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

PLAINTIFFS' RESPONSE TO APPLE'S PRETRIAL MEMORANDUM OF LAW

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INTRODUCTION

Nowhere in Apple's pretrial pleadings does it deny or dispute that there was a horizontal conspiracy among Publisher Defendants to raise consumer e-book prices and restrain retail price competition.[1] Instead, Apple argues that, because it believes its behavior would have been no different even in the absence of Publisher Defendants' horizontal agreement, Plaintiffs cannot prove Apple's liability. Apple's position is based on a fundamental misunderstanding of antitrust law. It also is squarely at odds with the evidence before the Court.

In making its assertion that Plaintiffs have not met their evidentiary burden, Apple relies heavily on the "tends to exclude" language of *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 764 (1984), and *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986). But, as Plaintiffs made clear in their April 26 Pretrial Memorandum of Law ("Plaintiffs' Memo"), the "tends to exclude" standard is applicable only when assessing antitrust liability based on the parallel actions of horizontal rivals.[2] Moreover, even Apple acknowledges that if direct evidence of agreement is present, the *Matsushita* analysis is irrelevant.[3] As Plaintiffs demonstrated in their Proposed Findings of Fact ("Plaintiffs' PFoF"), such evidence is abundant in this case, and certainly sufficient to prove by a preponderance of the evidence[4] that Apple and Publisher Defendants "had a conscious commitment to a common scheme designed to achieve an unlawful objective"[5]—namely, to raise consumer e-book prices and restrain retail price competition.

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[1] *See* Apple Inc.'s Pre-Trial Memorandum of Law ("Apple Memo"); Apple Inc.'s Proposed Conclusions of Law ("Apple PCoL"); Apple Inc.'s Proposed Findings of Fact ("Apple PFoF").

[2] Plaintiffs' Memo at 31–32; *see also infra* Section I.

[3] Apple Memo at 22–23.

[4] *United States v. Visa U.S.A., Inc.*, 163 F. Supp. 2d 322, 331 (S.D.N.Y. 2001).

[5] *Monsanto*, 465 U.S.at 764 (quotation omitted).

Apple's position that the agreement challenged in this action should be evaluated under the rule of reason rather than being condemned *per se* similarly relies on mixing and matching the horizontal with the vertical. While Apple is correct that certain aspects of the Apple Agency Agreements would be subject to rule of reason analysis if they were challenged piecemeal,[6] Apple's liability in this case arises from its facilitation of Publisher Defendants' horizontal agreement to raise consumer e-book prices. Such price-fixing agreements are subject to *per se* condemnation,[7] and appropriately so.

From a factual perspective, Apple rests its defense on claims that (1) it had no idea that Publisher Defendants collectively planned to raise consumer e-book prices, and (2) it took no actions to help Publisher Defendants move as a group to do so. But those claims are belied by the overwhelming factual record. Apple's own e-mails and admissions, coupled with those of Publisher Defendants and the phone records and testimony produced in this case, provide vivid details of both Publisher Defendants' agreement and Apple's knowing participation in their illicit scheme to raise consumer e-book prices and restrain retail price competition. Unfortunately for the e-book consumers of America, Apple and Publisher Defendants were successful in achieving their goals. Accordingly, Plaintiffs respectfully submit that the Court should enter judgment for Plaintiffs.

I. Apple's Defense Rests on Ignoring the Direct Evidence Against it and Misstating the Legal Test of its Liability.

As its papers make clear, Apple's case rests almost entirely on two dubious propositions. First, rather than confront the array of evidence against it, Apple merely points out that, as a general matter, direct evidence "is extremely rare in antitrust cases," and then contends without

[6] Apple Memo at 35–37.

[7] *See United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940); *Starr v. Sony BMG Music Entm't*, 592 F.3d 314, 326 n.4 (2d Cir. 2010).

elaboration that "Plaintiffs have no such evidence against Apple."[8] Second, Apple mischaracterizes Plaintiffs' theory on agreement as seeking an inference of Apple's participation in the conspiracy based on parallel conduct, and accordingly falling short because Apple did not act contrary to its own independent interests.[9]

Neither proposition is correct. First, there is strong direct evidence both of a horizontal agreement among Publisher Defendants and of Apple's knowledge of and participation in that agreement. Thus, the Court's analysis of this issue need go no further.[10] But if the Court does evaluate the reams of circumstantial evidence along with the direct evidence of Apple's liability, Plaintiffs do not ask the Court to infer Apple's participation from parallel conduct. There is no allegation here that Apple, the sole distributor who participated in this conspiracy, engaged in parallel conduct with any of its co-conspirators, Publisher Defendants. Thus, there is no inference from parallel conduct to make or undermine. Accordingly, whether Apple was acting in its own interest is of no consequence. Rather, Apple's involvement must be evaluated in light of "the evidence as a whole."[11]

A. There Is Significant Direct Evidence of Both a Conspiracy and Apple's Participation Therein.

In cases where a plaintiff presents direct evidence of a conspiracy, the plaintiff need not adduce evidence that "tends to exclude" the possibility that the alleged conspirators acted independently.[12] This is because, when a plaintiff puts forward direct evidence of conspiracy,

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[8] Apple Memo at 22.

[9] *Id.* at 24–27.

[10] *See In re Publ'n Paper Antitrust Litig.*, 690 F.3d 51, 63 (2d Cir. 2012).

[11] *In re Flat Glass Antitrust Litig.*, 385 F.3d 350, 369 (3d Cir. 2004).

[12] *In re Publ'n Paper*, 690 F.3d at 63; *Rossi v. Standard Roofing, Inc.*, 156 F.3d 452, 466 (3d Cir. 1998).

the degree of inference required is minimized and therefore "the Supreme Court's concerns over the reasonableness of inferences in antitrust cases evaporate."[13]

Thus, Apple's fundamental legal position depends on the absence of direct evidence against it. But Apple never explains why much of the evidence before the Court, including plain admissions of its own high-level executives and those of Publisher Defendants, is not properly considered direct.

Contrary to Apple's assertion, direct evidence is broader than wiretapped conversations.[14] The critical inquiry is whether evidence on its face reflects an agreement or common understanding of the parties. "Direct evidence explicitly refers to an understanding between the alleged conspirators, while circumstantial evidence requires additional inferences in order to support a conspiracy claim."[15]

Here, there is significant evidence that explicitly refers to an understanding between Apple and Publisher Defendants. Indeed, much of the evidence—both to support the existence of a horizontal agreement among Publisher Defendants and to support Apple's knowing participation in that agreement—is similar to evidence courts have considered direct proof of conspiracy in the past. For example, in *Monsanto*, the Supreme Court held that a supplier

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[13] *Rossi*, 156 F.3d at 466.

[14] Apple PCoL, at ¶ 15.

[15] *Golden Bridge Tech., Inc. v. Motorola, Inc.*, 547 F.3d 266, 271 (5th Cir. 2008). Apple relies on the formulation of direct evidence found in *In re Baby Food Antitrust Litigation*, holding that direct evidence is evidence that "requires no inferences." *In re Baby Food Antitrust Litig.*, 166 F.3d 112, 118 (3d Cir. 1999); Apple Memo at 22. That formulation has been rejected by the Second Circuit: "All evidence, including direct evidence, can sometimes require a factfinder to draw inferences to reach a particular conclusion, though perhaps on average circumstantial evidence requires a longer chain of inferences." *In re Publ'n Paper Antitrust Litig.*, 690 F.3d at 63. It also has been criticized elsewhere. *See In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 661 (7th Cir. 2002) (referring to *In re Baby Food*'s distinction between direct and circumstantial evidence as "confusing").

advising distributors that it would cut off access if the distributors failed to maintain a certain price level was direct evidence of a conspiracy.[16]

Similarly, Publisher Defendants here all threatened Amazon that unless it moved to agency (and accepted increased retail prices) Publisher Defendants would withhold their e-books.[17] And there also is substantial direct evidence that Apple knew that Publisher Defendants would make this very threat to Amazon, and in fact encouraged them to do so. For example, Mr. Cue had advised Random House that if Amazon balked at moving to an agency relationship, "windowing could be used to establish a distributor [*i.e.*, agency] model."[18] Similarly, in March 2010, Apple's Counsel Kevin Saul suggested to a smaller publisher that to comply with Apple's MFN, the publisher could "get others on an agency model, or withhold content."[19] And, of course, Mr. Jobs indicated Apple's knowledge that Publisher Defendants would demand agency terms from Amazon and every other e-book retailer when he told his biographer, before any publisher had actually delivered the ultimatum, that Publisher Defendants "went to Amazon and said, 'You're going to sign an agency contract or we're not going to give you the books.'"[20]

There also is overwhelming direct evidence that Apple understood Publisher Defendants collectively would use their price-setting authority under an agency model to raise consumer prices. Not least, Mr. Jobs admitted to his authorized biographer that Apple had "told the

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[16] 465 U.S. 752, 765 (1984). Although *Monsanto* often is cited for its language on inferring agreement, the Court actually upheld a jury verdict citing "substantial *direct* evidence of agreements to maintain prices." *Id.* (emphasis in original).

[17] Plaintiffs' PFoF, at ¶¶ 180-83.

[18] *Id.* at ¶ 107. Given that Mr. Cue repeatedly made identical or near-identical communications to Publisher Defendants, it is a reasonable inference that Mr. Cue gave the same advice to those publishers who actually threatened Amazon.

[19] *Id.* at ¶ 180.

[20] PX-0514, at pp. 503–04. *See also infra* note 71 and accompanying text.

publishers, 'We'll go to the agency model, where you set the price, and we get our 30%, and **yes, the customer pays a little more, but that's what you want anyway**.'"[21]

Courts also treat contemporaneous writings by co-conspirators that detail conspiratorial meetings as direct evidence of a conspiracy.[22] Again, there is ample direct evidence in this form of both Publisher Defendants' horizontal agreement and Apple's knowing participation therein. For example, Apple Counsel Kevin Saul's notes from Apple's December 15–16 meetings with Publisher Defendants include an entry that HarperCollins proposed the agency model to "fix Amazon pricing."[23]

Just days later, after speaking with three Publisher Defendant CEOs on December 21, 2009, Apple's Mr. Cue sent a summary of the conversations to Mr. Jobs. Mr. Cue explained that each Publisher Defendant understood that Apple's industry-wide agency proposal "solves Amazon issue."[24] Ms. Reidy of Simon & Schuster circulated her own summary of her December 21 conversation with Mr. Cue, writing that Mr. Cue "relay[ed] his conclusions" based on "having met with all the major publishers." Mr. Cue told Ms. Reidy that it was "important to Apple that there be 'some level of reasonable pricing'" and that Apple believed "the only way to get this is for the *industry* to go to the agency model."[25]

Less than two weeks later, Mr. Cue sent Publisher Defendants and Random House substantively identical emails demanding that they move all retailers to agency because otherwise Apple would remain exposed to price competition from retailers who remained on the

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[21] PX-0514, at p. 503 (emphasis added). *See also* Plaintiffs' Memo at 26; Plaintiffs' PFoF, at ¶¶ 92, 214; Plaintiffs' Proposed Conclusions of Law, at ¶ 37.

[22] *See, e.g.*, *Arnold Pontiac-GMC, Inc. v. Budd Baer, Inc.*, 826 F.2d 1335, 1338 (3d Cir.1987).

[23] PX-0036, at APLEBOOK-01601745.

[24] Plaintiffs' PFoF, at ¶ 108.

[25] *Id.* at ¶ 105 (emphasis added).

wholesale model.[26] In a follow-up conversation on January 9 documented by Ms. McIntosh of Random House, Keith Moerer described Apple's plan as a "way that would move the whole market off 9.99."[27] Likewise, Hachette's Ms. Thomas made notes of a January 19, 2010 conversation with Mr. Cue, including his observation that the Apple Agency Agreements were "the best chance for publishers to challenge the 9.99 price point."[28]

On January 24, Mr. Jobs invited News Corporation's James Murdoch to "[t]hrow in with Apple and see if we can *all* make a go of this to create a real mainstream ebooks market at $12.99 and $14.99."[29] And on January 26, the day that HarperCollins became the fifth and final Publisher Defendant to sign an Apple Agency Agreement, Apple lead negotiator Eddy Cue praised Simon & Schuster CEO Ms. Reidy as the "real leader of the book industry." Ms. Reidy responded by thanking Mr. Cue and expressing her hope that the iPad launch event the next day would "sustain us as we move through the next steps in the process of changing this industry."[30] Thus, Apple's attempt to distinguish this case from *Interstate Circuit* and *Toys "R" Us* on the ground that "Plaintiffs do not allege that Apple participated in or knew of a single one of the meetings or conversations that allegedly formed the basis of the purported conspiracy"[31] is baseless.

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[26] *Id.* at ¶ 109.

[27] *Id.* at ¶ 115.

[28] PX-0521, at HBG00013352.

[29] PX-0032, at APLEBOOK-03345078 (emphasis added). Apple's contention that Mr. Jobs' e-mail correspondence with Mr. Murdoch "reflects two executives wrestling with the realities of the e-books business" is unconvincing. Apple Memo at 31. Mr. Jobs plainly states that Publisher Defendants can either continue having Amazon price new release e-books at $9.99, or "throw in with Apple" in order to "create a real mainstream ebooks market at $12.99 and $14.99." Mr. Jobs' e-mail is direct evidence that Apple and Publisher Defendants knew that the price tiers would be the actual prices Publisher Defendants would charge for e-books. Indeed, Mr. Jobs' acute awareness of Publisher Defendants' unhappiness with the $9.99 pricing belies any credible claim that Mr. Jobs could have been unaware of Publisher Defendants' pricing plans under agency.

[30] PX-0613, at DOJ-SS0075849.

[31] Apple Memo at 22.

Of course, direct admissions of wrongdoing by employees of the conspirators also constitute direct evidence of a conspiracy.[32] Here, the then-CEOs of both Defendants have expressly acknowledged the contours of the common scheme. Penguin's CEO David Shanks admitted that Apple was the "facilitator and go between" for Publisher Defendants.[33] And at the iPad's launch, Mr. Jobs confidently asserted that Apple's e-book prices would "be the same" as Amazon's, with the context clear that Amazon's prices would be increased.[34] The next day, moreover, Mr. Jobs actually admitted that not only would prices be "the same," but that "the customer pays a little more."[35]

In its ruling on Defendants' motions to dismiss the parallel class case, this Court recognized that, if proved, many of Plaintiffs' allegations were properly thought of as direct evidence.[36] This category included Mr. Jobs' "prescient prediction" that Amazon's e-book prices would be the same as Apple's, as well as statements by Publisher Defendants that Amazon's pricing was a "big problem" for the industry and the identical demands made by Publisher Defendants (four on the same day) that Amazon switch to the agency model.[37] The direct evidence before the Court today is considerably wider and stronger than the allegations at issue in Defendants' motions to dismiss.[38]

Even under Apple's misstatement of *Matsushita* and *Monsanto*, direct evidence vitiates the standard it seeks to apply. Given the overwhelming direct evidence that Apple participated

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[32] *In re Text Messaging Antitrust Litig.*, 630 F.3d 622, 628 (7th Cir. 2010); *In re High Fructose Corn Syrup*, 295 F.3d at 662.

[33] PX-0542, at PEN-LIT-00199145.

[34] PX-0615, at 1:57.

[35] PX-0514, at p. 503.

[36] *In re Elec. Books Antitrust Litig.*, 859 F. Supp. 2d 671, 686–87 (S.D.N.Y. 2012).

[37] *Id*.

[38] Other examples of direct evidence of the conspiracy among Apple and Publisher Defendants can be found in Plaintiffs' Proposed Conclusions of Law, at ¶¶ 14, 37.

in and facilitated Defendants' agreement, it is unnecessary for the Court to determine whether Plaintiffs' evidence "tends to exclude" the possibility of independent conduct.[39]

B. Apple Misstates the Law Governing a Vertical Actor's Liability for Participating in a Horizontal Price-Fixing Conspiracy.

Even without the abundance of direct evidence in this record, the Court would be correct to reject Apple's claim that so long as it "acted independently in pursuit of its own business interests . . . any inference of a conspiracy" is "preclude[d]."[40] Apple confuses the relevant legal standard for inferring conspiracy among horizontal competitors accused of parallel conduct (*e.g.*, Publisher Defendants) with the standard for inferring whether Apple was "in the center as the ringmaster" of that agreement.[41] Here, there is no allegation of parallel conduct between Apple and any other defendant—no such allegation would make sense, as Apple could act in parallel only with its own rivals, other e-book retailers in this case. Rather, the allegation before the Court, similar to *Toys "R" Us*, is that Apple facilitated a conspiracy of its suppliers to restrain Apple's competitors. Apple's legal argument thus is untethered from both precedent and logic.[42]

In Apple's reading of the law, because it "acted at all times in its independent economic interest," it cannot be held liable under Section 1 of the Sherman Act, 15 U.S.C. § 1.[43] Apple has collected 31 cases that purportedly stand for this proposition. But in each case, the actual issue before the court was whether a conspiracy among rivals could be inferred from parallel conduct. In those circumstances, the "independent economic interest" rule makes sense because

[39] *See* Apple Memo at 22–23.

[40] *Id.* at 24.

[41] *Toys "R" Us, Inc. v. FTC*, 221 F.3d 928, 934 (7th Cir. 2000).

[42] *See Fineman v. Armstrong World Indus.*, 980 F.2d 171, 214 n.32 (3d Cir. 1992) (distinguishing horizontal case where finding of action contrary to self-interest helps rule out parallel behavior from case where one firm is in vertical relationship with co-conspirators).

[43] Apple Memo at 25.

it can help distinguish between independent business action and parallel behavior that is part of a conspiracy. Thus, for example, in assessing the plausibility of a conspiracy among airlines—clearly horizontal rivals—the Sixth Circuit held that it could not infer agreement from the airlines' parallel reduction of commission rates because doing so would have advanced each defendant's economic self-interest if undertaken individually.[44]

In *United States v. General Motors Corp.*, on the other hand, the Supreme Court found a group boycott to be illegal *per se* where a group of car dealers had joined together with their manufacturer, General Motors, to stop some dealers from reselling their automobiles to discounters.[45] To effectuate the conspiracy:

> General Motors sought to elicit from all the dealers agreements, substantially interrelated and interdependent, that none of them would do business with the discounters. These agreements were hammered out in meetings between nonconforming dealers and officials of General Motors' Chevrolet Division, and in telephone conversations with other dealers. It was acknowledged from the beginning that substantial unanimity would be essential if the agreements were to be forthcoming. . . . [O]ne of the purposes behind the concerted effort . . . was to protect [defendants] from real or apparent price competition.[46]

Similarly, Apple facilitated and supported an agreement among Publisher Defendants to move Amazon and other retailers to agency and then set consumer e-book prices—at all e-book stores, not just Apple's iBookstore—at the caps established in the Apple Agency Agreements. Apple and Publisher Defendants all recognized that the success of the conspiracy required substantial uniformity and unanimity both as to Publisher Defendants' participation in, and the terms of, the

[44] *In re Travel Agent Comm'n Antitrust Litig.*, 583 F.3d 896, 908 (6th Cir. 2009). This is just one example from the litany of cases Defendant cites on this point. They are all variations on this same theme. *See* Apple Memo at 26 n.6 & App. A.

[45] 384 U.S. 127, 143–44 (1966). Just as in this case, the conspiracy was multi-level but fundamentally horizontal.

[46] *Id.* at 144, 147.

conspiracy.[47] Apple and Publisher Defendants then acted in concert to provide an "elegant solution" to Apple's desire to avoid competing on price against retailers such as Amazon.[48]

General Motors defended its conduct with an argument nearly identical to Apple's: that its conduct was in its own independent economic interest. But the Supreme Court held that "by no stretch of the imagination" could General Motors' conduct in relation to its dealers be described as "merely 'parallel,'" and that it was of "no consequence . . . that each party acted in its own lawful interest. Nor is it of consequence for this purpose whether the [challenged conduct was] economically desirable." *Id*. at 142, 145.[49] Just like General Motors, Apple may not escape liability because restraining price competition by its rivals was in its independent self-interest.

II. Apple and Publisher Defendants Conspired To Raise Consumer E-Book Prices and Restrain Retail Price Competition.

A. Apple Was Motivated To Conspire with Publisher Defendants in Order To Restrain Retail E-book Price Competition.

In conjunction with its independent interest argument, Apple contends—without citation—that the most important question in a Section 1 case is "What motivated the defendant's actions?"[50] Since Apple contends that its motivation was merely "its independent economic interest,"[51] Apple apparently believes that it has found another basis for avoiding liability. But in a *per se* case "a finding of intent to conspire to commit the offense is sufficient;

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[47] Plaintiffs' PFoF, at ¶¶ 153–70.

[48] Kevin Saul Dep., at 163:14–16.

[49] Similarly, both Toys "R" Us and the theatres in *Interstate Circuit* advanced their independent business interests by facilitating their respective conspiracies—they both blunted price competition from discounters. *Toys "R" Us*, 221 F.3d at 936; *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 226 (1939). Apple's participation in its conspiracy with Publisher Defendants similarly allowed it to avoid price competition with Amazon.

[50] Apple Memo at 25. On the prior page, however, Apple downplays the importance of intent, stating: "Motivation to enter a conspiracy is never enough to establish a traditional conspiracy." *Id.* at 24.

[51] *Id*. at 25.

a requirement that intent go further and envision actual anti-competitive results would reopen the very questions of reasonableness which the *per se* rule is designed to avoid."[52]

Thus, it is irrelevant whether Apple intended to advance its independent economic interests. Rather, the key issue is whether Apple intended to advance those interests by conspiring with Publisher Defendants. On that score, the record is clear: Apple believed that facilitating Publisher Defendants' conspiracy to "fix Amazon pricing"[53] would allow it to accomplish its goals of opening an iBookstore and realizing generous margins, while avoiding having to compete against Amazon on price.[54]

Nor may Apple avoid antitrust liability by arguing it was bringing order and stability to "a market in turmoil."[55] The "uncertain and unsettled" e-books market Apple "sought to enter"[56] was similar to the "acute" market conditions the conspiring oil companies faced in *Socony-Vacuum*.[57] Just as the Supreme Court rejected the oil companies' claims that their acts to cure a competitive "evil" shielded them from Section 1 liability, Apple's self-appointed role to "create a real mainstream ebooks market at $12.99 and $14.99" does not shield it here.[58]

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[52] *United States v. Koppers Co.*, 652 F.2d 290, 296 n.6 (2d Cir. 1981). Intent may be considered under the rule of reason, but the Supreme Court has long been clear that a "good intention" will not "save an otherwise objectionable regulation or the reverse." *Bd. of Trade of City of Chicago v. United States*, 246 U.S. 231, 238 (1918).

[53] PX-0036, at APLEBOOK-01601745.

[54] Plaintiffs' PFoF, at ¶ 23. In any event, Apple's conceded intent to advance its own interests by means of eliminating a rival's ability to differentiate its offerings based on price, Apple Memo at 25, hardly seems appropriate to serve as a shield from antitrust liability.

[55] Apple Memo at 8; *see also id.* at 24, 31.

[56] *Id*. at 24.

[57] *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 170–77 (1940) (describing market conditions in oil and gasoline industry including, *inter alia*, a series of "price wars" in retail markets).

[58] Plaintiffs' PFoF, at ¶ 168 (citing PX-0032, at APLEBOOK-03345078).

B. Apple's Conspiracy with Publisher Defendants Was in its Own Economic Interest and Is, as a Result, Economically Plausible.

Even if the "tends to exclude" standard from *Matsushita* did apply, here, where the "conspiracy is economically sensible for the alleged conspirators to undertake," the standard is "more easily satisfied."[59] In fact, Apple itself supplies many "economically sensible" reasons for it to have conspired with Publisher Defendants. Apple admits that Amazon already was in the market and competing aggressively.[60] And so long as Amazon retained independent control of its retail prices, Apple believed it could not purchase e-books on standard wholesale terms, be "competitive" with Amazon,[61] and still earn its desired 30% gross margins. Thus, Apple "decided to use the agency model."[62] But agency was just a means to a "higher consumer prices" end for Publisher Defendants—who Apple admits were "deeply unhappy" with Amazon's low prices[63]—and they could achieve that end only if they were able to move Amazon and other retailers to agency, too.[64] And no Publisher Defendant believed it would have the bargaining power to do so absent collective action.[65] Publisher Defendants initially opposed Apple's inclusion of an MFN, price tiers, and anti-windowing provisions,[66] but subsequently agreed to Apple's terms in order to obtain the ability to raise retail prices.

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[59] *In re Publ'n Paper*, 690 F.3d at 63.

[60] Apple Memo at 24.

[61] *Id.* at 25. Apple uses the word "competitive" in its colloquial (rather than economic) sense, to mean "roughly equivalent to." *See id.* For purposes of economics and antitrust law, "competitive" prices are those determined by competition (regardless of their proximity to one another). *See* Richard Gilbert Direct Testimony, at ¶ 57. Retail e-book prices that are "competitive" in the antitrust sense is exactly what Apple sought to *avoid*.

[62] Apple Memo at 25.

[63] *Id.* at 24.

[64] Plaintiffs' PFoF, at ¶¶ 180–81.

[65] *See, e.g.*, Plaintiffs' PFoF, at ¶¶ 45, 176.

[66] All of which Publisher Defendants believed to be contrary to their own individual self-interests, a fact that supports an inference of a horizontal conspiracy among Publisher Defendants. *See* Plaintiffs' Proposed Conclusions of Law, at ¶¶ 25–26.

This is an economically sensible conspiracy, especially for Apple. In contrast, the Supreme Court held in *Matsushita* that the alleged conspiracy—that "a large number of firms have conspired over a period of many years to charge below-market prices"—was implausible precisely because it was *contrary* to the alleged conspirators' interests.[67] Accordingly, even if the "tends to exclude" standard did apply, it would set a low bar.

C. The Full Body of Circumstantial Evidence Against Apple Supports an Inference of Conspiracy.

Apple contends that no inference of conspiracy may be made here because none of the supposed "five pegs" of Plaintiffs' circumstantial case by itself "tends to exclude the possibility that Apple acted independently."[68] But in determining whether a conspiracy existed among Apple and Publisher Defendants, the Court does not evaluate each piece of evidence in isolation and determine whether it by itself "tends to exclude" the possibility of concerted action. Instead, "[a] court must look to the evidence as a whole and consider any single piece of evidence in the context of other evidence."[69]

So, for example, Apple may be correct when it argues that, *standing alone*, the price tiers in the Apple Agency Agreements do not tilt the balance of evidence toward finding a conspiracy. But there is other evidence that makes clear that Apple and Publisher Defendants all understood that the common retail price tiers they were negotiating would be the *de facto* retail prices for most if not all of their newly released and bestselling e-books once the Apple Agency

[67] 475 U.S. at 589–95.

[68] Apple Memo at 27.

[69] *In re Flat Glass Antitrust Litig.*, 385 F.3d 350, 369 (3d Cir. 2004); *see also Cont'l Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962) ("The character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole.") (citation omitted); *Apex Oil Co. v. DiMauro*, 822 F.2d 246, 252–53 (2d Cir. 1987); *In re High Fructose Corn Syrup*, 295 F.3d at 661.

Agreements went into effect.[70] And while Apple may be right that MFNs may be used in other instances to bargain for lower prices, context makes clear that was not true here. Instead, Apple knew that this MFN would incentivize Publisher Defendants to follow through on moving their other retailers to the agency model and raising prices across all retailers.[71]

Likewise, Mr. Cue's December 21, 2009 communications with the CEOs of Macmillan, Simon & Schuster, and Random House in which he made statements that "book prices are becoming too low," that "new release eBooks should be priced at $12.99," and that, to achieve "some level of reasonable pricing," the industry should "go to the agency model"[72]—communications that Apple omits from both its memorandum of law and its proposed findings of fact[73]—may not by themselves condemn Apple here. But when paired with the fact that Defendants agreed to an agency model that they used to raise the consumer price of most bestselling e-books from $9.99 to $12.99, those communications (whether characterized as direct or circumstantial evidence) support inferences of unlawful intent and agreement.[74]

III. Apple's Attempt To Shift the Focus of this Case to Amazon Is Both Misguided and Replete with Factual Misstatements.

Despite Amazon's clear testimony, and even clearer actions, showing that it preferred the wholesale model to agency, Apple argues that *Amazon* in fact *desired* to give up the opportunity to compete on price in the trade e-books market by moving to an agency relationship with

[70] Plaintiffs' PFoF, at ¶¶ 130–32.

[71] PX-0065, at APLEBOOK-00369168; PX-0514, at pp. 503–04; PX-0101, at APLEBOOK-03345032; Apple (Eddy Cue) CID Dep., at 87:7–12; Eddy Cue Dep., at 300:25–302:14.

[72] Plaintiffs' Memo at 2.

[73] *See* Apple Memo at 10; Apple PFOF, at ¶¶ 82–95.

[74] Mr. Jobs's January 24, 2010 e-mail exchange with James Murdoch, *see supra* note 29 and accompanying text, even if viewed as circumstantial rather than direct evidence, similarly supports these inferences.

Publisher Defendants.[75] Even if that assertion were true—and it plainly is not—it would be irrelevant. The victims of Defendants' conspiracy were e-books consumers, who were forced to choose between paying more for e-books and buying fewer of them. Whether Amazon willingly followed Apple and Publisher Defendants down this road—as other retailers such as Barnes & Noble surely did—is immaterial to the question of whether Apple facilitated a conspiracy to raise consumer e-book prices and restrain retail price competition, and Apple cites no authority that suggests otherwise.

Contrary to Apple's revisionist history, Amazon's executives have testified consistently that they "strongly resisted moving to agency and would not have done so but for these publishers insisting on it simultaneously."[76] Equally telling, Amazon maintained wholesale relationships with all publishers save Publisher Defendants and (eventually) Random House, endured the public and painful "buy button" dispute with Macmillan, and lost access to Penguin's newly released e-books for most of April and May 2010 while negotiating new terms. These are not the actions of a company that secretly desires agency.

Grasping for evidence to the contrary, Apple resorts to selective quotations. Apple shares with the Court Amazon's statement to HarperCollins CEO Brian Murray, for example, that when it came to the agency model, Amazon was "trying not to be closed minded . . . ."[77] But that e-mail's *very next words* (replaced by Apple's ellipsis) read: "but on the face of it we were not interested. Nothing we've seen gives us confidence that publishers will do a good job with

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[75] *See* Apple Memo at 33–35. Apple's current argument contrasts sharply with its and Penguin's prior claims in this litigation that Amazon desired to price e-books below cost until it had chased out all competing retailers and monopolized the market. *See* PX-0374, at 8–9 (Apple's Tunney Act submission concerning the proposed Final Judgment as to Hachette, HarperCollins, and Simon & Schuster); PX-0791, at 4–5 (Penguin's answer to the United States' Complaint).

[76] David Naggar Direct Testimony, at ¶ 35; *see also* Russell Grandinetti Direct Testimony, at ¶¶ 40, 47.

[77] Apple PFoF, at ¶ 179.

consumer pricing."[78] Likewise, Apple describes a Brian Murray e-mail as stating that Amazon "was going to dive into and evaluate the pros and cons of an agency model at an offsite meeting but that it could not get back to Mr. Murray [for] at least two weeks."[79] What that e-mail actually says is: "Amazon is preparing the pros and cons of moving to an agency model for Bezos. **This isn't a change that they want to do** and they haven't decided if they will fight this or not. They won't have a position for a week or two."[80] Similarly, Apple quotes two sentences of a Madeline McIntosh e-mail: "It would be a good time to share Amazon thoughts on the pros/cons of an agency model. In this case what I mean by that is vendor sets price, Amazon charges a commission per sale."[81] The next sentence of that e-mail, omitted by Apple, reads: "I ask this in the belief that Amazon would never accept such a model because it would mean losing pricing control."[82]

Apple engages in similarly loose treatment of the document on which it relies most heavily in claiming that Amazon secretly desired agency all along, a January 31, 2010 e-mail exchange between Random House's Madeline McIntosh and Amazon's Laura Porco.[83] Apple argues that, because Amazon in early 2009 considered pursuing a "profit share" or revenue share model for e-books—under which Amazon and the publisher each would take a set percentage of retail revenues instead of Amazon paying the publisher a set wholesale price for each e-book

[78] DX-0266, at AMZN-MDL-0161113.

[79] Apple PFoF, at ¶ 179 (citing DX-252).

[80] DX-252 (emphasis added).

[81] Apple PFoF, at ¶ 172 (quoting DX-532).

[82] DX-532.

[83] DX-278 (AMZN-MDL-0156193), directly or indirectly quoted, cited, or otherwise relied on in: Apple Memo at 15, 35; Apple PFoF, at ¶¶ 57, 191–93, 202, 214.

sold—Amazon was pleased to be forced by Publisher Defendants to accept an agency model with the same revenue split.[84]

Apple, however, improperly conflates a revenue share model (under which the retailer may set the consumer price) with agency (where the publisher sets the consumer price). As Apple's own witness, Theresa Horner, Vice President of Digital Content for Barnesandnoble.com,[85] explains: "a 'revenue share' model" is one "where B&N would set an eBook price in our eBookstore and keep a percentage commission on that sale price,"[86] whereas "an agency model" is one "in which the publisher set[s] the price and B&N, as an agent, earn[s] a 30% commission on each eBook sale."[87] In this case, it is disingenuous for Apple to argue that, because Amazon might have accepted a 30% split on consumer prices *that it set*, it also must have willingly embraced a model where it earned a 30% split on consumer prices *Publisher Defendants set*.[88] That Ms. McIntosh and Ms. Porco thought 30% to be a generous split for Amazon (or Apple) says nothing at all about whether Amazon welcomed ceding retail pricing authority to Publisher Defendants.[89] And the record clearly is to the contrary.

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[84] Apple Memo, at 15, 33–35; Apple PFoF, at ¶¶ 190–95, 202.

[85] Horner Decl., at ¶ 1.

[86] *Id.* at ¶ 9.

[87] *Id.* at ¶ 17.

[88] Apple plays the same game when it suggests that Amazon's self-publishing Kindle Direct program operates on an agency model. Apple Memo at 33–34; Apple PFoF, at ¶¶ 175, 284. While self-publishers using Kindle Direct set a "list price" and are paid a share of revenues, Amazon retains control of the actual retail price consumers pay and Amazon, not the self-publisher, executes all transactions with consumers; Kindle Direct does not operate on an agency model. *See* https://kdp.amazon.com/self-publishing/help?topicId=APILE934L348N ("**5.3.4 Customer Prices.** To the extent not prohibited by applicable local laws, *we have sole and complete discretion to set the retail customer price at which your Digital Books are sold through the Program*. We are solely responsible for processing payments, payment collection, requests for refunds and related customer service, and will have sole ownership and control of all data obtained from customers and prospective customers in connection with the Program." (bold in original; italics added)).

[89] It bears noting that this e-mail exchange strongly supports both (i) that accepting an Apple Agency Agreement was contrary to the economic interests of any Publisher Defendant absent the conspiracy, and (ii) that collective action was required, and used, to force Amazon to accept agency. Ms. McIntosh notes in her opening e-mail: "I guess what we never figured in was the idea that five publishers would band together and insist on receiving worse

Apple's attempts—shifting but unceasing from the very beginning of this litigation—to put Amazon on trial lack any basis in fact or law, and do not erase the substantial harm suffered by consumers from Apple's price-fixing conspiracy with Publisher Defendants.

IV. Apple Cannot Escape Liability Even Under the Rule of Reason.

In its brief, Apple offers just one conclusory footnote on the "quick look" doctrine.[90] But if the Court does not find *per se* illegality here, no more than a quick look is required to determine the anticompetitive character of the common scheme at issue. Specifically, there is no need for the Court to conduct a full blown market analysis under the rule of reason because the conduct in question resembles past anticompetitive schemes such as those found in *Toys "R" Us*, *Interstate Circuit*, and *General Motors*, and its effect—raising consumer prices and restraining retail price competition—strikes a blow to "the central nervous system of the economy."[91] Accordingly, under the quick look doctrine, Apple's conspiracy with Publisher Defendants should be held to violate Section 1 absent "some competitive justification even in the absence of a detailed market analysis."[92] As discussed *infra*, Apple has no such justification for its conduct.

Apple's efforts to escape liability under the rule of reason suffer from similar defects as its *per se* arguments. First, Apple erroneously suggests that a plaintiff's initial showing under the rule of reason must be more than "a substantially harmful effect on competition."[93] Second, Apple pretends that the restraint subject to review in this case is the vertical agency agreement between Apple and each Publisher Defendant instead of the horizontal agreement to raise

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terms." DX-278, at AMZN-MDL-0156194. Ms. Porco responds by commenting on how well served Random House was by essentially cheating on the conspiracy by sticking with the higher wholesale prices and lower retail prices of the traditional wholesale model: "And, who would have thought you would be sitting soo pretty…..able to write your own ticket. Sweet relative advantage. Brilliant." *Id.* at AMZN-MDL-0156193.

[90] Apple Memo at 37 n.10.

[91] *Socony-Vacuum*, 310 U.S. at 224 n.59.

[92] *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 109–10 (1984).

[93] *Capital Imaging Assocs., P.C. v. Mohawk Valley Med. Assocs.*, 996 F.2d 537, 546 (2d Cir. 1993).

consumer e-book prices and restrain retail price competition using the agency model. Third, Apple offers, as supposed procompetitive effects of Defendants' conduct, events unrelated to the market for trade e-books or otherwise not cognizable under the rule of reason.

As an initial matter, Apple argues that Plaintiffs must show price effects on "*all* trade e-book titles,"[94] to satisfy the initial burden under the rule of reason to show actual adverse effects "on competition as a whole in the relevant market."[95] The "competition as whole" language, however, simply puts into practice the longstanding principle that antitrust laws protect competition, not competitors.[96] This principle seeks to ensure that a plaintiff shows "more than just that he was harmed by defendant's conduct."[97] It does not require that all products within the relevant market reflect the effects of Defendants' conspiracy, nor does it have any weight in a law enforcement action that does not seek damages. Apple offers no authority to the contrary.

At the same time, Apple mostly ignores the actual detrimental effects that the analyses by Professor Gilbert and Professor Ashenfelter demonstrate: significantly higher retail prices for Publisher Defendants' e-books after Publisher Defendants collectively moved to agency.[98] Even

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[94] Apple Memo at 38 (emphasis in original).

[95] *Id.* (citing *Capital Imaging*, 996 F.2d at 543). Apple skips any analysis of the other valid method by which Plaintiffs can meet their initial burden—showing market power in a defined market, *Tops Mkts., Inc. v. Quality Mkts., Inc.*, 142 F.3d 90, 96 (2d Cir. 1998)—with a cursory aside stating that it does not possess market power and a curious citation to a footnote in a recent case addressing standing, not the rule of reason. Apple Memo at 37 (citing *Gatt Commc'ns, Inc. v. PMC Assocs., L.L.C.*, 711 F.3d 68, 75 n.8 (2d Cir. 2013)). The appropriate measure of market power here, though, is the collective market power of Publisher Defendants, whose power they and Apple exploited to limit retail price competition. *See, e.g.*, *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 332–33 (3d Cir. 2010) (explaining that the facilitators in *Interstate Circuit* and *Toys "R" Us* sought to "exploit the . . . collective market power" of the horizontal competitors whose conspiracies they helped facilitate). Plaintiffs accordingly also carry their burden on this alternative basis.

[96] *Clorox Co. v. Sterling Winthrop, Inc.*, 117 F.3d 50, 57 (2d Cir. 1997) (citing *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977)).

[97] *Id.* at 57 (quoting *K.M.B. Warehouse Distribs. v. Walker Mfg. Co.*, 61 F.3d 123, 127 (2d Cir. 1995)).

[98] Plaintiffs' PFoF, at ¶¶ 220–22. Apple baldly claims that "[a]verage prices for trade e-books have fallen, and output, whether measured in the number of sales, the number of titles, or the types and quality of e-books offered, has increased substantially. These facts are undisputed." Apple Memo at 5. To the contrary, the analysis on which Apple relies to make these assertions is so flawed and unreliable that it should be excluded. *See* Pls.' Mot. in

Apple's expert, Dr. Burtis, confirmed that "average prices for Publisher Defendants' ebooks increased" after the Apple Agency Agreements went into effect.[99]

Apple tries to cabin those effects to only "prices of defendant publishers' new release titles" and tries to minimize them with the claim that "these titles were only a fraction of the relevant market."[100] Professors Gilbert and Ashenfelter, however, found price effects across Publisher Defendants' entire e-book catalogs, not just their new releases.[101]

In any event, it was Amazon's "wretched" $9.99 pricing of newly released and bestselling titles that Publisher Defendants so despised.[102] Indeed, all Defendants recognized the importance of these titles: they were the ones covered by the pricing tiers and retail price MFN in the Apple Agency Agreements. Contrary to Apple's suggestion, the conspiracy's price effects on those e-books, and on all of Publisher Defendants' e-books, more than surpass Plaintiffs' initial burden of showing actual detrimental effects of the conspiracy.[103]

Apple's brief fails even to address the findings of Professors Gilbert, Ashenfelter, and Baker that the output of Publisher Defendants' e-books fell relative to what it would have been but for the conspiracy.[104] Apple instead retreats again behind its manufactured standard that Plaintiffs must show effects on all products in the market as a whole. Even if that were correct, though, Plaintiffs have produced just that type of market-wide output effects evidence in the

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Limine to Preclude Dr. Michelle Burtis from Offering at Trial Any Opinion on Competitive Effects, Apr. 26, 2013, at 3–4, 7–9.

[99] Plaintiffs' PFoF, at ¶ 223.

[100] Apple Memo at 39.

[101] Plaintiffs' PFoF, at ¶¶ 220–22.

[102] *Id.* at ¶¶ 25–31.

[103] *See, e.g.*, *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 478 (1992) (listing higher prices as a type of harm antitrust laws aim to prevent); *Virgin Atl. Airways Ltd. v. British Airways PLC*, 257 F.3d 256, 264 (2d Cir. 2001) (identifying increased prices, reduced output, and decreased quality as ways to demonstrate actual anticompetitive effects).

[104] Plaintiffs' PFoF, at ¶¶ 241–43.

form of Professor Ashenfelter's analysis showing that growth rate for e-books slowed after Publisher Defendants went to agency as part of their conspiracy.[105] This evidence independently satisfies Plaintiffs' initial burden to show that Apple and Publisher Defendants' conduct harmed competition and not just an individual competitor,[106] and thus demonstrates actual detrimental effects under the rule of reason.[107]

Compounding its error of misstating Plaintiffs' initial burden, Apple mistakenly focuses on claimed procompetitive effects of "the agency model,"[108] which Plaintiffs do not challenge. Rather, Plaintiffs challenge the conspiracy among Apple, Penguin, and the other Publisher Defendants to raise consumer e-book prices and to blunt retail price competition. Apple and Publisher Defendants used the agency model as a tool to accomplish their illegal objectives. In any event, the procompetitive effects Apple would claim mostly derive from *Amazon* redoubling its competitive efforts with respect to *titles not controlled by Publisher Defendants*.[109] Not surprisingly, Apple offers no legal authority for its perverse position that conspirators may be saved from antitrust liability if their target tries to cope with the conspiracy by competing harder elsewhere.

Throughout its memorandum, Apple also conflates benefits arising from the iPad—which would have existed and would have functioned as an e-reader under any circumstances,[110] and so cannot be credited to Defendants' unlawful agreement—with benefits from Apple's entry as an

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[105] *Id.* at ¶ 246.

[106] *Clorox*, 117 F.3d at 57.

[107] *Capital Imaging*, 996 F.2d at 546 ("Rule of reason analysis requires the antitrust plaintiff to bear the initial burden of demonstrating that the defendants' conduct or policy has had a substantially harmful effect on competition. The plaintiff may satisfy this burden without detailed market analysis by offering proof of actual detrimental effects, such as a reduction of output." (quotations omitted)); *Virgin Atl.*, 257 F.3d at 264 (showing output effect is a method for plaintiff to meet initial burden).

[108] Apple Memo at 37.

[109] Apple Memo at 37–38.

[110] Plaintiffs' PFoF, at ¶¶ 32–35.

e-book retailer.[111] Whatever the benefits the iPad may have brought consumers (such as the capabilities of the iPad itself and enhanced *device* competition), those benefits fall outside of the relevant market of trade e-books. Only procompetitive effects within the relevant market weigh against anticompetitive effects in the same relevant market.[112]

Relatedly, Apple appears to argue that its entry alone qualifies as a procompetitive benefit.[113] This "entry for entry's sake" argument loses sight of the ultimate touchstone of a rule of reason analysis: whether the examined restriction harms consumers—a focus that "cannot be overemphasized."[114] Apple's entry did not meaningfully benefit consumers because it did not yield price competition—Publisher Defendants' e-book prices were the same (and higher) across all retailers, just as Mr. Jobs envisioned.[115]

Finally, even if Apple's procompetitive justifications are credited, Plaintiffs still prevail, both because any procompetitive benefits are swamped by the harm suffered by consumers, and by a showing under the third step of the rule of reason analysis that less restrictive alternatives to the conspiracy existed.[116] Specifically, Apple could have either (i) negotiated agency

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[111] *See, e.g.*, Apple Memo at 5, 7, 36.

[112] *See United States v. Topco Assocs., Inc.*, 405 U.S. 596, 610 (1972).

[113] Apple Memo at 23–24. High, protected margins generally increase the willingness of firms to enter markets. If this were a justification for price-fixing and other naked restraints, thought, the Sherman Act would be gravely compromised. As the Supreme Court explained in *Catalano, Inc. v. Target Sales, Inc.*: "in any case in which competitors are able to increase the price level or to curtail production by agreement, it could be argued that the agreement has the effect of making the market more attractive to potential new entrants. If that potential justifies horizontal agreements among competitors imposing one kind of voluntary restraint or another on their competitive freedom, it would seem to follow that the more successful an agreement is in raising the price level, the safer it is from antitrust attack. Nothing could be more inconsistent with our cases." 446 U.S. 643, 649 (1980); *see also Nat'l Collegiate Athletic Ass'n*, 468 U.S. at 115–17 (rejecting argument that restraint on number of television broadcasts of football games could be justified by a desire to protect live attendance receipts).

[114] *Clorox*, 117 F.3d at 56 (citation omitted).

[115] Plaintiffs' PFoF, at ¶¶ 171, 217–30.

[116] *Geneva Pharm. Tech. Corp. v. Barr Labs. Inc.*, 386 F.3d 485, 506–07 (2d Cir. 2004) (listing steps of rule of reason analysis).

agreements without serving as "the facilitator and go between" for Publisher Defendants,[117] and without insisting on contractual provisions that predictably served to increase Publisher Defendants' incentives to collectively force Amazon onto the agency model, or (ii) simply entered the market on traditional wholesale terms and competed on price against Amazon and others, the way new competitors typically enter markets. Those options may not have been as profitable to Apple as the unlawful one it chose instead, but at least they would not have forced e-book consumers to foot the bill for Apple's insistence on 30% margins and protection from price competition. And the antitrust laws do not require that a "less restrictive alternative" be as profitable as the conduct challenged.

CONCLUSION

Contrary to Apple's alarmist rhetoric,[118] there is nothing "dangerous" about condemning Apple's role in its common scheme with Publisher Defendants to raise consumer e-book prices and restrain retail price competition. Protecting consumers from the harmful effects of such agreements is exactly what the antitrust laws are meant to do.

Apple's argument that it should evade antitrust liability because it never acted contrary to its own economic interests effectively would offer antitrust immunity to any cartel ringmaster. No firm would organize a horizontal conspiracy among its suppliers—as Plaintiffs allege Apple did here—*unless* it was in its own interests. And Apple's related suggestion that finding it liable here could chill procompetitive conduct in the future likewise is misplaced. A distributor who learns that a group of manufacturers would like to use its entry (or perhaps its expansion—Apple offers no reasoned limiting principle to the new carve-out from the Sherman Act it would create) to change their long-held business practices for the express purpose of raising consumer prices

[117] PX-0542, at PEN-LIT-00199145.

[118] Apple Memo at 6.

should pause before participating in such a venture. Apple did not pause. Instead, it embraced a Publisher Defendant's proposal to "fix Amazon['s] pricing"[119] and offered Publisher Defendants a way collectively to "solve[the] Amazon issue."[120] And, as Mr. Jobs proudly proclaimed to his biographer, "we pulled it off."[121]

Accordingly, the Court should declare that Apple has violated the Sherman Act, 15 U.S.C. § 1, and order all equitable relief necessary to undo the effects of Defendants' agreement and prevent Apple from similarly violating the antitrust laws in the future.

[119] PX-0036, at APLEBOOK-01601745.

[120] Plaintiffs' PFoF, at ¶ 108.

[121] PX-0514, at p. 504.

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