UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

LAVOHO, LLC, successor in interest to DIESEL EBOOKS, LLC, Plaintiff, -v- APPLE, INC.; HACHETTE BOOK GROUP, INC.; HARPERCOLLINS PUBLISHERS, LLC; VERLAGSGRUPPE GEORG VON HOLTZBRINCK GMBH; HOLTZBRINCK PUBLISHERS, LLC d/b/a/ MACMILLAN; THE PENGUIN GROUP, A DIVISION OF PEARSON PLC; and SIMON & SCHUSTER, INC., Defendants.	14cv1768 (DLC) OPINION & ORDER

APPEARANCES:

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DENISE COTE, District Judge:

Lavoho, LLC, the successor in interest to Diesel eBooks, LLC (hereinafter, "Diesel") brings this action against five book publishers, Hachette Book Group, Inc. ("Hachette"), HarperCollins Publishers, LLC ("HarperCollins"), Macmillan Publishers Inc. and Verlagsgruppe Georg Von Holtzbrinck GmbH ("Macmillan"), The Penguin Group ("Penguin"), and Simon & Schuster, Inc. ("Simon & Schuster") (collectively, "Publisher Defendants"). Pursuant to Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1, and Section 340 of the Donnelly Act, N.Y. Gen. Bus. Law § 340, Diesel seeks damages it asserts it sustained due to the defendants' conspiracy with Apple Inc. ("Apple") to fix prices and reduce competition in the e-book industry.[1] Diesel's claims arise from discussions initiated by Apple in December 2009 with the Publisher Defendants to explore the terms under which e-books might be available for Apple's new device, the iPad, which Apple launched in January 2010. As a result of these discussions, the Publisher Defendants implemented agency distribution agreements with e-book retailers with the purpose and effect of eliminating retail price competition and raising the retail prices for many e-books.

In 2011 and 2012, the U.S. Department of Justice ("DOJ"), various states, and class action plaintiffs filed antitrust lawsuits against the Publisher Defendants and Apple alleging violations of the Sherman Act. While the Publisher Defendants settled these claims, Apple proceeded to trial and was found liable in July 2013. United States v. Apple Inc., 952 F. Supp. 2d 638, 709 (S.D.N.Y. 2013). Diesel filed this antitrust case in March of 2014 alleging that its business was predicated on discounting, and that the defendants' agency conspiracy had caused Diesel's demise. Two other e-book retailers filed similar antitrust lawsuits in 2013 and 2014 against Apple and the Publisher Defendants. The Court has dismissed these two lawsuits. DNAML Pty, Ltd. v. Apple Inc. et al., No. 13-cv-6516 (DLC), 2015 WL 9077075 (S.D.N.Y. Dec. 16, 2015); Abbey House

[1] The plaintiff also brought this lawsuit against Apple. The plaintiff and Apple have settled.

Media, Inc. v. Apple Inc. et al., No. 14-cv-2000, 2016 WL 297720 (S.D.N.Y. Jan. 22, 2016).

Following the completion of discovery, the Publisher Defendants moved for summary judgment on the grounds that Diesel cannot show antitrust injury and that Diesel has not shown that its failure was caused by the agency conspiracy. The motion is granted. The plaintiff has not offered evidence to show that it has suffered antitrust injury arising from the Publisher Defendants' conspiracy to eliminate retail price competition for their e-books or from which a jury could find that that conspiracy caused the failure of its business.

BACKGROUND

The following facts are undisputed or taken in the light most favorable to the plaintiff. Scott Redford founded Diesel as an e-book retail store in December 2004. Diesel sold e-books through its website, built in part by its programing contractor on top of an existing e-commerce infrastructure. Its e-books were apparently intended to be read by consumers principally on their desktop computers. Diesel did not purchase its e-books directly from the Publisher Defendants at any time before the initiation of the defendants' price-fixing conspiracy. Instead, it purchased its inventory from Ingram Digital ("Ingram"), a wholesaler.[2] As a result, Diesel was required to pay a fee to Ingram of 10% of an e-book's digital list price ("DLP"), which increased its costs. Diesel would later tout its search engine optimization knowledge, fraud control, and platform scalability as the three keys to its early success.

I. Diesel's Performance Prior to Agency

Beginning in 2007, Diesel was faced with stiff competition. Amazon re-entered the e-book market at the end of 2007 and quickly became the dominant e-book retailer. Amazon also introduced its popular e-reader device, the Kindle, in November 2007. Amazon sold e-book versions of many hardcover books for $9.99, a price that was often well below Diesel's inventory cost for the book.

In 2009, Barnes & Noble re-entered the e-books market, and eventually adopted Amazon's $9.99 model for e-book versions of certain hardcover books. Barnes & Noble then introduced its e-reader device, the NOOK, in November 2009.

Prior to the implementation of agency pricing in the second quarter of 2010, Diesel's performance was variable. While

[2] Initially, Ingram provided Diesel with e-books in multiple proprietary formats, including Microsoft Reader, Palm, and Adobe. In 2008, Diesel also added a mobile format through the company Mobipocket, although Mobipocket's formatting was later purchased and re-packaged for Amazon's e-reader. Diesel also became a retailer for the self-publishing platform Smashwords and partnered with Google for access to its open domain content.

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