs, and OEMs any intellectual property rights owned or licensable by Microsoft that are required to exercise any of the options or alternatives expressly provided to them under this Final Judgment, provided that

1. all terms, including royalties or other payment of monetary consideration, are reasonable and non-discriminatory;
2. the scope of any such license (and the intellectual property rights licensed thereunder) need be no broader than is necessary to ensure that an ISV, IHV, IAP, ICP or OEM is able to exercise the options or alternatives expressly provided under this Final Judgment (*e.g.*, an ISV's, IHV's, IAP's, ICP's and OEM's option to promote Non-Microsoft Middleware shall not confer any rights to any Microsoft intellectual property rights infringed by that Non-Microsoft Middleware);
3. an ISV's, IHV's, IAP's, ICP's, or OEM's rights may be conditioned on its not assigning, transferring or sublicensing its rights under any license granted under this provision; and
4. the terms of any license granted under this section are in all respects consistent with the express terms of this Final Judgment.

Beyond the express terms of any license granted by Microsoft pursuant to this section, this Final Judgment does not, directly or by implication, estoppel or otherwise, confer any rights, licenses, covenants or immunities with regard to any Microsoft intellectual property to anyone.

J. No provision of this Final Judgment shall:

1. Require Microsoft to document, disclose or license to third parties: (a) portions of APIs or Documentation or portions or layers of Communications Protocols the disclosure of which would compromise the security of a particular installation or group of installations of anti-piracy, anti-virus, software licensing, digital rights management, encryption or authentication systems, including without limitation, keys, authorization tokens or enforcement criteria; or (b) any API, interface or other information related to any Microsoft product if lawfully directed not to do so by a governmental agency of competent jurisdiction.
2. Prevent Microsoft from conditioning any license of any API, Documentation or Communications Protocol related to anti-piracy systems, anti-virus technologies, license enforcement mechanisms, authentication/authorization security, or third party intellectual property protection mechanisms of any Microsoft product to any person or entity on the requirement that the licensee: (a) has no history of software counterfeiting or piracy or willful violation of

intellectual property rights, (b) has a reasonable business need for the API, Documentation or Communications Protocol for a planned or shipping product, (c) meets reasonable, objective standards established by Microsoft for certifying the authenticity and viability of its business, (d) agrees to submit, at its own expense, any computer program using such APIs, Documentation or Communication Protocols to third-party verification, approved by Microsoft, to test for and ensure verification and compliance with Microsoft specifications for use of the API or interface, which specifications shall be related to proper operation and integrity of the systems and mechanisms identified in this paragraph.

IV. Compliance and Enforcement Procedures

A. Enforcement Authority

1. The Plaintiffs shall have exclusive responsibility for enforcing this Final Judgment. Without in any way limiting the sovereign enforcement authority of each of the plaintiff States, the plaintiff States shall form a committee to coordinate their enforcement of this Final Judgment. A plaintiff State shall take no action to enforce this Final Judgment without first consulting with the United States and with the plaintiff States' enforcement committee.

2. To determine and enforce compliance with this Final Judgment, duly authorized representatives of the United States and the plaintiff States, on reasonable notice to Microsoft and subject to any lawful privilege, shall be permitted the following:

   a. Access during normal office hours to inspect any and all source code, books, ledgers, accounts, correspondence, memoranda and other documents and records in the possession, custody, or control of Microsoft, which may have counsel present, regarding any matters contained in this Final Judgment.

   b. Subject to the reasonable convenience of Microsoft and without restraint or interference from it, to interview, informally or on the record, officers, employees, or agents of Microsoft, who may have counsel present, regarding any matters contained in this Final Judgment.

   c. Upon written request of the United States or a duly designated representative of a plaintiff State, on reasonable notice given to Microsoft, Microsoft shall submit such written reports under oath as requested regarding any matters contained in this Final Judgment.

   Individual plaintiff States will consult with the plaintiff States' enforcement committee to minimize the duplication and burden of the exercise of the foregoing powers, where practicable.

3. The Plaintiffs shall not disclose any information or documents obtained from Microsoft under this Final Judgment except for the purpose of securing

compliance with this Final Judgment, in a legal proceeding to which one or more of the Plaintiffs is a party, or as otherwise required by law; provided that the relevant Plaintiff(s) must provide ten days' advance notice to Microsoft before disclosing in any legal proceeding (other than a grand jury proceeding) to which Microsoft is not a party any information or documents provided by Microsoft pursuant to this Final Judgment which Microsoft has identified in writing as material as to which a claim of protection may be asserted under Rule 26(c)(7) of the Federal Rules of Civil Procedure.

4. The Plaintiffs shall have the authority to seek such orders as are necessary from the Court to enforce this Final Judgment, provided, however, that the Plaintiffs shall afford Microsoft a reasonable opportunity to cure alleged violations of Sections III.C, III.D, III.E and III.H, provided further that any action by Microsoft to cure any such violation shall not be a defense to enforcement with respect to any knowing, willful or systematic violations.

B. **Appointment of a Technical Committee**

1. Within 30 days of entry of this Final Judgment, the parties shall create and recommend to the Court for its appointment a three-person Technical Committee ("TC") to assist in enforcement of and compliance with this Final Judgment.

2. The TC members shall be experts in software design and programming. No TC member shall have a conflict of interest that could prevent him or her from performing his or her duties under this Final Judgment in a fair and unbiased manner. Without limitation to the foregoing, no TC member (absent the agreement of both parties):

   a. shall have been employed in any capacity by Microsoft or any competitor to Microsoft within the past year, nor shall she or he be so employed during his or her term on the TC;

   b. shall have been retained as a consulting or testifying expert by any person in this action or in any other action adverse to or on behalf of Microsoft; or

   c. shall perform any other work for Microsoft or any competitor of Microsoft for two years after the expiration of the term of his or her service on the TC.

3. Within 7 days of entry of this Final Judgment, the Plaintiffs as a group and Microsoft shall each select one member of the TC, and those two members shall then select the third member. The selection and approval process shall proceed as follows.

   a. As soon as practicable after submission of this Final Judgment to the Court, the Plaintiffs as a group and Microsoft shall each identify to the other the individual it proposes to select as its designee to the TC. The Plaintiffs and Microsoft shall not object to each other's selection on any ground other than failure to satisfy the requirements of Section IV.B.2

above. Any such objection shall be made within ten business days of the receipt of notification of selection.

b. The Plaintiffs shall apply to the Court for appointment of the persons selected by the Plaintiffs and Microsoft pursuant to Section IV.B.3.a above. Any objections to the eligibility of a selected person that the parties have failed to resolve between themselves shall be decided by the Court based solely on the requirements stated in Section IV.B.2 above.

c. As soon as practical after their appointment by the Court, the two members of the TC selected by the Plaintiffs and Microsoft (the "Standing Committee Members") shall identify to the Plaintiffs and Microsoft the person that they in turn propose to select as the third member of the TC. The Plaintiffs and Microsoft shall not object to this selection on any grounds other than failure to satisfy the requirements of Section IV.B.2 above. Any such objection shall be made within ten business days of the receipt of notification of the selection and shall be served on the other party as well as on the Standing Committee Members.

d. The Plaintiffs shall apply to the Court for appointment of the person selected by the Standing Committee Members. If the Standing Committee Members cannot agree on a third member of the TC, the third member shall be appointed by the Court. Any objection by Microsoft or the Plaintiffs to the eligibility of the person selected by the Standing Committee Members which the parties have failed to resolve among themselves shall also be decided by the Court based on the requirements stated in Section IV.B.2 above.

4. Each TC member shall serve for an initial term of 30 months. At the end of a TC member's initial 30-month term, the party that originally selected him or her may, in its sole discretion, either request re-appointment by the Court to a second 30-month term or replace the TC member in the same manner as provided for in Section IV.B.3.a above. In the case of the third member of the TC, that member shall be re-appointed or replaced in the manner provided in Section IV.B.3.c above.

5. If the United States determines that a member of the TC has failed to act diligently and consistently with the purposes of this Final Judgment, or if a member of the TC resigns, or for any other reason ceases to serve in his or her capacity as a member of the TC, the person or persons that originally selected the TC member shall select a replacement member in the same manner as provided for in Section IV.B.3.

6. Promptly after appointment of the TC by the Court, the United States shall enter into a Technical Committee services agreement ("TC Services Agreement") with each TC member that grants the rights, powers and authorities necessary to permit the TC to perform its duties under this Final Judgment.

Microsoft shall indemnify each TC member and hold him or her harmless against any losses, claims, damages, liabilities or expenses arising out of, or in connection with, the performance of the TC's duties, except to the extent that such liabilities, losses, damages, claims, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the TC member. The TC Services Agreements shall include the following.

a. The TC members shall serve, without bond or other security, at the cost and expense of Microsoft on such terms and conditions as the Plaintiffs approve, including the payment of reasonable fees and expenses.

b. The TC Services Agreement shall provide that each member of the TC shall comply with the limitations provided for in Section IV.B.2 above.

7. Microsoft shall provide the TC with a permanent office, telephone, and other office support facilities at Microsoft's corporate campus in Redmond, Washington. Microsoft shall also, upon reasonable advance notice from the TC, provide the TC with reasonable access to available office space, telephone, and other office support facilities at any other Microsoft facility identified by the TC.

8. The TC shall have the following powers and duties:

a. The TC shall have the power and authority to monitor Microsoft's compliance with its obligations under this final judgment.

b. The TC may, on reasonable notice to Microsoft:

(i) interview, either informally or on the record, any Microsoft personnel, who may have counsel present; any such interview to be subject to the reasonable convenience of such personnel and without restraint or interference by Microsoft;

(ii) inspect and copy any document in the possession, custody or control of Microsoft personnel;

(iii) obtain reasonable access to any systems or equipment to which Microsoft personnel have access;

(iv) obtain access to, and inspect, any physical facility, building or other premises to which Microsoft personnel have access; and

(v) require Microsoft personnel to provide compilations of documents, data and other information, and to submit reports to the TC containing such material, in such form as the TC may reasonably direct.

c. The TC shall have access to Microsoft's source code, subject to the terms of Microsoft's standard source code Confidentiality Agreement, as approved by the Plaintiffs and to be agreed to by the TC members pursuant to Section IV.B.9 below, and by any staff or consultants who may have access to the source code. The TC may study, interrogate and interact with the source code in order to perform its functions and

duties, including the handling of complaints and other inquiries from non-parties.

d. The TC shall receive complaints from the Compliance Officer, third parties or the Plaintiffs and handle them in the manner specified in Section IV.D below.

e. The TC shall report in writing to the Plaintiffs every six months until expiration of this Final Judgment the actions it has undertaken in performing its duties pursuant to this Final Judgment, including the identification of each business practice reviewed and any recommendations made by the TC.

f. Regardless of when reports are due, when the TC has reason to believe that there may have been a failure by Microsoft to comply with any term of this Final Judgment, the TC shall immediately notify the Plaintiffs in writing setting forth the relevant details.

g. TC members may communicate with non-parties about how their complaints or inquiries might be resolved with Microsoft, so long as the confidentiality of information obtained from Microsoft is maintained.

h. The TC may hire at the cost and expense of Microsoft, with prior notice to Microsoft and subject to approval by the Plaintiffs, such staff or consultants (all of whom must meet the qualifications of Section IV.B.2) as are reasonably necessary for the TC to carry out its duties and responsibilities under this Final Judgment. The compensation of any person retained by the TC shall be based on reasonable and customary terms commensurate with the individual's experience and responsibilities.

i. The TC shall account for all reasonable expenses incurred, including agreed upon fees for the TC members' services, subject to the approval of the Plaintiffs. Microsoft may, on application to the Court, object to the reasonableness of any such fees or other expenses. On any such application: (a) the burden shall be on Microsoft to demonstrate unreasonableness; and (b) the TC member(s) shall be entitled to recover all costs incurred on such application (including reasonable attorneys' fees and costs), regardless of the Court's disposition of such application, unless the Court shall expressly find that the TC's opposition to the application was without substantial justification.

9. Each TC member, and any consultants or staff hired by the TC, shall sign a confidentiality agreement prohibiting disclosure of any information obtained in the course of performing his or her duties as a member of the TC or as a person assisting the TC to anyone other than Microsoft, the Plaintiffs, or the Court. All information gathered by the TC in connection with this Final Judgment and any report and recommendations prepared by the TC shall be treated as Highly

Confidential under the Protective Order in this case, and shall not be disclosed to any person other than Microsoft and the Plaintiffs except as allowed by the Protective Order entered in the Action or by further order of this Court.

10. No member of the TC shall make any public statements relating to the TC's activities.

C. **Appointment of a Microsoft Internal Compliance Officer**

1. Microsoft shall designate, within 30 days of entry of this Final Judgment, an internal Compliance Officer who shall be an employee of Microsoft with responsibility for administering Microsoft's antitrust compliance program and helping to ensure compliance with this Final Judgment.

2. The Compliance Officer shall supervise the review of Microsoft's activities to ensure that they comply with this Final Judgment. He or she may be assisted by other employees of Microsoft.

3. The Compliance Officer shall be responsible for performing the following activities:

   a. within 30 days after entry of this Final Judgment, distributing a copy of the Final Judgment to all officers and directors of Microsoft;

   b. promptly distributing a copy of this Final Judgment to any person who succeeds to a position described in Section IV.C.3.a above;

   c. ensuring that those persons designated in Section IV.C.3.a above are annually briefed on the meaning and requirements of this Final Judgment and the U.S. antitrust laws and advising them that Microsoft's legal advisors are available to confer with them regarding any question concerning compliance with this Final Judgment or under the U.S. antitrust laws;

   d. obtaining from each person designated in Section IV.C.3.a above an annual written certification that he or she: (i) has read and agrees to abide by the terms of this Final Judgment; and (ii) has been advised and understands that his or her failure to comply with this Final Judgment may result in a finding of contempt of court;

   e. maintaining a record of all persons to whom a copy of this Final Judgment has been distributed and from whom the certification described in Section IV.C.3.d above has been obtained;

   f. establishing and maintaining the website provided for in Section IV.D.3.b below.

   g. receiving complaints from third parties, the TC and the Plaintiffs concerning Microsoft's compliance with this Final Judgment and following the appropriate procedures set forth in Section IV.D below; and

h. maintaining a record of all complaints received and action taken by Microsoft with respect to each such complaint.

D. **Voluntary Dispute Resolution**

1. Third parties may submit complaints concerning Microsoft's compliance with this Final Judgment to the Plaintiffs, the TC or the Compliance Officer.

2. In order to enhance the ability of the Plaintiffs to enforce compliance with this Final Judgment, and to advance the parties' joint interest and the public interest in prompt resolution of issues and disputes, the parties have agreed that the TC and the Compliance Officer shall have the following additional responsibilities.

3. Submissions to the Compliance Officer.

   a. Third parties, the TC, or the Plaintiffs in their discretion may submit to the Compliance Officer any complaints concerning Microsoft's compliance with this Final Judgment. Without in any way limiting its authority to take any other action to enforce this Final Judgment, the Plaintiffs may submit complaints related to Sections III.C, III.D, III.E and III.H to the Compliance Officer whenever doing so would be consistent with the public interest.

   b. To facilitate the communication of complaints and inquiries by third parties, the Compliance Officer shall place on Microsoft's Internet website, in a manner acceptable to the Plaintiffs, the procedures for submitting complaints. To encourage whenever possible the informal resolution of complaints and inquiries, the website shall provide a mechanism for communicating complaints and inquiries to the Compliance Officer.

   c. Microsoft shall have 30 days after receiving a complaint to attempt to resolve it or reject it, and will then promptly advise the TC of the nature of the complaint and its disposition.

4. Submissions to the TC.

   a. The Compliance Officer, third parties or the Plaintiffs in their discretion may submit to the TC any complaints concerning Microsoft's compliance with this Final Judgment.

   b. The TC shall investigate complaints received and will consult with the Plaintiffs regarding its investigation. At least once during its investigation, and more often when it may help resolve complaints informally, the TC shall meet with the Compliance Officer to allow Microsoft to respond to the substance of the complaint and to determine whether the complaint can be resolved without further proceedings.

   c. If the TC concludes that a complaint is meritorious, it shall advise Microsoft and the Plaintiffs of its conclusion and its proposal for cure.

d. No work product, findings or recommendations by the TC may be admitted in any enforcement proceeding before the Court for any purpose, and no member of the TC shall testify by deposition, in court or before any other tribunal regarding any matter related to this Final Judgment.

e. The TC may preserve the anonymity of any third party complainant where it deems it appropriate to do so upon the request of the Plaintiffs or the third party, or in its discretion.

V. Termination

A. Unless this Court grants an extension, this Final Judgment will expire on the fifth anniversary of the date it is entered by the Court.

B. In any enforcement proceeding in which the Court has found that Microsoft has engaged in a pattern of willful and systematic violations, the Plaintiffs may apply to the Court for a one-time extension of this Final Judgment of up to two years, together with such other relief as the Court may deem appropriate.

VI. Definitions

A. "API" means application programming interface, including any interface that Microsoft is obligated to disclose pursuant to III.D.

B. "Communications Protocol" means the set of rules for information exchange to accomplish predefined tasks between a Windows Operating System Product and a server operating system product connected via a network, including, but not limited to, a local area network, a wide area network or the Internet. These rules govern the format, semantics, timing, sequencing, and error control of messages exchanged over a network.

C. "Consideration" means any monetary payment or the provision of preferential licensing terms; technical, marketing, and sales support; enabling programs; product information; information about future plans; developer support; hardware or software certification or approval; or permission to display trademarks, icons or logos.

D. "Covered OEMs" means the 20 OEMs with the highest worldwide volume of licenses of Windows Operating System Products reported to Microsoft in Microsoft's fiscal year preceding the effective date of the Final Judgment. The OEMs that fall within this definition of Covered OEMs shall be recomputed by Microsoft as soon as practicable after the close of each of Microsoft's fiscal years.

E. "Documentation" means all information regarding the identification and means of using APIs that a person of ordinary skill in the art requires to make effective use of those APIs. Such information shall be of the sort and to the level of specificity,

precision and detail that Microsoft customarily provides for APIs it documents in the Microsoft Developer Network ("MSDN").

F. "IAP" means an Internet access provider that provides consumers with a connection to the Internet, with or without its own proprietary content.

G. "ICP" means an Internet content provider that provides content to users of the Internet by maintaining Web sites.

H. "IHV" means an independent hardware vendor that develops hardware to be included in or used with a Personal Computer running a Windows Operating System Product.

I. "ISV" means an entity other than Microsoft that is engaged in the development or marketing of software products.

J. "Microsoft Middleware" means software code that

1. Microsoft distributes separately from a Windows Operating System Product to update that Windows Operating System Product;

2. is Trademarked or is marketed by Microsoft as a major version of any Microsoft Middleware Product defined in section VI.K.1; and

3. provides the same or substantially similar functionality as a Microsoft Middleware Product.

Microsoft Middleware shall include at least the software code that controls most or all of the user interface elements of that Microsoft Middleware.

Software code described as part of, and distributed separately to update, a Microsoft Middleware Product shall not be deemed Microsoft Middleware unless identified as a new major version of that Microsoft Middleware Product. A major version shall be identified by a whole number or by a number with just a single digit to the right of the decimal point.

K. "Microsoft Middleware Product" means

1. the functionality provided by Internet Explorer, Microsoft's Java Virtual Machine, Windows Media Player, Windows Messenger, Outlook Express and their successors in a Windows Operating System Product, and

2. for any functionality that is first licensed, distributed or sold by Microsoft after the entry of this Final Judgment and that is part of any Windows Operating System Product

a. Internet browsers, email client software, networked audio/video client software, instant messaging software or

b. functionality provided by Microsoft software that

i. is, or in the year preceding the commercial release of any new Windows Operating System Product was, distributed separately by Microsoft (or by an entity acquired by Microsoft) from a Windows Operating System Product;

ii. is similar to the functionality provided by a Non-Microsoft Middleware Product; and

iii. is Trademarked.

Functionality that Microsoft describes or markets as being part of a Microsoft Middleware Product (such as a service pack, upgrade, or bug fix for Internet Explorer), or that is a version of a Microsoft Middleware Product (such as Internet Explorer 5.5), shall be considered to be part of that Microsoft Middleware Product.

L. "Microsoft Platform Software" means (i) a Windows Operating System Product and/or (ii) a Microsoft Middleware Product.

M. "Non-Microsoft Middleware" means a non-Microsoft software product running on a Windows Operating System Product that exposes a range of functionality to ISVs through published APIs, and that could, if ported to or made interoperable with, a non-Microsoft Operating System, thereby make it easier for applications that rely in whole or in part on the functionality supplied by that software product to be ported to or run on that non-Microsoft Operating System.

N. "Non-Microsoft Middleware Product" means a non-Microsoft software product running on a Windows Operating System Product (i) that exposes a range of functionality to ISVs through published APIs, and that could, if ported to or made interoperable with, a non-Microsoft Operating System, thereby make it easier for applications that rely in whole or in part on the functionality supplied by that software product to be ported to or run on that non-Microsoft Operating System, and (ii) of which at least one million copies were distributed in the United States within the previous year.

O. "OEM" means an original equipment manufacturer of Personal Computers that is a licensee of a Windows Operating System Product.

P. "Operating System" means the software code that, *inter alia*, (i) controls the allocation and usage of hardware resources (such as the microprocessor and various peripheral devices) of a Personal Computer, (ii) provides a platform for developing applications by exposing functionality to ISVs through APIs, and (iii) supplies a user interface that enables users to access functionality of the operating system and in which they can run applications.

Q. "Personal Computer" means any computer configured so that its primary purpose is for use by one person at a time, that uses a video display and keyboard (whether or not that video display and keyboard is included) and that contains an Intel x86 compatible (or successor) microprocessor. Servers, television set top boxes, handheld computers, game consoles, telephones, pagers, and personal digital assistants are examples of products that are not Personal Computers within the meaning of this definition.

R. "Timely Manner" means at the time Microsoft first releases a beta test version of a Windows Operating System Product that is made available via an MSDN subscription offering or of which 150,000 or more beta copies are distributed.

S. "Top-Level Window" means a window displayed by a Windows Operating System Product that (a) has its own window controls, such as move, resize, close, minimize,

and maximize, (b) can contain sub-windows, and (c) contains user interface elements under the control of at least one independent process.

T. "Trademarked" means distributed in commerce and identified as distributed by a name other than Microsoft® or Windows® that Microsoft has claimed as a trademark or service mark by (i) marking the name with trademark notices, such as ® or ™, in connection with a product distributed in the United States; (ii) filing an application for trademark protection for the name in the United States Patent and Trademark Office; or (iii) asserting the name as a trademark in the United States in a demand letter or lawsuit. Any product distributed under descriptive or generic terms or a name comprised of the Microsoft® or Windows® trademarks together with descriptive or generic terms shall not be Trademarked as that term is used in this Final Judgment. Microsoft hereby disclaims any trademark rights in such descriptive or generic terms apart from the Microsoft® or Windows® trademarks, and hereby abandons any such rights that it may acquire in the future.

U. "Windows Operating System Product" means the software code (as opposed to source code) distributed commercially by Microsoft for use with Personal Computers as Windows 2000 Professional, Windows XP Home, Windows XP Professional, and successors to the foregoing, including the Personal Computer versions of the products currently code named "Longhorn" and "Blackcomb" and their successors, including upgrades, bug fixes, service packs, etc. The software code that comprises a Windows Operating System Product shall be determined by Microsoft in its sole discretion.

VII. Further Elements

Jurisdiction is retained by this Court over this action such that the Court may act *sua sponte* to issue further orders or directions, including but not limited to orders or directions relating to the construction or carrying out of this Final Judgment, the enforcement of compliance therewith, the modification thereof, and the punishment of any violation thereof.

Jurisdiction is retained by this Court over this action and the parties thereto for the purpose of enabling either of the parties thereto to apply to this Court at any time for further orders and directions as may be necessary or appropriate to carry out or construe this Final Judgment, to modify or terminate any of its provisions, to enforce compliance, and to punish violations of its provisions.

VIII. Third Party Rights

Nothing in this Final Judgment is intended to confer upon any other persons any rights or remedies of any nature whatsoever hereunder or by reason of this Final Judgment.

SO ORDERED.

COLLEEN KOLLAR-KOTELLY
United States District Judge

EXHIBIT 4

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

----------x

UNITED STATES OF AMERICA,

Plaintiff, CASE NO.

vs. 12-CV-2826(DLC)

APPLE INC., et. al,

Defendants.

----------x

HIGHLY CONFIDENTIAL

VIDEOTAPED DEPOSITION OF KEVIN SAUL

FRIDAY, FEBRUARY 22, 2013

9:11 A.M.

REPORTED BY:
KIMBERLEE SCHROEDER, CSR, RPR, CCRR
JOB NO. 28893

10:28:51 Can you tell me whether you received any
10:28:53 general training regarding antitrust compliance while
10:28:57 at Apple?
10:28:58 A. I don't recall.
10:29:01 Q. Do you recall ever receiving, again, general
10:29:07 antitrust compliance training?
10:29:12 A. I don't recall.
10:29:13 Q. Do you receive any training of any kind at
10:29:17 Apple?
10:29:18 A. General training -- general training, yes, in
10:29:31 areas that may impact the business.
10:29:37 Q. For example, you may receive training on
10:29:39 appropriate workplace conduct? Is that an area you
10:29:42 may receive training on?
10:29:44 A. That one is a possibility, sure.
10:29:48 Q. But you, sitting here today, you don't know
10:29:51 whether for sure you do?
10:29:52 A. Do what?
10:29:53 Q. Sitting here today, do you know whether for
10:29:56 sure you receive any training on appropriate workplace
10:29:59 conduct?
10:29:59 A. I don't recall.
10:30:00 Q. A fair amount of your work involves -- and I
10:30:06 apologize. You see what I'm doing. I'm using my
10:30:09 hand.

REPORTER'S CERTIFICATE

I, KIMBERLEE SCHROEDER, CSR 11414, duly authorized to administer oaths pursuant to Section 30(c) of the Federal Rules of Civil Procedure, hereby certify that the witness in the foregoing deposition was by me duly sworn to testify the truth, the whole truth and nothing but the truth in the within-entitled cause; that said deposition was taken at the time and place therein stated; that the testimony of the said witness was reported by me and thereafter transcribed by me and that the witness was given an opportunity to read and correct said deposition and to subscribe the same.

I further certify that I am not of counsel or attorney for either or any of the parties to said cause of action, nor in any way interested in the outcome of the cause named in said cause of action.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated this 24th day of February, 2013.

KIMBERLEE SCHROEDER, CSR, RPR, CCRR