Court File No. CT-2014-002

THE COMPETITION TRIBUNAL

IN THE MATTER OF the *Competition Act*, R.S.C. 1985, c. C-34, as amended;

AND IN THE MATTER OF an inquiry commenced under section 10 of the *Competition Act*, relating to certain alleged anti-competitive conduct in the markets for ebooks in Canada;

AND IN THE MATTER OF the filing and registration of a consent agreement pursuant to section 105 of the *Competition Act*;

AND IN THE MATTER OF an application under section 106(2) of the *Competition Act*, by Kobo Inc. to rescind or vary the Consent Agreement between the Commissioner of Competition and Hachette Book Group Canada Ltd., Hachette Book Group, Inc., Hachette Digital, Inc.; HarperCollins Canada Limited; Holtzbrinck Publishers, LLC; and Simon & Schuster Canada, a division of CBS Canada Holdings Co. filed and registered with the Competition Tribunal on February 7, 2014, under section 105 of the *Competition Act*.

BETWEEN:

KOBO INC.

Applicant

- and -

THE COMMISSIONER OF COMPETITION; HACHETTE BOOK GROUP CANADA LTD., HACHETTE BOOK GROUP, INC., HACHETTE DIGITAL, INC; HARPERCOLLINS CANADA LIMITED; HOLTZBRINCK PUBLISHERS, LLC; AND SIMON & SCHUSTER CANADA, A DIVISION OF CBS HOLDINGS CO.

Respondents

AFFIDAVIT OF MALLORY KELLY
Affirmed 28 August 2015

Department of Justice
Competition Bureau Legal Services
50 Victoria Street, 22nd Floor
Gatineau, Quebec
K1A 0C9

John Syme (LSUC #29333H)
General Counsel
Tel: (819) 953-3903
Fax: (819) 953-9267

Jean-Sébastien Gallant (LSUC #49319J)
Senior Counsel
Tel: (819) 953-3899
Fax: (819) 953-9267

Esther Rossman (LSUC #54414R)
Counsel
Tel: (819) 994-4045
Fax: (819) 953-9267

Counsel for the Commissioner

TO: **The Registrar**
Competition Tribunal
Thomas D'Arcy McGee Building
90 Sparks Street, Suite 600
Ottawa, Ontario
K1P 5B4

AND TO: **Nikiforos Iatrou**
Mandy L. Seidenberg
Bronwyn Roe
WeirFoulds LLP
4100 - 66 Wellington Street West
P.O.Box 35, Toronto-Dominion Centre
Toronto, ON M5K 1B7

Tel: 416-365-1110
Fax: 416-365-1876
niatrou@weirfoulds.com
mseidenberg@weirfoulds.com
broe@weirfoulds.com

Counsel for the Applicant

AND TO: **Linda Plumpton**
James Gotowiec
Torys LLP
30th Floor, 79 Wellington Street West
Box 270, TD South Tower
Toronto, ON M5K 1N2

Tel: 416-865-8193
Fax: 416-865-7380
lplumpton@torys.com
jgotowiec@torys.com

Counsel for the Respondents Hachette Book Group Canada Ltd., Hachette Book Group, Inc. and Hachette Digital, Inc.

AND TO: **Katherine L. Kay**
Danielle Royal
Stikeman Elliott LLP
5300 Commerce Court West
199 Bay Street
Toronto, ON M5L 1B9

Tel: 416-869-5507
Fax: 416-947-0866
kkay@stikeman.com
droyal@stikeman.com

Counsel for the Respondents HarperCollins Canada Limited

AND TO: **Randal Hughes**
Emrys Davis
Bennett Jones LLP
3400 One First Canadian Place
P.O.Box 130
Toronto, ON M5X 1A4

Tel: 416-777-7471
Fax: 416-863-1716
hughesr@bennettjones.com
davise@bennettjones.com

Counsel for the Respondents Holtzbrinck Publishers, LLC

AND TO: **Peter Franklyn**
Mahmud Jamal
Osler, Hoskin & Harcourt LLP
First Canadian Place
100 King Street West
Toronto, ON M5X 1B8

Tel: 416.362.2111
Fax: 416.862.6666
pfranklyn@osler.com
mjamal@osler.com

Counsel for the Respondents
Simon & Schuster Canada, a division of
CBS Canada Holdings Co.

Index

Court File No. CT-2014-002

THE COMPETITION TRIBUNAL

IN THE MATTER OF the *Competition Act*, R.S.C. 1985, c. C-34, as amended;

AND IN THE MATTER OF an inquiry commenced under section 10 of the *Competition Act*, relating to certain alleged anti-competitive conduct in the markets for e-books in Canada;

AND IN THE MATTER OF the filing and registration of a consent agreement pursuant to section 105 of the Act;

AND IN THE MATTER OF an application under section 106(2) of the *Competition Act*, by Kobo Inc. to rescind or vary the Consent Agreement between the Commissioner of Competition and Hachette Book Group Canada Ltd., Hachette Book Group, Inc., Hachette Digital, Inc.; HarperCollins Canada Limited; Holtzbrinck Publishers, LLC; and Simon & Schuster Canada, a division of CBS Canada Holdings Co. filed and registered with the Competition Tribunal on February 7, 2014, under section 105 of the *Competition Act*.

BETWEEN:

KOBO INC.

Applicant/Moving Party

- and -

THE COMMISSIONER OF COMPETITION;
HACHETTE BOOK GROUP CANADA LTD., HACHETTE BOOK GROUP, INC., HACHETTE DIGITAL, INC; HARPERCOLLINS CANADA LIMITED; HOLTZBRINCK PUBLISHERS, LLC; AND SIMON & SCHUSTER CANADA, A DIVISION OF CBS HOLDINGS CO.

Respondents/Responding Party

AFFIDAVIT OF MALLORY KELLY

I, **MALLORY KELLY**, of the City of Ottawa in the Province of Ontario, AFFIRM THAT:

1. I am John Syme's legal assistant at the Competition Bureau Legal Services in the Department of Justice, and as such have knowledge of the matters herein deposed.

2. I make this affidavit in support of the Commissioner of Competition's Response to a Notice of Motion by Kobo dated August 14, 2015.

3. On December 18, 2014 John Syme e-mailed Nikiforos Iatrou in relation to a proposed s.11 order against Kobo Inc. A copy is attached hereto and marked as **Exhibit "A"**.

4. On January 22, 2015, the Commissioner of Competition (the "**Commissioner**") filed applications for Orders pursuant to s. 11 of the *Competition Act* (the "**Act**") requiring Rakuten Kobo Inc. and Indigo Books & Music Inc. to produce certain documents and written returns of information. In support of those applications, the Commissioner filed the affidavit of Barbara Russel affirmed on January 15, 2015 for the applications. A copy of Barbara Russel Affidavit, without attachment, is attached hereto and marked as **Exhibit "B".**

5. On February 27, 2015 Chief Justice Crampton issued Reasons for the Reference Order pursuant to s. 11 of the Act (File numbers T-61-15 and T-62-15). A copy of the Reasons are attached hereto and marked as **Exhibit "C".**

6. I am advised by Mr. Syme and verily believe that, further to the Kobo s. 11 Orders, Kobo produced a number of documents including the following:

    a. A copy of an e-mail dated January 22, 2010 from Michael Serbinis to Heather Reisman is attached hereto and marked as **Exhibit "D".**
    b. A copy of a presentation titled "Understanding the New Digital Reader: Digital Symposium February 15 & 17, 2010" is attached hereto and marked as **Exhibit "E".**
    c. A copy of a presentation titled "Agency Status April 2, 201" is attached hereto and marked as **Exhibit "F".**

7. I am advised by Mr. Syme and verily believe that on July 10, 2013, the United States District Court Southern District of New York issued its decision in *United States of America* v. *Apple, Inc. et al.* Attached hereto and marked as **Exhibit "G"**.

8. I am advised by Mr. Syme and verily believe that on June 30, 2015, the United States Court of Appeals for the Second Circuit issued its decision in *United States of America* v. *Apple Inc. et al.* Attached hereto and marked as **Exhibit "H".**

9. I am advised by Mr. Syme and verily believe that on September 6, 2012, the United States District Court Southern District of New York issued its Final Judgment to defendants Hachette, HarperCollins, and Simon & Schuster. Attached hereto and marked as **Exhibit "I"** is a copy of the Final Judgement.

10. I am advised by Mr. Syme and verily believe that on August 12, 2013, the United States District Court Southern District of New York issued its Final Judgment to defendants Verlagsgruppe Georg Von Holtzbrink GMBH & Hotzbrink Publishers, LLC D/B/A Macmillan. Attached hereto and marked as **Exhibit "J"** is a copy of the Final Judgement.

11. I am advised by Mr. Syme and verily believe that on May 17, 2013, the United States District Court Southern District of New York issued its Final Judgment to defendants The Penguin Group, a Division of Pearson PLC, and Penguin Group (USA), Inc. Attached hereto and marked as **Exhibit "K"** is a copy of the Final Judgement.

12. John Syme advises me and I verily believe that in June 2010, just prior to the launch the Canadian "iBook" store, Apple Canada entered into Agency Agreements for the sale of e-books in Canada with three of the Publishers or their affiliates who are signatories to the Consent Agreement between the Commissioner and certain publishers dated February 6, 2014.

13. On February 7, 2014 the Competition Bureau made a News Release titled "Competition Bureau Takes Action to Promote Competition for ebooks". A copy of the New Release is attached hereto and marked as **Exhibit "L".**

14. Attached hereto and marked as **Exhibit "M"** is a copy of the Affidavit of Michael Tamblyn.

AFFIRMED before me at the City of of Gatineau in the Province of Québec this 28th day of August 2015.

A Commissioner for Taking Affidavits

LSUC # 493195

Mallory Kelly

Department of Justice Canada
Competition Bureau Legal Services
50 Victoria Street, 22nd Floor
Gatineau QC K1A 0C9

John Syme
Jean-Sébastien Gallant
Esther Rossman

Tel: (819) 953-3903
Fax: (819) 953-9267
John.Syme@cb-bc.gc.ca

Counsel to the Commissioner of Competition

TO: **The Registrar**
Competition Tribunal
90 Sparks Street, Suite 600
Ottawa Ontario K1P 5B4

AND TO: **Nikiforos Iatrou**
Bronwyn Roe
Weirfoulds LLP
4100 – 66 Wellington Street West
P.O. Box 35, Toronto-Dominion Centre
Toronto ON M5K 1B7

Tel: (416) 365-1110
Fax: (416) 365-1876
niatrou@weirfoulds.com
broe@weirfoulds.com
Lawyers for the Applicant/Moving Party

AND TO: **Linda Plumpton**
James Gotowiec
Torys LLP
30th Floor, 79 Wellington Street West
Box 270, TD South Tower
Toronto ON M5K 1N2

Tel: (416) 865-8193
Fax: (416) 865-7380
lplumpton@torys.com
jgotowiec@torys.com

Lawyers for the Respondent Hachette Book Group Canada Ltd., Hachette Book Group, Inc. and Hachette Digital, Inc

AND TO: **Katherine L. Kay**
Danielle Royal
Stikeman Elliott LLP
5300 Commerce Court West
199 Bay Street
Toronto ON M5L 1B9

Tel: (416) 869-5507
Fax: (416) 647-0866
kkay@stikeman.com
droyal@stikeman.com

Lawyers for the Respondents
HarperCollins Canada Limited

AND TO: **Randal Hughes**
Emrys Davis
Bennett Jones LLP
3400 One First Canadian Place
P.O. Box 130
Toronto ON M5X 1A4

Tel: (416) 777-7471
Fax: (416) 863-1716
hughsr@bennettjones.com
davise@bennettjones.com

Lawyers for the Respondents
Holtzbrinck Publishers, LLC

AND TO: **Peter Franklyn**
Mahmud Jamal
Osler, Hoskin & Harcourt LLP
First Canadian Place
100 King Street West
Toronto ON M5X 1B8

Tel: (416) 362-2111
Fax: (416) 862-6666
pfranklyn@osler.com
mjamal@osler.com

Lawyers for the Respondents
Simon & Schuster Canada, a division of
CBS Canada Holdings Co.

Court File No. CT-2014-002

THE COMPETITION TRIBUNAL

IN THE MATTER OF the *Competition Act*, R.S.C. 1985, c. C-34, as amended;

AND IN THE MATTER OF an inquiry commenced under section 10 of the *Competition Act*, relating to certain alleged anti-competitive conduct in the markets for e-books in Canada;

AND IN THE MATTER OF the filing and registration of a consent agreement pursuant to section 105 of the Act;

AND IN THE MATTER OF an application under section 106(2) of the *Competition Act*, by Kobo Inc. to rescind or vary the Consent Agreement between the Commissioner of Competition and Hachette Book Group Canada Ltd., Hachette Book Group, Inc., Hachette Digital, Inc.; HarperCollins Canada Limited; Holtzbrinck Publishers, LLC; and Simon & Schuster Canada, a division of CBS Canada Holdings Co. filed and registered with the Competition Tribunal on February 7, 2014, under section 105 of the *Competition Act*.

BETWEEN:

KOBO INC.

Applicant/Moving Party

- and -

THE COMMISSIONER OF COMPETITION;
HACHETTE BOOK GROUP CANADA LTD., HACHETTE BOOK GROUP, INC., HACHETTE DIGITAL, INC; HARPERCOLLINS CANADA LIMITED; HOLTZBRINCK PUBLISHERS, LLC; AND SIMON & SCHUSTER CANADA, A DIVISION OF CBS HOLDINGS CO.

Respondents/Responding Party

AFFIDAVIT OF MALLORY KELLY

John Syme
Jean-Sébastien Gallant
Esther Rossman

Department of Justice Canada
Competition Bureau Legal Services
Place du Portage, Phase I
50 Victoria Street, 22nd Floor
Gatineau Québec K1A 0C9

Tel: (819) 953-3903
Fax: (819) 953-9267
John.Syme@cb-bc.gc.ca

Counsel to the Commissioner of Competition

This is Exhibit A to the Affidavit of
Mallory Kelly
Affirmed 28 August 2015

McGarry, Amanda: CB-BC

From: Syme, John: CB-BC
Sent: December-18-14 4:43 PM
To: 'niatrou@weirfoulds.com'
Cc: Chaplan, Jonathan: CB-BC; Rossman, Esther: CB-BC
Subject: Ebooks - s 11 - Pre-Application Dialogue

Niki,

I write further to our conversations regarding the Commissioner's intention to file a section 11 order against Kobo.

On December 10, 2014, we advised you by telephone of the Commissioner's intention to seek a s. 11 order against Kobo from the Federal Court and indicated that we would be providing you with the Commissioner's draft specs for review on Friday, December 12, 2014. At the same time, we advised that we wanted to have pre-application dialogue early the following week, with your client if they wished to join. We proposed that the pre-application dialogue be on Monday, but specifically took the step of giving you this advance notice to ensure that you had adequate time to assess availability and arrange schedules accordingly. You indicated that you were travelling on Monday. You indicated that Tuesday morning at 10AM would work for you, but you wished to confirm Michael Tamblyn's availability, which you subsequently did.

As discussed, we provided you with the draft specifications Friday, December 12 (5:34 PM). On Tuesday morning at 9 AM, Richard Bilodeau, Barbara Russell and I called you to advise that the Commissioner's Inquiry had been amended to include Kobo as a subject. That amendment occurred on December 15, 2014. We wanted to advise you of that occurrence because, as Richard indicated, it is generally the Commissioner's practice to advise parties when they are the subject of an inquiry (Communications During Inquiries – Bulletin). We also thought it appropriate to advise you of that development before proceeding with the pre-application dialogue, though strictly speaking, from a legal perspective, the two events are not linked – i.e., the Commissioner can seek section 11 orders against persons who are and who are not, the subject of an inquiry and the test under s. 11 of the Act and the person's obligation to respond are the same in both instances.

We had our pre-application dialogue on Tuesday beginning at 10AM. Joining you on the phone were Michael Tamblyn (Kobo), Joe Colston, Joel Bauers (Duff & Phelps), as well as counsel from your firm, a visiting student and your assistant.

At the outset of our call, you raised, for the first time, the concern you had with proceeding with pre-application dialogue at that time. You indicated that in view of the holiday season being a very busy time of year for Kobo, while you were able to get some views from Mr. Tamblyn regarding the specifications, you had been unable to confer with other relevant persons at Kobo regarding same. You also indicated that you were busy with preparing your factum for the FCA appeal, which was due on December 22, 2014. I note in passing that Kobo's factum was originally due on December 8, 2014, but the Commissioner consented to your request to extend that date to the 22nd.

You also alleged that the Commissioner was bringing the s. 11 application to unfairly target Kobo for invoking its rights under section 106(2) of the Competition Act. That was a theme you returned to several times during our call, suggesting that the Commissioner was using s. 11 for an improper purpose. I stated categorically that the s. 11 application was not being brought as a result of Kobo's s. 106(2) and that I would be happy to make that statement in open court. In connection with your suggestion that the Commissioner was using s. 11 improperly, you indicated your understanding that s. 11 orders were not being sought against any other e-book retailer.

For the most part during our call, we discussed the specifications, with you making some overarching comments regarding the scope of the questions, as well as a number of comments regarding various individual specifications. From

our perspective, we found these comments to be helpful and I indicated as much during the course of our discussion, as well as at the end of our call.

You asked when we planned to file our s. 11 application. I advised that we planned to file this week. You again reiterated your concerns with the timing of the process.

We asked whether Kobo had a separate US affiliate or subsidiary. You indicated that there was no operating US Kobo subsidiary or affiliate, though there was a possibility there might have been a "Kobo US" for technical purposes, such as of entering into a lease.

Having considered your desire for additional time to confer with Kobo regarding the specifications, the Commissioner has decided to accommodate Kobo and not proceed, as planned, with filing its section 11 application this week. Further to the comments you made when we spoke on Tuesday, the Bureau is considering ways to narrow the scope of the specifications to take account of Kobo's concerns, while at the same time ensuring that it obtains the information it requires for purposes of the inquiry. For greater certainty, our decision to defer filing a s. 11 application is further to your request for additional time to review the specifications with Kobo and should not, in any way, be construed as an admission or acceptance of Kobo's position regarding the propriety of the Commissioner's s. 11 Application.

We anticipate sending you revised specifications on December 23, 2014 and are available for further pre-application dialogue on December 29 or 30, 2014. Please advise at what time on either of those two dates you would like to speak and the Bureau team will make itself available.

Regards,

John

This is Exhibit B to the Affidavit of
Mallory Kelly
Affirmed 28 August 2015

Court File No.

FEDERAL COURT

IN THE MATTER OF the *Competition Act*, R.S.C. 1985, c. C-34, as amended;

AND IN THE MATTER OF an inquiry under section 10 of the *Competition Act* relating to certain alleged anti-competitive conduct in the markets for e-books in Canada;

AND IN THE MATTER OF an *ex parte* application by the Commissioner of Competition for an Order requiring Rakuten Kobo Inc. to produce records pursuant to paragraph 11(1)(b) of the *Competition Act* and to make and deliver written returns of information pursuant to paragraph 11(1)(c) of the *Competition Act*.

BETWEEN:

THE COMMISSIONER OF COMPETITION

Applicant

- and -

RAKUTEN KOBO INC.

Respondent

AFFIDAVIT OF BARBARA RUSSELL

Affirmed 15 January 2015

I, Barbara Russell, a Competition Law Officer with the Competition Bureau (the "**Bureau**"), of the City of Ottawa, in the Province of Ontario, **AFFIRM THAT:**

1. I make this Affidavit in support of an *ex parte* application for an Order pursuant to section 11 of the *Competition Act*, R.S.C., 1985, c. C-34 (the "**Act**").

2. I am an authorized representative of the Commissioner of Competition (the "**Commissioner**") for the purpose of this application.

3. I have been employed by the Competition Bureau (the "**Bureau**") as a Competition Law Officer for over four years. During this time, I have been involved in numerous investigations and inquiries under Part VIII of the Act. During the course of these investigations and inquiries, I have interviewed market participants and reviewed records and information pertaining to these investigations and inquiries.

4. I am part of a team of Competition Law Officers working on an inquiry under Part VIII of the Act into certain alleged anti-competitive conduct to restrict e-book retail price competition in the markets for e-books in Canada (the "**Inquiry**"). I therefore have personal knowledge of the matters to which I depose. Where I do not have personal knowledge of the matters to which I depose, I have set out the grounds for my belief.

I. THE COMMISSIONER HAS COMMENCED AN INQUIRY

5. The Commissioner is an officer appointed by the Governor in Council under section 7 of the Act and is responsible for the administration and enforcement of the Act.

6. On 6 July 2012 the Commissioner commenced the Inquiry under subparagraph 10(1)(b)(ii) of the Act on the basis that the Commissioner has reason to believe that grounds exist for the making of an Order under Part

VIII of the Act with respect to certain alleged anti-competitive conduct to restrict e-book retail price competition in the markets for e-books in Canada.

II. CIRCUMSTANCES OF THE INQUIRY

Inquiry Upon Commencement

7. Upon commencement, the Inquiry concerned the following persons and their Canadian affiliates:

   a. Hachette Book Group, Inc.;

   b. HarperCollins Publishers L.L.C.;

   c. Verlagsgruppe Georg Von Holtzbrinck GmbH, Holtzbrinck Publishers, LLC, doing business as Macmillan;

   d. The Penguin Group, a division of Pearson plc, Penguin Group (USA), Inc.; and

   e. Simon & Schuster, Inc. (collectively, the "**Publishers**").

8. Based on the Commissioner's preliminary investigation the Commissioner concluded that there was reason to believe the following:

   a. two or more of the Publishers had entered into an agreement or arrangement which restricted e-book retail price competition;

   b. further to this agreement or arrangement, two or more of the Publishers had engaged and were engaging in conduct to restrict e-book retail price competition in Canada; and, in particular, that two or more of the Publishers had entered into agency agreements with e-book retailers that, among other things, limited or impeded the ability of e-book retailers to set, alter or reduce the retail price of e-

books sold to consumers ("**Agency Agreements**") and that certain of these agreements contained "most favoured nation" or MFN provisions whereby the retail price at which one e-book retailer sells an e-book to consumers depends on the retail price at which another e-book retailer sells the same e-book to consumers; and

c. by engaging in the aforementioned conduct, two or more of the Publishers had prevented or lessened competition and were preventing or lessening competition substantially in the markets for e-books in Canada.

9. Based on information the Bureau has gathered to date, the Commissioner has reason to believe that two or more of the Publishers engaged in the aforementioned conduct since as early as 2010 and that two or more Publishers continue to engage in this conduct through their ongoing Agency Agreements with e-book retailers.

Background to the Inquiry

Wholesale and Agency

10. In the United States and Canada, e-book retailers have typically entered into one of two types of contracts with e-book publishers:

a. under the **wholesale** model, a publisher typically enters into a wholesale agreement with an e-book retailer pursuant to which the retailer pays the publisher its designated wholesale price for each e-book and the retailer sets the retail price; and

b. under the **agency** model, a publisher typically enters into an agency agreement with an e-book retailer pursuant to which the

publisher sets the retail price and the retailer sells the e-book on the publisher's behalf.

11. In Canada and the US, prior to the entry of Apple Inc. ("**Apple**") in 2010, most publishers and e-book retailers, including Amazon and Kobo Inc., now Rakuten Kobo Inc., ("**Kobo**"), were operating under the wholesale model. Apple began selling e-books in Canada and the US in 2010 under the agency model.

12. In January 2010, Apple entered into Agency Agreements which were operational in the US, with the following publishers; Hachette Book Group, Inc.; HarperCollins Publishers L.L.C.; Holtzbrinck Publishers, LLC, doing business as Macmillan; Penguin Group (USA) Inc.; and Simon & Schuster, Inc. Under those agreements the publishers set the retail selling price for e-books. The agreements fixed Apple's commission on e-book sales at 30% of the retail selling price of any given book. The agreements also contained MFN provisions.

13. The MFN provisions in these Agency Agreements provided that the publishers would adjust Apple's retail price for any given "new release" e-book to match any lower retail price offered by another e-book retailer. In other words, while a publisher could set the retail price for a given e-book for Apple (and any other agency agreement retailers), if there was even one retailer operating under the wholesale model, it could, in effect, determine the retail price for all retailers. As such, the publishers had an incentive to switch all e-book retailers to the agency model.

The US Investigation and Settlement[1]

14. On 11 April 2012 the United States Department of Justice (the "**US DOJ**") filed a civil antitrust action, *United States of America v. Apple, Inc., et al.* (the "**US DOJ Complaint**"), before the United States District Court for the Southern District of New York (the "**US Court**") against the following US publishers:

    a. Hachette Book Group, Inc.;

    b. HarperCollins Publishers L.L.C.;

    c. Verlagsgruppe Georg von Holtzbrinck GmbH and Holtzbrinck Publishers, LLC d/b/a Macmillan;

    d. The Penguin Group, a division of Pearson PLC, and Penguin Group (USA), Inc.; and

[1] The European Commission (the "**Commission**") also conducted an investigation in respect of e-books. The Commission concluded that by jointly switching the business model for the sale of e-books with the same key terms on a global basis, five publishers (see below) and Apple may have engaged in a concerted practice with the object of raising retail prices of e-books in the European Economic Area or preventing lower prices for e-books. The five EU Publishers and Apple settled with the Commission. The Publishers agreed to terminate all existing agency agreements that include retail price restrictions or a retail price MFN and not to enter into new agreements that include price MFN clauses for five years. They also committed to a two-year "cooling-off period", during which retailers would be free to offer retail price discounts for e-books up to an amount equal to the commission the retailer receives from the publisher over a one year period.

The 5 referenced publishers are Hachette Livre SA; HarperCollins Publishers Limited and HarperCollins Publishers, L.L.C; Georg von Holtzbrinck GmbH & Co. KG and Verlagsgruppe Georg von Holtzbrinck GmbH; Simon & Schuster Inc., Simon & Schuster (UK) Ltd., and Simon & Schuster Digital Sales, Inc.; and The Penguin Publishing Company Limited, The Penguin Group (a subsidiary of Pearson plc), Penguin Group (USA) Inc. and Dorling Kindersley Holdings Limited.

e. Simon & Schuster, Inc. (collectively, the "**US Publisher Defendants**").

15. The US DOJ Complaint was also filed against Apple (collectively with the US Publisher Defendants, the "**US Defendants**"). Attached hereto as Exhibit 1 is a copy of the US DOJ Complaint.

16. In the US DOJ Complaint, the US DOJ alleged that: 1) beginning no later than 2009, the US Defendants engaged in a conspiracy and agreement to raise, fix and stabilize retail e-book prices, to end price competition among e-book retailers, and to limit retail price competition among the US Publisher Defendants; 2) this conspiracy and agreement was ultimately effectuated by collectively adopting and adhering to functionally identical methods of selling e-books and price schedules; and 3) the conspiracy and agreement among the US Defendants resulted in anti-competitive effects, including increasing the retail prices of trade e-books and eliminating competition on price among e-book retailers. See US DOJ Complaint, Exhibit 1, at paragraphs 94 – 95 and 102.

17. The US Publisher Defendants each reached settlements with the US DOJ that were entered as Final Judgments between 6 September 2012 and 12 August 2013. While the precise terms of the Final Judgments varied among the US Publisher Defendants, they all required the US Publisher Defendants to take steps, either by terminating agreements or not enforcing them, to nullify provisions in their Agency Agreements that:

a. limited e-book retailers' ability to set, alter, or reduce the retail price of any e-book or to offer price discounts to consumers; or

b. constituted an MFN provision.[2]

18. The Final Judgments also prohibited the US Publisher Defendants from, among other things: 1) entering into agreements with e-book retailers that limit an e-book retailer's ability to set, alter or reduce an e-books price for as long as two years and 2) entering into agreements with MFN provisions for as long as five years, with the exception that the US Publisher Defendants could enter into "agency lite" agreements with e-book retailers. Under the agency lite model, publishers could continue to set the retail price for e-books, but within certain limits, retailers had the ability to offer price reductions or discounts to consumers. Attached hereto as Exhibits 2, 3, and 4 are copies of the Final Judgments with the US Publisher Defendants.

19. In paragraph 17 of the Affidavit filed in support of Kobo's Stay Motion, described below, Michael Tamblyn, at the time Kobo's Chief Content Officer and now its President and Chief Content Officer, states that, as a result of the Final Judgments, certain of Kobo's US Agency Agreements with publishers were altered, including its agreements with Hachette, HarperCollins, Simon & Schuster, and Macmillan. The former Agency Agreements became agency lite agreements. Attached hereto as Exhibit 5 is a copy of the public version of Mr. Tamblyn's Affidavit which was filed on 21 February 2014, without its accompanying exhibits, ("**Tamblyn Affidavit**").

20. Mr. Tamblyn states that the implementation of the agency lite model has had a "negative impact on Kobo's US market share and revenues" and that "[S]ince the entry of Agency Lite, Kobo has shed revenues as it has been forced to discount titles to match the deep discounting that some US

[2] As "Price MFN" is defined in the Final Judgments.

competitors have engaged in." See Tamblyn Affidavit, Exhibit 5, at paragraphs 18 and 19.

21. In respect of Canada, Kobo has Agency Agreements with, among others, Hachette Digital, Inc.; HarperCollins Canada Limited; Holtzbrinck Publishers, LLC, d/b/a Macmillan; and Simon & Schuster Canada, a division of CBS Canada Holdings Co.

The Consent Agreement and Kobo's s-s. 106(2) Application

The Consent Agreement

22. On 7 February 2014, the Competition Tribunal (the "**Tribunal**") registered a consent agreement (the "**Consent Agreement**") between the Commissioner and:

    a. Hachette Book Group Canada Ltd, Hachette Book Group, Inc., Hachette Digital, Inc.;

    b. HarperCollins Canada Limited;

    c. Holtzbrinck Publishers, LLC; and

    d. Simon & Schuster Canada, a division of CBS Canada Holdings Co. (collectively, the "**Settling Publishers**").

    Attached hereto as Exhibit 6 is a copy of the Consent Agreement.

23. The recitals to the Consent Agreement provide, in part, that the Commissioner alleges that, further to an agreement or arrangement, the Settling Publishers have engaged in conduct with the result that competition in the markets for e-books in Canada has been substantially prevented or lessened, contrary to section 90.1 of the Act and that, while the Settling

Publishers do not accept or admit the Commissioner's allegations, they will not contest them for purposes of the Consent Agreement.

24. The Consent Agreement requires the Settling Publishers to, among other things, terminate or amend any agreements with e-book retailers that restrict the retailer's ability to reduce or discount the retail price of e-books offered to consumers in Canada or that contain MFN provisions of the sort described in paragraphs 8 (b) and 13 of this affidavit.

25. In the press release issued when the Consent Agreement was registered, the Bureau noted its expectation that the implementation of the Consent Agreement would lower the price of e-books in Canada. Attached hereto as Exhibit 7 is a copy of the Bureau's 7 February 2014 Press Release.

26. In the days following the registration of the Consent Agreement, certain of the Settling Publishers began taking steps to implement its terms by sending Kobo amendment and termination notices in respect of its Agency Agreement's with them.

Kobo's s-s. 106(2) Application

27. On 21 February 2014, Kobo Inc., Kobo filed an application pursuant to s-s. 106(2) of the Act seeking an Order rescinding the Consent Agreement or, in the alternative, varying its terms.

28. Kobo also sought an Order staying the registration of the Consent Agreement pending the determination of its application. On 18 March 2014, the Tribunal stayed the Consent Agreement.

29. As a result of Kobo's s-s. 106(2) Application and Stay Motion, provisions in the Settling Publishers' Agency Agreements that restrict the ability of e-book retailers in Canada, like Kobo and Amazon, to reduce or discount the price

for the e-books they sell to Canadian consumers currently remain in place, as do the MFN provisions of those agreements.

30. The Bureau's investigation has revealed that retail prices for many best-selling or new release e-books in Canada are substantially higher than in the United States where, as described, settlements which addressed conduct similar to that addressed by the Consent Agreement were implemented.

31. In connection with Kobo's s-s. 106(2) Application, on 15 April 2014, the Commissioner filed a Reference with the Tribunal. On 8 September 2014, the Tribunal issued its Reference Decision. Kobo appealed the Tribunal's Decision to the Federal Court of Appeal on 17 September 2014. I am advised by John Syme, counsel for the Commissioner, and verily believe that: 1) the next step in the appeal is for the Commissioner to file his Memorandum of Fact and Law on or before 6 February 2015; and 2) the parties to the appeal have agreed to request an expedited hearing of the appeal.

32. On 24 November 2014, the Tribunal held a case management conference ("**CMC**") further to the s-s 106(2) proceeding. I am advised by Jonathan Michaud, Senior Competition Law Officer on the case team, and I verily believe that, at the CMC, Mr. Syme indicated that the Commissioner was prepared to consent to Kobo's application to rescind the Consent Agreement. Counsel for Kobo and counsel for the Settling Publishers indicated, among other things, that they required time to consider their respective positions in light of that development.

33. The Tribunal convened a second CMC on 22 December 2014 to obtain the views of the Commissioner, the Settling Publishers, Kobo and Indigo Books & Music Inc. ("**Indigo**", which is seeking intervenor status in Kobo's s-s.

106(2) Application) regarding whether Kobo's application should proceed as then currently scheduled. Following that CMC, the Tribunal issued an Order suspending the proceedings in respect of Kobo's s-s. 106(2) Application pending the determination of Kobo's appeal to the Federal Court of Appeal. Attached hereto as Exhibit 8 is a copy of the Competition Tribunal's Order of 22 December 2014.

III. RAKUTEN KOBO INC. HAS, OR IS LIKELY TO HAVE, INFORMATION THAT IS RELEVANT TO THE INQUIRY

34. I believe that Kobo has, or is likely to have, information that is relevant to the Inquiry. Kobo carries on business as an e-book retailer in the United States and is the largest retailer of e-books in Canada.

35. Rakuten Kobo Inc. is a corporation registered in the province of Ontario. It was amalgamated on 11 January 2012 under the corporate name Kobo Inc. and changed its corporate name to Rakuten Kobo Inc. on 1 July 2014. It has a registered office address of 135 Liberty Street, Suite #101, Toronto ON, M6K 1A7. Attached hereto as Exhibit 9 is a copy of the Corporation Profile Report from the Ontario Ministry of Government Services showing the corporate information for Rakuten Kobo Inc.

36. On 14 December 2009, Indigo transferred all of the assets of "Shortcovers", its "digital reading initiative", to Kobo Inc. Following the transfer, Indigo was the majority shareholder of Kobo and Indigo's CEO and Founder, Heather Reisman, became the Chair of Kobo Inc. On 12 January 2012, Rakuten, Inc. closed its acquisition of Kobo Inc. and acquired 100% of its total issued and outstanding shares. Attached hereto as Exhibits 10 and 11, respectively, are copies of Indigo's 15 December 2009 press release, "Indigo Spins Off Shortcovers to Launch Kobo" and Rakuten, Inc.'s 12 January 2012 press release, "Rakuten Closes Acquisition of Kobo".

37. In the Tamblyn Affidavit, Mr. Tamblyn states that as a result of the e-books settlement in the United States, certain of Kobo's contracts with publishers for the sale of e-books in the U.S. were altered. See Tamblyn Affidavit, Exhibit 5, at paragraph 17.

38. In respect of Canada, Mr. Tamblyn states that "having been the one 'on the ground' negotiating the shift to Agency in Canada" he can "speak firsthand to the fact that the shift to Agency in Canada occurred in a very different manner than it is alleged to have happened in the US." See Tamblyn Affidavit, Exhibit 5, at paragraph 33.

39. In the period following the registration of the Consent Agreement, the Commissioner has continued to gather information pursuant to the Inquiry insofar as it relates to, among others, Pearson Canada Inc., Penguin Canada Books Inc., Penguin Group (USA), Inc. (now Penguin Group (USA), LLC) and The Penguin Group, a division of Pearson plc (collectively, "**Penguin**").

40. Information obtained over the course of the Inquiry, including information obtained after the Consent Agreement was concluded, suggests that Kobo, or in some instances Indigo negotiating on Kobo's behalf, may have influenced or attempted to influence the switch from the wholesale model to the agency model in Canada, including by:

    a. revealing sensitive information to several publishers regarding the status of negotiations of Kobo's Agency Agreements with other publishers;

    b. discussing with a publisher the possibility of Amazon's supply of e-books being cut off in view of the fact that Amazon was allegedly

delaying the shift from the wholesale model to the agency model in Canada; and

c. creating or trying to create an opportunity to speak with multiple publishers during a joint meeting.

41. For example, with respect to paragraph 40(b) of this affidavit, according to Kobo, Amazon was delaying the shift from the wholesale model to the agency model in Canada. One of the strategies that had allegedly been employed in the US to move Amazon from the wholesale model to the agency model was for a publisher or publishers to cut off the supply of e-books to Amazon which had resisted the move to agency model. This was sometimes referred to as causing the e-book retailer to "go dark".

42. In an email dated 24 February 2011 from Ami Greko, Kobo's Senior Vendor Relations person in the US, to Mr. Fritz Foy, Executive Vice-President, Digital Publishing, Macmillan US, Ms. Greko discusses this strategy with respect to Canada:

> FYI, just chatted with Canadians about Canadian Agency – we have other publishers going dark with retailers operating in Canada who can't support agency as of March 31. The decision was made specifically because Amazon has been claiming delays of unknown duration to hold off the agency rollout in CA in an attempt to try to starve us out.
>
> You might already have this intel, but figured it couldn't hurt to pass along. [...]

A copy of Ami Greko's 24 February 2011 email is attached hereto as Exhibit 12.

43. A review of documents and information obtained as part of the Inquiry indicates that certain publishers did cause Amazon and other retailers to

"go dark" in Canada in Spring 2011. This review also indicates that at least one publisher monitored the actions of other publishers in Spring 2011 in an attempt to confirm whether they had also caused Amazon to "go dark" in Canada.

44. For another example, with respect to paragraph 40(c) above, in an internal Penguin email dated 23 February 2011, Mike Bryan, President of Penguin Canada briefed David Shanks, CEO of Penguin USA, and Coram Williams, CFO of the Penguin Group, on a conversation with an outside third-party regarding Indigo:

> [...] The other point that came out of the conversation was [REDACTED]'s view that Indigo and the major publishers all have a massive stake in ensuring that the success of the physical book as a format continues (they are not making money out of e-book sales in the present price wars with Amazon) and that [REDACTED] would welcome a combined meeting on how we might achieve this in Canada.[...]

45. In his response to Mr. Bryan's email, Mr. Shanks stated:

> [...]We would never meet with Barnes and all our competitors. The Government would be all over that. We would meet separately with Indigo being the facilitator and go between. That is how we worked with Apple and the government is still looking into that. [...]

Attached hereto as Exhibit 13 is a copy of the 23 February 2011 internal Penguin email, the above-referenced parts of which were made public in the last slide of the US DOJ's Opening Statement in *United States of America v. Apple, Inc., et al.* The entire email string has not been produced because the balance of the string is in respect of unrelated matters, some of which may be commercially sensitive, and does not pertain to creating or

trying to create an opportunity to speak with multiple publishers during a joint meeting.

46. Approximately one month later, in an email dated 18 March 2011, from Ami Greko, Kobo's Senior Vendor Relations person in the US, to employees at Macmillan, Ms. Greko suggests a meeting between Kobo and "key publishers":

> [...] For the past two years in May, Kobo's CEO Michael Serbinis and EVP Michael Tamblyn have come to New York City to visit with key publishers and give insight into how the company has been doing and our roadmap for the coming year.
>
> This year we'd like to do it as a large (more fun!) event for all of our key publishers at once, followed by a cocktail reception for mingling. [...]

Attached hereto as Exhibit 14 is a copy of Ami Greko's 18 March 2011 email.

47. Kobo has acknowledged that it pressed several publishers to move to the agency model in Canada, but has maintained that the agency model is not something concocted by the Publishers and imposed on Kobo, but rather something Kobo pursued on an individual basis with publishers.

48. On 15 December 2014, the Commissioner expanded the Inquiry in view of his conclusion that there is reason to believe that there are grounds for making an Order against Kobo under Part VIII of the Act. On that same date, the Commissioner expanded the Inquiry to encompass another person given his conclusion that there is reason to believe that there are grounds for making an Order under Part VIII of the Act against that person. That person has been advised that they are subject of the Inquiry, but the name of that person has not been made public.

49. With the view of determining the facts in respect of the Publisher's alleged anti-competitive conduct, in the Order sought the Commissioner has named Ami Greko as a "Senior Officer" and seeks, among other things, records relating to Kobo's meeting with "key publishers", as described above.

V. THE ORDER SOUGHT

50. The records and written returns of information the Commissioner seeks from Kobo are set out in Schedules I and II of the Order sought (the "**Draft Order**"). The Commissioner seeks these records and written returns of information with the view of determining the facts for purposes of the Inquiry.

51. The Commissioner seeks records and written returns of information that relate to matters including the following:

    a. non-written communications between Kobo and any two or more e-book publishers in relation to the sale, pricing or supply of e-books in Canada;

    b. non-written communications between Kobo and any e-book publisher about the actions taken by another e-book publisher in relation to the sale, pricing or supply of e-books in Canada;

    c. the introduction or negotiation of agreements between e-book publishers and e-book retailers relating to the sale, pricing or supply of e-books in Canada or in the United States, including the shift from the wholesale model to the agency model;

    d. business and strategic considerations regarding agency agreements;

    e. the pricing of e-books in Canada;

f. any competitive responses of Kobo in relation to potential or actual entry, expansion or exit of e-book retailers in Canada; and

g. the relationship between Kobo and its retail partners and retail affiliates, including Indigo.

52. The Commissioner seeks records created or modified during the period from 1 September 2009 to the date of the issuance of the Order, and written returns for the same period (the "**Relevant Period**"). It was in or about the fall of 2009 when the US Defendants began communicating with one another about agency.

53. The Commissioner seeks records further to paragraph 11(1)(b) and written returns of information further to paragraph 11(1)(c) of the Act. Following a review of those records and that information, the Commissioner will determine whether to seek an Order compelling a person that has or is likely to have information (including a "Senior Officer" of Kobo, as defined in the Draft Order), to be examined under oath or solemn affirmation by a representative of the Commissioner pursuant to paragraph 11(1)(a) of the Act.

54. By way of a concurrent application to the Federal Court, the Commissioner is seeking a s. 11 Order against Indigo in the context of the Inquiry to assist him in determining the facts. In addition, the Commissioner intends to seek a s. 11 Order against one or more other market participants in the context of the Inquiry to assist him in determining the facts.

V. INFORMATION IN THE COMMISSIONER'S POSSESSION

55. The case team has conducted a review of the Bureau's files to determine whether the Commissioner has records or information that are responsive to the Draft Order. In particular, the case team reviewed records and

information provided in the course of this Inquiry. In addition, the team used the Bureau's information management system to search for other investigations and inquiries pursuant to which the Bureau may have received records or information that are responsive to the Draft Order. I also communicated with representatives of the Bureau's enforcement branches to determine if there were other investigations or inquiries pursuant to which the Bureau received records or information that are responsive to the Draft Order.

56. Except as described below, I concluded that the Bureau has not received records or information that are responsive to the Draft Order.

Information Previously Provided by Rakuten Kobo Inc.

Information Provided in the Context of the Inquiry

57. Kobo has from time to time voluntarily provided information to the Bureau in connection with the Inquiry since at least 14 June 2012, when counsel for the Commissioner, members of the Bureau case team and Nick Catros, Senior Vice President Business and Legal Affairs at Kobo, held a conference call to discuss Kobo's business and the use of Agency Agreements in Canada. On 17 October 2012, the Bureau received additional information from Mr. Catros, including written returns on the introduction of the agency model in Canada and one third-party study relating to, among other things, e-books.

58. On 16 November 2012, Douglas Clark, then an Assistant Deputy Commissioner of Competition in the Civil Matters Branch, sent Kobo a voluntary Request for Information ("**RFI**"). The RFI contained seven written return specifications, including one data specification, and 10 records

specifications. Attached hereto as Exhibit 15 is a copy of the Mr. Clark's letter to Kobo and the RFI.

59. In response to the RFI, Kobo provided the Bureau:

    a. on 4 January 2013, with data responses (the "**2013 Data Responses**").

    b. on 14 January 2013, with:

        i. written information responses, which included general information, as well as responses to specific information requested in the RFI; and

        ii. a copy of Kobo's organizational chart current as of the date of the written responses (the "**Organizational Chart**");

    c. on 1 March 2013, with profit and loss statements, (the "**Profit and Loss Statements**"); and

    d. in or around March and April 2013, with nine agreements with publishers (the "**Spring Agreements**").

60. In addition, on 9 September 2013, counsel for the Commissioner sent Kobo an email requesting certain of its agreements with publishers in force as of that date, as well as a description of changes made to certain of its agreements with publishers. In response, Kobo provided sixteen additional agreements (the "**Fall Agreements**") and summaries of changes made to certain of those agreements.

61. The Organizational Chart, the Profit and Loss Statements and the Spring Agreements were the only records received from Kobo further to the RFI. The Draft Order does not require Kobo to reproduce these records nor does

it require Kobo to reproduce the Fall Agreements, which were also provided voluntarily.

62. The Bureau did not require Kobo to provide the balance of the records contemplated by the RFI. Certain of the records the Bureau did not require Kobo to produce previously are contemplated by the Draft Order. As indicated above, the Commissioner's Inquiry is ongoing and the Commissioner has obtained additional information in connection with the Inquiry since 9 September 2013.

63. Specification 12 of Schedule II of the Order requires Kobo to reproduce the 2013 Data Responses. Specification 12 requests four additional fields of data to the 2013 Data Responses and requests data for the full Relevant Period. A reproduction of the 2013 Data Responses as part of the response to Specification 12 is necessary to ensure a complete and workable production of data in response to the Draft Order.

64. As a member or the case team and by virtue of my own attendance, I know that Kobo voluntarily participated in a number of meetings and phone calls with the Bureau in the context of the Inquiry. In connection with these meetings, Kobo has on occasion provided slide decks prepared for the case team and letters to the Bureau containing information on, among other things, e-book markets, e-book retailers and the shift from the wholesale model to agency model for e-books in Canada.

Information Provided in the Context of Other Examinations

65. Mr. Michaud, Senior Competition Law Officer on the case team, advises me and I verily believe that a review he had the Bureau case team conduct indicates, in the context of other investigations and inquiries, Kobo has

provided limited information to the Commissioner and no records that would be responsive to the Draft Order.

66. Nevertheless, if Kobo has previously provided records to the Commissioner that are responsive to the Draft Order, paragraph 11 of the Draft Order allows the Commissioner to waive further production of the records. Paragraph 11 provides:

> **THIS COURT FURTHER ORDERS** that where a Respondent previously produced a record to the Commissioner the Respondent is not required to produce an additional copy of the record or thing provided that the Respondent: (1) identifies the previously produced record or thing to the Commissioner's satisfaction; (2) makes and delivers a written return of information in which it agrees and confirms that the record was either in the possession of the Respondent, on premises used or occupied by the Respondent or was in the possession of an officer, agent, servant, employee or representative of the Respondent; and where this is not the case, the Respondent shall make and deliver a written return of information explaining the factual circumstances about the possession, power, control and location of such record; and (3) receives confirmation from the Commissioner that such records or things need not be produced. Where the Respondents' affiliate, as identified in Schedule I, previously produced a record or thing to the Commissioner, the Respondent is not required to produce an additional copy of the record, provided that the Respondent complies with the three conditions above.

67. In addition, specifications in Schedule I to the Draft Order which may capture records previously provided by Kobo expressly provide that such records need not be re-produced.

Information Provided in the Inquiry by Third Parties

68. With certain of the specifications in Schedule I, the Commissioner is seeking some records from Kobo that he may already have in his possession from third parties. For example, the Commissioner has obtained records and information from the Settling Publishers pursuant to a request for information provided to each of the Settling Publishers on 7 February 2014. In particular, following the registration of the Consent Agreement, the Settling Publishers provided the Bureau with records, including records relating to the negotiation or enforcement of any agency agreement between any major e-book publisher and certain retailers (including Kobo). Certain of these records and information may be partially responsive to the Draft Order.

69. The Settling Publishers have agreed to provide the Commissioner with records or additional information on an ongoing basis in the context of "actual (or anticipated) legal proceedings commenced before a Tribunal or court further to the Inquiry." The Settling Publishers' commitment is without prejudice to the Commissioner's ability to seek s. 11 Orders against one or more of the Settling Publishers if the Commissioner is not satisfied with the Settling Publishers' responses to the Commissioners request for information or if the Consent Agreement is rescinded. A copy of a 7 February 2014 letter from Parul Shah, counsel to the Commissioner at that time, pertaining to the above is attached hereto as Exhibit 16.

70. In addition, on 3 March 2014, the Commissioner obtained a s. 11 Order against Pearson Canada Inc. and Penguin Canada Books Inc. (the "**Penguin Order**") further to the Inquiry. Certain records and information obtained pursuant to that Order may be partially responsive to the Draft Order. A copy of the Penguin Order is attached hereto as Exhibit 17.

71. The Commissioner requires records and information requested in the Draft Order from Kobo to determine the facts relating to the Inquiry, as well as to ensure the completeness of the information that the Commissioner now has in his possession.

VI. COMMUNICATIONS WITH RAKUTEN KOBO INC.

72. On 10 December 2014, I attended a call wherein counsel for the Commissioner, Mr. Syme, informed counsel for Kobo, Nikiforos Iatrou, that the Commissioner would be seeking an Order on an *ex parte* basis to obtain records and information from Kobo pursuant to paragraphs 11(1)(b) and 11(1)(c) of the Act.

73. This was confirmed in a letter from Mr. Syme to Mr. Iatrou on 12 December 2014. The letter also enclosed a draft of the specifications without the form of the Order attached and invited Kobo to participate in a conference call with the Bureau with the purpose of determining whether there are alternative sources or forms of information that may respond more directly to the Commissioner's request for records and information and identifying any issues that may impair Kobo's ability to comply with the specifications of the Draft Order, among other things. Attached hereto as Exhibit 18 is a copy of the letter sent on 12 December 2014.

74. On 16 December 2014, Assistant Deputy Commissioner of the Civil Matters Branch, Richard Bilodeau, Mr. Syme and I had a conference call with Mr. Iatrou. During this call, Mr. Bilodeau advised Mr. Iatrou that Kobo was a subject of the Inquiry.

75. On 16 December 2014, Mr. Syme, Mr. Bilodeau, members of the case team and I had a conference call with Mr. Iatrou, Mr. Tamblyn and other members of the Kobo team (the "**First Pre-Application Call**").

76. During the First Pre-Application Call, Mr. Iatrou expressed concerns related to both the s. 11 application, in general, and to certain specifications specifically. The general concerns related primarily to timing. Mr. Iatrou indicated that the holiday season is Kobo's busiest time of the year, and therefore he had had insufficient time to properly review and discuss the Draft Order with Kobo representatives. Mr. Iatrou indicated that the holiday season would be particularly busy for a retailer.

77. Mr. Iatrou suggested that the Commissioner was bringing a s. 11 application at this time to unfairly target Kobo for invoking its rights under s-s. 106(2) of the Act. In that connection, he noted his understanding that only Kobo and Indigo were being targeted with s. 11 Orders. Mr. Syme asserted categorically that the Commissioner's s. 11 application was unrelated to Kobo's s-s. 106(2) Application. Mr. Iatrou opined that if the Commissioner were proceeding with a s. 11 against Kobo, he should also seek s. 11 Orders against other similarly placed e-book market participants, as Kobo's information, by itself, would be of no use to the Commissioner in his Inquiry. Finally, Mr. Iatrou asserted that it would be more appropriate for the Commissioner to seek some of the records and information contemplated by the Draft Order from the Publishers, rather than Kobo.

78. Mr. Iatrou further indicated that, in view of the busy holiday season, some employees who Mr. Iatrou would have wanted to review the Draft Order were unavailable and would continue to be unavailable until early January 2015.

79. In terms of the draft specifications Mr. Iatrou expressed concerns including: 1) the duration of the Relevant Period, as defined in the Draft Order; 2) the overall burden responding to the Draft Order would place on Kobo; 3) the inclusion of the US market in some of the Draft Order's specifications; 4) overlap with the RFI; and 5) his view that some of the information sought in

the Draft Order pertains to publisher activity, not retailer activity, and should more properly be sought from a publisher. The Bureau team and Mr. Syme asked questions of Mr. Iatrou to better understand Kobo's concerns.

80. During the course of the call, counsel for the Commissioner indicated that, should the Order be issued, the Bureau would be amenable to post-issuance dialogue with Kobo. The purpose of this dialogue would be to, amongst other things, address outstanding issues. At the conclusion of the call, Mr. Syme thanked Mr. Iatrou for his comments and indicated that the Bureau would consider them in due course.

81. On 17 December 2014, Mr. Iatrou sent a letter to Mr. Syme asking for additional information in relation to Kobo being made a subject of the Inquiry. Specifically, Mr. Iatrou asked for: 1) the section of the Act under which Kobo was being investigated; and 2) the information that led the Commissioner to make Kobo a subject of the Inquiry, including when that information came to the Commissioner's attention.

82. Mr. Iatrou also reiterated concerns that were raised during the First Pre-Application Call, including: 1) the Commissioner's timing in seeking to apply for a s. 11 Order; and 2) the appropriate source for some of the information sought in the draft specifications. Mr. Iatrou suggested that further dialogue should occur after the holiday season has passed. A copy of Mr. Iatrou's 17 December 2014 letter is attached hereto as Exhibit 19.

83. On 18 December 2014, Mr. Iatrou emailed Mr. Syme to elaborate upon a comment provided during the First Pre-Application Call related to document retention. Mr. Iatrou confirmed that in mid-September 2014, Kobo proactively took steps to preserve the records and files of its critical business people insofar as relationships with the publishers were concerned. Mr. Iatrou stated this obviated:

a. the need to request Kobo's document retention policies as the documents had already been preserved, irrespective of any applicable policies; and

b. any need to obtain files from individuals other than those selected by Kobo, since individuals whom Kobo believed were likely to have any documents relevant to the matters in issue had already had records preserved.

Mr. Iatrou's 18 December 2014 email is attached hereto as Exhibit 20.

84. On 18 December 2014, Mr. Syme emailed Mr. Iatrou advising him that, having considered Kobo's desire for additional time to review the draft specifications, the decision had been made not to proceed, as planned, with filing a s. 11 application that week. Mr. Syme further advised that the Bureau anticipated sending Kobo revised specifications on 23 December 2014 and would be available for further pre-application dialogue on 29 or 30 December 2014.

85. Mr. Syme also stated, for greater certainty, that the decision to defer filing was further to Kobo's request for additional time, and should not be construed as an admission or acceptance of Kobo's position regarding the propriety of the Commissioner's s. 11 application. Mr. Syme's 18 December 2014 email is attached hereto as Exhibit 21.

86. On 19 December 2014, Mr. Syme sent a letter to Mr. Iatrou in response to his letter of 17 December 2014 and email of 18 December 2014. Mr. Syme advised Mr. Iatrou that since the conclusion of the Consent Agreement, the Commissioner obtained additional information in the context of the Inquiry. Mr. Syme further advised Mr. Iatrou that the primary focus of the Inquiry is in respect of s. 90.1 of the Act. Mr. Syme also noted Mr. Iatrou's views

regarding steps previously taken by Kobo to preserve its records and suggested that this, as well as Mr. Iatrou's concern regarding the appropriate Relevant Period, would be matters best canvassed in further pre-application dialogue. Mr. Syme's 19 December 2014 letter is attached hereto as Exhibit 22.

87. On 22 December 2014, Mr. Iatrou sent an email to Mr. Syme indicating that Kobo would welcome the chance for further dialogue, but that the Bureau's proposed days were problematic because of the busy holiday season and Mr. Tamblyn's schedule. Mr. Iatrou requested that the dialogue occur early in the New Year. Mr. Iatrou also underscored the following aspects of concerns previously raised: 1) the fact that the Commissioner had not identified for Kobo what information had been received to prompt the Commissioner to include Kobo in his Inquiry; and 2) his view that Kobo was being presented with a s. 11 while other involved parties were not. Mr. Iatrou's 22 December 2014 email is attached hereto as Exhibit 23.

88. On 23 December 2014, Mr. Syme sent Mr. Iatrou revised draft schedules for Kobo's review and an invitation to participate in a second round of pre-application dialogue. Attached hereto as Exhibit 24 is a copy of the letter sent on 23 December 2014.

89. On 30 December 2014, Mr. Syme, members of the case team and I had another conference call with Mr. Iatrou, various members of his counsel team and representatives from a firm engaged by Kobo to assist in the records preservation process (the "**Second Pre-Application Call**").

90. At the outset of the call, Mr. Iatrou indicated that neither Mr. Tamblyn nor members of Kobo's business team were available for the call due to the holiday period. However, Mr. Iatrou confirmed that he had gone through the

revised Draft Order and had some discussions with Mr. Tamblyn, though not in great detail.

91. During the call, Mr. Iatrou again expressed concerns relating to the specifications of the Draft Order, including: 1) the duration of the Relevant Period, as defined in the Draft Order; 2) the inclusion of the US market in some of the Draft Order's specifications; 3) overlap with the RFI; 4) written returns specifications that could potentially capture information pertaining to an individual e-book title; 5) the Commissioner seeking information from Kobo that it felt should be sought from e-book publishers; and 6) the ability to accurately respond to written returns specifications regarding past communications.

92. In an effort to narrow certain specifications in the Draft Order, the Bureau case team asked for additional details regarding Kobo's Retail Partner and Affiliate programs. That request was confirmed by email on 30 December 2014 and Kobo was asked to provide further information regarding that question by 5 January 2015. Attached hereto as Exhibit 25 is a copy of the 30 December 2014 email.

93. By email on 1 January 2015, Mr. Iatrou indicated that he had been as-yet unable to obtain a full answer regarding the affiliate and partnership programs, due to the holiday season; however, he did provide what he described as a "high level" answer to the Bureau's query.

94. In his email, Mr. Iatrou also reiterated Kobo's objections with respect to specification 12 in Schedule II; namely, having to re-produce data that Kobo already provided in response to the RFI, the time period the Draft Order covered, and certain additional fields of data for which Kobo does not keep records.

95. Mr. Iatrou also advised that, in respect of the additional fields of information contemplated by Specification 12 in Schedule II, Kobo cannot provide the data fields beyond what was provided in response to the 2012 RFI because it does not keep the necessary data or records. Mr. Iatrou stated that there is no reasonable or feasible way for Kobo to assemble the data or otherwise create it so as to respond to Specification 12. He advised that although Kobo's merchandisers categorize books as bestsellers or new releases, these are subjective judgment calls that Kobo's staff make, based on their knowledge of inventory and sales and the space available on the website to promote these books. Mr. Iatrou advised that these appear on Kobo's website and change constantly.

96. Finally, Mr. Iatrou reiterated his assertion that some of the information sought by the Commissioner should be obtained from the publishers; his request for additional information with respect to the Commissioner's decision to seek a s. 11 Order against Kobo; and his view that Kobo's response to the proposed s. 11 Order could not possibly advance the Inquiry in the absence of similar orders being sought from all market participants. Attached hereto as Exhibit 26 is a copy of Mr. Iatrou's 1 January 2015 email.

97. By email on 5 January 2015, Mr. Iatrou advised that Kobo made a priority request of its team to obtain the information the Bureau had requested regarding Kobo's Retail Partner and Affiliates programs and on 7 January 2015, Mr. Syme, and members of the case team, including myself, had a conference call with Mr. Iatrou to clarify the team's understanding. Attached hereto as Exhibit 27 is a copy of Mr. Iatrou's 5 January 2015 email.

98. By email on 12 January 2015, Mr. Iatrou provided Mr. Syme further concerns pertaining to three specific specifications in the 23 December 2014 Draft Order. These three concerns pertained to: 1) the breadth of

records captured in a specification regarding communications; 2) the burden a specification requesting all relevant Records would place on Kobo; and 3) a reiteration of Mr. Iatrou's concern about the ability to accurately respond to a written returns specification regarding past communications, and the breadth of this written return specification. Attached hereto as Exhibit 28 is a copy of Mr. Iatrou's 12 January 2015 email.

99. The Commissioner made changes to the earlier versions of the specifications provided to Kobo on 12 and 23 December 2014, including, but not limited to:

a. narrowing the duration for which certain records or returns are to be provided;

b. amending a particular specification so as not to require Kobo to produce all related records, but rather a specified subset of records;

c. removing the inclusion of the US market in numerous specifications;

d. amending particular specifications to indicate that documents previously provided by Kobo to the Commissioner may be excluded from Kobo's response;

e. specifying that, for written returns of specifications regarding past communications, Kobo may exercise best efforts to recall, including by reviewing calendars, emails or such other documents and materials as available;

f. amending particular specifications to indicate that the specification is not intended to capture information pertaining to an individual e-book title; and

g. amending the definition of "Top Kobo Associate" to include the Company's top four highest gross revenue generating Kobo Partners and top four highest gross revenue generating Kobo Affiliates, rather than the top 15.

100. All of the changes enumerated above as well as numerous additional changes have been made with a view to narrowing the scope and breadth of the requested records and information, and to facilitating production for Kobo. A copy of the schedules of the current Draft Order illustrating the changes made to the 12 December 2014 schedules sent to Kobo is attached hereto as Exhibit 29.

101. Following the First Pre-Application call, the Bureau removed from the Draft Order a specification requesting all records relating to, among other things, communications between Kobo and two or more publishers. However, following the Second Pre-Application Call, the Bureau added to the Draft Order a narrowed version of this previously-deleted specification in order to capture records relating to a proposed meeting between Kobo and "key publishers" in 2011, as discussed at paragraph 46 of this affidavit. As a result, Kobo has not had the opportunity to comment on this specification.

102. As described in paragraphs 77, 79, 82 and 96 of this affidavit, in the course of pre-application dialogue, Mr. Iatrou stated that the Commissioner should obtain from publishers certain of the information and documents that the Commissioner seeks from Kobo. As described in paragraphs 68 to 71 of this affidavit, the Commissioner has received, and may continue to receive, records and information from the Settling Publishers and Penguin.

103. As noted to Kobo in the First Pre-Application Call and described in paragraph 80 of this affidavit, the Bureau would be amenable to post-issuance dialogue with Kobo for the purpose of, among other things:

a. prioritizing information to be supplied to the Bureau;

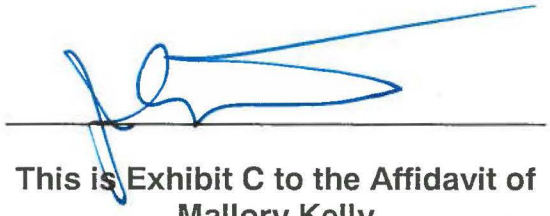
b. discussing custodians and search terms to be used in conducting electronic searches; and

c. where information has been produced on a rolling basis, confirming whether further information is required by the Bureau in response to a particular specification of the Order.

AFFIRMED BEFORE ME at the City of Gatineau in the Province of Québec this 15th day of January 2015.

A Commissioner of Affidavits
lawyer, Barreau du Québec
282594-5

Barbara Russell



This is Exhibit C to the Affidavit of
Mallory Kelly
Affirmed 28 August 2015

Federal Court  Cour fédérale

Date: 20150227

Dockets: T-61-15
T-62-15

Citation: 2015 FC 256

BETWEEN:

THE COMMISSIONER OF COMPETITION

Applicant

and

INDIGO BOOKS & MUSIC INC.

Respondent

AND BETWEEN:

THE COMMISSIONER OF COMPETITION

Applicant

and

RAKUTEN KOBO INC.

Respondent

REASONS FOR ORDERS

CRAMPTON C.J.

[1] On January 22, 2015 I granted the *ex parte* application by the Commissioner of Competition for Orders requiring the production of records and the delivery of written returns by the Respondents, pursuant to paragraphs 11(1)(*b*) and 11(1)(*c*) of the *Competition Act*, RSC, 1985, c C-34 [the "**Act**"], respectively.

[2] The purpose of these reasons is to address certain positions advanced by one or both of the Respondents in their exchanges of correspondence with the Commissioner prior to the *ex parte* hearing.

I. Background

[3] As described more fully in *Canada (Commissioner of Competition) v Pearson Canada Inc*, 2014 FC 376 ["***Pearson***"], in mid-2012 the Commissioner commenced an inquiry [the "**Inquiry**"] under subparagraph 10(1)(*b*)(ii) of the Act with respect to certain alleged anti-competitive conduct to restrict electronic book ("**E-book**") retail price competition in the markets for E-books in Canada. Among other things, that conduct involved a change by the largest publishers of general interest and non-fiction books in Canada from a wholesale distribution model to an agency distribution model. As a result of that change, retail price competition in the markets for E-books in Canada is alleged to have been restricted.

[4] The initiation of the Inquiry followed investigations and subsequent enforcement action taken in the United States and Europe in relation to a similar change from a wholesale distribution model to an agency distribution model that occurred in those jurisdictions.

[5] On February 7, 2014, a consent agreement [the "**CA**"] between the Commissioner and four of those publishers [the "**Settling Publishers**"] was filed with the Competition Tribunal [the "**Tribunal**"]. The Settling Publishers are Hachette Book Canada Ltd. and certain of its affiliates, Holtzbrinck Publishers, LLC (doing business as Macmillan), HarperCollins Canada Limited and Simon & Schuster Canada, a division of CBS Canada Holdings Co.

[6] One of the recitals to the CA states that "the Commissioner alleges that further to an agreement or arrangement, the [Settling Publishers] have engaged in conduct with the result that competition in the markets for E-books in Canada has been substantially prevented or lessened, contrary to section 90.1 of the Act."

[7] Broadly speaking, the CA is directed towards distribution agreements between the Settling Publishers and retailers of E-books. Among other things, the CA prohibits the Settling Publishers from directly or indirectly restricting, limiting or impeding an E-book retailer's ability to set, alter or reduce the retail price of any E-book for sale to consumers in Canada, or to offer price discounts or any other form of promotions to encourage consumers in Canada to purchase one or more E-books. The CA also prohibits the Settling Publishers from entering into an agreement with any E-book retailer that has one of those effects. These prohibitions apply for 18 months, commencing on the fortieth day following the registration of the CA.

[8] Certain other terms in the CA prohibit the Settling Publishers from entering into agreements with E-book retailers that contain particular types of most-favoured nation clauses, for a period of four years and six months from the date of the registration of the CA.

[9] In addition, the CA requires the Settling Publishers to take steps to terminate, and not renew or extend, agreements with E-book retailers that have certain types of provisions. In lieu of such action, the CA permits the Settling Publishers to take certain alternative steps to satisfy their obligations.

[10] According to an affidavit filed by Barbara Russell on behalf of the Commissioner in each of these applications [the "**Russell Affidavits**"], in the days following the registration of the CA, certain of the Settling Publishers began taking steps to implement its terms by sending amendment and termination notices to E-book retailers, including Kobo Inc., which has since changed its name to Rakuten Kobo Inc. [collectively, "**Kobo**"].

[11] Kobo also develops and retails E-Book reading devices and creates free application software for reading E-books on computers and mobile devices.

[12] On February 21, 2014, Kobo filed a Notice of Application pursuant to subsection 106(2) of the Act for, among other things:

A. an order rescinding the CA; and

B. in the alternative, an order varying the terms of the CA, to remove certain obligations of the Settling Publishers;

[13] Pursuant to an order issued by Justice Rennie, dated March 18, 2014, the registration of the CA has been stayed "pending the determination of Kobo's application under section 106 of the Act."

[14] On April 15, 2014, the Commissioner filed a Notice of Reference pursuant to subsection 124.2(2) of the Act, concerning the nature and scope of the Tribunal's jurisdiction under subsection 106(2).

[15] In September 2014, the Competition Tribunal issued its decision in connection with that reference (*Kobo Inc v The Commissioner of Competition*, 2014 Comp Trib 14). That decision is currently under appeal before the Federal Court of Appeal.

[16] On December 15, 2014, the Commissioner expanded the Inquiry to include Kobo and an unnamed third party as targets. The Commissioner then engaged in a dialogue with Kobo and Indigo, respectively, regarding early versions of the draft Orders that he sent to each of them.

[17] According to the Russell Affidavits, on December 14, 2009, Indigo Books & Music Inc. ["**Indigo**"] transferred all of the assets of its "Shortcovers" digital reading business to Kobo. Following the transfer, Indigo was the majority shareholder of Kobo and Indigo's Chief Executive Officer, Heather Reisman, became the Chair of Kobo.

[18] At the hearing of this application, the Commissioner confirmed that Indigo is not a target of the Inquiry.

[19] In January 2012, Rakuten Inc. acquired 100% of the issued and outstanding shares of Kobo Inc., and changed its name to Rakuten Kobo Inc. According to an affidavit sworn by Ms. Reisman in connection with Indigo's request for leave to intervene in Kobo's above-mentioned application under subsection 106(2) of the Act, Kobo's business remains "a central and integral component of Indigo's E-book and broader eReading strategy."

II. Relevant legislation

[20] The legislation that is relevant to this application is essentially the same as the legislation addressed in *Pearson*, above, at paras 22-27.

III. The Draft Orders and their Schedules

[21] The draft Orders submitted by the Commissioner on these applications (the "Kobo Draft Order" and the "Indigo Draft Order," respectively) were virtually identical in all material respects to the orders recently issued by this Court pursuant to section 11 of the Act. As noted in *Pearson*, above, at para 28, those Orders have evolved into essentially a template that reflects comments provided by the Court to the Commissioner in prior hearings under section 11. The Court expects that that template will continue to evolve as circumstances warrant. In their correspondence with the Commissioner prior to the hearing of this application, and as has generally been the case in recent applications under section 11, the Respondents did not raise any concerns with respect to the text in the main body of the draft Orders.

[22] Schedules I and II to the draft Orders described the records to be produced pursuant to subparagraph 11(1)(*b*) of the Act and the written returns of information to be produced pursuant to subparagraph 11(1)(*c*), respectively. Those schedules each had a modest number of specifications and, at least to some extent, reflected input previously provided by the Respondents to the Commissioner.

[23] In its correspondence with the Commissioner, Kobo raised a number of concerns with respect to Schedules I and II to the Kobo Draft Order. I will address below those concerns that may be relevant to other respondents to *ex parte* applications under section 11 of the Act in the future. I will also address certain general concerns that were raised by each of Kobo and Indigo. However, I will refrain from addressing concerns that led the Commissioner to make changes to earlier versions of the Kobo Draft Order or the Indigo Draft Order, prior to making these applications.

[24] At the outset, it bears repeating that the Court's focus in proceedings initiated under section 11 of the Act typically will be on satisfying itself that (i) an inquiry is in fact being made, (ii) the Commissioner has provided full and frank disclosure, (iii) the information or records described in the Order(s) being sought are relevant to the inquiry in question, and (iv) the scope of such information or records is not excessive, disproportionate or unnecessarily burdensome (*Pearson*, above, at paras 32-59).

[25] In this application, after reviewing the materials filed by the Commissioner, I satisfied myself as to the first two of those matters. After the Commissioner agreed during the hearing to

make certain changes to the draft Order. I was also satisfied with respect to the third and fourth of those matters.

[26] In its correspondence, Kobo noted that the Commissioner has been investigating this matter for over two years and had already entered into the CA. In those circumstances, it submitted that it was incumbent upon the Commissioner to provide a clear, full and compelling explanation for suddenly imposing upon Kobo an onerous request for information.

[27] In my view, paragraphs 40 – 48 of the Russell Affidavit filed in proceeding T-62-15 provided that explanation. In brief, those paragraphs described the basis for the Commissioner's reason to believe that grounds exist for the making of an order under Part VIII of the Act against Kobo. Among other things, the Russell Affidavit explained that information obtained after the CA was concluded suggests that Kobo, or in some instances Indigo negotiating on Kobo's behalf, may have influenced or attempted to influence the switch from the wholesale model to the agency model in Canada.

[28] Kobo also was troubled that the Russell Affidavit failed to address the fact that Kobo had offered to voluntarily provide any information that the Commissioner might still require, after having reviewed the substantial amount of information that Kobo previously provided to the Commissioner.

[29] There are perfectly valid reasons why the Commissioner may prefer to seek information under section 11, rather than on a voluntary basis, from targets of inquiries as well as from third

parties. These include the fact that compliance with an order issued under section 11 may be more effectively and efficiently enforced than compliance with a less formal request for information by the Commissioner. This Court will not interfere with this exercise of the Commissioner's discretion.

[30] Kobo further asserted that some of the information described in the Kobo Draft Order had previously been provided, and that Kobo "should not be put to the cost of having to re-review prior answers and engage in a line-by-line analysis in order to filter out duplicative responses." Kobo maintained that "the proper way to proceed is for the Commissioner to actually determine what it [sic] needs, then seek it, rather than shifting the burden and cost on a respondent like Kobo."

[31] I am very sympathetic to this position. In my view, the burden should be on the Commissioner to demonstrate persuasively why information that has previously been provided by a respondent should be provided again.

[32] In this application, the key focus of Kobo's concern in this regard appeared to be upon an extensive request for data that was described in specification 12 of Schedule II to the Kobo Draft Order. Among other things, that specification sought such data for the entire Relevant Period, as defined in the introduction to Schedules I and II (September 1, 2009 to the date of the Order). This request was made notwithstanding the fact that Kobo had voluntarily provided essentially the same data, for the period September 1, 2008 to mid-November 2012, pursuant to a request for information issued by the Competition Bureau on November 16, 2012.

[36] In my view, the more appropriate way for Kobo to deal with this latter issue is to invoke paragraph 10 of the Order, which contemplates that Kobo need not provide information that it does not have, because it never existed.

[37] As to the additional two years' worth of data, I am satisfied that this will be relevant to the Commissioner's assessment of whether competition is or is likely to be prevented or lessened substantially, as set forth in section 90.1 of the Act.

[38] Kobo raised a related objection that because E-book distribution "contracts disclose a gradual shift to agency in Canada, beginning in 2010 and ending in 2012 … that period of time should be the focus of the Draft Order." Once again, I am satisfied that information pre-dating (to September 2009) and post-dating (to the date of the Order) that period of time is relevant to the Commissioner's assessment of whether competition is or is likely to be prevented or lessened substantially. I am also satisfied that it would not be disproportionate or unduly burdensome for the Commissioner to request such information from Kobo.

[39] Stated differently, it is understandable that the Commissioner might require information pertaining to a reasonable period of time pre-dating and post-dating the period of time that is the focus of the Inquiry. Such information typically will be relevant to the Commissioner's assessment of the business context in which the conduct that is the subject of the Inquiry may have taken place and the extent to which, if at all, that conduct prevented or lessened competition, or is likely to prevent or lessen competition substantially, relative to the situation that would have existed "but for" that conduct (*Pearson*, above, at paras 77-79).

[33] Initially, counsel to the Commissioner explained that the information previously supplied was being requested again to ensure that "there is no break in the data." However, it was not immediately apparent why it would be necessary to request the information in question again for that purpose.

[34] When pressed on this issue during the hearing, and after being given an opportunity to confer with staff in the Competition Bureau, counsel explained that their concern was that they were "not going to be able to sew the original response together with the new response because there may be some new fields or the data set may not be compatible. In other words, we may not be able to put them together … to do an analysis or a complete run" (Transcript, at 55). I was satisfied with this explanation, particularly after the Commissioner agreed to amend Specification 12 of Schedule II of the draft Order to state that Kobo need not reproduce the data previously submitted, provided that the additional data is in the same format and based on the same methodology as the prior data, and is capable of being successfully merged with that prior data, to create a continuous, successive and uninterrupted data base.

[35] Kobo also objected to having to provide five additional fields of data, relative to the data it previously supplied, and to having to provide "two extra years of data, effectively doubling the size of the request." With respect to the five additional fields, Kobo explained that it does not keep its data in a format that has those fields.

[40] Kobo also asserted that it had filed an application pursuant to subsection 106(2) of the Act in respect of the CA, that the Commissioner then filed a reference under subsection 124.2(2) of the Act, and that, as a result of that reference, the Commissioner had not yet filed a response to that application. It maintained that the effect of the Order being sought under section 11 of the Act was "to unfairly circumvent the normal Tribunal process, and remove from the Tribunal its ability to exercise oversight over the discovery process." Indigo shared this concern, and added that it fully expected that, "as part of the Tribunal proceedings, the Commissioner will seek to compel Indigo to produce relevant records and other information in furtherance of its application for leave to intervene or as part of the ultimate proceedings."

[41] In support of its position, Indigo referred to Justice McKeown's decision in *Canada (Competition Act, Director of Investigation and Research) v Canadian Pacific Ltd.* 1997 CanLII 2729 (CT), 74 CPR (3d) 55 [***"CP"***]. That case concerned a motion by the Director of Investigation and Research (now the Commissioner) to strike out portions of a response filed by the respondents to that proceeding. Among other things, the respondents there alleged that the Director had "abused his section 11 powers by using them as a substitute for the Tribunal's discovery process, gaining advantages (such as productions from third parties) not available to CP." In essence, the Director took the position that the Tribunal has no supervisory jurisdiction over the Director's exercise of his statutory powers accorded to him under the Act. CP replied that subsection 8(1) of the *Competition Tribunal Act*, RSC, 1985, c 19 (2nd Supp), provides the Tribunal with the jurisdiction to govern its own process, and that implicit in this jurisdiction is the power to ensure that such process is not subverted through the Director's conduct of inquiries.

[42] Justice McKeown agreed with both the position of the Director and with CP. He therefore declined to strike the allegations of abuse of process on the basis that the Tribunal lacks jurisdiction. However, he proceeded to strike the above-quoted allegation from the respondents' response on the ground that it was "plain and obvious" and "beyond doubt" that it should be struck, as it contained no reasonable defence and was immaterial. In so doing, he observed: "Any advantage which the Director obtains through the use of section 11 examinations is an advantage accorded to him under the Act." He added: "If, however, at a later date, evidence is obtained by the respondents which would directly link the Director's conduct in his inquiry to a subversion of the process of the Tribunal, it would be open to the respondents to bring a motion before the Tribunal to deal with such an allegation." (*CP*, above, at para 13).

[43] In the proceedings that Kobo has initiated before the Tribunal under subsection 106(2) of the Act, it will similarly be open to Kobo or Indigo to bring such a motion, should they wish to do so. However, for the purposes of the present application before me under section 11 of the Act, I do not agree with the suggestions of Kobo and Indigo that the Commissioner is acting inappropriately by seeking the information described in Schedules I and II of the Orders, pursuant to section 11 rather than as part of the Tribunal's discovery process. Stated differently, Kobo and Indigo have not displaced the presumption that actions taken by the Commissioner pursuant to the Act are *bona fide* and in the public interest (*Pearson*, above, at para 43).

[44] The information described in Schedules I and II to the Orders is relevant to the Inquiry and relates to matters which are much broader in scope than those being raised in Kobo's application before the Tribunal, pursuant to subsection 106(2) of the Act. Among other things,

the focus of that application is upon the CA between the Commissioner and the Settling Publishers. By contrast, the information being sought from Kobo and Indigo pursuant to the present application under section 11 of the Act relates to an inquiry that continues to evolve, and now includes Kobo and an unnamed third party as targets.

[45] I recognize that, in its application before the Tribunal, Kobo is seeking broad rights to "test the basis of" the CA – a position that has been rejected by the Tribunal and is now being advanced before the Federal Court of Appeal. However, Kobo clarified in its oral submissions before the Tribunal that it does not wish to make submissions with respect to whether the impugned conduct of the Settling Publishers "prevents or lessens, or is likely to prevent or lessen, competition substantially in a market," as is also required by subsection 90.1(1). (*Kobo*, above, at paras 27-28).

[46] Kobo and Indigo also suggested that the Commissioner is acting inappropriately because he is only seeking information pursuant to section 11 from the two parties seeking to have the CA set aside or varied, and is not seeking to obtain information from other participants in the Canadian book industry, including the Settling Publishers.

[47] Leaving aside the Settling Publishers for a moment, for the reasons discussed at paragraphs 27 to 29 above, and based on the information set forth in section III of the Russell Affidavit filed in proceeding T-61-15, I am satisfied that it is entirely legitimate for the Commissioner to be seeking, pursuant to section 11, the information described in Schedules I and II to the Orders. If the Commissioner later decides to seek information pursuant to section 11

from additional parties in the Canadian book industry, the Court will assess the Commissioner's applications at that time. For the purposes of the present application, there does not appear to be anything untoward associated with the Commissioner seeking information under section 11 only from Kobo and Indigo. Contrary to the position taken by Kobo and Indigo, I am satisfied that they are not being targeted as a result of their involvement in proceedings before the Tribunal.

[48] With respect to the Settling Publishers, the Commissioner has entered into the CA and has preserved his right to obtain additional information from those persons. In this regard, paragraph 68 of the Russell Affidavit filed in proceeding T-62-15 states that "the Commissioner has obtained records and information from the Settling Publishers pursuant to a request for information [the "SP RFI"] provided to each of the Settling Publishers on 7 February 2014." A similar statement is made at paragraph 59 of the Russell Affidavit filed in proceeding T-61-15. Exhibits 16 and 14 to those affidavits, respectively, include a copy of the cover letter to the SP RFI that was sent to one of the Settling Publishers. That document states that the Commissioner may seek additional information on a voluntary basis in certain circumstances, and that the Commissioner may seek an order under section 11 of the Act only in the following circumstances:

> ... if the Commissioner is not satisfied with the response to the RFI or the additional requests for records or information as set out above, and his concerns are not addressed to his satisfaction within a reasonable time period after having provided written notice to the Settling Publisher setting out his concern(s) regarding the response referred to above, and having provided to the Settling Publisher a reasonable opportunity to address those concerns; or if (for any reason) the agreement between the Commissioner and the Settling Publisher, which the Competition Tribunal registered on 7 February 2014 pursuant to section 105 of the Act, is rescinded.

[49] When pressed during the hearing on the scope of the limitations in the cover letter to the SP RFI, counsel to the Commissioner categorically rejected the suggestion that the terms of the letter might preclude the Commissioner from seeking information described in Schedules I or II of the Order from the Settling Publishers. In this regard, counsel stated that the Commissioner reads the terms of the letter as reflecting his view that the Settling Publishers have a broad based commitment to cooperate with the Commissioner's ongoing inquiry. He added that those terms do not preclude the Commissioner from obtaining any of the information that Kobo and Indigo state is more appropriately sought from the Settling Publishers (Transcript, at 33). In my view, that is a reasonable interpretation of the terms of that letter.

[50] For greater certainty, there is nothing inappropriate about the Commissioner having taken the position described immediately above with the Settling Publishers. As stated earlier, it is within the Commissioner's discretion to decide whether to seek information from targets of inquiries or third parties on a voluntary basis or pursuant to section 11 of the Act. There may be very legitimate reasons for the Commissioner to exercise that discretion in favour of electing to seek certain types of information on a voluntary basis, including where this is done as part of a negotiated settlement. I do not read terms of the letter described above as precluding the Commissioner from seeking from the Settling Publishers, pursuant to section 11 of the Act, the type of information that he has decided to seek from Kobo and Indigo, should he decide that it is necessary to do so, i.e., because he is not able to obtain that information on a voluntary basis.

[51] More broadly, while it may be the case that information that is relevant to an inquiry may be more conveniently, expeditiously or efficiently provided by a person other than a respondent

to an application under section 11 of the Act, it is within the Commissioner's discretion to seek the information from that respondent, rather than from such other person.

[52] In any event, counsel to the Commissioner provided reasonable explanations for seeking information from Kobo and Indigo that they believe should have been sought from the Settling Publishers. In brief, he stated that the case team had assessed the extent to which the Settling Publishers might have some of the information being sought from Kobo and Indigo, and concluded that such information was minimal, and largely confined to the agency agreements and communications between Kobo or Indigo and the Settling Publishers. With respect to the agency agreements, counsel added that the Commissioner wants to ensure that he has a full set of them (Transcript, at 36-37). With respect to communications with the Settling Publishers, he stated:" In other words, if there is follow-on communications internal to Kobo or Indigo or with some third party commenting upon or discussing the strategy and so forth, we are not going to see that" if they only request a copy of the communications from the Settling Publishers (Transcript, at 34).

[53] Finally, some of the specifications in Schedules I and II of the draft Orders requested information in respect of the U.S. operations of Kobo and Indigo. Neither Kobo nor Indigo raised a question with respect to this issue. Nevertheless, it was not immediately apparent why such information might be relevant to the Inquiry, given that focus of the Inquiry, as described at paragraphs 8 and 40 – 47 of the Russell Affidavit filed in proceeding T-62-15, is upon the impact on competition in Canada that has resulted from, or is likely to result from, the shift from

wholesale distribution agreements to agency distribution agreements for the sale of E-books in this country.

[54] When pressed on this point during the hearing of this application, counsel to the Commissioner explained that information pertaining to the market(s) for the sale of E-books in the U.S. is relevant to the Inquiry because it can assist the Commissioner to understand how competition in the sale of E-books in Canada may have evolved, in the absence of the shift from wholesale distribution agreements to agency distribution agreements. In this regard, counsel noted that, as a result of the final judgments issued in the U.S., there was a movement away from agency agreements and from some of the terms that were contained in those agreements. That movement resulted in some changes in the market, such that the Commissioner can assess "what happened through that whole period, from wholesale to agency, and then the removal of agency … [in terms of] price and other competitive dynamics in the market." (Transcript, at 26).

[55] I agree with the Commissioner that such information is relevant, and may indeed be very helpful, to the Inquiry.

[56] Nevertheless, the Court will remain vigilant in the future to ensure that information sought from respondents in respect of their U.S. operations is not disproportionate, having regard to the scope of those operations, relative to the scope of the respondents' Canadian operations. Where, for example, it may not be necessary to seek information in respect of a respondent's operations throughout the U.S., the Court's proportionality concern may be adequately addressed by seeking such information only in respect of certain representative States in the U.S.

IV. Conclusion

[57] Given all of the foregoing, and the changes that the Commissioner made prior to filing these applications to address various specific concerns that were raised either by Kobo or Indigo, I was satisfied that the information set forth in the Orders that I have issued, including the schedules thereto, is relevant to the Inquiry and not disproportionate, excessive or unnecessarily burdensome.

"Paul S. Crampton"
Chief Justice

Ottawa, Ontario
February 27, 2015

FEDERAL COURT

SOLICITORS OF RECORD

DOCKETS:	T-61-15 AND T-62-15
STYLE OF CAUSE:	THE COMMISSIONER OF COMPETITION v INDIGO BOOKS & MUSIC INC. and THE COMMISSIONER OF COMPETITION v RAKUTEN KOBO INC.
PLACE OF HEARING:	OTTAWA
DATE OF HEARING:	JANUARY 22, 2015
REASONS FOR ORDER:	CRAMPTON C.J.
DATED:	FEBRUARY 27, 2015

APPEARANCES:

John Syme Esther Rossman	FOR THE APPLICANT
No one appearing	FOR THE RESPONDENTS

SOLICITORS OF RECORD:

DEPARTMENT OF JUSTICE CANADA Gatineau, Québec	FOR THE APPLICANT
Adam Fanaki, Davies Ward Phillips & Vineberg LLP, Toronto, Ontario Nikiforos Iatrou WeirFoulds LLP Toronto, Ontario	FOR THE RESPONDENTS

This is Exhibit D to the Affidavit of
Mallory Kelly
Affirmed 28 August 2015

Message

From: Michael Serbinis
Sent: 1/22/2010 10:12:27 PM
To: Heather Reisman [HReisman@indigo.ca]
Subject: Re: Highlights: Meetings in New York

Will call u when I land.

Also will have some time to think about it this weekend and talk to Joel.

If the agency model happens - we'll have 30 pts of gross margin vs 3 today.

And this compares to 7/5/3 points through our Indigo deal.

We can spend a lot more on direct acquisition (tv etc) and paying device partners to bring us customers.

Its a huge shift in the model.

In the suggested Indigo model it may be the Kobo brand, with newly added Kobo customer service costs and the customer remains Indigos and we get only 7 percent vs 30.

Michael Serbinis
Chief Executive Officer
Kobo Inc.

----- Original Message -----
From: Heather Reisman <HReisman@indigo.ca>
To: Michael Serbinis
Sent: Fri Jan 22 13:54:32 2010
Subject: RE: Highlights: Meetings in New York

Thanks for update... would love to talk more. Will you have time to call me when you get back.

Also... would love to hear thoughts on work Joel has done. He has really looking at this as much from KOBO as Indigo. I do think we need one unified brand. I think we could push Borders there. Thx too for quick connect on the UK guys. I think they are awesome and could be very interesting for us.

[redacted] But these things are always long shots..... our job to keep pushing to be a real player here.

H.

-----Original Message-----
From: Michael Serbinis [mailto:mserbinis@kobobooks.com]
Sent: Friday, January 22, 2010 4:49 PM
To: Heather Reisman
Subject: Highlights: Meetings in New York

Today was an intense day in New York. The entire industry model is changing and it was very important to be here.

1. Agency Model
-Pubs want it; they set the price, we get a commission of 30%. Prices will vary from 16.99 / 14.99 / 12.99
-this will make us far more profitable; but take away price control from us / everyone
-They are not there yet, but are working down to the wire over the weekend
-They will 'use' Apple as the catalyst to change their model
-Apple was here working to make it happen
-Amazon was here working to fight it as the change in terms will apply to everyone selling ebooks
-Harper is out in front, Hachette is bullish, Simon is working towards it, Random House isn't there yet. RH is the most Amazon friendly
-If enough Publishers get there, we'll see an announcement. If not, we

won't.
-If there is an an announcement, we'll all have a period of time to prepare to launch with the new model - including amazon

2. Enhanced Content
-Many are working to deliver richer content, but not all believe it justifies a higher price

3. Windowing
-Nobody wants to do it but it is a strategic imperative for now.

[redacted]
-we are definitely getting in their way of acquiring distribution
[redacted]

5. Our Apps
-Universal praise of our mobile apps, website, eink app and tablet app
-also very positive feedback on the kobo ereader

6.Bundling
-Generally no interest in bundling an ebook for free / small fee. No one wants to devalue the ebook as it is the future. Also no interest in Ads or Lending.

Michael Serbinis
Chief Executive Officer
Kobo Inc.

This is Exhibit E to the Affidavit of
Mallory Kelly
Affirmed 28 August 2015

kobo

Understanding the New Digital Reader

Digital Symposium
February 15 & 17, 2010

MICHAEL TAMBLYN
EVP CONTENT, SALES & MERCHANDISING, KOBO, INC.

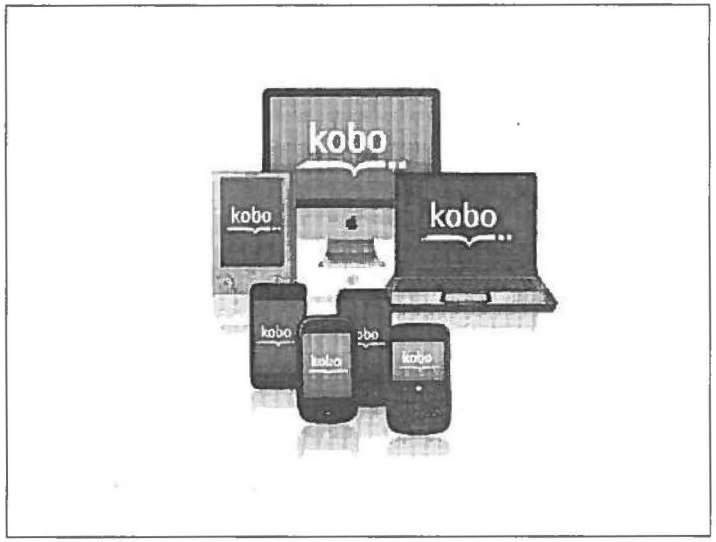
mtamblyn@kobobooks.com
@mtamblyn
t. (416) 977-8737 x3346
m. (416) 409-5925

Michael Tamblyn

Text

Content, Sales & Merchandising

I head up Content, Publisher Relations, Sales & Merchandising



Text

45 minutes

reading at lunch

reading in bed

agency

iPad

fear and panic

inside the brains
of publishers

price

value

mental math of
$9.99

why ebook should be cheaper

why ebook could be more expensive

new digital reader

what they want

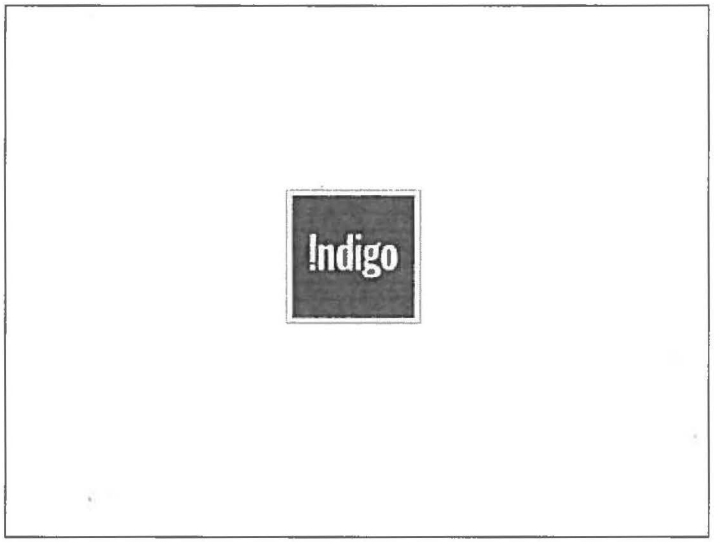
...
And if we have time, we'll talk about (#)

kobo

We are based in Toronto.

September 2008

To talk about us, we need to go back about a year.



Indigo most of you know – $1B book retailer, also had the advantage of doing very well through the most recent downturn
Indigo had been looking at the ebook space
- how would ebooks impact bricks and mortar

Estimate:
Lose 5-10% of print sales
to ebooks in 5 years

And that's a fairly significant hit if you are a retailer. 10% would be like the worst recession in living memory, except that it would never get better. It would only get worse.

Choice:

So they had a choice

a) Let someone else take 5-10% of Indigo's sales.

b) Enter the ebook market and take it ourselves.

Strategy:
Build Your Own
Competition
(Kobo vs. Indigo)

Key principles:

There are great devices out there.
There will be more.
They will get better.

Let the reader choose the right device for them.

Anywhere in the world.

"Your whole reading life,
always with you."

February 26, 2009
pilot launch

shortcovers

over 1 million downloads

2M+ books in catalogue

200 Countries

(~120 countries/week)

We sell ebooks via the web...

...and on mobile devices

Browsing and Searching

A full bookstore in your pocket.

Keep as much of the experience inside the app as possible. Search, browse.

Buy a book...

kobo

12

...it's added to your Library

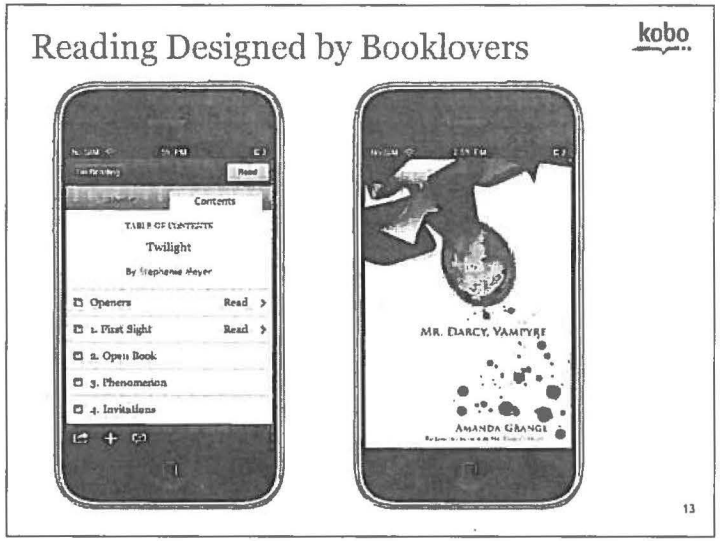
kobo

12

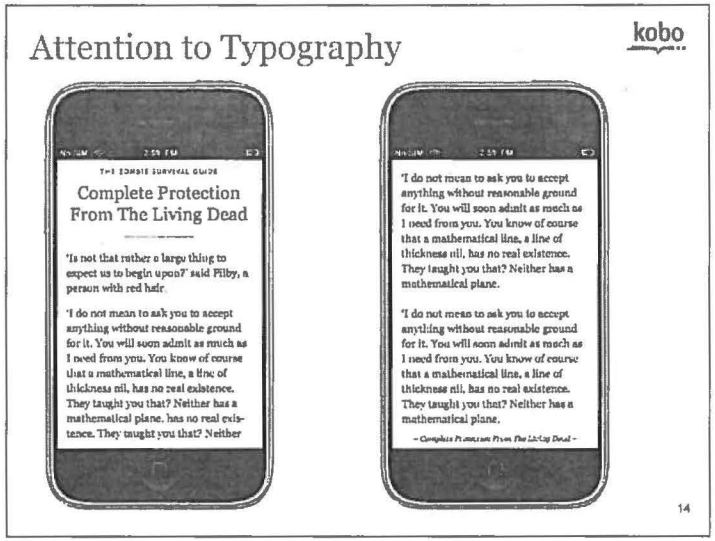
on the device and in "The Cloud"

Move to the web or a different device...

...your books follow you.



We care that the books look good.



and that the reading experience is immersive and uncluttered.

With the ability to customize

14

but you can always customize

And share recommendations

14

and start a conversation about the books you love, or find the next in the series or spread the word about a book you like.

Also available on Blackberry, ...

... Android, and Palm Pre

Desktops, Netbooks, Tablets & iPad

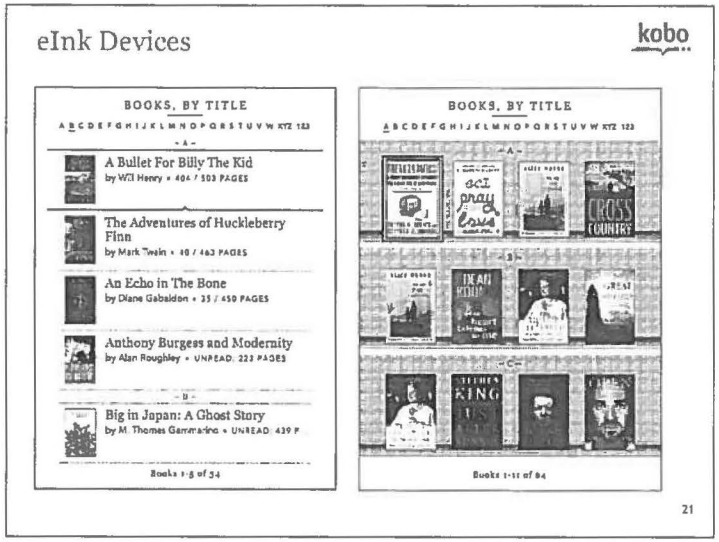
kobo

...for an even better store experience

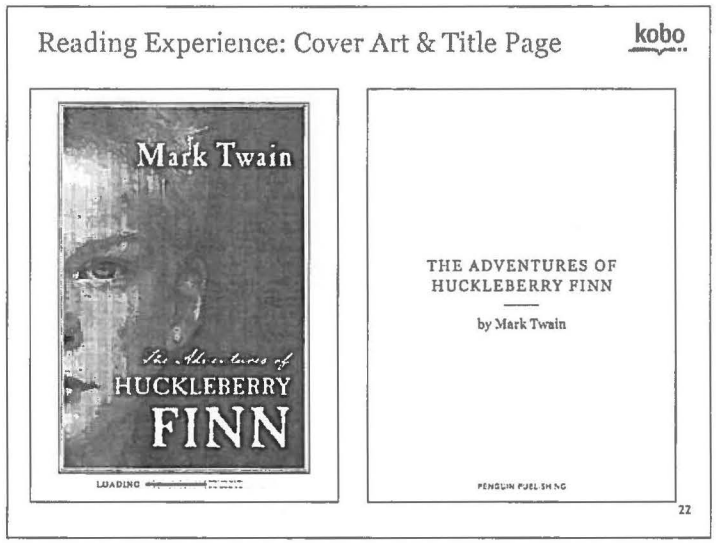
kobo

18

and we're very excited about what tablets can do in terms of providing the same page size as printed books.

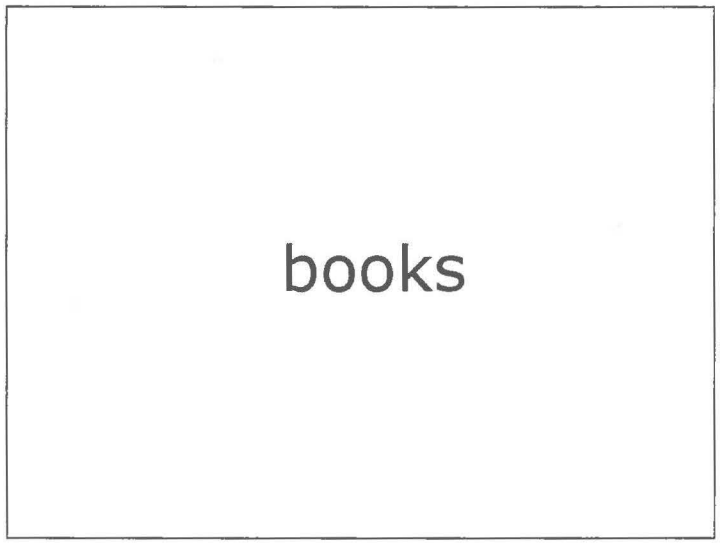


That said, we haven't forgotten about eink devices, and I'll talk a bit more about those later on.



Adobe Digital Editions
(Sony Reader, Nook, Cool-er, and more)

DRM
tied to users account



The focus of our store is certainly books.

But we are building out our selection of newspapers, magazines, periodicals, research reports, textbooks, and more.

December 15, 2009

new partners

kobo

REDgroup retail	Largest bookseller in Australia, New Zealand and Singapore
Indigo	Largest bookseller in Canada
BORDERS.	Second-largest bookseller in US
	15 telecom carriers, 10,000 retail locations in UK, EU, Asia

REDgroup launch: March/April 2010

Content, Sales & Merchandising

As I said at the beginning, my job is to head up content, sales & merchandising for Kobo. That means I spend all of my time acquiring content, opening new markets and making sure that people find what they're looking for when they visit us, or or even better that we surprise them in new and exciting ways. In other words, I spend all of my time thinking about...(#)

What publishers want.

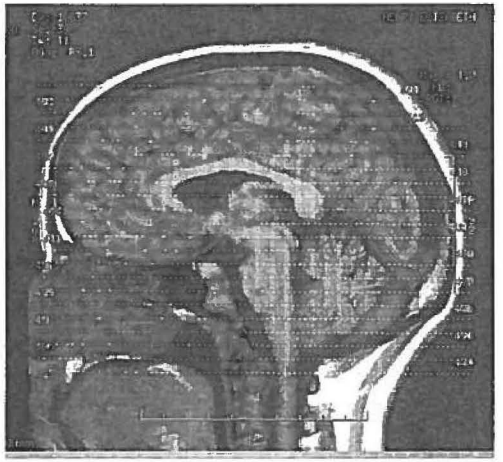
What publishers want

What readers want.

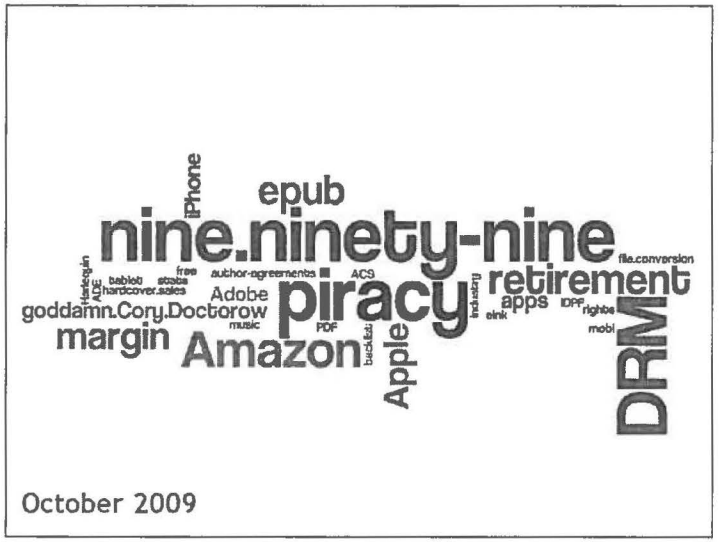
And what readers want.

What publishers want.

Now it should be no surprise to anyone that there is no easy answer to what publishers want. But whenever possible, we try to get a read on it. Every once in a while, we capture a publisher in the wild, bring them back to the lab (#)



hook them up to a scanner and look to see what thoughts they have regarding ebooks. (OK, really we just sit down and talk, but the end result is the same.) Now interestingly, when I did a talk like this back about 5 months ago, we saw something that looked like this.



... ((what we see))
There's a lot of stuff rolling around in there right now. There's a certain kind of brain freeze that can go on, thinking about that stuff over and over again. So that was in October.

Now, 5 months later, the picture has radically changed. The entire conversation around ebooks has condensed into a conversation about price, agency vs. $9.99 and Amazon vs. Apple. (#) Although retirement seems to be a constant. (#) Lunch shows up if we capture the subject before noon.
Price really is the only discussion going on related to ebooks right now. Interestingly, the one thing that we don't tend to hear when we're talking to publishers is (#)

What do readers want?

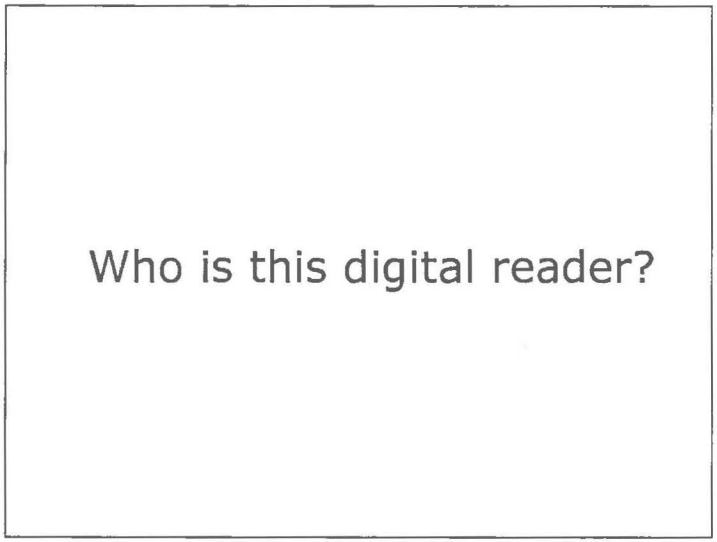
What are readers doing now?

And yet if the conversation has become dominated by pricing and agency, what we're really talking about is:

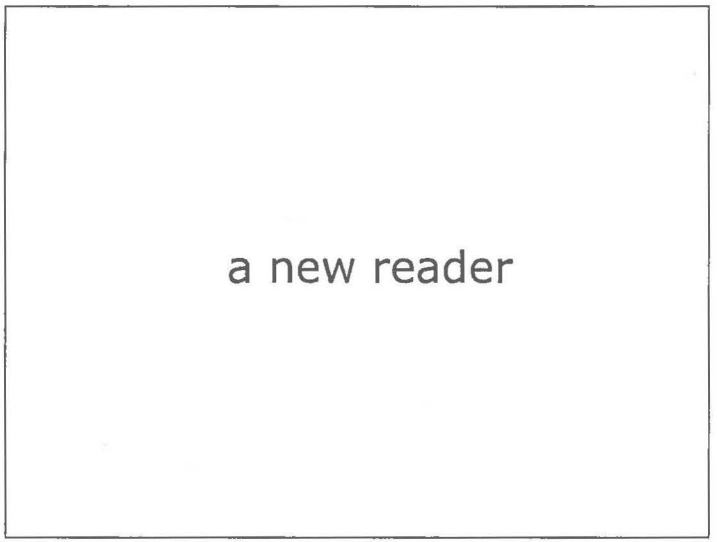
What do readers think an ebook is worth?

...

And to answer that, we first need to answer: (#)



And that's what I want to spend some time on today. One of the reasons that publishers are so freaked out right now is that there is (#)



a new reader out there. And no one is sure how much of the vast collection of hard-won wisdom built up over decades of publishing books and selling books still applies. And there has been no end of theorizing and speculating and panic. But really, we should be past that now. Because we have (#)

data

At Kobo, unlike some other retailers, we are promiscuous sharers of data. In uncertain times, more data is better. It means better decisions. And if publishers are making better decisions, it usually means things work out better for us as well.

Who is this digital reader?

So let's talk about this new digital reader, based on Kobo's data -- the surveys we've run, the data we've collected, the sales we've made.

KOBO0010639

55% female/45% male

KOBO0010640

35-40 years old
(vs. 50 in stores)

Is a frequent book buyer...

1.7 - 1.9 / month
(and climbing)

And just to put that into context, the average North American bricks-and-mortar bookstore patron buys ~1 month.

The average loyalty card holder (Paid $15 for a frequent-buyer card) buys ~2 month.

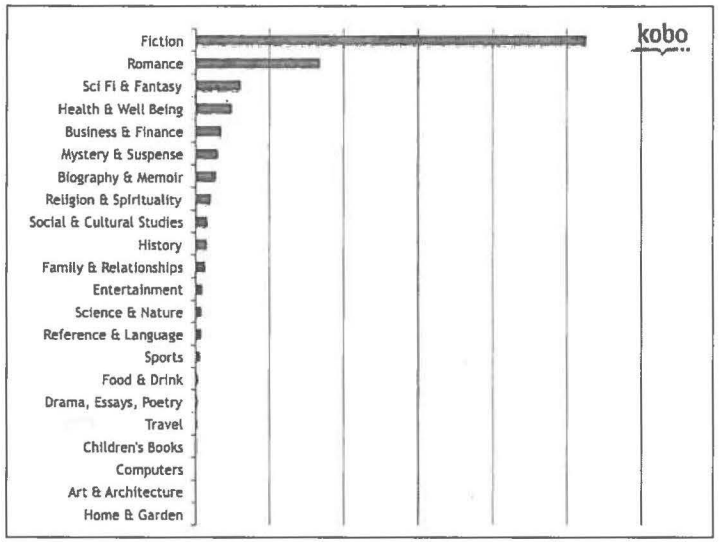
So our average buyer is like the most frequent buyer in stores. We love that.
And we do everything we can to increase it. And that's before we start firing up loyalty programs, personalization, recommendations based on purchase history.

KOBO0010643

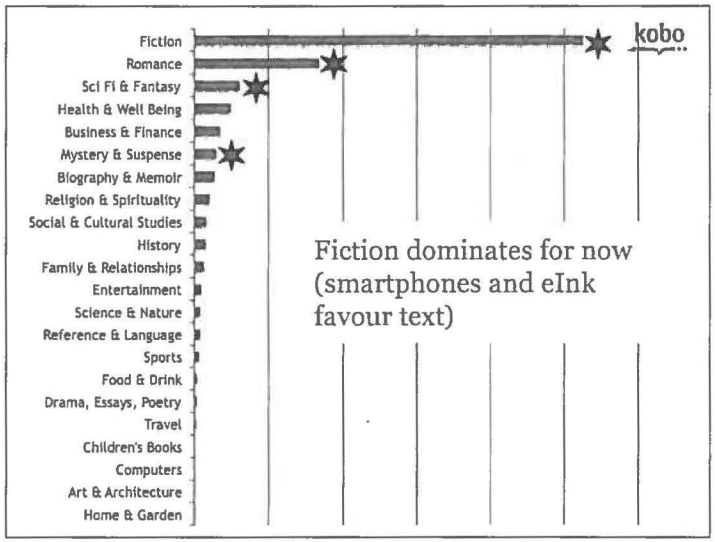
What do they read?

KOBO0010644

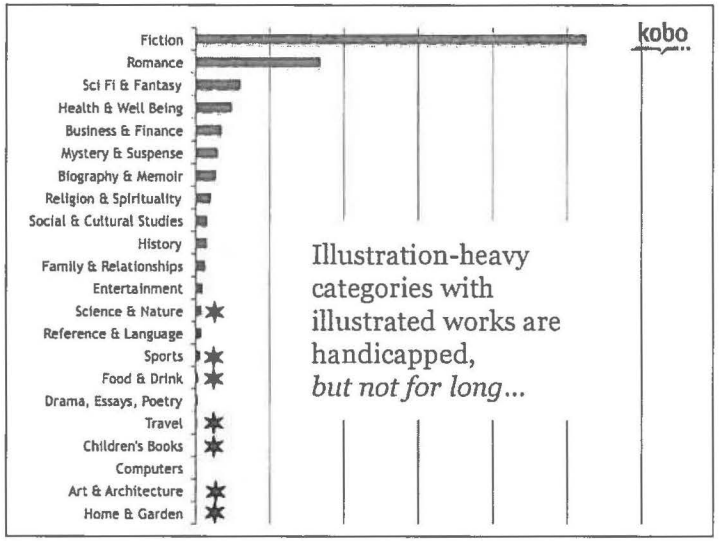
Escape first,
information second.



This is units purchased from March 2009 - January 2010. And what we can clearly see is that..

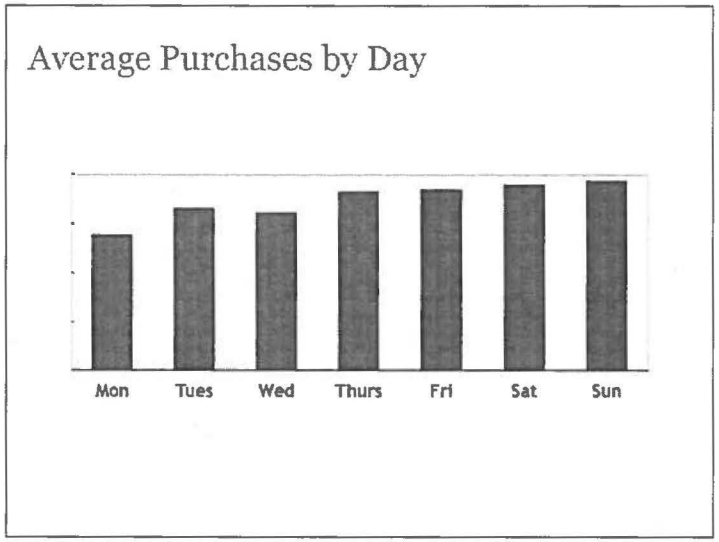


But there are some interesting stories within this:
eBooks, right now, are shockingly fiction-friendly:
Most of our readers are on smartphones and eink devices. A format that favours text-only content. ((Smartphones->small screens / eink-> black and white))
We were surprised that mystery ranked lower until we realized that Mystery readers tend to skew somewhat older than other fiction genres, which probably handicaps their sales a bit.

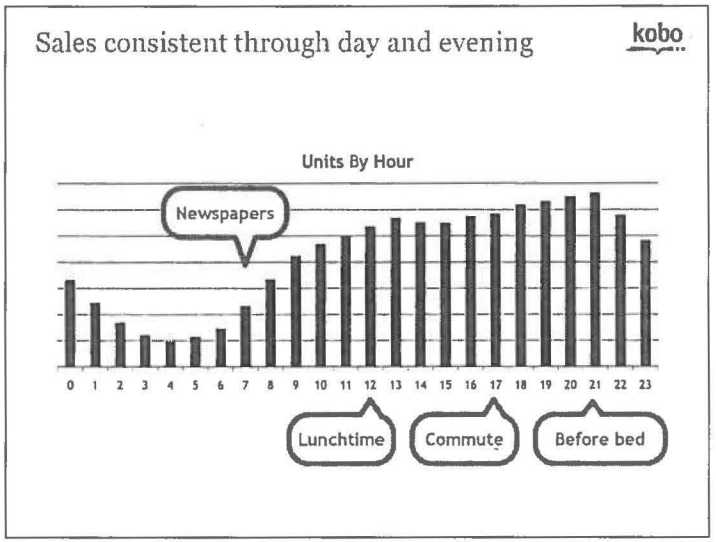


Those illustrated categories have incredible room for growth. As we start to see devices that can handle full colour, we'll These also tend to be the categories where we have the fewest titles to choose from. We are starting to sell PDFs for heavily illustrated works because we want to grow in this market.

When do they read?



So we can see that Monday is the doldrums of reading.
Tuesday, on the other hand is much better because it's New Release day. Most publishers drop their new releases on Tuesday and we promote them heavily, so we see a spike then.
And then from Wednesday through to the weekend, we see a steady climb, with Sunday being the busiest day of the week, 40% higher on average than Monday.

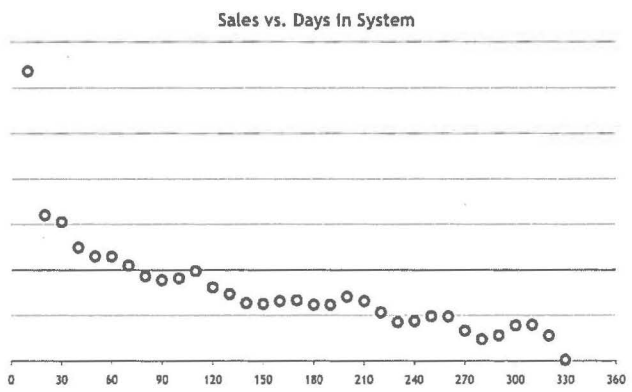


(#) Lunch and then the drop through the afternoon
(#) and then a steady rise once the commute home starts, Commute,
(#) peaking right before bed
It's also fascinating to see that reading books is very definitely an afternoon activity.
(#) Morning is all about current events, which is why we're doing much more with newspapers.

This is a new release market.

New releases sell well...

kobo

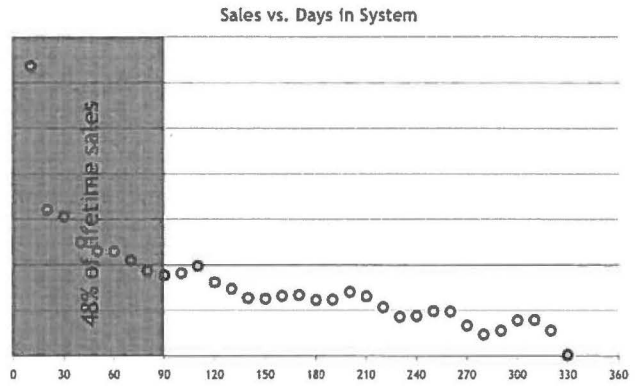


19

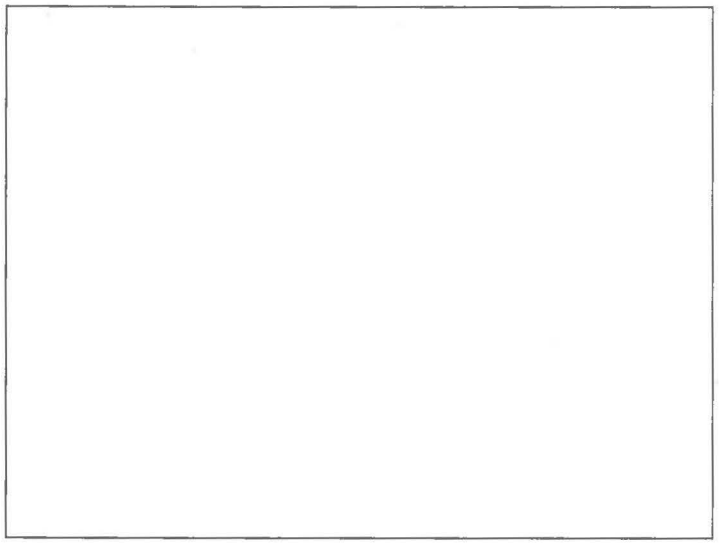
unless the ebook release is delayed.

Sales impact of windowing.

kobo

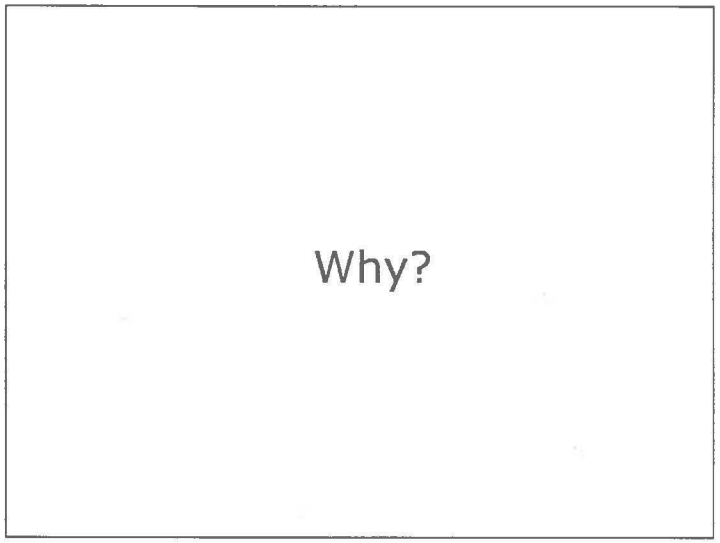


20



So we've talked about who they are
We've talked about what they're reading
We've talked about when they're reading

How much?



And the two are obviously inextricably linked

To talk about How Much is really to talk about Price and Value of eBooks.

kobo

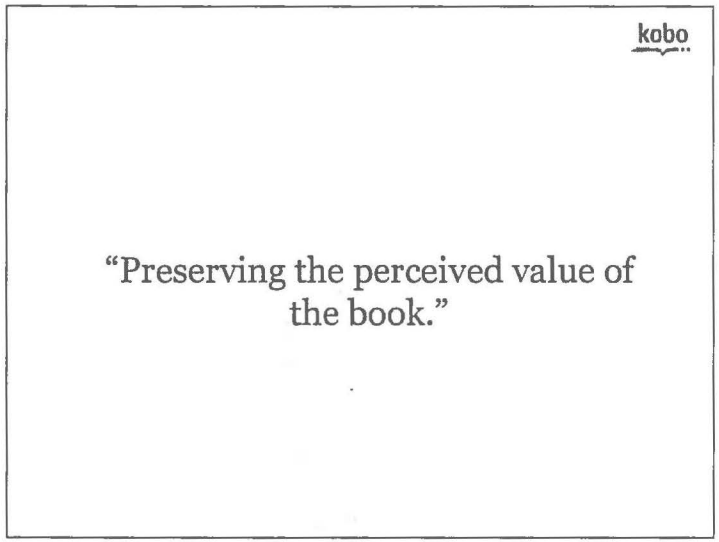
A Brief Geography of Price

So let's take a tour through a brief geography of eBook pricing.

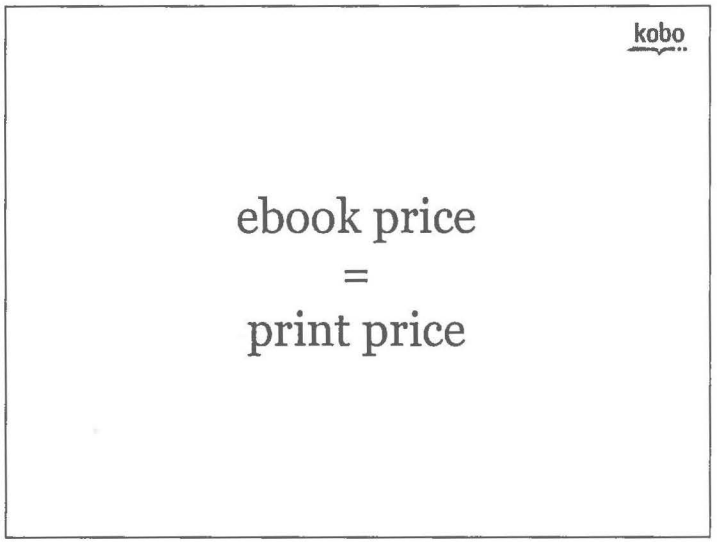
kobo

"Defend the price of hardcovers"

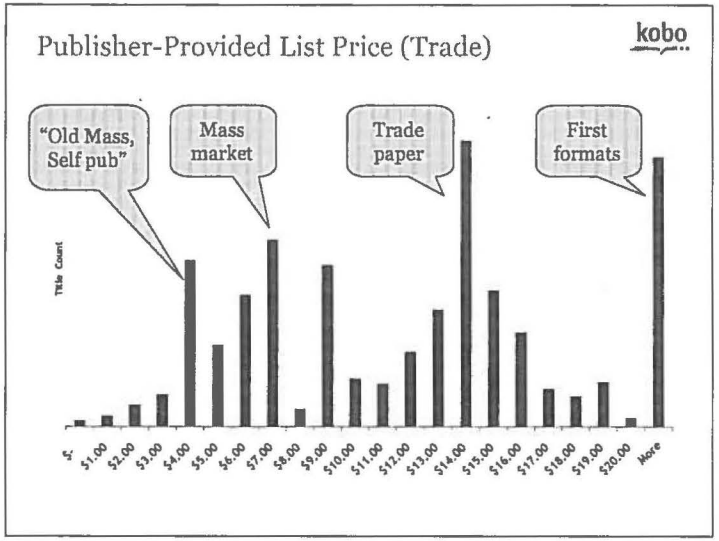
We hear a lot about the idea of defending the price of hardcovers and (#)



Both of which mean, quite reasonably...



So as a result, so far, the price that publishers have provided ebooks to retailers has been equal to the price of the print books. So when we get books from publishers, it looks something like this:

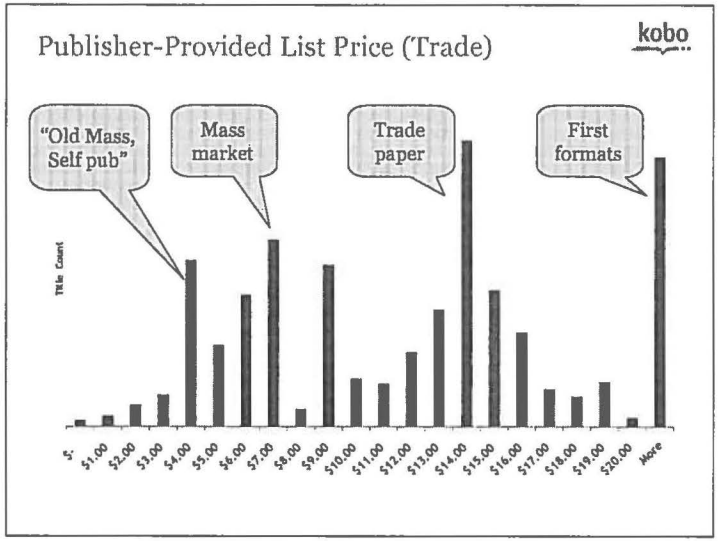


So these are the raw materials we get from publishers.
(#) First formats (hardcovers) all north of $20
(#) Trade paperbacks clustered around $14
(#) Mass markets around $7
(#) And old mass market, self-published works around $4
But here's the problem...

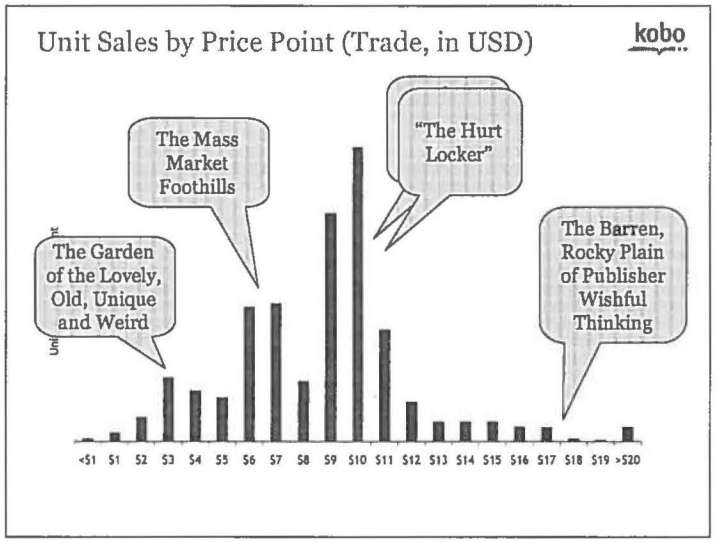
kobo

People will not buy $20 ebooks.

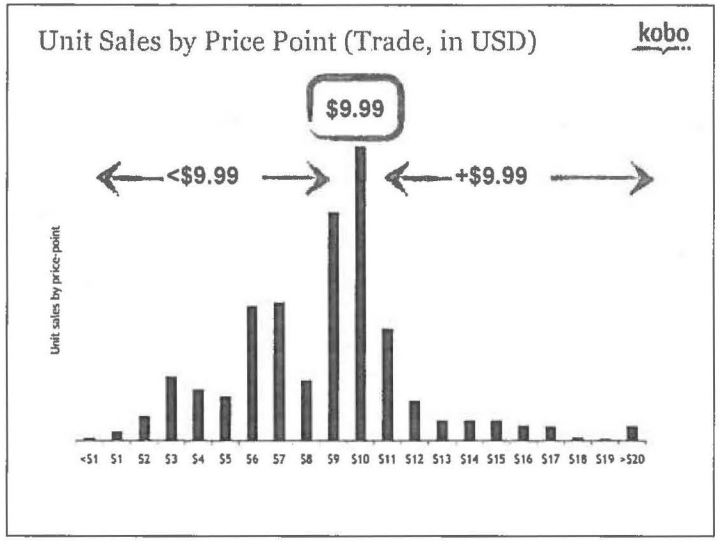
People will not buy $20 ebooks.
And this is not for lack of trying. We have all kinds of books at every conceivable price point. But at the end of the day, we use the margin granted to us by publishers to turn (# - this



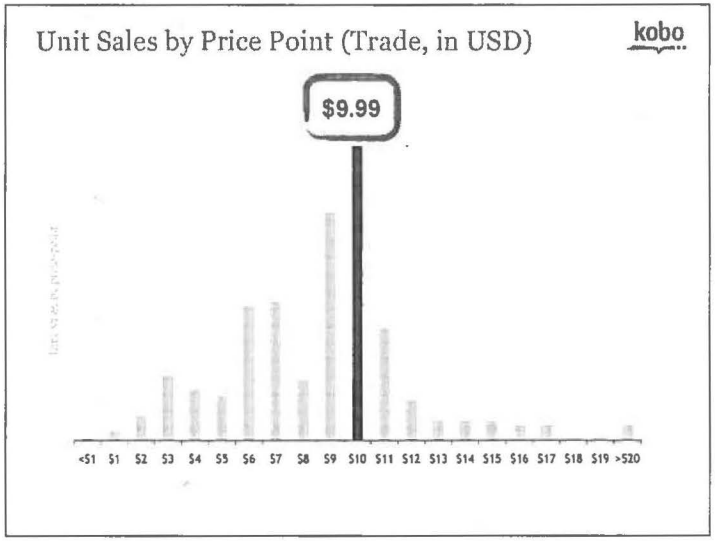
this...



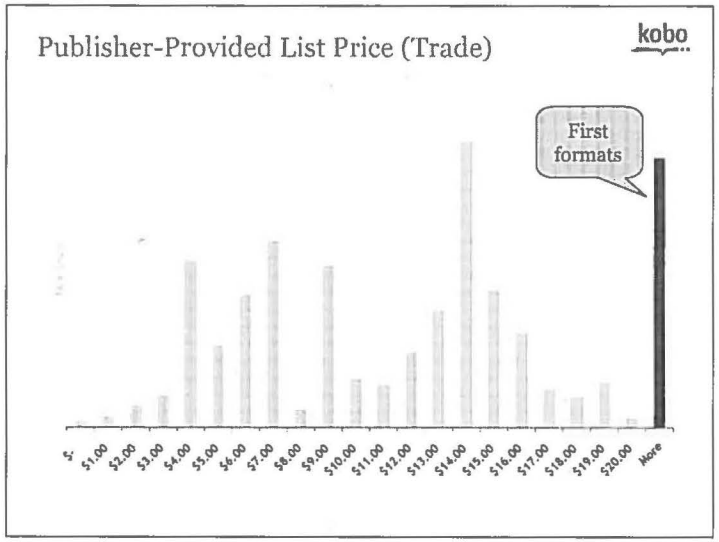
Into this. Here is unit sales by price-point in US dollars.
We see the (#) Mass Market Foothills,
having first passed through
(#) The Garden of the lovely, old, unique and weird – backlist mass market series, romance titles with a second life, stand-alone short stories, and beginner erotica, self-published accounts of alien abduction, and enthusiastic combinations of the two.
from whence we ascend to $10 (#)
The Pinnacle of Negative Margin. Although I hear rumors that in Seattle, the $10 pricepoint is known as (#) "The Hurt Locker".
And then you'll notice that we do not descend, we plummet to (#)
The Barren, Rocky Plain of Publisher Wishful Thinking
where many a $25 undiscounted ebook lies undisturbed and perfectly preserved as a warning to ebook retailers who pass by.



Now there are a couple of interesting things here.
Certainly the (#) $9.99 pricepoint is the single pricepoint at which we sell the most units.
But we sell far more at (#) less than $9.99. The current ebook consumer is definitely a price-conscious one.
And you'll notice that if you add them all up, it's not that we don't sell *any* books north of 10. We also sell almost as many books at greater than $9.99 than we do at $9.99, we just don't sell very many at any given price point.



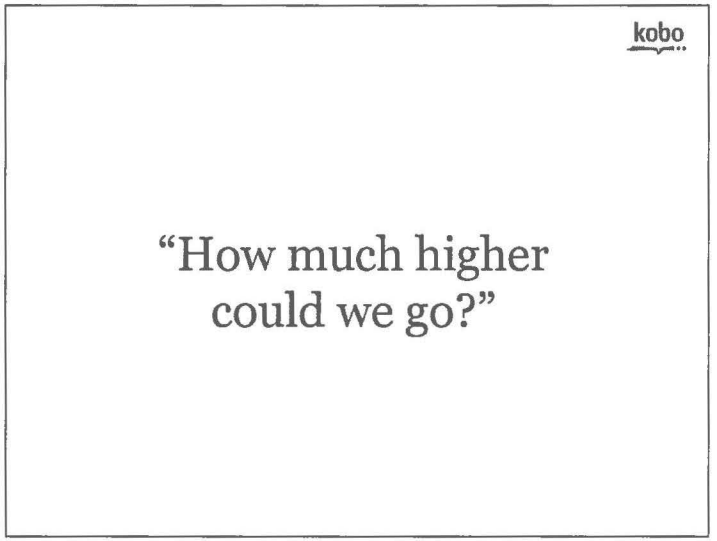
The source of all the publisher consternation is that so many of these $9.99 ebooks



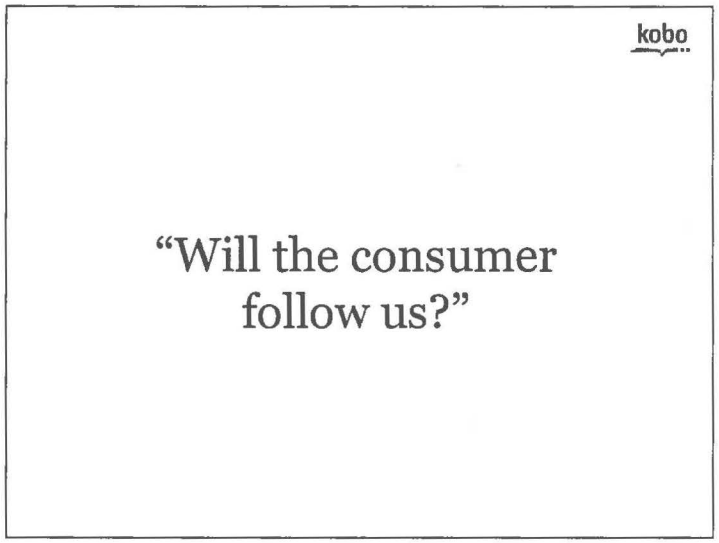
used to be those $20 first formats and hardcovers.

It turns out that the average price of a book sold at Kobo, weighted for volume, is $8.76.

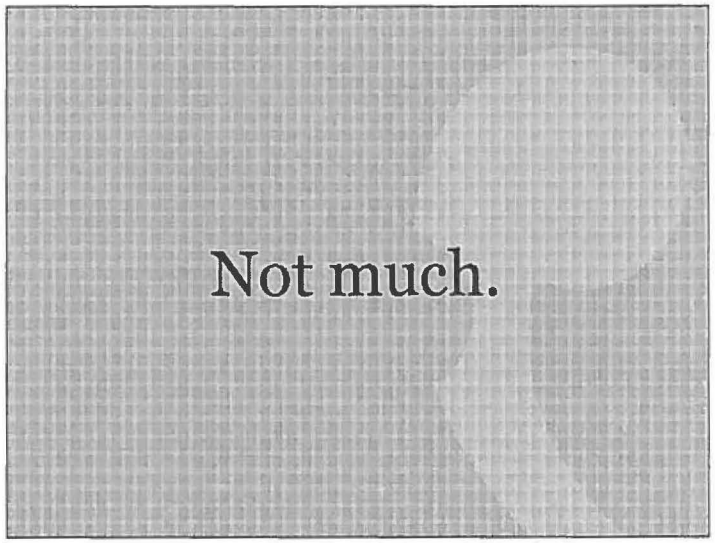
That's the trade number, excluding textbooks & STM.
And this is not to say that we don't think there is some room to maneuver here. There definitely is.
$10 is an artifact of pricing driven by retail competition. The only problem is that we don't see a lot of consumers



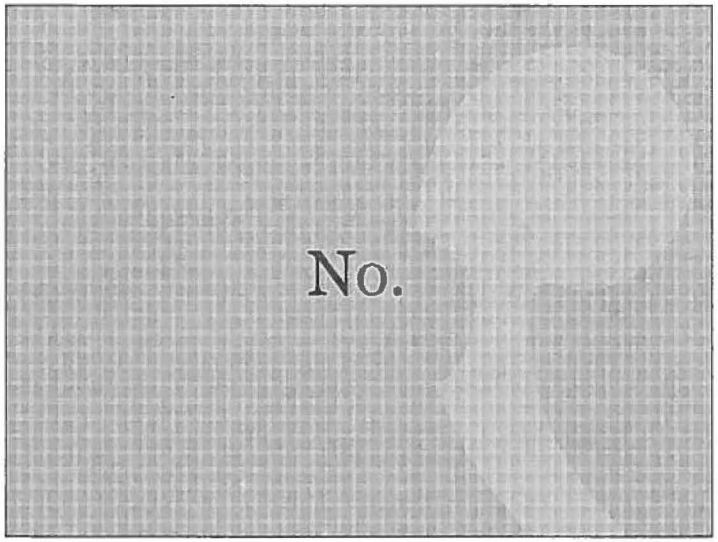
So the real questions of the moment are: "How much higher could we go?"



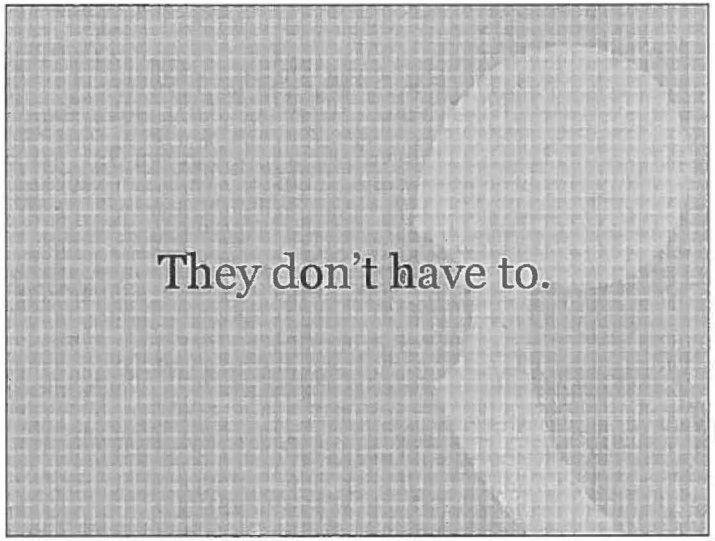
and "Will the consumer follow us?". The answers to those questions right now are (#)



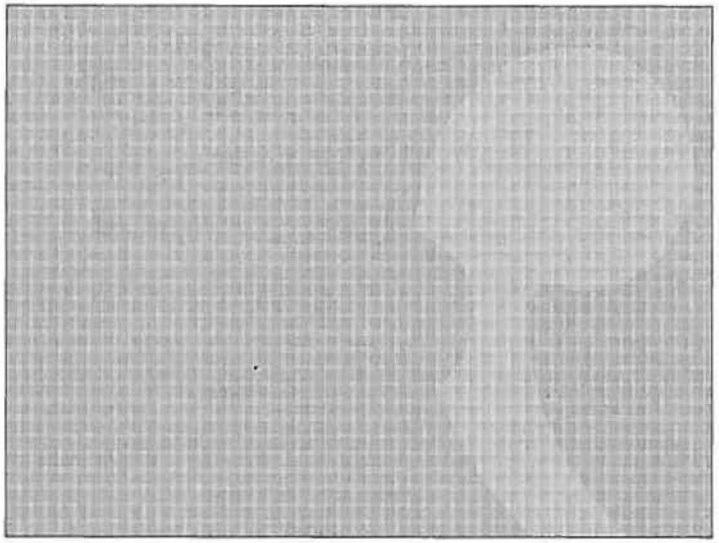
Not much and (# - No.)



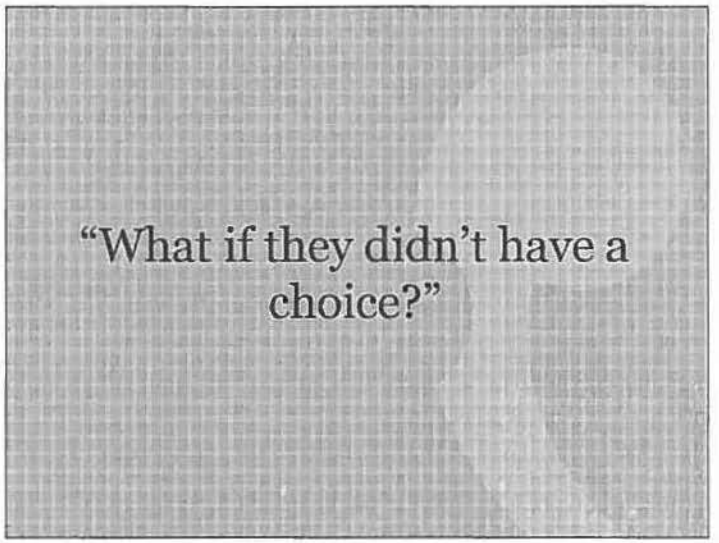
No.
For the very simple reason that (#)



$9.99 is a retailer-defined pricepoint, set to fight for market share in what is without a doubt the most cut-throat retail environment I have ever seen. Without some kind of major outside intervention, $9.99 is here to stay. So they don't have to.

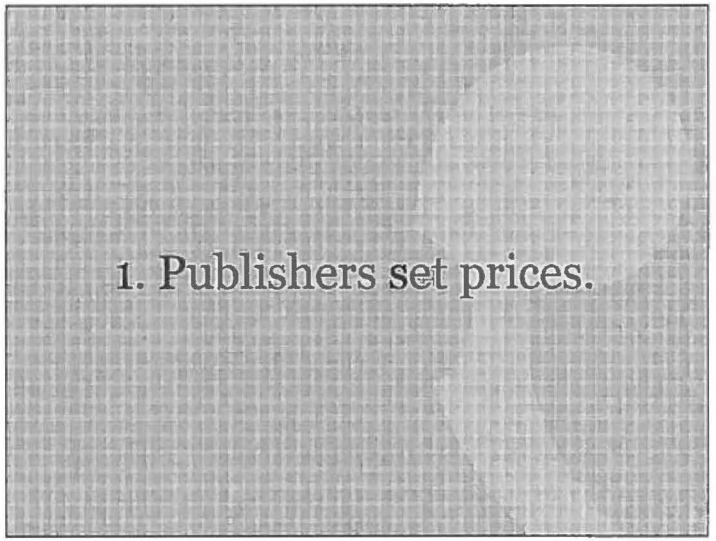


which raises the question...



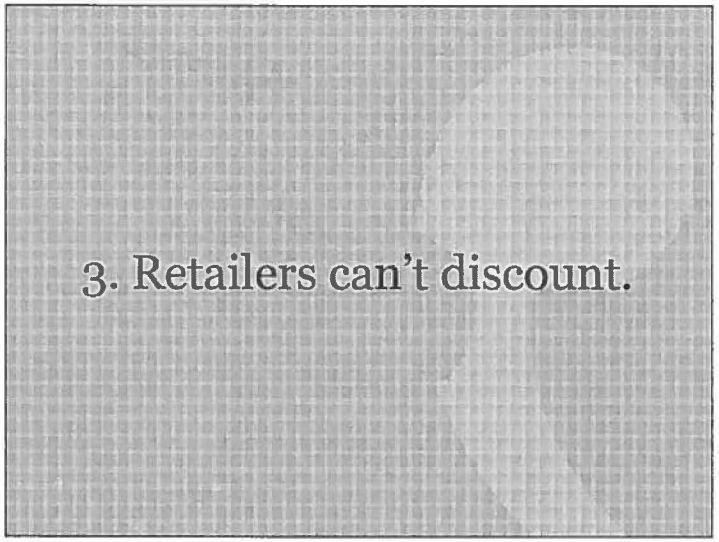
...
Which brings us to...

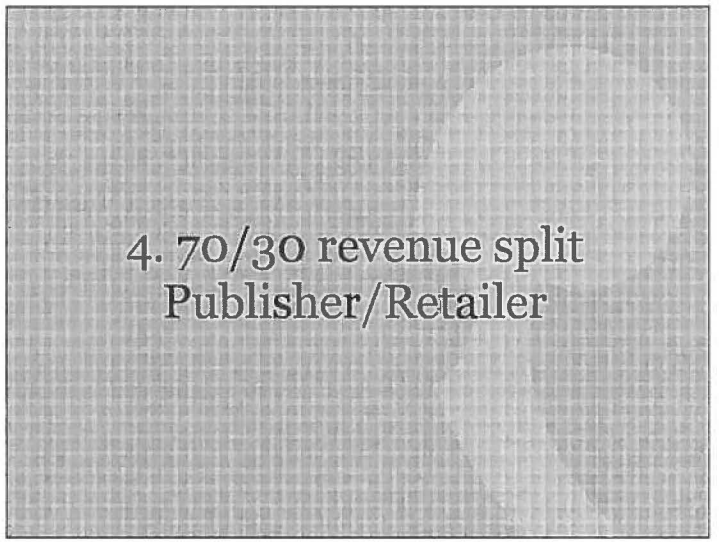
Agency.
Now to be clear, no one has actually seen an agency agreement yet. The agreements are still being written. But the general gist is: (#)



2. eBook prices are lower than print prices.
(new releases: $12.99-14.99)

2. eBooks are released simultaneously with print books.





What it really proposes is to take the sales of new releases that are happening (#- here

Here
and redistribute them
(#) here, her, and here.
But it's a double-edged sword. It gets rid of the (#) pesky $9.99 pricepoint

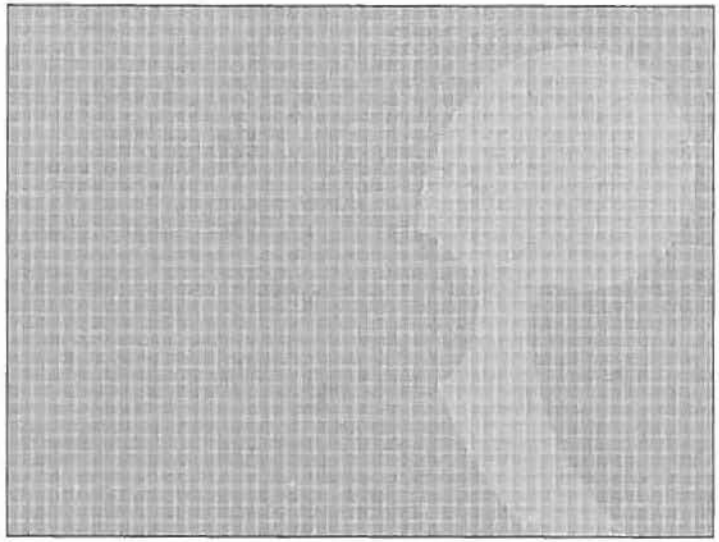
Publisher gets control of pricing.

but makes less.

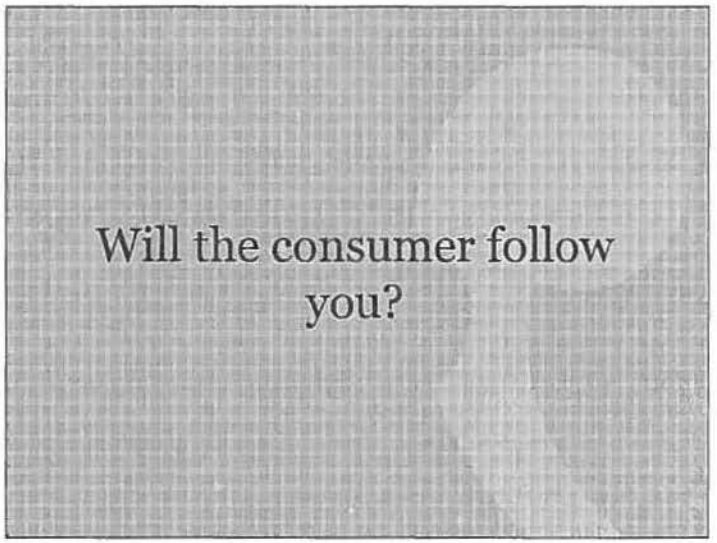
	List	Net
Wholesale (50%)	$24.00	$12.00
Agency (70%)	$12.99	$9.09

...

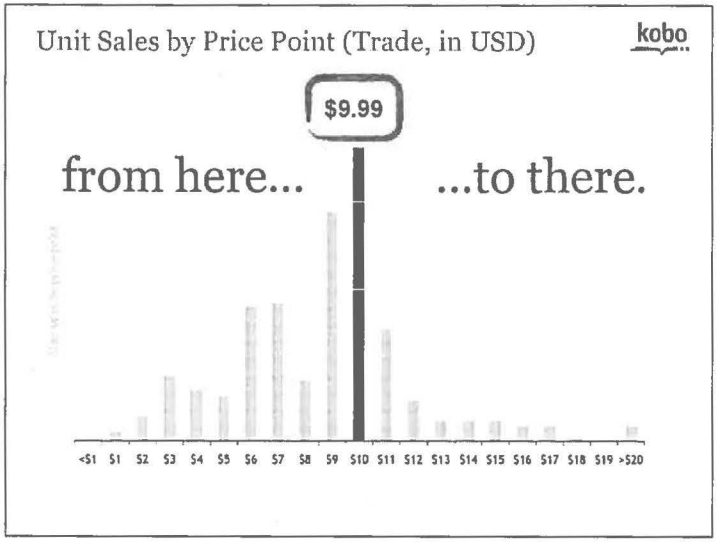
(#) And not a little bit less. That's a fair bit less.



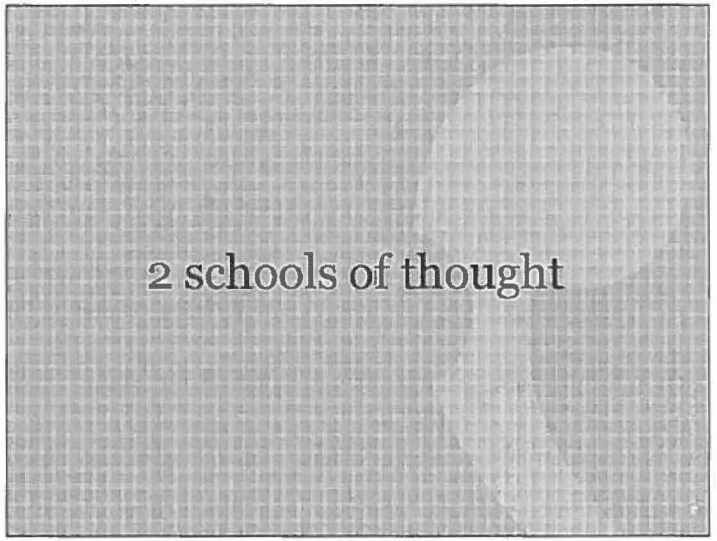
There is also a bet with agency.



What if the consumer won't follow you there?



From here (#) to there.



and this gets to the core of "What's an ebook worth?"

#1
Consumers would pay more, we've just never asked them to.

#2
eBooks have both lower cost and limitations on their use.
Therefore ebooks should be cheaper.

Both are true.

Which one is *more* true?

#1
Consumers would pay more, we've just never asked them to.

This one we've actually done some research on. We ran focus groups in the U.S. where we asked potential ebook customers to rank the following benefits of ebooks.

Instant. Can buy whenever, wherever.
Cost savings vs. print.
Convenience - easier to carry.
Not tied to a particular device.
Read on mobile devices/smartphones.
Read offline (don't need an internet connection.)
Highlight/annotate.

1. Instant. Can buy whenever, wherever.
2. Convenience - easier to carry.
3. Not tied to a particular device.
4. Read on smartphones/mobile devices.
5. Cost savings vs. print.
6. Read offline (don't need an internet connection.)
7. Highlight/annotate.

Now to be clear, they unequivocally said ebooks needed to be cheaper than print books. But they didn't say that price was their only reason for buying.

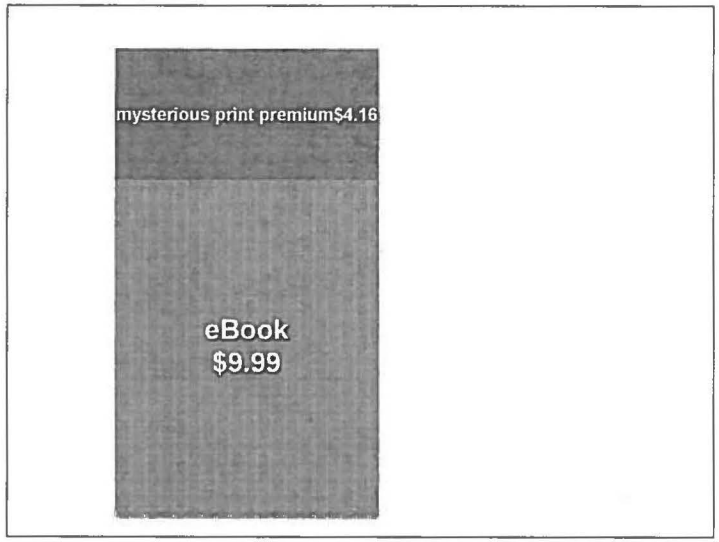
Suggests there is some room to move price.
(Just not much.)

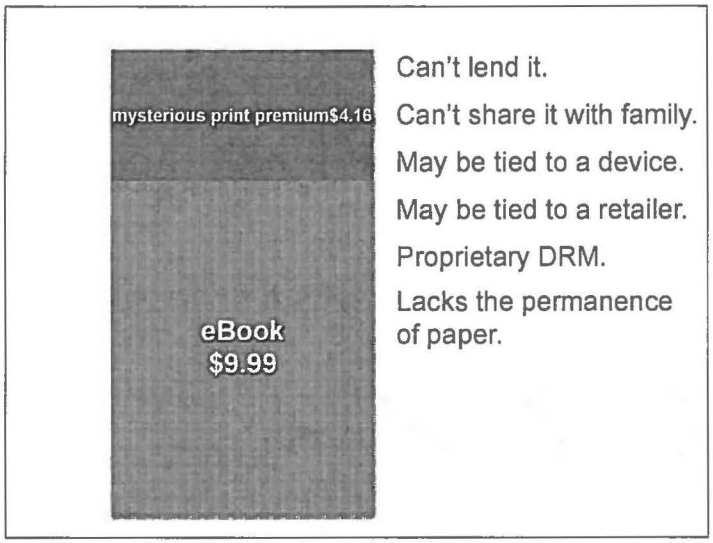
#2
eBooks have both lower cost and limitations on their use.
Therefore ebooks should be cheaper.

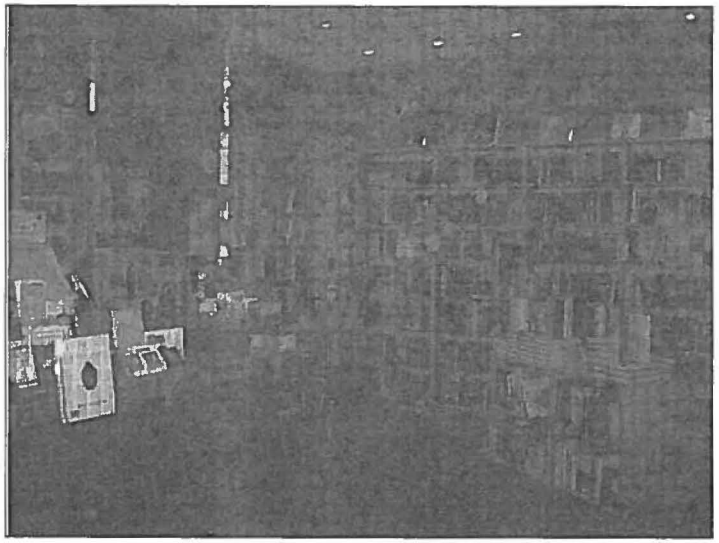
Also true.

The average sale price of a print book in the US is about:

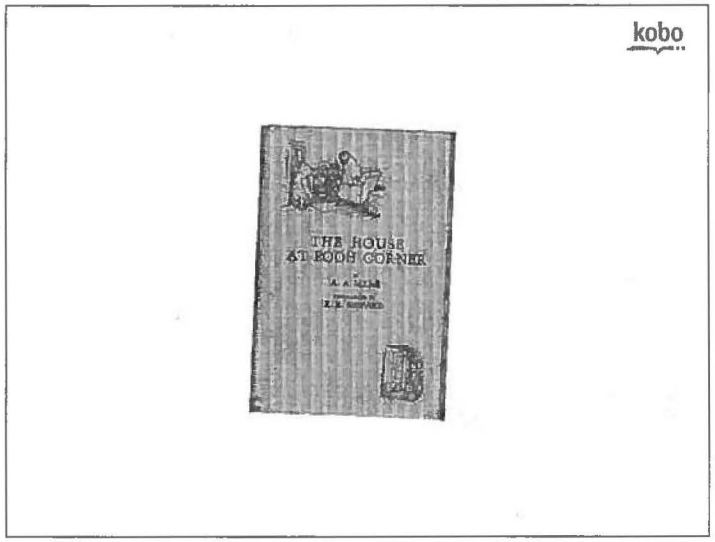
And it turns out if you ask people why they're willing to pay $14 or 15 dollars for a paper book but rarely willing to pay more than $10 for an ebook, even though they aren't industry insiders or people working for publishing or economists, they can generally give you a pretty good breakdown of (#)


mysterious print premium$4.16
eBook
$9.99

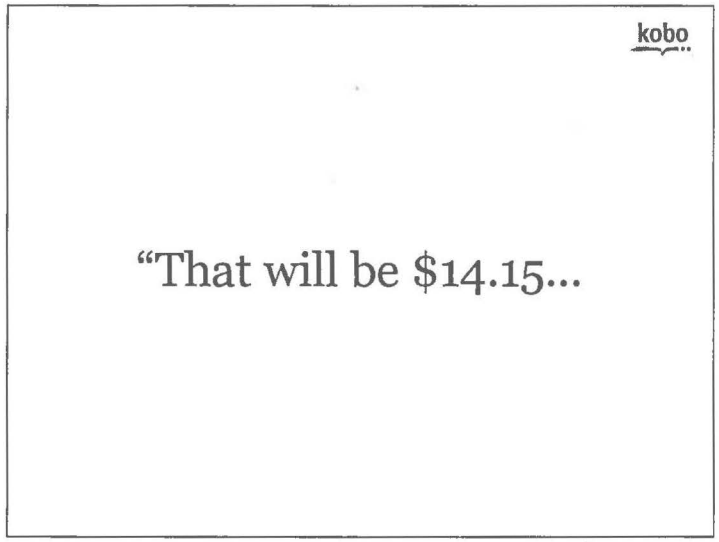

mysterious print premium$4.16
eBook
$9.99
Can't lend it.
Can't share it with family.
May be tied to a device.
May be tied to a retailer.
Proprietary DRM.
Lacks the permanence of paper.



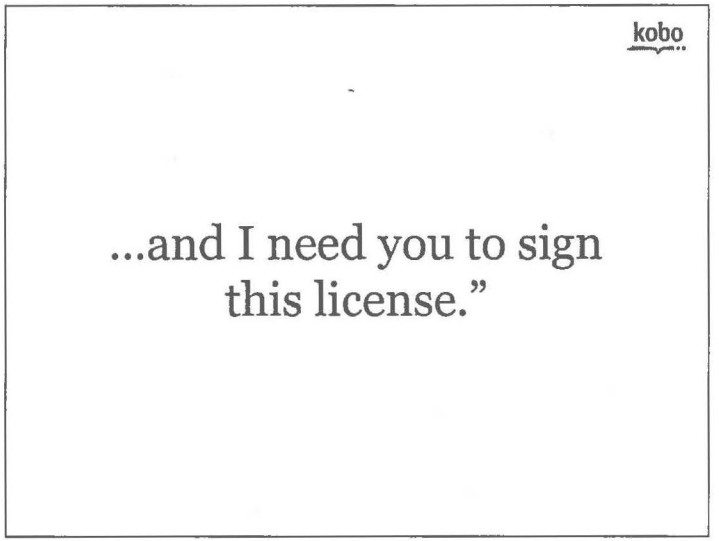
Imagine you are at your local bookstore.

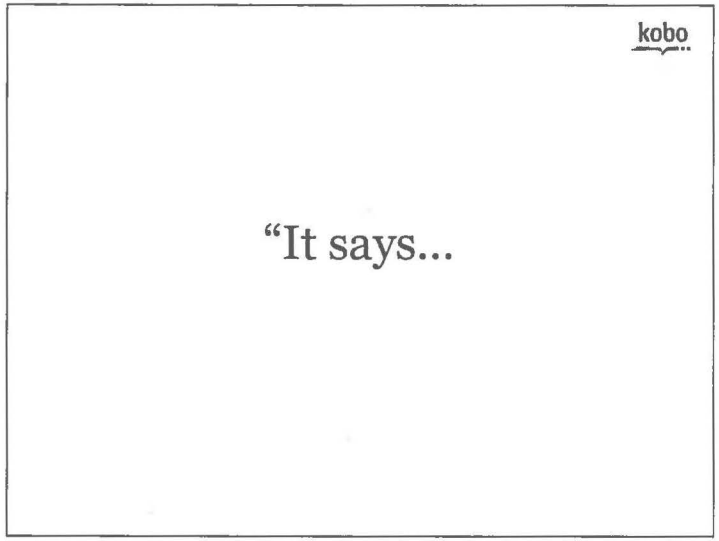


You want to buy a copy of The House at Pooh Corner for your niece.



And the person at the counter says. "That will be $14.15...





These terms apply to all users of the Service, whether or not you are a Registered User.

A. You shall use the Service for lawful purposes only. you shall not post or transmit through the Service any material that (i) violates or infringes in any way upon the rights of others, (ii) is unlawful, threatening, abusive, defamatory, invasive of privacy or publicity rights, vulgar, obscene, profane or otherwise objectionable, or (iii) encourages conduct that would constitute a criminal offense, gives rise to civil liability or otherwise violate any law. Without Kobo's express prior approval, you shall not post or transmit through the Service any material that contains advertising or any solicitation with respect to products or services. You shall not use the Service to advertise or perform any commercial solicitation, including, without limitation, the solicitation of users to become subscribers of other on-line information services. Any conduct by you that in Kobo's discretion restricts or inhibits any other user from using or enjoying the Service will not be permitted.

B. All content on the Service, including but not limited to designs, text, graphics, pictures, video, information, applications, software, music, sound and other files, and their selection and arrangement ("Site Content"), save and except for any literary works are the proprietary property of Kobo or its licensors with all rights reserved. No Site Content may be modified, copied, distributed, framed, reproduced, republished, downloaded, displayed, posted, transmitted, or sold in any form or by any means, in whole or in part, without Kobo's prior written permission. Provided that you are eligible for use of the Service and subject to these Terms of Use, you are granted a limited license to access the Service and the Site Content and to download or print a copy of any portion of the Site Content to which you have properly gained access solely for your personal, non-commercial use, provided that you keep all copyright and other proprietary notices intact. You may not upload or republish Site Content on any internet, intranet or Extranet site or incorporate the information in any other database or compilation, and any other use of the Site Content is strictly prohibited. The foregoing license is subject to these Terms of Use and does not include use of any data mining, robots or similar data gathering or extraction methods. Any use of the Service or the Site Content other than as specifically authorized herein, without the prior written permission of Kobo, is strictly prohibited and will terminate the license granted herein. Such unauthorized use may also violate applicable laws including without limitation copyright and trade-mark laws and applicable

trademark or other proprietary right without the express permission of the owner of the copyright, trademark or other proprietary right and the burden of determining that any material is not protected by copyright rests with you. You shall be solely liable for any damage resulting from any infringement of copyrights, proprietary rights, or any other harm resulting from such a submission. By submitting material to any public area of the Service, you automatically grant, or warrant that the owner of such material has expressly granted Kobo the royalty-free, worldwide, perpetual, irrevocable, non-exclusive right and license to use, reproduce, modify, adapt, publish, display, translate and distribute such material (in whole or in part) and/or to incorporate it in other works in any form, media or technology now known or hereafter developed. You also permit any other user of the Service to access, view, store or reproduce the material for that user's personal use. You grant Kobo the right to edit, copy, display, publish and distribute any material made available on the Service by you. The foregoing does not apply to literary works provided to Kobo for sale on the Service by a publisher or other content provider.

D. You may not obscure or misrepresent your geographical location, forge headers, use proxies, use IP spoofing or otherwise manipulate identifiers in order to disguise the origin of any message or transmittal you send on or through the Service. You may not pretend that you are, or that you represent, someone else, or impersonate any other individual or entity.

E. You are prohibited from violating or attempting to violate the security of the Service, including, without limitation:

(a) accessing data not intended for you, including logging into a server or account which you not authorized to access;

(b) attempting to probe, scan or test the vulnerability of a system or network to breach security or authentication measures without proper authorization;

(c) using any "deep-link", "page-scrape", "robot", "spider" or other automatic device, program, algorithm or methodology, or any similar or equivalent manual process, to access, acquire, copy or monitor any portion of the

(a) accessing data not intended for you, including logging into a server or account which you not authorized to access;

(b) attempting to probe, scan or test the vulnerability of a system or network to breach security or authentication measures without proper authorization;

(c) using any "deep-link", "page-scrape", "robot", "spider" or other automatic device, program, algorithm or methodology, or any similar or equivalent manual process, to access, acquire, copy or monitor any portion of the Service or any Site Content, or in any way reproduce or circumvent the navigational structure or presentation of the Service or any Site Content, to obtain or attempt to obtain any materials, documents or information through any means not purposely made available through the Site;

(d) taking any action that imposes an unreasonable or disproportionately large load on the infrastructure of the Service or Kobo's systems or networks, or any systems or networks connected to the Service or to Kobo'

(e) conducting a reverse look-up, tracing or seeking to trace any information on any other user, Registered User or visitor to the Service, or any other customer of Kobo, to its source, or exploit the Service or any service or information made available or offered by or through the Service, in any way where the purpose is to reveal any information, including but not limited to personal identification or information, other than your own information, as provided for by the Service;

(f) attempting to interfere with, disrupt or disable service to any user, host or network, including, without limitation, via means of "denial of service" attacks, overloading, "flooding", "mailbombing" or "crashing";

(g) forging any TCP/IP packet header or any part of the header information in any e-mail or newsgroup posting;

(h) disrupt network nodes or network services or otherwise restrict, inhibit, disrupt or impede Kobo's ability to monitor or make available the Service; or

(i) taking any action in order to obtain services to which you are not entitled

kobo

"...only you can read it..."

kobo

"You cannot lend it."

kobo

"Or sell it used."

kobo

"You have to keep it on a shelf in your house that I will sell you..."

kobo

"...for $259 USD
(plus shipping & handling)."

kobo

"You may not put books on
this shelf that you have
bought from other stores."

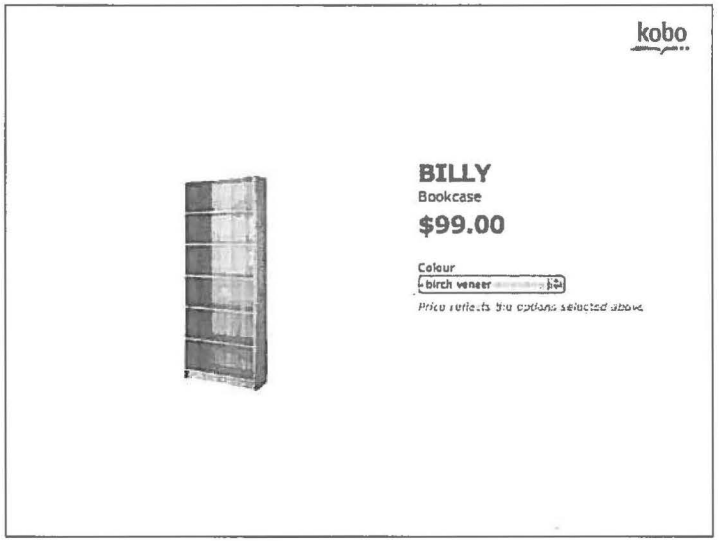
kobo

"If the shelf breaks, you may lose your books. Or not. We'll decide."

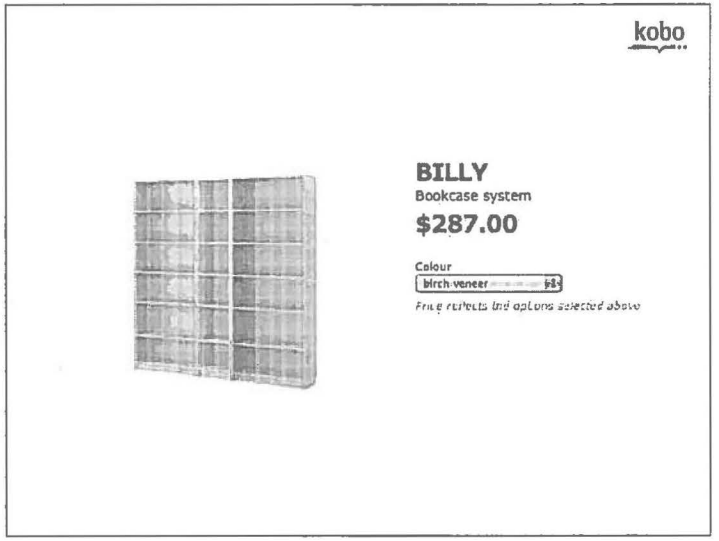
kobo

"If you find a shelf you like better made by someone else, too bad."

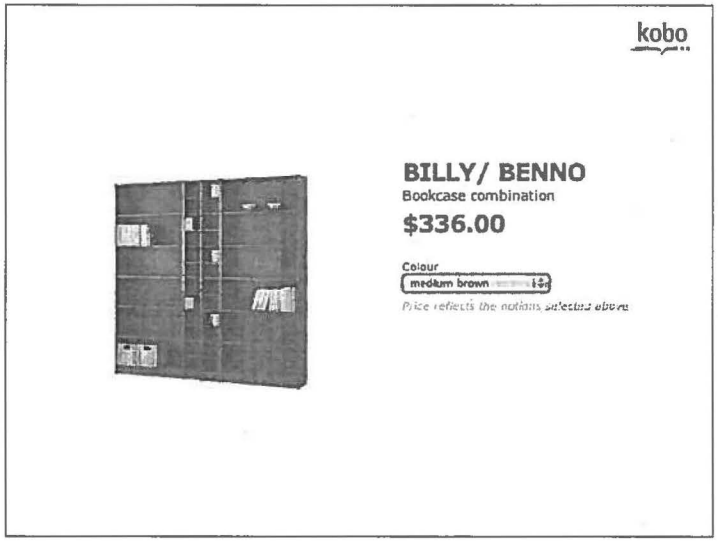
So basically, Imagine that you have to live with the



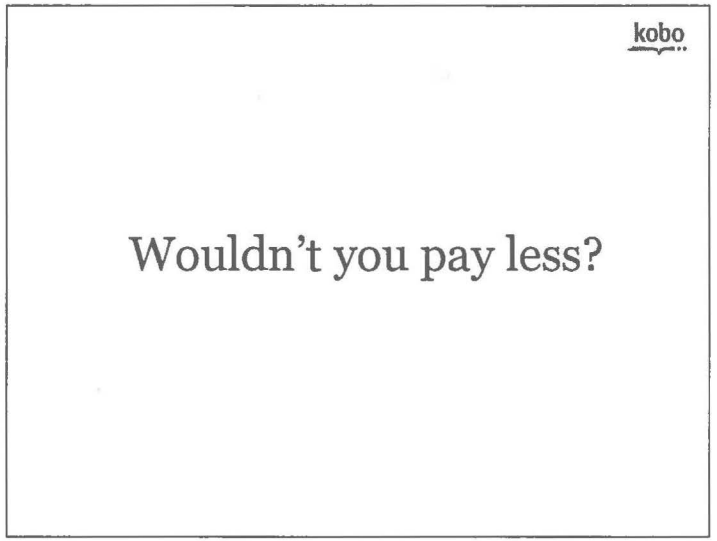
Ikea bookcases that you bought from Ikea when you were in university for the rest of your life. You can (#- upgrade



You can upgrade, when they bring out a new version,



move from birch veneer to medium brown, add some more storage space and extra shelves. But only Ikea. Forever.



And yet those are the terms under which most ebooks are bought.

kobo

license

kobo

Kobo says:
Take your books with you

kobo

to any device

kobo

If you find a better device,
move your library there.

kobo

A book that you can't take with you is worth less.

kobo

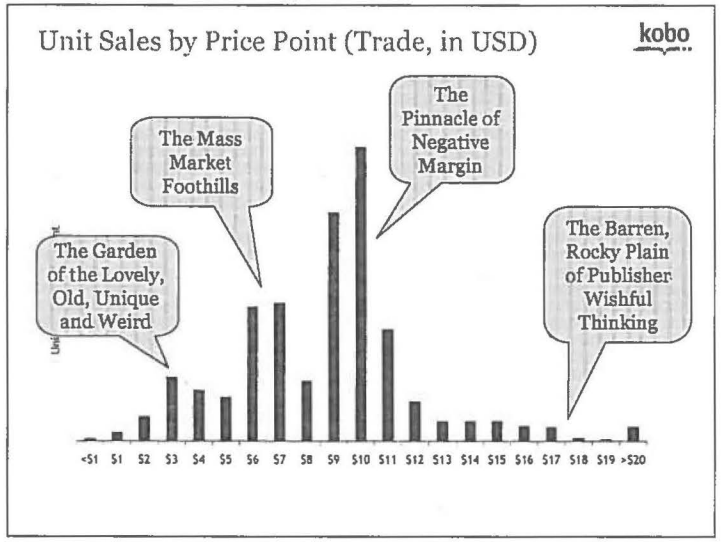
The more an ebook has can be used like a paper book...

kobo

...or does interesting things that print books can't do...

kobo

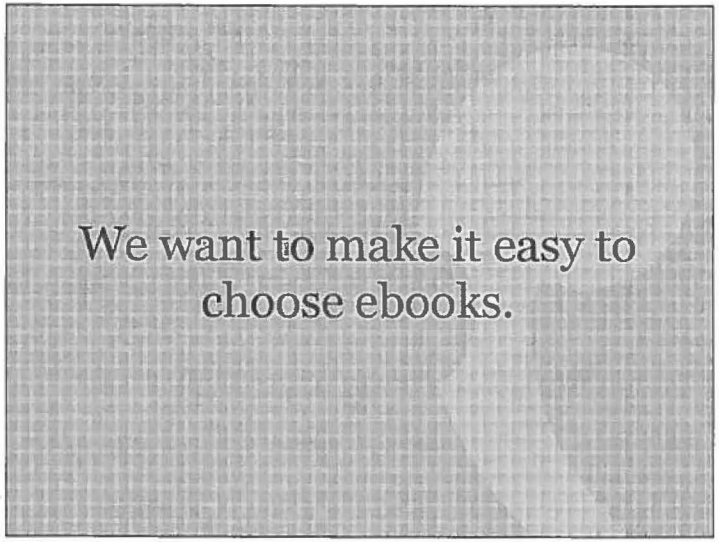
...the easier it will be to move from $9.99."

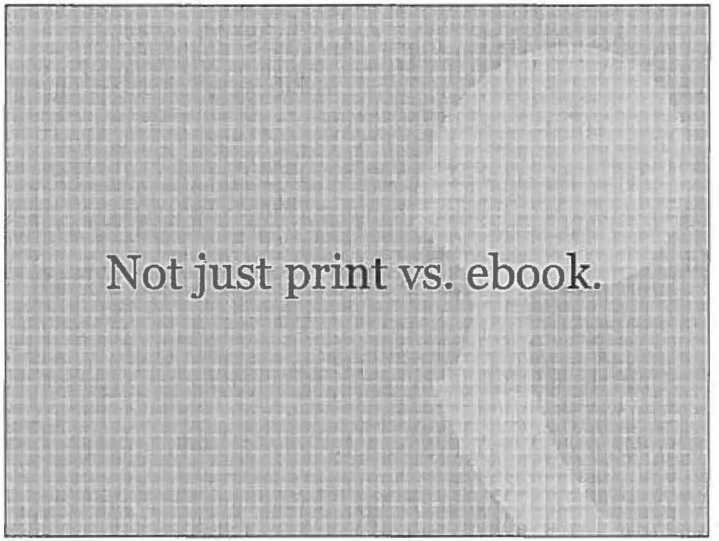


The reader always has a choice.

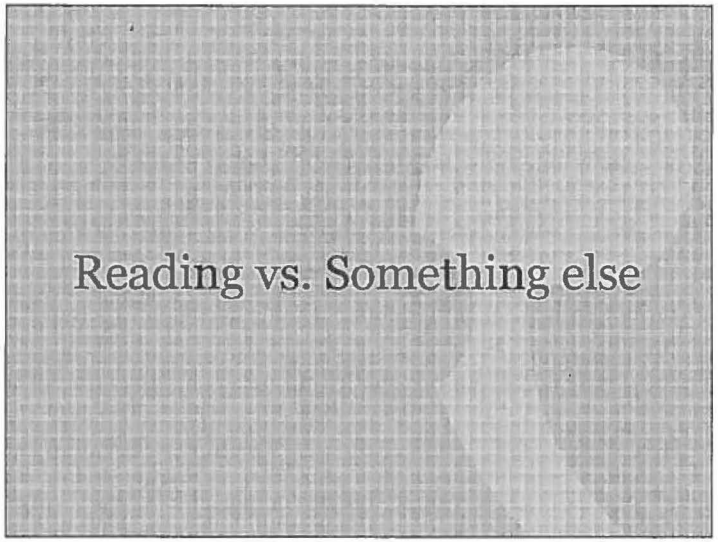
...

Which brings us to...





...
Which brings us to...



The easier we make it for reading to take place, the more we make reading something that can grab those open spans of time, the more ebooks can be seen as a lifetime investment, the more valuable they become, the more books can continue to hold their own against all the other options vying for our scarce hours of time.

kobo

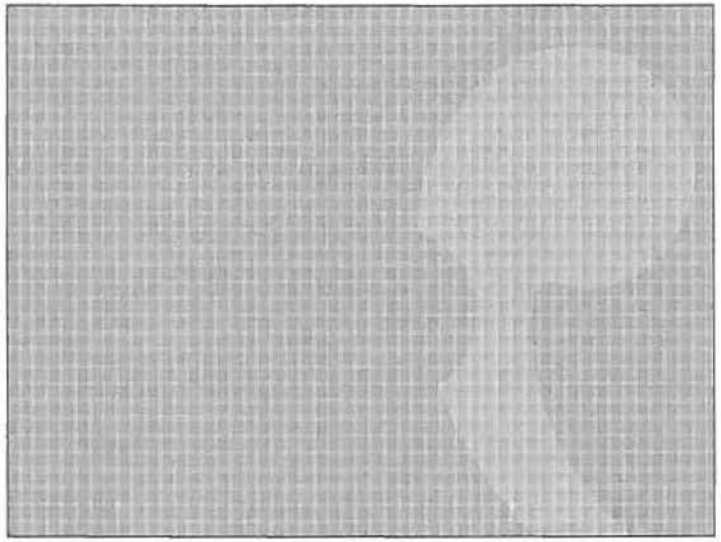
Understanding the New Digital Reader

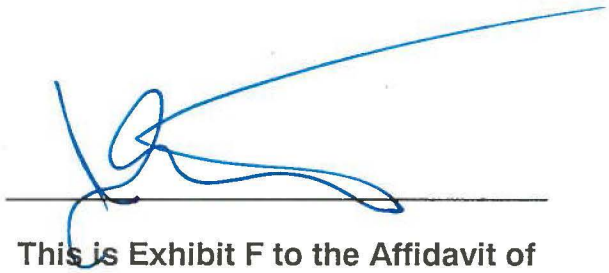
Digital Symposium
February 15 & 17, 2010

MICHAEL TAMBLYN
EVP CONTENT, SALES & MERCHANDISING, KOBO, INC.

mtamblyn@kobobooks.com
@mtamblyn
t. (416) 977-8737 x3346
m. (416) 409-5925

KOBO0010741





This is Exhibit F to the Affidavit of
Mallory Kelly
Affirmed 28 August 2015

kobo

Agency Status

April 2, 2010

MICHAEL TAMBLYN
EVP CONTENT, SALES & MERCHANDISING
CONFIDENTIAL

mtamblyn@kobobooks.com
t. (416) 977-8737 x3346
m. (416) 499-5925

Agency Overview

kobo

The agency model was developed to allow publishers to regain control of ebook pricing, create a level playing field for retailers, and facilitate Apple's entry into the ebook market by eliminating loss-leadering as a marketing and customer acquisition tactic.

- Under Agency, Publishers will:
  - Be the seller of record for all ebook purchases through retailers designated as agents;
  - Set prices on all ebooks. Prices the same across all agents;
  - Set "hardcover" prices generally between $12.99 and $14.99, with some publishers reserving the right for higher prices.
  - Generally discontinue "windowing", delaying the release of ebooks vs. print releases

Retailer Restrictions

Publishers' primary focus: blocking any retail tactic that could result in retailers being able to provide a direct or indirect discount to further compete on price.

- **Under Agency, Retailers cannot:**
  - Discount the list prices of books from agency publishers;
  - Provide any coupon, promotion or other tactic that lowers the price of an ebook to a consumer;
  - Distribute any direct or indirect benefit as a result of purchasing an ebook (e.g. loyalty program points, accumulated value, etc.) whether or not it is redeemed for an ebook;
  - Engage in giveaways, Buy-X-Get-1-Free, even if the agent bears the full cost of the promotion

Sub-agents (Borders, Indigo, et al) must also follow all agency restrictions. Kobo is liable for the compliance of all sub-agents.

Taxation

Most technically challenging aspect of agency. Agent must collect and remit to the Publisher state/local taxes in any state in which the Publisher has a nexus.

- Kobo required to collect US state/local taxes even though a non-US company wherever the publisher has a nexus.
- Must quickly implement state/local tax calculation into purchase path across all platforms;
- Penguin, Macmillan, Hachette are offering a bridge period of 60-90 days for Kobo to fix its systems. S&S and Harper require that we provide a "tax inclusive price" until we can collect;
- This also applies to partners/sub-agents (Borders, et al.)

Risks

Aside from the risk of consumer dissatisfaction due to rising prices, the greatest risk is that retailers have lost the ability to employ tactics to focus, motivate and reward specific consumer behaviours.

Risks	Mitigation
Sales decline after April 1 as consumers face rising ebook prices	Highlight discounting, sustain $9.99 with Random House, other non-agency publishers.
Sales frequency drops off as promotions no longer available to drive purchase frequency	eReader purchase frequency may offset those customers motivated by coupons.
	Non-ebook incentives as rewards for frequent purchases - "Enter to Win...", eReaders for frequent purchasers
Publishers raise ebook prices to protect more profitable hardcover sales (no particular incentive to grow ebook channel vs. protecting overall revenue.)	Apple has stated they will not list titles > $14.99 (but this may change if customer price tolerance is more forgiving on iPad.)
Kobo loses the ability to incent valuable customer behaviours through discounts and rewards. (New customer referrals, writing reviews, registration, upgrading, etc.)	Shift to non-ebook-discount awards - prizes, eReader giveaways, cash.
Lack of price competition spurs more intense competition in advertising, brand building, user	Must leverage device partners, focus on differentiating on user experience, device

Agency Agreement status

Of the "Agency 5", we are closing with 3, still in negotiations with 1, and at an impasse with one that may result in delisting of some titles.

[redacted]	Signed US + Canada
[redacted]	Signed US now, Canada 3-6 weeks
[redacted]	Signed US only
[redacted]	Signed US only
[redacted]	Signed US only. Most conservative re: state/local tax collection, vendor-of-record attribution, etc.

Agency Criteria

Since this model became public, other publishers have asked if they could work with us on agency terms. Here are our criteria:

1. Agency applies to all vendors.
   You can't be agency with some and wholesale with others unless there are *significant* disadvantages for wholesale vendors.
2. Agency is being rolled out to all vendors simultaneously.
   Other vendors can't have a window where they are advantaged vs. agents.
3. Sale price discount vs. print. $11.99-14.99 for new releases, TP $9.99 or less, MM <$6.
4. MFN re: collection, timing, price, discount terms.
   The model only works if all agents are treated equally.

Canada vs. U.S.

2 of of the "Agency 5" - Macmillan and Hachette - include Canada in the agreements going live April 1st.

- Agency appears to be legal in Canada (agency has an exemption under Competitions Act s.45 on price-fixing.)
- Open to challenge, but if struck down, exposure is to publisher, not retailer/agent;
- Only Macmillan, Hachette have set agency terms for Canada. Macmillan has delayed Canada 3-6wks;
- Expect to see Harper, Penguin, S&S put forward agency for Canada sometime in April/May.
- Agency agreements with Harper, Penguin, S&S may force Kindle to collect GST (they would have to be an agent of the Canadian rights-holding entity, who would be required to remit GST)

This is Exhibit G to the Affidavit of
Mallory Kelly
Affirmed 28 August 2015

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, Plaintiff, -v- APPLE INC., et al., Defendants.	12 Civ. 2826 (DLC) OPINION & ORDER
THE STATE OF TEXAS, et al., Plaintiffs, -v- PENQUIN GROUP (USA) INC., et al., Defendants.	12 Civ. 3394 (DLC)

APPEARANCES:

For plaintiff the United States:

Mark W. Ryan
Lawrence E. Buterman
Daniel McCuaig
Stephen T. Fairchild
Nathan P. Sutton
Carrie Syme
Bill Jones
United States Department of Justice
Antitrust Division
450 Fifth Street, N.W., Suite 4000
Washington, DC 20530

For plaintiff States:

For State of Texas, Liaison Counsel for Plaintiff States

Gabriel Gervey
Eric Lipman
David Ashton
Office of the Attorney General of Texas
P.O. Box 12548
Austin, TX 78711

For State of Connecticut, Liaison Counsel for Plaintiff States

W. Joseph Nielsen
Gary M. Becker
Office of the Attorney General of Connecticut
55 Elm Street
Hartford, CT 06106

For defendant Apple Inc.:

Orin Snyder
Lisa H. Rubin
Gibson, Dunn & Crutcher, LLP
200 Park Avenue, 47th Floor
New York, NY 10166

Daniel S. Floyd, Pro hac vice
Daniel G. Swanson, Pro hac vice
Gibson, Dunn & Crutcher, LLP
333 South Grand Ave.
Los Angeles, CA 90071

Cynthia Richman
Gibson, Dunn & Crutcher, LLP
1050 Connecticut Avenue, N.W.
Washington, DC 20036

Howard E. Heiss
O'Melveny & Myers LLP
7 Times Square
New York, NY 10036

Table of Contents

DENISE COTE, District Judge:

This Opinion explains how and why the prices for many electronic books, or "e-books," rose significantly in the United States in April 2010. Plaintiffs the United States of America ("DOJ") and thirty-three states and U.S. territories (the "States") (collectively, "Plaintiffs"), filed these antitrust suits on April 11, 2012, alleging that defendant Apple Inc. ("Apple") and five book publishing companies conspired to raise, fix, and stabilize the retail price for newly released and bestselling trade e-books in violation of Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1 ("Sherman Act"), and various state laws. These cases represent two of four related actions brought before this Court alleging the same e-books price-fixing conspiracy between Apple and the publishers.[1] The publishers are Hachette Book Group, Inc. ("Hachette"), HarperCollins Publishers LLC ("HarperCollins"), Holtzbrinck

[1] The other two cases are State of Texas, et al. v. Hachette Book Group, Inc., et al., 12 Civ. 6625 (DLC), in which forty-nine states, the District of Columbia, and the U.S. Territories and Possessions the Virgin Islands, Puerto Rico, the Northern Mariana Islands, Guam, and American Samoa, bringing claims as parens patriae, have settled their claims against Hachette, HarperCollins, and Simon & Schuster ("Settlement Action"); and In re: Electronic Books Antitrust Litigation, 11 MD 2296 (DLC), in which class action plaintiffs bring claims for damages ("Class Action").

Publishers LLC d/b/a Macmillan ("Macmillan"), Penguin Group (USA), Inc. ("Penguin"), and Simon & Schuster, Inc. ("Simon & Schuster" or "S&S") (collectively, "Publisher Defendants").

Only Apple proceeded to trial; the Publisher Defendants have settled their claims with both the DOJ and the States. This Opinion presents the Court's findings of fact and conclusions of law following the bench trial that was held from June 3 to 20, 2013 to resolve the issue of Apple's liability and the scope of any injunctive relief. As described below, the Plaintiffs have shown that Apple conspired to raise the retail price of e-books and that they are entitled to injunctive relief. A trial on damages will follow.

PROCEDURAL HISTORY

Fact and expert discovery in these actions concluded on March 22, 2013. The parties' Joint Pretrial Order, proposed findings of fact and conclusions of law, and pretrial memoranda were submitted on April 26 and, following rulings on redactions, were filed on May 14.

At the time the trial was scheduled, the parties agreed that a bench trial would resolve claims for liability and injunctive relief. With the parties' consent, the trial was conducted in accordance with the Court's customary practices for non-jury proceedings, which includes taking direct testimony

from witnesses under a party's control through affidavits submitted with the pretrial order. The parties also served with the Joint Pretrial Order copies of all exhibits and deposition testimony that they intended to offer as evidence in chief at trial.[2]

At trial, the Plaintiffs called twelve fact witnesses and two expert economists. The Plaintiffs' fact witnesses included three Apple employees: Eddy Cue ("Cue"), Senior Vice President of Internet Software and Services at Apple; Keith Moerer ("Moerer"), a Director of iTunes at Apple; and Kevin Saul ("Saul"), Associate General Counsel at Apple, and the lead business lawyer supporting Apple's Internet and Software Services division. The Plaintiffs also called senior executives from each of the five Publisher Defendants: David Shanks ("Shanks"), CEO of Penguin; Carolyn Reidy ("Reidy"), President

[2] The Court's procedures for non-jury proceedings were discussed in detail at conferences held on June 22 and October 26, 2012, and May 8, 2013. As the parties were informed, the Court prepared a draft opinion in advance of the bench trial based on the witness affidavits and other documents submitted with the pretrial order and the arguments of counsel in their trial memoranda. At trial, the affiants swore to the truth of the contents of their affidavits and were tendered for cross and redirect examination, and the other trial evidence was formally received. The parties understood that the Court's final findings of fact and conclusions of law would incorporate all of this evidence. Consistent with these procedures, and with the expectation that the Court had already prepared a draft opinion, the parties jointly asked the Court for its preliminary views on the merits at the final pretrial conference held on May 23, 2013.

and CEO of Simon & Schuster; Brian Murray ("Murray"), CEO of HarperCollins; John Sargent ("Sargent"), CEO of Macmillan; and David Young ("Young"), Chairman and CEO of Hachette from 2006 through March 2013, who currently serves as Chairman of the Board of Directors of Hachette. The Plaintiffs called four additional fact witnesses: Russell Grandinetti ("Grandinetti"), Vice President -- Kindle at non-party Amazon.com ("Amazon"); David Naggar ("Naggar"), Vice President of Kindle Content at Amazon; Laura Porco ("Porco"), Amazon's Director of Kindle Books from 2006 to 2011; and Thomas Turvey ("Turvey"), Director of Strategic Partnerships at non-party Google Inc. ("Google"). The Plaintiffs' expert witnesses were Dr. Richard Gilbert ("Gilbert"), Emeritus Professor of Economics and Professor of the Graduate School at the University of California, Berkeley, and a Senior Consultant (Affiliate) at Compass Lexecon, an economic consulting firm; and Dr. Orley Ashenfelter ("Ashenfelter"), the Joseph Douglas Green 1895 Professor of Economics at Princeton University.

Affidavits submitted by the Plaintiffs constituted the direct testimony of four of their fact witnesses -- Grandinetti, Naggar, Porco, and Turvey -- and both of their expert witnesses. Apple had intended to call seven of Plaintiffs' witnesses in its own case -- Cue, Moerer, Murray, Reidy, Sargent, Saul, and Young. Thus, these witnesses' affidavits were also received

during the Plaintiffs' case in chief. The Plaintiffs subpoenaed Shanks to testify at trial.[3] Each of these witnesses appeared at trial and was cross-examined.

The Plaintiffs also offered excerpts from the depositions of John Makinson ("Makinson"), Chairman and CEO of the Penguin Group, the parent company of Penguin; Arnaud Nourry ("Nourry"), Chairman and CEO of Hachette Livre, the parent company of Hachette; and Maja Thomas ("Thomas"), Senior Vice-President at Hachette. Apple offered counter-designations as to Nourry and Thomas.

During the presentation of its defense, Apple presented affidavits constituting the direct testimony of three fact witnesses and three expert economists. Apple's fact witnesses were Robert McDonald ("McDonald"), the manager of Apple's U.S. iBookstore; Theresa Horner ("Horner"), Vice President of Digital Content for Barnesandnoble.com, a subsidiary of non-party Barnes & Noble, Inc. ("Barnes & Noble"); and Madeline McIntosh ("McIntosh"), Chief Operating Officer of non-party Random House, Inc. ("Random House"). Apple's expert witnesses were Dr. Benjamin Klein ("Klein"), Professor Emeritus of Economics at the University of California, Los Angeles, Senior Consultant at

[3] Penguin settled these actions on the eve of trial and therefore the affidavit constituting the direct testimony of Shanks, which had been submitted with the Joint Pretrial Order, was not offered at trial.

Compass Lexecon, and President of EAC Associates, Inc.; Dr. Michelle Burtis ("Burtis"), Ph.D., Senior Advisor at Cornerstone Research, Inc., an economic and financial consulting firm; and Dr. Kevin Murphy ("Murphy"), George J. Stigler Distinguished Service Professor of Economics at the University of Chicago, and Faculty Research Associate at the National Bureau of Economic Research. Each of these witnesses, except McIntosh, appeared at trial and was cross-examined. The Plaintiffs did not seek to cross-examine McIntosh.

As noted, the bench trial was held from June 3 to June 20, 2013, and this Opinion presents the Court's findings of fact and conclusions of law. The findings of fact appear principally in the following Background section, but also appear in the remaining sections of the Opinion.

SUMMARY OF FINDINGS

The Plaintiffs have shown that the Publisher Defendants conspired with each other to eliminate retail price competition in order to raise e-book prices, and that Apple played a central role in facilitating and executing that conspiracy. Without Apple's orchestration of this conspiracy, it would not have succeeded as it did in the Spring of 2010.

There is, at the end of the day, very little dispute about many of the most material facts in this case. Before Apple even

met with the first Publisher Defendant in mid-December 2009, it knew that the "Big Six" of United States publishing -- the Publisher Defendants and Random House (collectively, the "Publishers") -- wanted to raise e-book prices, in particular above the $9.99 prevailing price charged by Amazon for many e-book versions of New York Times bestselling books ("NYT Bestsellers") and other newly released hardcover books ("New Releases"). Apple also knew that Publisher Defendants were already acting collectively to place pressure on Amazon to abandon its pricing strategy.

At their very first meetings in mid-December 2009, the Publishers conveyed to Apple their abhorrence of Amazon's pricing, and Apple assured the Publishers it was willing to work with them to raise those prices, suggesting prices such as $12.99 and $14.99. Over the course of their negotiations in December 2009 and January 2010, Apple and the Publisher Defendants educated one another about their other priorities. Apple strongly hoped to announce its new iBookstore when it launched the iPad on January 27, 2010, but would only do so if it had agreements in place with a core group of Publishers by that date, could assure itself it would make a profit in the iBookstore, and could offer e-book titles simultaneously with their hardcover releases. For their part, if the Publisher Defendants were going to take control of e-book pricing and move

the price point above $9.99, they needed to act collectively; any other course would leave an individual Publisher vulnerable to retaliation from Amazon.

Apple and the Publisher Defendants shared one overarching interest -- that there be no price competition at the retail level. Apple did not want to compete with Amazon (or any other e-book retailer) on price; and the Publisher Defendants wanted to end Amazon's $9.99 pricing and increase significantly the prevailing price point for e-books. With a full appreciation of each other's interests, Apple and the Publisher Defendants agreed to work together to eliminate retail price competition in the e-book market and raise the price of e-books above $9.99.

Apple seized the moment and brilliantly played its hand. Taking advantage of the Publisher Defendants' fear of and frustration over Amazon's pricing, as well as the tight window of opportunity created by the impending launch of the iPad on January 27 (the "Launch"), Apple garnered the signatures it needed to introduce the iBookstore at the Launch. It provided the Publisher Defendants with the vision, the format, the timetable, and the coordination that they needed to raise e-book prices. Apple decided to offer the Publisher Defendants the opportunity to move from a wholesale model -- where a publisher receives its designated wholesale price for each e-book and the retailer sets the retail price -- to an agency model, where a

publisher sets the retail price and the retailer sells the e-book as its agent.

The agency agreements that Apple and the Publisher Defendants executed on the eve of the Launch divided New Release e-books among price tiers. The top of each tier, or cap, was essentially the new price for New Release e-books. The caps included $12.99 and $14.99 for many books then being sold at $9.99 by Amazon.

The agreements also included a price parity provision, or Most-Favored-Nation clause ("MFN"), which not only protected Apple by guaranteeing it could match the lowest retail price listed on any competitor's e-bookstore, but also imposed a severe financial penalty upon the Publisher Defendants if they did not force Amazon and other retailers similarly to change their business models and cede control over e-book pricing to the Publishers. As Apple made clear to the Publishers, "There is no one outside of us that can do this for you. If we miss this opportunity, it will likely never come again."

Through the vehicle of the Apple agency agreements, the prices in the nascent e-book industry shifted upward, in some cases 50% or more for an individual title. Virtually overnight, Apple got an attractive, additional feature for its iPad and a guaranteed new revenue stream, and the Publisher Defendants removed Amazon's ability to price their e-books at $9.99. A

detailed explanation of how Apple facilitated this conspiracy and changed the face of the e-book industry follows.

BACKGROUND

Defendant Apple engages in a number of businesses, but as relevant here it sells the iPad tablet device and distributes e-books through its iBookstore. E-books are books that are sold to consumers in electronic form, and that can and must be read on a dedicated electronic device such as the iPad, the Barnes & Noble Nook, or Amazon's Kindle. The Publisher Defendants publish both e-books and print books. The five Publisher Defendants and Random House represent the six largest publishers of "trade" books in the United States.[4] These six firms are often referred to within the publishing industry as the "Big Six."[5] The Publisher Defendants sold over 48% of all e-books in the United States in the first quarter of 2010.

[4] Trade books consist of general interest fiction and non-fiction books. They are to be distinguished from "non-trade" books such as academic textbooks, reference materials, and other texts.

[5] Titles from the Bix Six publishers accounted for over 90% of all U.S. NYT Bestseller book sales in 2010. Random House is the largest of the Big Six, followed, in descending order of size, by Penguin, Simon & Schuster, HarperCollins, Hachette, and Macmillan. When it comes to e-books, the largest of the Big Six in early 2010 was Penguin, followed in descending order by Random House, HarperCollins, Hachette, S&S, and Macmillan.

A. Development of the E-book Market

Amazon's Kindle was the first e-reader to gain widespread commercial acceptance. When the Kindle was launched in 2007, Amazon quickly became the market leader in the sale of e-books and e-book readers.[6] Through 2009, Amazon dominated the e-book retail market, selling nearly 90% of all e-books.[7]

Amazon utilized a discount pricing strategy through which it charged $9.99 for certain New Release and bestselling e-books. Amazon was staunchly committed to its $9.99 price point and believed it would have long-term benefits for its consumers. In order to compete with Amazon, other e-book retailers also adopted a $9.99 or lower retail price for many e-book titles.

Prior to April 2010, the Publishers distributed print and digital books through a wholesale pricing model, in which a content provider sets a list price (also known as a suggested retail price) and then sells books and e-books to a retailer -- such as Amazon -- for a wholesale price, which is often a percentage of the list price. The retailer then offers the book and e-book to consumers at whatever price it chooses. Prior to

---

[6] The Nook was released two years later, in November of 2009, offering some competition to Amazon. The iPad was released in April 2010.

[7] At present, the largest U.S. retailers of trade e-books include Apple, and non-parties Amazon, Barnes & Noble, Google, Kobo Inc., and Sony Corporation.

2009, many publishers set a wholesale price for e-books at a 20% discount from the equivalent physical book wholesale price to reflect the many cost savings associated with the distribution and sale of e-books. For instance, there is no cost for the printing, storage, packaging, shipping, or return of e-books. With a digital book discount, Amazon's $9.99 price point roughly matched the wholesale price of many of its e-books.

B. Publishers' Discontent with the $9.99 Price Point

The Publishers were unhappy with Amazon's $9.99 price point and feared that it would have a number of pernicious effects on their profits, both in the short run and long-term. In the short-term, the Publishers believed the low price point was eating into sales of their more profitable hardcover books, which were often priced at thirty dollars or more, and threatening the viability of the brick-and-mortar stores in which hardcover books were displayed and sold. Over the long-term, they feared that consumers would grow accustomed to e-books priced at $9.99 and that the $9.99 price point would erode prices for all books, thereby threatening the business model for the publishing industry. They believed that this low price failed to reflect the true value of many books and also failed to distinguish among books in terms of the effort entailed to create and produce them and in terms of their quality, however one might measure quality.

The Publishers also feared Amazon's growing power in the book distribution business. They were concerned that, should Amazon continue to dominate the sale of e-books to consumers, it would start to demand even lower wholesale prices for e-books and might begin to compete directly with publishers by negotiating directly with authors and literary agents for rights -- a process referred to as disintermediation.[8]

As a result, the Publisher Defendants determined that they needed to force Amazon to abandon its discount pricing model. As Hachette's Young bluntly put it, they had to "defea[t] [Amazon's] $9.99 pricing policy," and prevent the "wretched $9.99 price point becoming a de facto standard."

C. January 2009-December 2009: Publisher Defendants Pursue Strategies to Combat Amazon Pricing

Beginning in at least early 2009, the Publisher Defendants began testing different ways to address what Macmillan termed "book devaluation to $9.99," and to confront what S&S's Reidy described as the "basic problem: how to get Amazon to change its pricing" and move off its $9.99 price point. They frequently coordinated their efforts to increase the pressure on Amazon and decrease the likelihood that Amazon would retaliate -- an outcome each Publisher Defendant feared if it acted alone.

---

[8] In fact, as described below, Amazon announced a new initiative in January 2010 that would assist authors in self-publishing through Amazon on the Kindle Digital Platform.

One of the strategies that they employed was the elimination of the existing discount on wholesale prices of e-books. This meant that the wholesale price for e-books would equal the wholesale price for physical books, and as a result, the wholesale price that Amazon paid for an e-book would be set at several dollars above Amazon's $9.99 price point. This tactic, however, failed to convince Amazon to change its pricing policies and it continued to sell many NYT Bestsellers as loss leaders at $9.99.[9]

The Publishers were not shy about expressing their displeasure to Amazon about its $9.99 pricing. In February 2009, Penguin told Amazon that "their 9.99 model" was "not a good sustainable one." HarperCollins similarly warned Amazon that it was "seriously considering changes to our discount structure and our digital list prices for all retailers." In March 2009, Macmillan's Sargent met with Amazon to express his own concern with the $9.99 price point, and indicated that "all the pubs" were talking about it. In June 2009, S&S's Reidy bluntly told Amazon that the $9.99 price point was "a mistake" and that she would "continue to be vocal because she thinks it's terrible for the business." In early December 2009, Hachette's

[9] Among other strategies that two or more of the Publishers discussed with each other were retail price maintenance, mandatory minimum advertised pricing, and a joint venture to sell e-books.

Nourry met with Amazon's Naggar, and told him that Amazon's $9.99 pricing posed a "big problem" for the industry. According to Nourry, if Amazon raised e-book prices by even one or two dollars it would "solve the problem."

The Publisher Defendants did not believe, however, that any one of them acting alone could convince Amazon to change its pricing policy. They also feared that if they did not act as a group, Amazon would use its ever-growing power in the book distribution business to retaliate against them. As a result, the Publisher Defendants conferred about their need to act collectively if they were to have any impact on Amazon's pricing. As a Penguin executive reported to the Penguin Group Board of Directors under the heading "competition and collaboration," it "will not be possible for any individual publisher to mount an effective response" to Amazon "because of both the resources necessary and the risk of retribution, so the industry needs to develop a common strategy."

Thus, as early as December 2008, Stefan von Holtzbrinck of Macmillan and Hachette's Nourry agreed "to exchange information and cooperate very tightly on all issues around e-books and the Kindle." Nourry explained that "at the heart of our strategy" are discussions among "top publishers" in the United States "to create an alternative platform to Amazon for ebooks." He observed, however, that the goal of these ventures is "less to

compete with Amazon than to force it to accept a price level higher than 9.99." During the Summer of 2009, Nourry came to New York and met with the CEOs of Hachette's competitors on June 29 and 30. Nourry reported after his first day of meetings that "the movement is positive" with respect to Macmillan, S&S, HarperCollins, and Penguin. While he expressed his continued fear that Amazon's pricing would lead to "selling content at 7$ . . . [l]ike it works in the music business," he was reassured to know that "none of our competitors" wanted this to happen either.

On a fairly regular basis, roughly once a quarter, the CEOs of the Publishers held dinners in the private dining rooms of New York restaurants, without counsel or assistants present, in order to discuss the common challenges they faced, including most prominently Amazon's pricing policies. Before one such dinner, Hachette's Young promised Nourry that he would raise with his competitors their options to confront the "potentially dominant role played by . . . Amazon" in e-books, "in order to control their strategy and pricing." As Young put it, "I hate [Amazon's] bullying behavior and will be happy to support a strategy that restricts their plans for world domination."

As the Publisher Defendants' CEOs testified, the Publishers did not compete with each other on price; while they were serious competitors, their preferred fields of competition were

over authors and agents. Thus, they felt no hesitation in freely discussing Amazon's prices with each other and their joint strategies for raising those prices.

In the Fall of 2009, Reidy explained to her superior at Simon & Schuster's parent company CBS Corporation, Leslie Moonves ("Moonves"), that S&S was considering several different options to "get Amazon to change its pricing." As Reidy explained,

> we've always known that unless other publishers follow us, there's no chance of success in getting Amazon to change its pricing practices. . . . And of course you were right that without a critical mass behind us Amazon won't 'negotiate,' so we need to be more confident of how our fellow publishers will react if we make a move."

Reidy assured Moonves, however, that she was "fairly sure that at least two of them would quickly follow us" and would "keep thinking of how to attack the problem (as we perceive it) of current eBook pricing; as you realize, we think it's too important to ignore." Reidy acknowledged to Moonves that "we need to 'gather more troops' and ammunition first!"

In addition to raising the wholesale price of e-books, another strategy that Publisher Defendants adopted in 2009 to combat Amazon's $9.99 pricing was the delayed release or "withholding" of the e-book versions of New Releases, a practice

that was also called "windowing."[10] By the end of 2009, four of the Publisher Defendants -- Macmillan, Simon & Schuster, Hachette, and HarperCollins -- had announced or implemented a policy of windowing some of their most popular e-book titles on Amazon. By making the more expensive hardcover version available to the public before the lower priced e-book, the Publisher Defendants hoped to protect the sales of New Release hardcover books and to pressure Amazon to raise its e-book prices. Sargent explained his support for withholding e-books from Amazon in the following terms, "Right now it is all about tactics while we try to get hardcovers over the artificially low 9.99 price point," and "we need to do something to budge Amazon from their current strategy." Hachette's Young similarly believed that "windowing . . . was the only way we could deal with Amazon selling off the family jewels."

In order for the tactic of windowing to succeed, the Publishers knew they needed to act together. That several Publishers synchronized the adoption and announcement of their windowing strategies was thus no mere coincidence. For example,

[10] Publishers had traditionally delayed the release of paperback versions of hardcover books. This practice is known as windowing. While the delayed release of some e-book titles, particularly those of popular New Releases, is more technically known as withholding, many in the publishing industry also called it windowing, and that term will also be used in this Opinion to refer to the delayed release of e-books as a strategy employed by the Publisher Defendants to pressure Amazon to lift its e-book prices.

Hachette's Young told Nourry in late Fall 2009, "[c]ompletely confidentially, Carolyn [Reidy] has told me that they [S&S] are delaying the new Stephen King, with his full support, but will not be announcing this until after Labor Day." Understanding the impropriety of this exchange of confidential information with a competitor, Young advised Nourry that "it would be prudent for you to double delete this from your email files when you return to your office." When HarperCollins soon followed with its own windowing announcement, delaying the digital release of Sarah Palin's Going Rogue, Hachette's Nourry congratulated Murray on his decision: "Well done for the Palin book," Nourry wrote, "and welcome to the Club!"

The Publisher Defendants' synchronized windowing strategy was publicly reported and tied to their discontent with Amazon's pricing. A Wall Street Journal article of December 9, entitled "Two Major Publishers to Hold Back E-Books," reported that S&S was windowing in order to "tak[e] a dramatic stand against the cut-rate $9.99 pricing of e-book best sellers," and that Hachette would follow suit in an effort to "preserve our industry" from authors' work being "sold off at bargain-basement prices." The article's author noted that "publishers have come to fear that the bargain prices will lead consumers to conclude that books are worth only $10, or less, upsetting the pricing model that has survived for decades." The article reported that

S&S was intentionally focusing its windowing efforts on its most popular titles; as an S&S executive explained, she was concerned that e-book sales were "cannibalizing new best-selling hardcovers, which are the mainstay of the publishing business."

A New York Times article of the same day entitled "Publishers Delay E-book Releases," described an even broader effort among the Publisher Defendants to delay the digital release of certain popular titles. It reported that "[p]ublishers have been debating the timing of e-books in part as a way to protest the low prices -- typically $9.99 -- that online retailers like Amazon and Sony are offering on ebook versions of new releases and best sellers." It stated that at least four Publishers -- S&S, Hachette, HarperCollins, and Macmillan -- already had begun or announced an intention to window e-books in the coming year. The article described the economics of windowing and tied the strategy to the protection of Publishers' physical book business, stating that

> Although publishers currently receive the same wholesale price for an e-book that they receive for a print book (meaning the retailer takes a loss on the sale of the most popular e-books), publishing houses worry that eventually, Amazon and other e-book retailers will pressure publishers to take a smaller cut on e-books. In addition, since 95 percent of the business still comes from print booksellers, the publishers want to prevent those retailers from reducing orders.

The next day, the Wall Street Journal similarly announced that others had joined the windowing movement, reporting that

"HarperCollins Joins Ranks of Those Delaying E-Books," as "the debate over the timing and pricing of e-books heats up." The article stated that, beginning in early 2010, HarperCollins will delay the release of "five to ten hardcover titles each month." It quoted Murray saying, "We have to believe that delaying the e-book edition helped hardcover sales." The article also reported that Penguin was "watching the current situation with interest."

The three Publisher Defendants who had announced their adoption of a windowing policy hoped that Macmillan, Penguin, and Random House would join their campaign. As Nourry expressed on December 6, in order "[t]o succeed our colleagues must . . . follow us." Five days later, S&S's Reidy advised Macmillan that it would "love" for Macmillan "to join" Hachette, HarperCollins, and S&S in windowing, and "fel[t] if one more publisher comes aboard, everyone else will follow suit." On December 15, Macmillan announced that, starting in January, it would delay release of most of its e-books for 90 days.[11] It was reported in the Wall Street Journal on December 16.

This left only two of the Big Six not yet committed to windowing. Penguin's Makinson reported in December that Hachette had started to "put a lot of pressure" on Penguin "to join the windowing movement," but Penguin refused to do so.

[11] As it turned out, Macmillan never implemented this policy.

Penguin's McCall was well aware that "[i]f other publishers don't follow suit" with windowing, Amazon's $9.99 "predatory pricing will continue, and we'll lose." When Penguin and Random House chose not to join their competitors and delay the release of e-books, Hachette's Young found their refusal "deeply divisive and disappointing."

Even though by the Winter of 2009, four of the Publisher Defendants had delayed the release of some e-books or announced an intention to so, they knew that windowing was not a long-term solution to Amazon's $9.99 pricing model. Among other things, windowing carried serious risks. As Sargent recognized, windowing was "really bad" because it encouraged piracy. Reidy noted that windowing "did not seem the wisest course" since "it doesn't seem smart to penalize the eBook reader: we in fact want to encourage eBook purchases, so long as we can maintain our margins and income." She feared that windowing could "alienate an entire portion (and a growing one) of our audience." As Sargent admitted to an author on December 14, while windowing could be used as a short-term tactic, "[w]indowing is entirely stupid," and "actually makes no damn sense at all really." As a Penguin study showed, when a Publisher delayed the release of e-books, its sales never recovered. The lost customers neither bought the print book at a higher price nor returned to purchase those e-books when they finally became available.

Sargent, for one, hoped that over time Publishers would be able to move to a system of simultaneous release of e-books with their physical counterparts, but at a higher price point of between $12.95 and $14.95. In order to do so, the Publishers would need to find a way to gain long-term control over pricing, including on Amazon. "The questions is," Sargent wondered, "how to get there?" Other Publisher Defendants envisioned even higher price points for e-books, but pondered the same fundamental dilemma. It was in this context that Apple arrived on the scene and provided the Publisher Defendants with the means to achieve their shared goal.

D. Apple's Development of iBooks

Apple is one of America's most admired, dynamic, and successful technology companies. Its innovative devices are immensely popular not only in this country but around the world. But, as of 2009, Apple had no e-bookstore. Consumers could read e-books on Apple's devices through third party software, such as apps, but Apple did not yet have its own e-reading software or e-bookstore with a collection of books available for purchase.

Apple did not have an e-bookstore in 2009 because it did not yet have a device that its founder Steve Jobs ("Jobs") believed would be a great e-reader. He demanded no less before he would invest his company's energies in e-books. That was about to change.

In 2009, Apple was close to unveiling the iPad. With this revolutionary tablet, Apple was able to contemplate the arrival of its first great device for reading e-books. Therefore, under the direction of Apple's Cue, Moerer and others began studying the e-book industry. As of 2009, Cue had worked at Apple for twenty years and had played a major role in creating Apple's content stores, beginning with Apple's Online Store in 1998, the iTunes Store in 2003, and the App Store in 2008. Since 2004, Cue had been responsible for running all of Apple's digital content stores and had led Apple's negotiations in its deals with major content providers.

By June, Cue's team had assembled data that showed that the book market in North America was larger than the music market. The book industry was estimated to be roughly $35 to $42 billion in size, with trade books comprising $12.5 billion of that figure. While trade e-books accounted for just $100 million or so of those numbers, that market was growing at an exponential rate. Apple's McDonald predicted that the e-book market could reach nearly $1 billion in 2010.

Apple, of course, knew that Amazon was the dominant e-retailer ("e-tailer") of books. While part of Amazon's success could be attributed to its Kindle, Apple understood that another reason for Amazon's success in the e-book market was its low prices. As of that time, Apple had little experience with

competing on price when selling content; indeed, it considered itself a price "leader" in selling music, apps, and other content.

It was also clear to Cue that "all the content owners hate Amazon."[12] As early as February 2009, Cue recognized that "[t]he book publishers would do almost anything for us to get into the ebook business." Apple had also discovered analyst reports in June 2009 that indicated that a price of $12.99 could be a more profitable price point for e-books than Amazon's $9.99.

By November 2009, Apple had compiled a "Business Outlook" for audio book and e-book opportunities. It concluded that selling e-books as individual apps was "flawed." It was at that relatively late date that Jobs authorized Cue to pursue the development of a dedicated Apple e-bookstore (the "iBookstore") for the iPad. Apple planned to demonstrate the iPad to the public at the Launch on January 27, 2010, and planned to ship the devices to stores in early April 2010.

Apple believed that the iPad would be a transformational e-reader. In contrast to the black-and-white e-reader devices on the market at the time, the iPad would have the capacity to display not only e-book text but also e-book illustrations and photographs in color on a backlit screen. The iPad would also

[12] Cue attributed the Publishers' hatred of Amazon to Amazon "leveraging [its] force in physical [books] to force [the Publishers] into bad deals" in e-books.

have audio and video capabilities and a touch screen, which Apple believed would be seen by readers as a particularly attractive feature.

Even though the iPad Launch would happen with or without an iBookstore, Apple did hope to announce its new iBookstore at the Launch. This would ensure maximum consumer exposure and provide a dramatic component of the Launch. But, this left Cue with less than two months for Apple to acquire enough content to create a viable Apple e-bookstore, and that period included the Christmas and New Year holidays.[13] As a result, Apple streamlined its efforts and concentrated on executing agreements with the Big Six Publishers for trade e-books. It would broaden its campaign to add more publishers and to include other kinds of e-books, including textbooks and every other kind of e-book, after the Launch.

Cue also had his own reasons for working hard to make the iBookstore a reality in time for the Launch. He was, of course, an able and experienced negotiator. He took pride in all he had achieved for Apple and wanted to succeed in adding an e-bookstore to its other content domains. Cue believed that with the introduction of the iPad the iBookstore held the

[13] The record does not reveal when Apple began to develop the software for the iBookstore, but it is clear that Apple was intensely engaged in that development throughout this two month window.

potential to be another rousing success for his company. But, beyond professional pride, Cue had more personal reasons for making the iBookstore a reality in record-breaking time. Cue knew that Jobs was seriously ill and that this would be one of his last opportunities to bring to life one of Jobs's visions and to demonstrate his devotion to the man who had given him the opportunity to help transform American culture.

E. December 15 to 16, 2009: Apple's First New York Meetings with Publishers

Beginning on December 8, 2009, Cue's team contacted the Publishers to set up meetings the following week to discuss an "extremely confidential" subject. Apple made it clear in these calls that it would be trying to meet with each of the Big Six CEOs on its whirlwind trip to New York City.

Apple's requests for meetings in New York was an exciting turn of events for the Publishers and prompted a flurry of telephone calls among them. They speculated about how they might turn Apple's entry into the e-book business to their advantage in their battle with Amazon. They were well aware of the press reports that Apple would be announcing the arrival of another revolutionary device. Reidy, Murray, and Young exchanged at least five telephone calls on December 10 and 11 alone. These calls among the Publisher Defendants' CEOs would continue and intensify at critical moments during the course of

the Publishers' ensuing negotiations with Apple.[14] See Appendix A.

Even before it met with any of the Publishers on December 15, Apple already knew several things that are important to the events that would unfold in the coming weeks. As previously described, Apple understood that the Publishers wanted to pressure Amazon to raise the $9.99 price point for e-books, that the Publishers were searching for ways to do that, and that they were willing to coordinate their efforts to achieve that goal. By December 15, the Wall Street Journal and New York Times articles of December 9 and 10 had described the windowing commitment made by three of the Big Six. Cue viewed the e-book market at the time to be dysfunctional and ripe for Apple's arrival.

For its part, Apple had decided that it would not open the iBookstore if it could not make money on the store and compete effectively with Amazon.[15] Apple knew that it needed access to a

[14] The telephone calls among the Publisher Defendants during the period of their negotiations with Apple represented a departure from the ordinary pattern of calls among them. By contrast, there was only one telephone call made between these CEOs during the week prior to Apple's first contact with the Publishers on December 8.

[15] Some months earlier, Apple had considered proposing to Amazon that they simply divide the e-market for books and music, with iTunes acting as "an ebook reseller exclusive to Amazon and Amazon becom[ing] an audio/video iTunes reseller exclusive to Apple."

large number of titles. It was unwilling to allow e-books to be windowed at any Apple store. Apple also preferred to sell e-books at prices below their physical counterparts, although that object largely fell by the wayside in the coming weeks. Prior to meeting with the Publishers, Apple assumed that it would purchase e-books from them under the wholesale model and resell them, in line with the arrangement Apple used to obtain movies and TV shows for resale through its iTunes store.

As a master negotiator, Cue came well prepared for his meetings. He knew how to convey Apple's conditions for entry and at the same time give the Publishers an incentive for entering, almost overnight, into a partnership with Apple. He decided to entice the Publishers by conveying an unambiguous message that Apple was willing to sell e-books at prices up to $14.99, that is, at a price point $5 above Amazon's price for many New Releases and NYT Bestsellers.

Cue, Moerer, and their in-house attorney Saul met separately with Hachette, Penguin, and Random House on December 15, and with HarperCollins, Macmillan, and S&S on December 16. If there was one Publisher that Apple most desired to have in its iBookstore, it was Random House, the largest Publisher. As events unfolded, however, that would be the only Publisher who declined to join the iBookstore before the Launch.

Following a script, Apple conveyed in each of these meetings that it hoped to be able to begin selling e-books through an e-bookstore within the next 90 days as a feature on a new web-enabled machine. Apple expected that its entry into the market with an iBookstore on this device would help make books "cool" for the iTunes generation and quickly make Apple the vehicle through which a significant percentage of e-books were sold.

Cue emphasized that Apple would only launch an e-bookstore if it got all of the major Publishers to sign on. As Cue intended, each of the Publishers understood that this was a reference to the Big Six.

The parties exchanged thoughts about a workable business model in these meetings. Apple learned that current wholesale prices for e-books typically fell in the range of $13 to $15, and some were even sold at prices as high as $17.50. Cue told Publishers that they would need to lower their wholesale prices for Apple if Apple were to enter the business. In order for Apple to compete with Amazon it needed to be able to price e-books as cheaply as Amazon did, and it was not willing to pursue a strategy of loss leaders. As Reidy recorded, Apple expressed that it "cannot tolerate a market where the product is sold significantly more cheaply elsewhere."

Well aware of the Publishers' experimentation with windowing, Apple also told Publishers that it opposed windowing; it believed that withholding e-books alienated customers and led to piracy. Random House and Macmillan agreed, telling Apple that they believed windowing was "a terrible, self-destructive idea," even though Macmillan admitted that it might be considering "holdbacks" on some NYT Bestsellers.

Hachette and later HarperCollins surprised Apple with their suggestion that, instead of a wholesale model, Apple adopt an agency model for the distribution of e-books. Hachette told Apple that it had already discussed switching to an agency model with Barnes & Noble and had concluded that it was an attractive business model for selling e-books.[16] During these meetings, Cue rejected the idea. Within days, however, he would reconsider their suggestion.

Mainly, however, the Publishers told Apple how unhappy they were with Amazon's $9.99 price point. Every Publisher with whom Apple met lamented Amazon's pricing New Releases and NYT Bestsellers at $9.99. Several of them made clear that they were actively searching for a way to gain more control over pricing and were implementing tactics they did not enjoy, like

[16] Hachette's Thomas had spoken to a HarperCollins executive on December 10, in advance of their meetings with Apple, regarding exploring agency as an alternative business model.

windowing, in an attempt to effect the change that was of utmost importance to them.

For example, Penguin in its meeting with Apple shared its view that a $9.99 e-book was not a "sustainable model." The next day, S&S frankly admitted "hating" Amazon pricing, and HarperCollins revealed that it was interested in the agency model in order "to fix Amazon pricing." HarperCollins advocated that e-book prices be set in the range of $18 to $20, which Cue viewed as utterly unrealistic. Listening to the Publishers, Cue understood that they were afraid that Amazon's pricing strategy threatened their overall business.

Apple, in turn, assured the Publishers that it was not interested in entering the e-book market by pursuing a low-price strategy. Apple opined that $9.99 was not yet "engrained" in the consumer mind, and suggested in each meeting pricing e-books at between $11.99 and $14.99. The Publishers were thrilled. Macmillan agreed immediately with Apple's suggested $14.99 retail price for New Releases.

As Cue promptly reported to Jobs on December 15, after he had completed the first three of his six meetings, "[c]learly, the biggest issue is new release pricing and they want a proposal from us." Cue was confident that he would be able to build the iBookstore in time for the Launch. As he told Jobs, "[n]othing scared me or made me feel like we can't get these

deals done right away." In his view, the Publishers had been "ecstatic" about what Apple's arrival could mean for "their industry."

On the heels of their initial meetings with Apple, the Publisher Defendants enthusiastically shared the good news that Apple was willing to enter the e-book market with a significantly higher price point for newly-released e-books. On December 17, Reidy reported the "[t]errific news!" to Moonves that Apple was entering the e-book market and "was not interested in a low price point for digital books." Reidy understood that "they [Apple] don't want Amazon's $9.95 to continue." Hachette's Nourry similarly told Cue after their initial meeting that he was glad it appeared "our business interests are very much aligned." HarperCollins later reflected that Apple was the Publishers' "best partner" because it "do[es]n't like deep discounting."

Several of the Publishers hashed over their meetings with Apple with one another. After Young had met with Apple but before S&S had its meeting, Young could not resist calling Reidy to share the wonderful news that the "Top Man" at Apple opposed $9.99 pricing. He hesitated to say more because S&S would be meeting with Apple the following day, and he did not want to "spoil [the] fun." Young and Reidy promised to "check in" with each other after S&S had its meeting with Apple, and did so in

several calls over the course of the next two days.[17] At a breakfast meeting, Penguin's Makinson discussed the Apple meetings with Hachette's Nourry. On December 17, Rupert Murdoch, Chairman and CEO of HarperCollins' parent company News Corp, relayed to Random House that Apple would soon be launching an e-reader and would be "selling books at 15 dollars." Charlie Redmayne, a HarperCollins' digital officer, bluntly suggested to Murray immediately after their meeting with Apple on December 16 that they coordinate a response to Apple with the other Publishers. As Redmayne wrote, in light of their "[g]reat meeting . . . I wou[]ld talk to the other CEO's early and look to present in early Jan."

F. Apple Switches Gears and Presents An Agency Model with 30% Commission

Having received an enthusiastic reception from the Publishers, the Apple team returned to Apple's headquarters in Cupertino, California and quickly absorbed what it had heard. One idea that it considered proposing to the Publishers, but rejected, was an across-the-board 25% discount for e-books off the wholesale price for physical books. With many NYT Bestsellers having a $12 wholesale price for the hardcover book, this would allow a $9 digital wholesale price, which Apple's

[17] On December 15, Hachette's Young spoke to S&S's Reidy by telephone prior to his meeting with Cue. On December 16, Reidy called Young just minutes after her meeting with Cue had ended. The next day, the two exchanged three calls.

Moerer thought should be "acceptable" to the Publishers for all of their e-books with the possible exception of a few blockbusters.

Cue quickly decided, however, to go a different route. Unless the Publishers agreed to lower wholesale prices for e-books, Apple would run the risk of losing money if it tried or was forced to match Amazon's pricing to remain competitive. The wholesale model also allowed the Publishers to try to control digital book prices by windowing e-books. As Apple had expressed to the Publishers, it strongly believed that withholding content would interfere with the growth of the digital market and was inconsistent with its business goals and practices. Apple thus embraced the model that Hachette and HarperCollins had proposed -- the agency model. Apple was already familiar with this model since it used the agency model to sell apps through its App Store.

Apple realized that the recent turmoil in the digital book business strengthened its hand in proposing this new business model to the Publishers. Apple did not have to open an e-bookstore when it launched the iPad; it could add the iBookstore later. On the other hand, the Publishers were searching for an alternative to Amazon's pricing policies and excited about Apple's entry into the e-book industry and the prospect that that entry would give them leverage in their negotiations with

Amazon. Apple appreciated that, in the words of Macmillan's Sargent, the Publishers viewed Apple as "offer[ing] the single best opportunity [they] would ever have to correct the imbalance in our e-book market."

Apple settled on an agency model with a 30% commission, the same commission it was using in its App Store. Agency would give the Publishers the control over e-book pricing that they desired, and ensured that Apple would make a profit from every e-book sale in its iBookstore without having to compete on price. Apple realized, however, that in handing over pricing decisions to the Publishers, it needed to restrain their desire to raise e-book prices sky high. It decided to require retail prices to be restrained by pricing tiers with caps. While Apple was willing to raise e-book prices by as much as 50% over Amazon's $9.99, it did not want to be embarrassed by what it considered unrealistically high prices.

The agency model presented one significant problem. Apple wanted its iBookstore to be a rousing success. For that to happen, Apple needed not only content but also customers. Apple realized that if it moved to an agency model with the Publishers, Apple would be at a competitive disadvantage so long as Amazon remained on the wholesale model and could price New Releases and NYT Bestsellers at $9.99, or even lower to compete with Apple. Since it was inevitable that the Publishers would

raise e-book prices when given the opportunity -- indeed, Apple expected the Publishers to raise the prices to the tier caps -- e-books priced at $9.99 by Amazon would doom the iBookstore. Why would a consumer buy an e-book in the iBookstore for $14.99 when it could download it from Amazon for $9.99?

To ensure that the iBookstore would be competitive at higher prices, Apple concluded that it needed to eliminate all retail price competition. Thus, the final component of its agency model required the Publishers to move all of their e-tailers to agency. Apple expected that this proposal would appeal to the Publishers. After all, it would allow them to "fix" their "problem" with Amazon's pricing.

Apple's first meetings with the Publishers in New York had occurred on a Tuesday and Wednesday. Just three days later, on Saturday, Cue was ready to test drive his agency model and hear preliminary reactions from the Publishers. On December 19, Cue emailed three of the six Publishers' CEOs to set up thirty minute meetings for the following Monday or Tuesday to "update you [on] all my findings and thoughts." Cue already knew from the meetings earlier in the week that Hachette and HarperCollins were enamored of the agency model and did not contact them again at this stage. He had pegged Penguin's CEO as a "follower," and chose to hold off on contacting him. After all, Penguin and Random House were the only Publishers that had not publicly

announced any plans to withhold e-books from Amazon. Cue decided instead to test his proposal with S&S, Macmillan, and Random House.

Cue chose these three Publishers carefully. He considered Reidy a real "leader" among her fellow CEOs. He was not wrong. As described below, she was instrumental in convincing both Penguin and Macmillan to sign up with Apple when they were wavering. She was in frequent contact with Young, Shanks and Sargent at every critical juncture in the weeks before the Launch.

Cue reached out to Macmillan's Sargent for a different reason. He had been impressed with Sargent's personal history, in particular his family's storied connection with the publishing industry.[18] Cue believed that a partnership with Macmillan would add caché. But, most importantly, Cue wanted the largest Publisher, Random House, to come on board.

Cue succeeded in speaking with key executives from each of these three Publishers early the following week. He explained that he had met with all of the Big Six the preceding week, and had come to the conclusion that the way forward would involve four components. First, the e-book "industry" needed to move to the agency model, which would allow the Publishers to set the

[18] Sargent's father, John Turner Sargent, Sr., was the President and CEO of the Doubleday & Company publishing house from 1963 to 1978, and led the company's expansion into an industry giant.

prices and introduce what Cue euphemistically termed "some level of reasonable pricing." Second, Apple would need a 30% margin on e-books sold through Apple. Third, he proposed setting prices for New Release e-books at $12.99, that is, $3 over Amazon's $9.99 price. Finally, to remove all retail price competition, the Publishers would have to adopt the agency model for all of their e-tailers.

Reidy described her conversation with Cue in a detailed email to colleagues at S&S that day. According to Reidy, Cue "didn't think anything [other than the agency model] would keep the market from its current pricing 'craziness.'" Reidy did not hesitate over the suggestion that the industry as a whole be moved to an agency model; Reidy had replied to Cue, "if we make these our terms, then they are our terms." Overall, Reidy was intrigued, but worried that the 30% commission for Apple would be too "steep."

Markus Dohle ("Dohle"), Chairman and CEO of Random House at the time, similarly described his conversation with Cue to colleagues at Random House. Dohle reported that Cue "thinks that book prices are becoming too low -- he is worried about the consumer perception. Therefore he suggests an 'agency model.'" Eliminating price competition with Amazon was essential to Cue since "[h]e assumes that if we find a new TOS [terms of sale, wholesale] model which would provide A[pple] with an acceptable

margin, Amazon would lower the prices again following . . . their loss leader[] strategy." As Dohle reported, when he expressed concern about Amazon's willingness to accept an agency model, Cue suggested that "windowing could be used to establish a distributor [agent] model" if Amazon balked.

Shortly after his conversation with Cue, Sargent wrote to Cue to suggest a pricing strategy that would allow Publishers to price some e-books at $19.95, but that "put the majority of new releases at the 14.95 or 12.95 price points." Introducing the concept of a dual model, an idea that would continue to have appeal for Sargent in the following weeks, Sargent also suggested that Apple offer two alternative terms of sale -- a "30% agency model with no windowing," and "[a] [d]iscount model that includes windowing" -- allowing each Publisher to "decid[e] which model to buy under." Sargent later reflected to another Macmillan executive that he believed this dual approach "[w]ould force Amazon's hand."

On December 21, Cue advised Jobs that his talks with the Publishers had gone "well and everyone understood our position and thought it was reasonable." Cue observed that the Publishers recognized "the plus" of moving to an agency model, namely it "solves Amazon issue."[19] On the "negative" side, they

[19] Cue asserted at trial that "solves Amazon issue" referred to pricing e-books in the iBookstore above $9.99, and was not a

were troubled by a commission for Apple that was as high as 30%. That gave the Publishers a "little less" than they would like. As of that point, Cue believed that the Publishers were willing to pursue a strategy of moving all of their e-tailers to the agency model, and in fact several Publishers had told him so. The Publishers believed, however, that a $12.99 price for an e-book would be too low if the physical book sold for more than $35. Cue reported that he had urged them to focus "on the other 99% and we can figure out how to solve the exceptions" later.

---

reference to raising prices across the industry or eliminating Amazon's ability to set prices. Indeed, Cue protested at trial that, throughout its negotiations with the Publisher Defendants, Apple was concerned only with the pricing that would prevail in the iBookstore and sought only to "fix" Amazon's pricing or "solve the Amazon issue" in its own e-bookstore. In this and several other aspects of Cue's testimony, regrettably, he was not credible. The documentary record and the commercial context of the negotiations leave room for no other conclusion. Apple's pitch to the Publishers was -- from beginning to end -- a vision for a new industry-wide price schedule. Any other course would have left the Publishers vulnerable to Amazon's pricing strategies and would have forced Apple to compete on price. Accordingly, Cue's repeated assertion at trial that his sole "focus" was on thinking about the agency deals and their effects "from an Apple point of view," cannot be taken at face value. As a savvy negotiator he knew how to place himself in the Publishers' shoes, understand their interests, and appeal to their concerns, as he eventually admitted toward the end of his testimony. Cue recognized that the Publishers were consumed first and foremost by a desire to eliminate Amazon's $9.99 price for e-books across the market. His colleagues, including Saul, acknowledged that they understood at the time that Apple could not solve the Publisher's problem with $9.99 if the Publishers left Amazon on wholesale. Thus, Cue and his team found a way to solve the "Amazon problem" for the Publishers; not just "as to Apple," but industry-wide.

Buoyed by the reactions of the three Publishers to Apple's proposal that the entire e-book industry be converted to an agency model -- with higher prices for e-books, a 30% commission for Apple and no retail price competition -- Cue's team turned their energies toward fleshing out a structure for this arrangement. They entered the Christmas break with every hope that an iBookstore could be announced at the Launch.

G. Apple's Term Sheet: All E-tailers to Agency and Pricing Caps

Shortly after the Christmas holidays, Cue wrote to each of the Publishers to present Apple's term sheet. On January 4 and 5, the first Monday and Tuesday in the new year, Cue wrote six essentially identical emails.[20] Only the introduction varied. For the three Publishers with whom he had talked in late December, Cue began his emails with, "As we discussed." For the other three, he began with the following comment: "After talking to all the other publishers and seeing the overall book environment, here is what I think is the best approach for ebooks."[21]

In these emails, Cue recapped the key components of Apple's proposed agency model. It included the elimination of retail

---

[20] Cue sent emails to Macmillan, S&S, Random House, and Hachette on January 4. Cue's emails to Penguin and HarperCollins were sent on January 5.

[21] For reasons unknown, Cue sent two emails to Macmillan, one with each greeting.

price competition and raising many e-book prices by at least $3. Cue wrote, "Just like the App Store, we are proposing a principal-agency model with you, where you would be the principal and iTunes would sell your product as your agent for your account. In exchange for acting as your agent iTunes would get a 30% commission for each transaction." For "hardback books" that retail for less than $35, the Publisher would set a price for an e-book at any price up to $12.99; for trade or mass-market paperback books, the price would be capped at $9.99; and for any book that retailed above $35, the e-book price would be capped at $14.99 and increments of $5 above that. Cue added that a "realistic" price for an e-book would be less than 50% of the retail price for the hardcover book. He emphasized that "to sell e-books at realistic prices . . . all resellers of new titles need to be in agency model." In closing, Cue reiterated that Apple "think[s] these agency terms accomplish[] all the goals we both have."

It was as apparent to the Publishers as it was to Apple that Apple's proposal would only allow the Publishers to raise the consumer prices for e-book versions of their key titles above Amazon's $9.99 price point to the proposed price caps if they moved Amazon and their other e-tailers to agency. Reidy immediately advised her S&S colleagues that she was "in total agreement" that the "[a]gency model should hold for all

retailers; these would become our terms." Reidy's notes on her copy of Cue's e-mail captured the benefits she saw accruing from Apple's proposal. The ability to raise e-book prices and protect the physical book business was front and center. Her notes read: "Higher price slows Ebks/casual purchaser/keeps retailers/stops authors leaving."

In the conversations that followed the dissemination of the term sheet, Publishers told Apple that the proposed price caps were too low. Apple reiterated that it would not tolerate windowing, it did not want to lose money, and it did not want any price competition. It advocated for an industry-wide adoption of the agency model as "the only way" to "move the whole market off 9.99."

H. Creation of the MFN Clause

One week after it distributed the term sheet, Apple distributed a draft contract. During the intervening week, however, Cue's thinking about how to achieve an industry-wide shift to the agency model changed. His in-house counsel had been working on an alternative way to reach that goal that was even more effective in protecting Apple's interests. Saul proposed using an MFN clause for retail prices. The MFN guaranteed that the e-books in Apple's e-bookstore would be sold for the lowest retail price available in the marketplace.

Apple had used an MFN in one of its music agreements, but the music had been purchased under a wholesale model. Apple's use of an MFN for a retail price was a unique feature of its e-book agency agreements.

By combining the MFN with the pricing tiers, the pricing discretion Apple gave to the Publishers with one hand, it took away with the other. While Publishers could theoretically raise e-book prices in the iBookstore above the $9.99 price point to the top of the Apple pricing tiers, unless the Publishers moved all of their e-tailers to an agency model and raised e-book prices in all of those e-bookstores, Apple would be selling its e-books at its competitors' lower prices. Using Saul's characterization, the "elegant" solution presented by the MFN accomplished all of Apple's objectives. It eliminated any risk that Apple would ever have to compete on price when selling e-books, while as a practical matter forcing the Publishers to adopt the agency model across the board. As Cue admitted to colleagues in Britain in the Spring, "any decent MFN forces the model."[22]

Cue had an opportunity to explain the concept of the MFN to Moerer on January 10. Moerer had been speaking with Random House, which was increasingly skeptical of Apple's proposals,

[22] Cue's words are captured in a colleague's memorandum. At trial, Cue denied that he had actually spoken in those terms.

and he wanted Cue's advice on how to respond to several of its questions. One question was, "Are we willing to accept an agency model if other retailers continue a standard wholesale model for new releases without holdbacks?" Cue responded, "We are (I don't think we can legally force this).[23] What we care about is price so the contract will say we get it at 30% less whatever the lowest retail price out in the market is (whether agency or wholesale)."

With the adoption of the MFN, Apple dropped from the agency contract it was drafting the explicit requirement that had appeared in its term sheet that all e-tailers be placed on an agency model. But, Apple did not change its thinking. It believed that the Publishers should still move their e-tailers to agency, and in the weeks that followed, it made sure that happened. Cue was able to report to Jobs on January 13, three days after his e-mail exchange with Moerer, that at least two of the Publishers had agreed to "go [to the] agency model for new releases with everyone else." Thus, despite the fact that it would tell Random House during its increasingly difficult negotiations that it could accept a hybrid model where Random

[23] Apple takes the position that Cue's explanation that it couldn't "legally force" the Publishers to place all of their e-tailers on an agency contract is not a reference to the lawfulness of such a requirement, but is instead a reference to Apple's skepticism that it could legally enforce the clause against any Publisher who reneged on its commitment. It is unnecessary to resolve this ambiguity.

House moves to agency with Apple but stays on wholesale with some retailers, there is no evidence that Apple ever communicated to any of the Publisher Defendants that they were free to leave their other retailers of e-books on a wholesale model or that Apple ever rescinded its demand that each of them move to an agency arrangement with all resellers.[24]

As described above, Apple, quite simply, did not want to compete with Amazon on price. Apple was confident that the iPad would be a revolutionary and wildly popular device. It was happy to compete with Amazon on that playing field, where it believed its strength resided. It would match its device -- the iPad -- against the Kindle. As HarperCollins executive Robert Zaffiris observed on January 20, "Apple is cutting a blanket agency deal to level the playing field and ultimately compete in two areas they feel good about -- technology and iTunes."

I. January 11: Apple Distributes Draft Agency Agreements

On Monday, January 11, Apple sent its proposed eBook Agency Distribution Agreement ("Draft Agreement") to each of the

[24] A great deal of time was spent at trial trying to understand a series of five emails drafted by Jobs on January 14. Cue wanted Jobs's approval for higher price caps, and Jobs's emails show that he was quite concerned about the profitability of the iBookstore. Jobs's final email in the chain indicates that the Publishers need to "move Amazon to the agent model too for new releases for the first year. If they don't, I'm not sure we can be competitive." The e-mails were addressed to Cue and he denies ever receiving any of them, including the last in the series.

Publishers. With the iPad launch just sixteen days away, Cue told Jobs that his "goal" was to "get at least 2 of them to sign this week."

The Draft Agreement contained all of the essential elements of the contracts that the Publisher Defendants would accept two weeks later, including a "day and date" commitment to prohibit windowing on the Apple iBookstore,[25] price tiers, the 30% commission, and the MFN. Although the Publisher Defendants were able to negotiate around the edges, none of the material terms of the contract changed. Apple insisted that its agency contract be uniform. It assured the Publisher Defendants that they would all be getting the same terms, as would every other publisher who decided to sell e-books through the iBookstore.

In the end, each of the Publisher Defendants simply had to decide whether they wanted to take this opportunity to raise the price of e-books or not. The risks of acting and of failing to act were similarly large. As explained below, if a Publisher accepted Apple's terms it was bound to lose some of the revenue it would otherwise make from selling e-books, and could be assured that it would incur the wrath of Amazon. If the Publisher declined to join Apple it would lose this particular opportunity, backed by Apple, to confront Amazon as one of an

[25] The day and date commitment required Publishers to give Apple e-books on the same date they released physical books.

organized group of Publishers united in an effort to eradicate the $9.99 price point.

In the two intervening weeks before the Launch, Apple and the Publishers engaged in intensive negotiations. Apple's Cue, Moerer, and Saul stayed in New York for the nine days immediately preceding the Launch to conclude the negotiations. Up until the very end, it was not clear precisely how many of the five Publisher Defendants would agree to execute the agency contract with Apple.

By all accounts, the negotiations were tough, particularly because Apple made few concessions. The Apple team reminded the Publishers though that this was a rare opportunity for them to achieve control over pricing. As Cue put it bluntly to Hachette, the agency model proposed by Apple was "the best chance for publishers to challenge the 9.99 price point." Some of the discussions regarding three contract terms -- the MFN, the 30% commission, and the pricing tiers -- are described here.

1. MFN Negotiations

The MFN clause required publishers to match in Apple's iBookstore any lower retail price of a New Release offered by any other retailer. The proposed MFN read: "If, for any particular New Release in hardcover format, the then-current Customer Price at any time is or becomes higher than a customer price offered by any other reseller ("Other Customer Price"),

then Publisher shall designate a new, lower Customer Price to meet such lower Other Customer Price." Customer Price was defined as "the price displayed to the [customer] on the [Apple] Online Store, as designated by [the] Publisher for each eBook by selecting from the prices set forth" in an exhibit to the contract.

As already described, the MFN effectively forced the Publisher Defendants to change their entire e-book distribution business to an agency model if they wanted to take control of retail pricing. Any other course would be a race to the bottom in e-book prices and would give the Publisher Defendants a fixed share of a far too small revenue stream.

Under the then-existing wholesale model for selling e-books, the Publisher Defendants received a designated wholesale price for each e-book. This wholesale model was more profitable for a Publisher's e-book business than the agency model proposed by Apple. Under a wholesale arrangement a Publisher received roughly 50% of the hardcover list price from the retailer, whereas under Apple's agency arrangement a Publisher received only 70% of the retail price. For example, as shown on this table, a Publisher might receive $13 on a wholesale basis for an e-book sold by Amazon for $9.99, but (because of the MFN) only $7 from Apple so long as Amazon was still selling that e-book for $9.99. Even if Apple and Amazon

were on the same agency arrangement with a Publisher, and that Publisher were able to move the retail price of the e-book to the top of the Apple price tier and sell it for $12.99, the Publisher would still receive less revenue under the agency model: $9.10 instead of the $13.00 in revenue under the wholesale model.

Publisher Per Unit Earnings
for New Release and NYT Bestseller Titles
Wholesale vs. Agency Model

	Amazon on Wholesale prior to Apple's entry	Apple on Agency with MFN; Amazon on Wholesale	Apple and Amazon on Agency with MFN and Apple price tiers
Hardcover list price	$26.00	$26.00	$26.00
E-book wholesale price (assuming 50%)	$13.00	$13.00	--
Amazon retail price	$9.99	$9.99	$12.99
Apple iBookstore retail price	--	$9.99	$12.99
Publisher revenue received from Amazon	$13.00	**$13.00**	**$9.10**
Publisher revenue received from Apple	--	**$7.00**	**$9.10**

Because the revenue each Publisher Defendant would receive per e-book sold through the Apple store was substantially less than what it was currently receiving under its wholesale arrangements, there was no financial incentive for a Publisher to sign an agency agreement with Apple unless those agreements suited its long-term interests. And as Apple well understood,

that long-term interest was compelling. The Publisher Defendants wanted to shift their industry to higher e-book prices to protect the prices of their physical books and the brick and mortar stores that sold those physical books. While no one Publisher could effect an industry-wide shift in prices or change the public's perception of a book's value, if they moved together they could.

To change the price of e-books across the industry, however, the Publishers would have to raise Amazon's prices. This is where the MFN became such a critical term in Apple's contracts with the Publisher Defendants. It literally stiffened the spines of the Publisher Defendants to ensure that they would demand new terms from Amazon. Thus, the MFN protected Apple from retail price competition as it punished a Publisher if it failed to impose agency terms on other e-tailers.

Many of the documents received into evidence at trial as well as trial testimony reflect this understanding. After signing the Agreement, HarperCollins acknowledged that "[t]he Apple agency model deal means that we will have to shift to an agency model with Amazon" to "strengthen our control over pricing."

Penguin's CFO acknowledged on February 15, 2010, "[g]iven the clauses about price matching in the Apple contract, this could mean that we have to suspend or delay certain sales of

e-books to Amazon until the contract is renegotiated" to move Amazon to the agency model. Recognizing the compulsive nature of the MFN, Shanks testified that in evaluating the Apple deal he came to understand that "the only way we could do [agency]" was if Penguin moved to agency with other e-book retailers as well.

Reidy testified that the MFN meant, as a practical business matter, that S&S would be moving all its other e-book retailers to agency "unless we wanted to make even less money." As Reidy had written to Moonves, remaining on a wholesale model with Amazon "would just enshrine the $9.99 price point at a later date and would require us to lower our own pricing to those who accept the agency model to that price point." Reidy knew that once S&S signed its Agreement with Apple, "we need to change our ebook selling terms with our other eRetailers before" the iBookstore opened, or risk "a situation whereby we must price our adult new release eBooks sold through Apple at $9.99, undercutting one of the reasons for making the deal."

Young also understood that the MFN required Hachette to move all of its e-book retailers to an agency relationship, and "ensure," in his words, "a competitive, level playing field for

e-book sellers."[26] Fully recognizing the benefits and risks from the Apple offer, Nourry told Young that he was "not against [the] MFN as long as it is legal" because "[w]e need to find higher pricing points."[27]

Cue explained that the Publisher Defendants generally did not fight him on the MFN.[28] He was even told that it was an unnecessary feature of the contract since the Publishers were going to move to an agency relationship with all e-book retailers anyway.

The final agency agreements with the Publisher Defendants (the "Agreements") included an MFN in paragraph 5(b). Although there were variations among the five paragraphs, the core principle of the MFN remained intact. The MFN assured that Apple would face no retail price competition and that the Publisher Defendants had no choice but to demand that Amazon, and every other e-book retailer, adopt the agency model. As Saul insisted in an e-mail to an independent publisher who was

---

[26] The word "competitive" in this and many other contexts at the trial means the opposite of competition. It means the eradication of retail price competition.

[27] Macmillan also identified that the antitrust risk of signing the agency agreement with the MFN could be "huge."

[28] Although Cue attempted to deny this fact at trial, at his deposition Cue admitted that the Publisher Defendants generally "accepted" the MFN, and although the term was negotiated, Cue never felt it was discussed "in [the] completely material way of saying, no, we're not doing that." Instead, the conversations were focused mainly on "trying to create loopholes or exceptions to it."

frustrated that the MFN removed the publisher's control over pricing, "There are possible unilateral ways you can comply with our [MFN] provision, such as get others on an agency model, or withhold content. Others have agreed to this and we cannot make any changes."

2. 30 Percent Commission Negotiations

The 30% commission on which Apple insisted in its agency agreements meant that any increase in retail prices, even up to the caps of the pricing tiers, would not compensate for the revenue loss the Publisher Defendants would experience from the sale of e-books under the agency model. Some of the Publisher Defendants predicted that the loss would be roughly 17% of their e-book gross revenue and amount to millions of dollars.

HarperCollins' Murray immediately recognized that "[t]he combination of Apple's proposed pricing tiers and the 30% commission meant that HarperCollins would make less money per book than it was then making on a wholesale model." To address this problem, HarperCollins suggested that Apple take a commission of just 20%.

Apple refused to budge. This was the same commission it charged in the App Store. It would give Apple only a single digit positive margin and, in Apple's view, was necessary to generate the revenue Apple needed to build a great iBookstore.

The 30% commission was ultimately adopted across all of Apple's final Agreements.

3. Price Tier Negotiations

The Publisher Defendants fought hardest over the price caps. They and Apple knew that these negotiations were really about setting the new industry prices for e-books.

These negotiations were intense even though the Draft Agreement included more generous price tiers than the term sheet had proposed.[29] The Draft Agreement capped e-book prices at $12.99 for New Release titles with hardcover list prices of $30 or under, and set a $14.99 price tier cap for New Release titles with hardcover list prices above $30, with incremental price tier increases for every $5 increase in the hardcover list price above $30. For books other than New Releases, the price cap was set at $9.99.

To dramatize the immediate increase in the price of e-books that the Publishers could achieve under the Apple agency agreement, and to assure each Publisher Defendant that it was being treated no differently than its competitors, Moerer sent a table of proposed book prices to them in identical e-mails on

[29] The January 4 term sheet had set a price cap at $14.99 for any book with a hardcover list price above $35, and $12.99 for any hardcover book listed below $35. The Draft Agreement, by contrast, set the demarcation between $12.99 and $14.99 at $30, allowing for higher e-book prices in relation to a title's hardcover list price.

the same day Apple sent out the Draft Agreements. The table showed fiction NYT Bestsellers from every member of the Big Six. It listed the book's title, author, and publisher. It showed each title's hardcover list price, followed by its retail prices when sold as an Amazon hardcover book; Amazon e-book; Barnes & Noble e-book; and finally, as a proposed iTunes e-book.[30] The proposed prices under the iTunes column were always either $12.99 or $14.99, and were always several dollars higher than the then-existing e-book price at Amazon and Barnes & Noble. In some cases, the iTunes e-book price was even higher than the Amazon hardcover price.[31] While the final column would only display Apple's e-book prices for titles published by the particular Publisher receiving that version of the table, the layout made it easy for the Publishers to see that they were all being treated identically. The first page of one of these tables is set out below.

---

[30] Sensitive to the fact that the table looked like an Apple retail price list, Moerer clarified in a follow-up email to Shanks that the prices in the table's final column designating the "iTunes eBook Retail Price" are the "top price tier we've proposed" and that "[i]n the agency model, Penguin would set retail prices at its sole discretion, at this price or any lower price, with Apple acting as your agent."

[31] The Amazon price for e-books, by contrast, was always lower than its retail price for a title's corresponding physical book.

Subject: our meeting tomorrow
Date: Mon, 11 Jan 2010 14:34:29 -0800
From: Keith Moerer <kmoerer@apple.com>
To: <david.shanks@us.penguingroup.com>
Cc: Eddy Cue <cue@apple.com>
Message-ID: <75004564-BE31-48CE-A0EC-EC9ECC98D588@apple.com>

David--

I look forward to meeting with you and Genevieve tomorrow morning.

Kevin Saul has sent a draft agreement in separate email. Eddy has also asked me to send you our pricing analysis of Jan. 1 NYT bestsellers, which will help explain the price tiers we've proposed for hardcover new releases.

Best, Keith

NYT Bestsellers-Hardcover Fiction	Title	Author	Publisher	Hardcover List Price	Amazon Hardcover Retail Price	Amazon eBook Retail Price	B&N eBook Retail Price	iTunes eBook Retail Price
	The Lost Symbol	Dan Brown	Random House	$29.95	$12.00	$9.60	$9.60	
	I, Alex Cross	James Patterson	Hachette	$27.99	$16.79	$9.99	$9.99	
	Under the Dome	Stephen King	Simon & Schuster	$35.00	$21.00	$9.99	$9.99	
	The Help	Kathryn Stockett	Penguin	$24.95	$9.50	$8.55	$8.55	$12.99
	Pirate Latitudes	Michael Crichton	HarperCollins	$27.99	$14.00	$9.99	$9.99	
	Ford County	John Grisham	Random House	$24.00	$11.00	NA	NA	
	U is for Undertow	Sue Grafton	Penguin	$27.95	$14.96	$9.99	$9.99	$12.99
	The Last Song	Nicholas Sparks	Hachette	$24.99	$12.96	$8.80	$8.80	
	The Christmas Sweater	Glenn Beck	Simon & Schuster	$19.99	$11.97	$9.99	$9.99	
	Breathless	Dean Koontz	Random House	$28.00	$14.00	$9.99	$9.99	
	The Lacuna	Barbara Kingsolver	HarperCollins	$26.99	$13.00	$9.99	$9.99	
	True Blue	David Baldacci	Hachette	$27.99	$13.97	$9.99	$9.99	
	Wolf Hall	Hilary Mantel	Macmillan	$27.00	$11.00	$8.80	$8.80	
	The Gathering Storm	Robert Jordan	Macmillan	$29.99	$17.54	NA	NA	
	Half Broke Horses	Jeannette Walls	Simon & Schuster	$26.00	$14.46	$9.99	$9.99	
	Pursuit of Honor	Vince Flynn	Simon & Schuster	$27.99	$12.47	$8.00	$8.00	
	The Scarpetta Factor	Patricia Cornwell	Penguin	$27.95	$14.97	$9.99	$9.99	$12.99
	The Girl Who Played with Fire	Stieg Larsson	Random House	$25.95	$13.00	$7.99	$7.99	
	The Wrecker	Clive Cussler	Penguin	$27.95	$15.97	$9.99	$9.99	$12.99
	South of Broad	Pat Conroy	Random House	$29.95	$16.97	$9.99	$9.99	
	Last Night in Twisted River	John Irving	Random House	$28.00	$15.97	$9.99	$9.99	
	Too Much Happiness	Alice Munro	Random House	$25.95	$15.17	$9.99	$9.99	
	Nanny Returns	Emma McLaughlin	Simon & Schuster	$25.00	$14.39	$9.99	$9.99	
	Too Much Money	Dominick Dunne	Random House	$26.00	$15.21	$9.99	$9.99	
	Her Fearful Symmetry	Audrey Niffenegger	Simon & Schuster	$26.99	$13.49	$5.79	$5.79	
	Heat Wave	Richard Castle	HarperCollins	$19.99	$11.69	$9.99	$9.99	
	Divine Misdemeanors	Laurell K. Hallantine	Random House	$26.00	$14.97	$9.99	$9.99	

Penguin, HarperCollins, Hachette, and S&S quickly told Apple that they were willing to do an agency model for New

Releases, and that they would "go with" the agency model with "everyone else," but that they needed higher price caps. The debate over the caps essentially ended on Saturday, January 16. This was five days after the Draft Agreements had been distributed. Despite their efforts, the Publisher Defendants achieved only modest adjustments to the price caps.

On January 16, Cue sent nearly identical e-mails to each of the Publisher Defendants with a revised pricing proposal. Under this new regime, Cue decreased the hardcover list price triggers for the $12.99 and $14.99 e-book caps a second time, but carved out NYT Bestellers for special treatment. When a NYT Bestseller was listed for $30 or less, the iTunes price would be capped at $12.99; when it was listed above $30 and up to $35, the iTunes price would be no greater than $14.99.[32] For all other New Releases, the caps in the Draft Agreement would be applied to physical books with slightly lower list prices. For example, the $12.99 cap now applied to titles with list prices between $25.01 and $27.50 instead of those at $30 or less; the $14.99 cap applied to books with list prices between $27.51 and $30 instead of over $30. Cue also added two additional price caps at $16.99 and $19.99 for books listed between $30.01-$35 and $35.01-$40, respectively.

[32] Cue's January 16 offer kept the price caps for NYT Bestsellers at the caps listed for all New Releases in the Draft Agreement.

In his e-mails to the Publisher Defendants, Cue outlined the advantages he perceived they would gain from Apple's entry into the market, defended the pricing tiers of $12.99 and $14.99 for NYT Bestsellers, explaining that "it is critical that we appear at least reasonable" in relation "to the heavy discounting that is happening for NYT bestsellers." Cue added that, "This gives you significantly more tiers and higher prices." Except for small exceptions which were immaterial to Apple, this pricing proposal was the one finally adopted in the Agreements.

Cue had described these tiers to Jobs as prices that would "push [the Publisher Defendants] to the very edge," but still create a "credible offering in the market." Cue warned Jobs that "[t]his will be hard to get because they [the Publishers] will be losing an additional $1.40, but we should try."

Further confirming that Apple well understood that the negotiations over the price "caps" were actually negotiations over ultimate e-book prices, Cue's calculation of the $1.40 loss arose from his proposal that the prices of the NYT Bestsellers be capped at prices lower than other New Releases at similar hardcover list prices, and lower than the Publisher Defendants had been expecting. If a New Release with a list price of $30 or less was a NYT Bestseller, the cap moved from $14.99 to

$12.99, meaning that the Publisher would receive 70% of $12.99 instead of 70% of $14.99, or $1.40 less.

Cue was right to expect pushback from the Publishers over the carve-out for NYT Bestsellers. Hachette's Thomas identified the ceilings of $14.99 and $12.99 for NYT Bestsellers as a drawback when writing to her colleagues on January 19. Thomas warned that these prices would represent a "significant" loss to Hachette's profit margin.

The Publisher Defendants recognized that Apple's pricing regime would be a game-changer for the e-book industry. Because these caps would become the new standard industry-wide prices, they continued to push for higher ceilings. As Hachette's Nourry testified, the whole concept of price "caps," when coupled with the Publishers' move to an agency model of distribution, was that "people all have the same prices." Nourry was thus particularly "reluctant to fixing best seller prices at 12$90" with Apple "because it may be our last chance to bring it back up to say 14$99."

HarperCollins similarly understood that the "upshot" of the Apple agreement "is that Apple would control price and that price would be standard across the industry." Indeed, it believed that the benefit of moving to an agency model with Apple's price cap structure was the creation of "uniform prices"

for e-books and an "increase" in price "from 9.99 to 12.99 or 14.99 for most books."[33]

Ultimately, the Publisher Defendants all capitulated to Cue's revised pricing regime. Even though Penguin's McCall still wanted to see all NYT Bestsellers capped at $14.99, he recognized on January 19 that Apple's proposal of $12.99 was "probably the middle ground where compromise is going to have to happen." The reference to "middle ground" was a reference to the spread between Amazon's $9.99 price for the e-book version of NYT Bestsellers and the Barnes & Noble price for the physical book version. He observed as well that "[i]f we migrate all accounts to agency selling, the price spread shouldn't matter, since we'll have a level playing field."

Macmillan was also unhappy with the price caps proposed by Apple. It opposed the concept of price caps in general, but, as Sargent recognized, Apple wanted the price caps "as protection against excessively high prices that could either alienate [its] customers or subject [it] to ridicule." S&S accepted the price caps proposed on January 16 on the condition that Apple would agree to "review pricing" after one year on the new model. Cue readily agreed.

---

[33] Through a process known as translation, the prices for digital books are automatically set according to a predetermined relationship to the prices of their physical counterparts.

The January 16 pricing tiers were incorporated into Apple's final Agreements and were identical for each Publisher Defendant. Through Apple's adoption of price caps in its Agreements, it took on the role of setting the prices for the Publisher Defendants' e-books and eventually for much of the e-book industry. As described below, the Publisher Defendants largely moved the prices of their e-books to the caps, raising them consistently higher than they had been albeit below the prices that they would have preferred.

As of January 16, the Launch was just eleven days away and Cue did not have a single Agreement executed. At that point, he had set a deadline of Thursday, January 21, as the final date by which the Publishers had to sign agency agreements with Apple.[34] As noted above, Cue and his team came to New York for this final push. They arrived on Monday, January 18, and stayed until January 26, the day before the Launch. By January 26, Apple had executed its fifth Agreement.

J. January 18-27: Publishers Initiate Agency Negotiations with Amazon

As already recounted, this entire endeavor was shaped by the Publishers' desire to raise the price of e-books being sold through Amazon. With nearly a 90% market share for e-books in

[34] Cue wanted to be sure he had the Agreements in place early enough so that Jobs could finalize his presentation introducing the iBookstore during the Launch.

2009, Amazon was the single most important seller of e-books in America, and also a dominant seller of physical books. Because of this power, the Publishers feared retaliation from Amazon unless they acted in unison. The confrontation with Amazon began the week of January 18, before any of the Publisher Defendants had actually signed an Apple Agreement.

Press reports on January 18 and 19 alerted the publishing world and Amazon to the Publishers' negotiations with Apple. A Wall Street Journal article titled "Publisher in Talks with Apple Over Tablet" reported on January 18 that HarperCollins and Apple were in discussions over an agency relationship and that this shift might mean higher prices for e-books. The article explained that "HarperCollins is expected to set the prices of the e-books . . . with Apple taking a percentage of sales," and noted that "[o]ther publishers have also met with Apple." The article reported that "enhanced" e-book new releases could be priced as high as $14.99 or $19.99.[35] A detailed article on January 19 in the trade publication Publishers Lunch also reported that the Big Six were negotiating terms with Apple that would give them an opportunity to impose an agency model on the entire industry and to raise prices.

[35] While Murray chose to describe the price increases as related to e-books "enhanced" with special features, in fact the price increases implemented through the Apple Agreements applied to all e-books.

On the night of January 18, Amazon received confirmation from a former colleague who was now working at Random House that most of the Publishers were likely to enter agency agreements with Apple. Random House's McIntosh confirmed to Amazon's Porco that several of the Publisher Defendants were negotiating e-book agency distribution agreements with Apple and that Random House "was under pressure from other publishers" to join them. Porco was concerned that Random House would be the only Publisher who decided to keep the "current model" that allowed retailers like Amazon make pricing decisions.

Amazon was adamantly opposed to adoption of the agency model and did not want to cede pricing authority to the Publishers.[36] On January 20, Amazon disclosed how it would respond. It would appeal directly to authors and encourage something the Publishers feared: disintermediation.

---

[36] Apple has suggested that Amazon was less opposed to the agency model than the evidence shows. It points to a single brainstorming session between two Amazon employees in early 2009, in which they tried to come up with ideas to mollify the Publishers. The two employees pondered whether the Publishers would agree to accept a flat percentage of the retail price for e-books and quickly dismissed the idea since it would mean a significant loss of revenue for the Publishers. This was not a discussion of the agency model; there was no discussion about Amazon ceding control over the retail price. There is simply no credible evidence that Amazon moved willingly to the agency model in 2010. On January 31, 2010, after the Publisher Defendants executed the Agreements, these two individuals expressed astonishment that Publishers had agreed to a deal that resulted in a significant loss of revenue for them.

That day, Amazon announced that authors and publishers of Kindle e-books could choose a "new 70 percent royalty option" for e-books with a list price "between $2.99 and $9.99." Under this option, the author would receive 70% of the list price, net of delivery costs. Using as an example an e-book being sold for $8.99, the author would make just $3.15 under the standard option, but $6.25 with the "new 70 percent option."

This was not happy news for the Publishers. With an author receiving $6.25 of $8.99, and Amazon keeping the rest, this amounted to a naked play to eliminate the Publishers as a middle-man between authors and Amazon. Shanks observed, "On Apple I am now more convinced that we need a viable alternative to Amazon or this nonsense will continue and get much worse." HarperCollins' parent News Corp also reacted with anger. News Corp's Rupert Murdoch called HarperCollins to complain and in no uncertain terms expressed a desire to take revenge on Amazon.

During this week, Amazon had a long-scheduled set of meetings in New York with the Publishers. In separate conversations on January 20 and over the next few days, the Publisher Defendants all told Amazon that they wanted to change to an agency distribution model with Amazon. HarperCollins had a particularly contentious meeting with Amazon on January 20,

when it told Amazon that it "had to" move to agency.[37] Amazon made clear that it preferred to continue to do business on the wholesale model.

On January 22, alluding to its negotiations with Apple and the deadline associated with the impending Launch, HarperCollins outlined its terms in writing to Amazon. The message referred to the "tremendous change" occurring in the e-book industry "this week and next week." It warned that Amazon had to act quickly since

> [d]eliberations are moving fast. If I could get your support to this kind of agency model in principle, I have less need to support other partners who wish to enter the ebook business. As I mentioned we haven't made any decisions yet about how we will sell ebooks to consumers yet, but decision time is approaching.

Attempting to leverage its Apple negotiations to get a better deal with Amazon, HarperCollins included a proposed retail price for the majority of titles at either $12.99 or $14.99, but a commission of just 5% for Amazon. HarperCollins then leveled its threat to Amazon. If Amazon declined its offer, HarperCollins would delay for six months the release of any e-book sold on a wholesale basis.

On January 20, Amazon also met with Macmillan. At a lunch between Macmillan's Sargent and Amazon's Grandinetti, Sargent

---

[37] In internal emails that morning, HarperCollins executives explained that a "big win of the Agency model is that by us setting price we can protect the value of our hard covers."

announced that Macmillan was planning to offer Amazon the option to choose either an agency and reseller model. But, Sargent was mistaken. Neither Apple nor his fellow Publisher Defendants would allow Amazon the option of remaining on a wholesale model. At a dinner that night, Cue explained to Sargent that Macmillan had no choice but to move Amazon to an agency model if it wanted to sign an agency agreement with Apple. The next morning, on January 21, Sargent wrote to Cue and in a carefully crafted message admitted that he had "misread" Cue in their previous discussions, and warned that "[t]he stumbling block is the single large issue we clearly had a misunderstanding about." That stumbling block was "significant enough for us that we may in fact give you a no later today." Referring to the commitment to move all resellers of e-books to an agency model, Cue responded that afternoon that he "d[id]n't believe we are asking you to do anything, you haven't told us you are doing. We are just trying to get a commitment." He requested that they all "sit down . . . and talk through it."[38]

---

[38] Neither Sargent nor Cue was credible during the trial when they denied that Cue had explained at dinner that Macmillan was required to put Amazon on the agency model. Sargent protested that he could not remember the conversation, even though his email on the following day referred to "the single large issue" that might lead Macmillan to abandon its negotiations with Apple. Cue explained in his deposition that the biggest issues during his negotiations with Macmillan were the MFN and price tiers, and that he thought the discussion at dinner had been about pricing tiers; then at trial explained that he now

Cue also enlisted Sargent's competitors to intercede with him: Cue spoke with Reidy, the CEO he considered a leader in the industry, for over twenty minutes after receiving Sargent's email on January 21. Cue also called Murray immediately after hanging up with Reidy, and they talked for ten minutes later that day. At that point, Cue called Sargent and urged him to speak with Murray and Reidy. Sargent spoke to both Murray and Reidy by telephone for eight and fifteen minutes, respectively.

The straight talk from Reidy, Murray, and Cue worked.[39] Sargent called Grandinetti immediately after hanging up with Reidy, and told him that the Apple contract "required" Macmillan to offer Amazon the agency model only.

Amazon received a virtually identical message from a third Publisher Defendant on January 20. Hachette told Amazon that day that it was looking at the agency model, and believed that it could offer only one pricing model to retailers, either the agency or reseller model, but not both.

---

remembered that they had discussed one-off promotions. Cue's contemporaneous notes, however, indicate that the core issue in dispute with Macmillan was, in fact, the MFN and its implications. In an email to Jobs on the evening of January 21, just hours after sending his email to Sargent, Cue reported that "[a]fter a long afternoon with their general counsel, we are in agreement on the terms" with Macmillan, "but the CEO and GC have legal concerns over the price matching."

[39] While Murray was fully supportive of the requirement that all e-tailers be moved to an agency model, as described below, he remained unhappy over the size of Apple's commission and the existence of price caps.

On Friday, January 22, S&S's Reidy advised Amazon that it was likely to move its entire business to the agency model. Amazon asked if it could continue to sell under the wholesale model after a window of ninety days. Reidy said she would look at the idea, but did not actually consider it to be a realistic option since it "would just enshrine the $9.99 price point at a later date." Amazon's Grandinetti expressed appreciation for the call, but said he was not sure "what this would mean in terms of our overall relationship." Reidy explained her expectations about pricing going forward, and underscored that she did not intend to go as low as $9.99.

Thus, by the end of that week, four of the five Publisher Defendants had put Amazon on notice that they were joining forces with Apple and would be altering their relationship with Amazon in order to take control of the retail price of e-books.[40] It was clear to Amazon that it was facing a united front.

K. January 21-26: Execution of Agreements

Even though Apple had told the Big Six in December that it needed all of them to sign on in order to open its e-bookstore, on January 21 it learned that Random House, the largest Publisher, would not sign an agency agreement. Apple decided to

[40] Amazon had reached out to Penguin during that period, but Penguin had not responded.

proceed without Random House. It let the Publisher Defendants know about Random House's decision and of its own decision to proceed with an iBookstore so long as four of them agreed to its terms before the Launch. In the days that followed, Apple kept the Publisher Defendants apprised about who was in and how many were on board.

The Publisher Defendants kept each other informed as well. The CEOs of the Publisher Defendants made over 100 telephone calls to one another in the short period of time between December 8, when Cue first contacted them, and January 26, when the Agreements were signed. In the critical negotiation period, over the three days between January 19 and 21, Murray, Reidy, Shanks, Young, and Sargent called one another 34 times, with 27 calls exchanged on January 21 alone.[41]

On Thursday, January 21, Cue briefed Jobs on the status of his negotiations with the Publishers.[42] Cue was confident that S&S and Penguin would sign. Penguin did not want to be alone, but Cue predicted that if he had secured as few as two other

---

[41] While many of these calls were simply efforts to reach the other person, those efforts and the conversations that occurred during some of them reflect the intensity of the communications in this period.

[42] At this stage, it was Cue's judgment that Random House would wait until after the Launch to make a decision whether to convert to the agency model. Cue relayed Random House's email describing its "excitement" about Apple entering the market and "building a bookstore", but expressing several reservations about Apple's terms.

Publishers, Penguin would sign on. Cue reported that Hachette and Macmillan had legal concerns over the "price matching," that is, the MFN. HarperCollins was still trying to get Apple to accept a 10% commission on New Releases and to shorten the definition of a New Release to a title that had been in the market two months.[43] Cue believed that the Publishers' hesitation to make a commitment to Apple was due to their fear over how difficult it was going to be to force Amazon to convert to an agency relationship. As Cue explained, "[i]n the end, they want us and see the opportunity we give them but they're scared to commit! It [has] less to do with the terms and more about the dramatic business change for them. . . . They just have to get some balls."

By Friday evening, January 22, Cue was able to report progress. He informed Jobs that he had commitments from Hachette, S&S, Macmillan, and Penguin that they would sign. At this point, Penguin required assurance that three other Publishers were also signing Agreements. As Cue admits, in these final days the Publishers needed reassurance that they would not be alone in signing an agency agreement with Apple because they feared Amazon's reaction, reassurance that Cue readily provided.

---

[43] The "new release" period would be set in the final Agreements at seven months.

The first Publisher to agree to Apple's terms was S&S. S&S signed its Agreement on Monday, January 25. Reidy advised Moonves that at the Launch Apple would announce that NYT Bestsellers would be priced at $12.99.

Hachette's Young had agreed to sign by January 22, but needed approval from France. Hachette executed its Agreement on January 24. As Nourry explained, Hachette signed the Agreement because the agency model "will put an end to price deflation . . . . We do not like the 12,90 price point, but it is much better than 9,99." Hachette also committed to Apple that it would move all of its relationships with distributors to an agency relationship.

On January 21, Cue sent substantively identical e-mails to Macmillan and Penguin stating that Apple had completed its first agency agreement and was "very close" on two more. By the next day, January 22, Macmillan had agreed to the deal. As Cue told Sargent, Macmillan was the third Publisher to agree to Apple's terms. Macmillan executed the Agreement on January 25. Macmillan's Sargent testified that he decided to sign the Agreement even though he was "not completely happy with some of Apple's terms," because it was a "much better business strategy than simply continuing the status quo with Amazon."

On January 22, Penguin's Shanks had asked Cue whether Apple had "any more of the [B]ig [S]ix confirmed yet?" Even though

three other Publishers had joined with Apple by the morning of January 25, a Monday, Penguin was still hesitant. Shanks wanted assurance that he could price e-book versions of paperbacks, particularly trade paperbacks, above $9.99. Once again, S&S's Reidy played a pivotal role. Cue called Shanks, and the two spoke for twenty minutes that morning. Less than an hour after getting off the telephone with Cue, Shanks called Reidy to discuss Penguin's status in its negotiations with Apple. By that afternoon, Penguin had executed its Agreement. Penguin advised Apple that it would be moving to an agency arrangement with all of its e-tailers.

That same day, Penguin reported to its board that when Apple announces "its long-awaited entry into the e-reader market" on Wednesday, "you may also see in the media that Penguin, along with a few other major trade publishers, has made a partnership with Apple for the sale of US eBooks in the iTunes store." The report explained the agency model it had agreed to adopt with Apple, and stated that "we don't think [the agency model and the discount model we currently use with Amazon] for eBooks can coexist very long, and so we're going to be telling all our re-selling middlemen (Amazon, Barnes & Noble, e.g.) that we're going to deal with them for eBooks on the agency basis in the future, too." At its next "Road Show" Penguin credited Apple with its own decision to begin the "monumental effort" of

moving its other e-tailers to agency. It reported that, in light of the "pending release of the iPad," and "[a]s a way to enter the market place, Apple proposed moving the entire industry to an agency model."

HarperCollins was the last of the five Publisher Defendants to agree to execute an Agreement. As late as Friday, January 22, Murray wrote to Cue to thank him for his visit that morning, but to underscore HarperCollins' demands. HarperCollins wanted "flexibility" on price outside the tiers; it wanted to sell through other "agents" at a higher price than the retail prices in the iBookstore; it wanted to limit the commission to 10%; and it wanted a shorter "new release window." Reflecting his understanding that his company would be trying to get all of its distributors to adopt an agency relationship, Murray explained, "We need to have flexibility on the agency window. We believe this window should be 6 months rather than 12 months in the event that one or more large retailers do not move to an agency model."

Cue was concerned that HarperCollins wanted to "drive ebook prices sky high." So, Cue suggested that Jobs call James Murdoch of News Corp, HarperCollins' parent company, and "tell him we have 3 signed so there is no leap of faith here."[44]

[44] Jobs and Cue had met James Murdoch for the first time on January 14, when representatives from News Corp had visited

Jobs called Murdoch on January 22 about HarperCollins' intransigence. While Murdoch wanted to do business with Apple, he remained concerned about the economics of the deal, as he described in some detail in an email he sent to Jobs. Jobs's lengthy response on Saturday, January 23, included the following:

> 1. The current business model of companies like Amazon distributing ebooks below cost or without making a reasonable profit isn't sustainable for long. As ebooks become a larger business, distributors will need to make at least a small profit, and you will want this too so that they invest in the future of the business with infrastructure, marketing, etc.
>
> 2. All the major publishers tell us that Amazon's $9.99 price for new releases is eroding the value perception of their products in customer's minds, and they do not want this practice to continue for new releases.
>
> 3. Apple is proposing to give the cost benefits of a book without raw materials, distribution, remaindering, cost of capital, bad debt, etc., to the customer, not Apple. This is why a new release would be priced at $12.99, say, instead of $16.99 or even higher. Apple doesn't want to make more than the slim profit margin it makes distributing music, movies, etc.
>
> 4. $9 per new release should represent a gross margin neutral business model for the publishers. We are not asking them to make any less money. As for the artists, giving them the same amount of royalty as they make today, leaving the publisher with the same profits, is as easy as sending them all a letter telling them that you are paying them a higher percentage for ebooks. They won't be sad.
>
> 5. Analysts estimate that Amazon has sold slightly more than one million Kindles in 18+ months (Amazon has never said). We will sell more of our new devices than all

---

Apple's Cupertino headquarters to discuss a broad range of mutual business interests.

> of the Kindles ever sold during the first few weeks they are on sale. If you stick with just Amazon, B&N, Sony, etc., you will likely be sitting on the sidelines of the mainstream ebook revolution.
>
> 6. Customers will demand an end-to-end solution, meaning an online bookstore that carries the books, handles the transactions with their credit cards, and delivers the books seamlessly to their device. So far, there are only two companies who have demonstrated online stores with significant transaction volume -- Apple and Amazon. Apple's iTunes Store and App Store have over 120 million customers with credit cards on file and have downloaded over 12 billion products. This is the type of online assets that will be required to scale the ebook business into something that matters to the publishers.
>
> So, yes, getting around $9 per new release[45] is less than the $12.50 or so that Amazon is currently paying. But the current situation is not sustainable and not a strong foundation upon which to build an ebook business. And the amount we will pay should be gross margin neutral. Apple is the only other company currently capable of making a serious impact, and we have 4 of the 6 big publishers signed up already. Once we open things up for the second tier of publishers, we will have plenty of books to offer. We'd love to have HC among them.

Murdoch still demurred, particularly with respect to Apple's proposed price points, so Jobs wrote again on the morning of January 24.

> Our proposal does set the upper limit for ebook retail pricing based on the hardcover price of each book. The reason we are doing this is that, with our experience selling a lot of content online, we simply don't think the ebook market can be successful with pricing higher than $12.99 or $14.99. Heck, Amazon is selling these books at $9.99, and who knows, maybe they are right and we will fail even at $12.99. But we're willing to try at the prices

[45] Jobs's reference to $9 in revenue is a reference to the 70% of a $12.99 e-book price that a Publisher would receive under Apple's agency Agreement.

we've proposed. We are not willing to try at higher prices because we are pretty sure we'll all fail.

As I see it, HC has the following choices:

1. Throw 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.

2. Keep going with Amazon at $9.99. You will make a bit more money in the short term, but in the medium term Amazon will tell you they will be paying you 70% of $9.99. They have shareholders too.

3. Hold back your books from Amazon. Without a way for customers to buy your ebooks, they will steal them. This will be the start of piracy and once started there will be no stopping it. Trust me, I've seen this happen with my own eyes.

Maybe I'm missing something, but I don't see any other alternatives. Do you?

On January 23, Cue had sent his own message to Murray. "I wanted to let you know that we have 4 publishers completed so it is real shame" to not have an agreement with HarperCollins. The next day, Cue also wrote to an executive at News Corp. He expressed that Apple "think[s] our customers will pay a reasonable price (. . . 50-100% more than existing e-books)" and candidly laid out Apple's "basic deal points," including that Apple is offering "new release hardback pricing maximums which are way higher than $9.99 -> &12.99 or $14.99 for most."

Murray had a round of telephone calls with other Publisher Defendants prior to signing. In the end, HarperCollins concluded that the deal Apple was offering was the best it could

get at that time. It considered the economics of the deal to be "terrible" for it and its authors but "the strategic value" of creating an Apple e-bookstore to be "very high." It principally feared "Amazon[']s reaction," but as the fifth Publisher to adopt an agency agreement with Apple, it hoped the reaction would be "muted." Ultimately, HarperCollins understood this was a "once-in-a-lifetime chance to flip the model." On January 26, the day before the Launch, HarperCollins became the fifth Publisher Defendant to accept the Agreement.

The only Publisher to decline to sign the Agreement was Random House. As noted, it had informed Apple of its decision on January 21. Apple had been as inflexible in its bargaining with Random House as it had been with the Publisher Defendants. Random House declined to adopt the Agreement for several reasons. It believed it "would be better off economically sticking with the wholesale model." It also realized that it was not well equipped at that time to set efficient retail prices, and that it would be necessary to make a "complete switch to agency" if it entered into an agency agreement with Apple, which it was not prepared to do.

Thus, in less than two months, Apple had signed agency contracts with five of the six Publishers, and those Publisher Defendants had agreed with each other and Apple to solve the "Amazon issue" and eliminate retail price competition for

e-books. The Publisher Defendants would move as one, first to force Amazon to relinquish control of pricing, and then, when the iBookstore went live, to raise the retail prices for e-book versions of New Releases and NYT Bestsellers to the caps set by Apple.

Each of the Publisher Defendants realized that its negotiations with Amazon would be difficult, but in their view they had embarked upon a mission that was necessary to protect the publishing business. They took comfort in their knowledge that the five of them stood together, and in Apple's presence in the market. As Reidy wrote to Cue on the day before the iBookstore was officially announced, it was her hope that the iPad Launch "will sustain us as we move through the next steps in this process of changing the industry."

This would not have happened without Apple's ingenuity and persistence. Apple's task had not been easy, but it had succeeded. As Reidy acknowledged in an email to Cue on January 21, working with the Publishers had been like "herding . . . cats." For his part, Cue appreciated all that Reidy had done to convince her peers to join forces with Apple at several critical junctures. He thanked Reidy for being a "real leader."

The Publisher Defendants took those "next steps" to "chang[e] the industry" immediately; the coordinated pressure on Amazon began at once. On the day of the Launch, January 27,

HarperCollins advised Amazon in writing that it had reached its first agency agreement with Apple. "In the interest of 'no surprises,'" HarperCollins advised Amazon that it had decided to move all of their New Release e-books to the agency model, and had "reached an agreement with our first agent, Apple" last night. Penguin also called Amazon on January 27, right after the Launch, to explain that it had moved to agency with its "first customer," referring to Apple.[46] Macmillan's Sargent did not attend the Launch, because as he had told Cue on January 24, "I expect I will be in Seattle or traveling back," from delivering the news in person to Amazon.[47]

---

[46] Grandinetti responded that he did not understand why Penguin was "working so hard to have [Amazon send it] less money on each sale while at the same time, reducing total sales and frustrating us."

[47] Cue admitted at trial that Apple "expected" each of the Publisher Defendants to demand that Amazon move to an agency model, but denied actually "knowing" that they would. This testimony was not credible, for many reasons. Cue's denial of prior knowledge of Sargent's trip to Amazon was particularly brazen given the January 24 email in which Sargent explained his inability to attend the Launch because he would be traveling to Seattle, Jobs's comment to his biographer on January 28 -- the day of Sargent's meeting with Amazon -- that the 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,'" a January 30 email exchange between Saul and Cue monitoring news about Amazon's decision to remove Macmillan's buy buttons and wondering whether Cue had "talk[ed] with [J]on" Sargent and a January 31 email in which Sargent reported to Cue on the trip.

L. January 27: The Launch of the iPad and iBookstore

On January 27, Jobs launched the iPad. As part of a beautifully orchestrated presentation, he also introduced the iPad's e-reader capability and the iBookstore. He proudly displayed the names and logos of each Publisher Defendant whose books would populate the iBookstore. To show the ease with which an iTunes customer could buy a book, standing in front of a giant screen displaying his own iPad's screen, Jobs browsed through his iBooks "bookshelf," clicked on the "store" button in the upper corner of his e-book shelf display, watched the shelf seamlessly flip to the iBookstore,[48] and purchased one of Hachette's NYT Bestsellers, Edward M. Kennedy's memoir, True Compass, for $14.99. With one tap, the e-book was downloaded, and its cover appeared on Jobs's bookshelf, ready to be opened and read.

When asked by a reporter later that day why people would pay $14.99 in the iBookstore to purchase an e-book that was selling at Amazon for $9.99, Jobs told a reporter, "Well, that won't be the case." When the reporter sought to clarify, "You mean you won't be 14.99 or they won't be 9.99?" Jobs paused, and with a knowing nod responded, "The price will be the same," and explained that "Publishers are actually withholding their

[48] To the public's delight, Jobs described this transition as "like a secret passageway."

books from Amazon because they are not happy." With that statement, Jobs acknowledged his understanding that the Publisher Defendants would now wrest control of pricing from Amazon and raise e-book prices, and that Apple would not have to face any competition from Amazon on price.

The import of Jobs's statement was obvious. On January 29, the General Counsel of S&S wrote to Reidy that she "cannot believe that Jobs made the statement" and considered it "[i]ncredibly stupid."

M. January 28 to 31: The Publisher Defendants Force Amazon to Adopt the Agency Distribution Model

As previously discussed, the Publishers recognized that any one of them acting alone would not be able to compel Amazon to move to agency. Five of them had now agreed to join forces, but none of them was eager to be the first to meet with Amazon. As Sargent explained, however, he knew the Apple Agreement gave the Publishers "a point in time when we could actually address our . . . issues with Amazon"; it "gave us the chance to change the entire business model for digital books." So Sargent made the first move.

Skipping the Launch to which he had been invited, Sargent flew instead to Seattle, accompanied by Napack. Thus, Macmillan, the smallest of the five Publishers, did the honorable thing and delivered its message in person. Sargent

did not expect the meeting to go well. As he put it, he was "on [his] way to Seattle to get [his] ass kicked by Amazon." He was right.

At their meeting, Sargent advised Amazon on January 28 that it had just two options: either (1) move to an agency arrangement or (2) not receive Macmillan's Kindle versions of New Releases for seven months. Seven months was no random period -- it was the number of months for which titles were designated New Release titles under the Apple Agreement and restrained by the Apple price caps and MFN. The meeting lasted roughly twenty minutes. Amazon let Macmillan know in blunt terms that it was unhappy.

Macmillan had anticipated that Amazon might retaliate against it by removing the "buy buttons" on the Amazon site that allow customers to purchase books from Amazon's online store or from the Kindle, or by eliminating Macmillan's products from its sites altogether. That night, Macmillan learned which option Amazon had chosen. Amazon removed the buy buttons for both print and Kindle versions of Macmillan titles. Customers could view the Macmillan books on the Amazon website but could not purchase them.

On January 30, Sargent took out an ad in an industry publication to communicate quickly with the industry. Written in the form of a letter to "Macmillan authors/illustrators and

the literary agent community," Sargent described the terms he offered to Amazon during their Thursday meeting, including the "deep windowing of titles" if Amazon did not switch to the agency model. He explained that Macmillan would price most titles at first release under the agency model between $12.99 and $14.99. Sargent expressed his regret at Amazon's reaction to his ultimatum, and explained the reasons he had for acting as he did.

> In the ink-on-paper world we sell books to retailers far and wide on a business model that provides a level playing field, and allows all retailers the possibility of selling books profitably. Looking to the future and to a growing digital business, we need to establish the same sort of business model, one that encourages new devices and new stores. One that encourages healthy competition. One that is stable and rational. It also needs to insure that intellectual property can be widely available digitally at a price that is both fair to the consumer and allows those who create it and publish it to be fairly compensated.

Macmillan knew it would not stand alone. Sargent wrote to a friend several days later that "the deal that 5 of us did with Apple meant someone was gonna have to do it [first]. . . . The optics make it look like I stood alone, but in the end I had no doubt that the others would eventually follow."[49] Hachette's Nourry had written to Sargent the day after the publication of Sargent's letter to the industry stating, "I can ensure you that

[49] Conscious that he should not admit the truth, Sargent disingenuously added: "Interesting in that we did the Apple deal with no contact with other publishers, yet when Jobs announced he had 5 on the agency plan things were clear."

you are not going to find your company alone in the battle" with Amazon.[50] The next day, Penguin's Makinson similarly wrote, "[j]ust to say that I'm full of admiration for your articulation of Macmillan's position on this. Bravo." Internally, Hachette's Nourry told Young that he wanted to "enter in the battle as soon as possible," and in an allusion to Macmillan's small size, that he was "thrilled to know how A will react against 3 or 4 of the big guys."

Over the weekend, it became obvious to Amazon that its strategy had failed. The feedback was mixed, but included intense criticism of Amazon by customers and publishers. Nourry celebrated on Monday, February 1, by observing that "Amazon's stock is down 9%!"[51]

Amazon knew that its battle was not just with Macmillan but with five of the Big Six. As Grandinetti testified, "[i]f it had been only Macmillan demanding agency, we would not have negotiated an agency contract with them. But having heard the same demand for agency terms coming from all the publishers in such close proximity . . . we really had no choice but to negotiate the best agency contracts we could with these five

---

[50] The next day, Nourry wrote a similar email to Sargent's superior, Stefan von Holtzbrinck, assuring him that he "very much appreciate[s] what MacMillan is doing" and he can "[b]e sure others will enter the battle field!"

[51] The subject line of the email was "Now it must really hurt . . .".

publishers." Unless it moved to an agency distribution model for e-books, Amazon customers would cease to have access to many of the most popular e-books, which would hurt Kindle customers and the attractiveness of the Kindle.

Amazon announced on its website on Sunday, January 31, that it would "capitulate and accept" Macmillan's agency terms "because Macmillan has a monopoly over their own titles, and we will want to offer them to you even at prices we believe are needlessly high for e-books." Shortly thereafter, Amazon sent a letter to the Federal Trade Commission complaining about the simultaneous nature of the demands for agency from the Publishers who had signed with Apple.

N. The Five Amazon Agency Agreements

On Sunday, January 31, Amazon signaled to Macmillan that it was willing to negotiate. That night, Sargent sent an e-mail marked "URGENT!!" to Cue. Sargent explained that he was "gonna need to figure out our final agency terms of sale tonight. Can you call me please?" Cue and Sargent spoke that night.[52] With help from Apple, Macmillan negotiated an agency agreement with Amazon, which was signed that Friday, February 5.

[52] While Cue denied at trial that their conversation was about the Macmillan negotiations with Amazon, his denial was not credible. Macmillan had executed its Agreement with Apple a week earlier; the only final agency terms still under discussion were with Amazon.

Macmillan made no secret of its intention to raise prices. Sargent wrote to Grandinetti on February 2, that "[w]e can not budge on the final price that the consumers pay for our books. . . . That is the very heart of the agency model, and it is why we are doing this. . . . [W]e can not give up control of price. If we do we are much worse off than we were before." But, referring to Macmillan's across-the-board shift to agency, Sargent assured Amazon that it "will never be disadvantaged on [the] pricing" for Macmillan's e-books.

In light of their overlapping threats to remove content from Amazon's platform if it did not move to agency in early April, when the iPad became available, Amazon moved quickly to execute agency agreements with the remaining Publisher Defendants. But, to avoid being vulnerable in the future to collective pressure during contract negotiations, Amazon insisted that each of the five agency agreements have a different termination date. The final five contracts ranged in length from terms of eighteen months to three years, or ended on different dates, from January 31, 2012 to June 30, 2012.

Amazon did not want to give up control over pricing or raise its prices, and like Apple, assumed that under an agency model each of the Publisher Defendants would set retail prices at the price caps. During the negotiations, therefore, it shared data with the Publisher Defendants illustrating how the

wholesale model was more profitable for the Publishers. Amazon also included a "model parity" clause in any agreement. This gave Amazon the option to return to a wholesale model of distribution in the event any Publisher agreed to a wholesale distribution arrangement with any other e-tailer.

During their negotiations with Amazon, the Publisher Defendants shared their progress with one another. As Naggar testified, whenever Amazon "would make a concession on an important deal point," it would "come back to us from another publisher asking for the same thing or proposing similar language." For example, when Amazon agreed with one Publisher Defendant to forego any promotional activity in exchange for assurance that it would never be disadvantaged on price, it received a call the next day from another saying, "so I understand . . . you're willing to forego promotions." Similarly, with respect to the length of the agreements, Penguin's McCall left a voicemail for Naggar indicating that Penguin had been "hearing through the grapevine that you guys are maybe coming to some agreements that are less than three years . . . maybe you're moving off of that," and suggesting they chat.

By the end of March 2010, Amazon had completed agency agreements with Macmillan, HarperCollins, Hachette, and S&S. Because of circumstances that were unique to Penguin and its

reseller contract, its agency agreement with Amazon was the last to be executed. Penguin signed its agency contract with Amazon on June 2, 2010, but before that date, Penguin had refused to allow Amazon to sell any of Penguin's new e-books.

Apple closely monitored the progress of the Publisher Defendants in their negotiations with Amazon.[53] The Publisher Defendants told Apple when their agency agreements with Amazon had been signed, and Apple watched as they swiftly moved their prices for New Release e-books on Amazon to the top of Apple's tiers. On April 3, 2010, Cue emailed Jobs to report that "[w]e have reviewed all the books on Amazon and they have switched to agency with the publishers. . . . Overall, our NYT bestsellers and new releases are the same as Amazon." At that point, Penguin was the only Publisher Defendant who had not yet signed an agency agreement with Amazon. As such, Cue told Jobs that Apple was "changing a bunch of Penguin titles to $9.99 . . . because they didn't get their Amazon deal done." When Penguin's Shanks wrote to Cue to share the news it had "finally" reached an agreement with Amazon "on our new terms of sale," he added

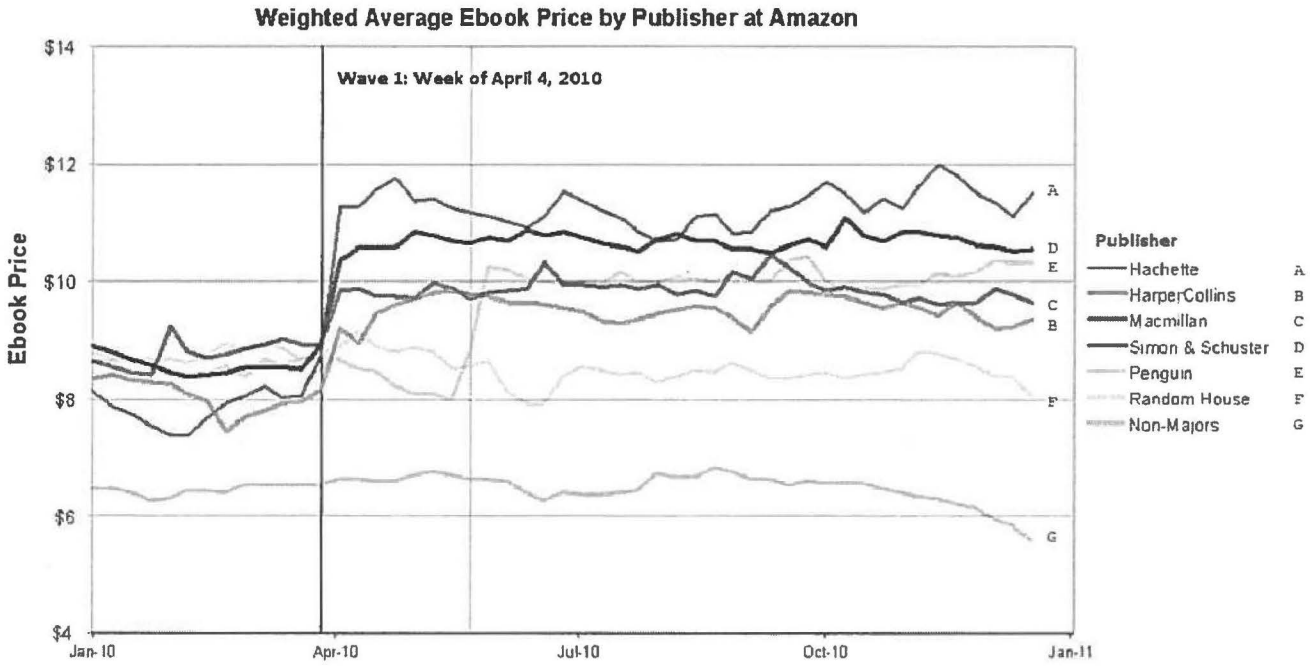
[53] At trial, Moerer at first denied that he had watched the prices of the Publisher Defendants' e-books on Amazon or had noticed that they had increased to the price caps. As a director of iTunes for Apple, this was not credible, and Apple witnesses, included Moerer, eventually came to admit that they did track these price increases as they were occurring.

that "The playing field is now level." Cue responded, "Great news and congratulations!!!"

O. Prices after Agency

Just as Apple expected, after the iBookstore opened in April 2010, the price caps in the Agreements became the new retail prices for the Publisher Defendants' e-books. In the five months that followed, the Publisher Defendants collectively priced 85.7% of their New Release titles sold through Amazon and 92.1% of their New Release titles sold through Apple within 1% of the price caps. This was also true for 99.4% of the NYT Bestseller titles on Apple's iBookstore, and 96.8% of NYT Bestsellers sold through Amazon. The increases at Amazon within roughly two weeks of moving to agency amounted to an average per unit e-book retail price increase of 14.2% for their New Releases, 42.7% for their NYT Bestsellers, and 18.6% across all of the Publisher Defendants' e-books.

The following chart, prepared by one of Apple's experts, illustrates this sudden and uniform price increase. While the average prices for Random House's e-books hovered steadily around $8, for four of the Publisher Defendants, the price increases occurred at the opening of the iBookstore; Penguin's price increases awaited the execution of its agency agreement with Amazon and followed within a few weeks. The bottom flat line represents the average prices of non-major publishers.



The Publisher Defendants raised more than the prices of just New Release e-books. The prices of some of their New Release hardcover books were also raised in order to move the e-book version into a correspondingly higher price tier.[54] And, all of the Publisher Defendants raised the prices of their backlist e-books, which were not governed by the Agreements'

[54] The relationship between the price of e-books and their hardcover counterpart is a complex topic that was only tangentially explored at trial. Apple conceded, however, that it had not been Amazon's policy to price e-books above their hardcover version, but that the Publishers who adopted an agency model for distribution of their e-books did not always follow that practice. There is evidence that, with the adoption of the agency model, as many as 20% of trade e-books became more expensive for consumers than their physical counterpart.

price tier regimen. As Cue had anticipated, the Publisher Defendants did this in order to make up for some of the revenue lost from their sales of New Release e-books.

The following two charts, one prepared by the Plaintiffs' expert and another from an expert for Apple, respectively, compare the price increases for the Publisher Defendants' New Releases with the price increases for their backlist books. Despite drawing from different time periods, their conclusions are very similar. The Publisher Defendants used the change to an agency method for distributing their e-books as an opportunity to raise the prices for their e-books across the board.

E-Book Average Price Increases at Amazon by Publisher Defendants Following the Move to Agency

Amazon Weighted Average Price Increases

Publisher	All eBooks	New Releases	NYT Bestsellers	Backlist
Hachette	33.0%	14.1%	37.9%	37.5%
HarperCollins	13.6%	12.5%	44.0%	15.2%
Macmillan	11.6%	14.0%	-	11.2%
Penguin	18.3%	19.5%	43.6%	17.6%
Simon & Schuster	18.0%	15.1%	28.7%	19.8%
Defendant Publishers	18.6%	14.2%	42.7%	19.6%
Random House	0.01%	1.9%	0.2%	0.3%
Non-Majors	-0.2%	-0.9%	1.1%	0.1%

Average E-book Prices of Backlist and New Release Titles in the Periods Before and After Agency

	Amazon	Barnes & Noble	Sony
Backlist			
Before Agency	$7.16	$6.84	$8.07
After Agency	$8.78	$8.20	$8.43
Percent Change	23%	20%	4%
Hardcover New Release and NYT Bestsellers			
Before Agency	$10.37	$9.99	$11.31
After Agency	$12.28	$11.60	$11.97
Percent Change	18%	16%	6%

Not surprisingly, the laws of supply and demand were not suspended for e-books. When the Publisher Defendants increased the prices of their e-books, they sold fewer books.

There were various measurements offered at trial to quantify the lost sales. One study found that the Publisher Defendants who shifted their e-tailers to agency in early April 2010 sold 12.9% fewer units at major retailers in a two-week period following the implementation of agency prices than they had in a two-week period preceding it, at least for books that were available in both periods.[55] Another expert opined that the Publisher Defendants' sales decreased by 14.5% relative to a control group consisting of Random House.[56]

[55] By contrast, in this study non-party publishers' sales increased 5.4% in the same period.

[56] Apple argued at trial that the decline in sales of the Publisher Defendants' e-books compared to those sold by Random House was attributable to Amazon's promotion of Random House

Amazon prepared charts for the Publisher Defendants illustrating the impact of their pricing decisions on their sales. Amazon concluded that "[c]ompared to the 3 agency publishers -- Harper, Hachette and Penguin, who had overall kindle book units decline in Q2 compared to Q1, Random House had an increase of 41%." It is unnecessary to quantify the precise decline in the sales for the Publisher Defendants that can be properly attributed to their decisions to raise their e-book prices. It is abundantly clear, and not surprising, that each of the Publisher Defendants lost sales of e-books due to the price increases.

Thus, consumers suffered in a variety of ways from this scheme to eliminate retail price competition and to raise e-book prices. 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. Now that the Publisher Defendants were in control of pricing, they were also less willing to authorize retailers to give consumers the benefit of promotions. As Macmillan explained to Barnes &

---

books during the time Random House remained on a wholesale model of distribution. Apple did not offer persuasive evidence, however, that the loss in sales was substantially due to anything other than the fact that Amazon continued to price many Random House New Releases at $9.99 while the Publisher Defendants raised the prices of their e-books substantially higher.

Noble, it would not agree to a proposed promotion because "[w]e worked hard to push the price of our new Ebooks up just a few dollars -- and this would immediately signal not an increase in value, but a decrease in value."

While conceding that the prices for the Publisher Defendants' e-books went up after Apple opened the iBookstore, Apple argued at trial that the opening of the iBookstore actually led to an overall decline in trade e-book prices during the two-year period that followed that event. Its evidence was not persuasive. Apple's experts did not present any analysis that attempted to control for the many changes that the e-book market was experiencing during these early years of its growth, including the phenomenon of disintermediation and the extent to which other publishers decided to remain on the wholesale model. The analysis presented by the Plaintiffs' experts as well as common sense lead invariably to a finding that the actions taken by Apple and the Publisher Defendants led to an increase in the price of e-books. After all, the Publisher Defendants accounted for roughly 50% of the trade e-book market in April 2010, and it is undisputed that they raised the prices for not only their New Release but also their backlist e-books substantially.

P. Random House Adopts an Agency Model

If there were any doubt about the impact of the Apple agency Agreement on e-book prices, at least in so far as the

market for trade e-books is concerned, the experience of Random House confirms each of the observations just made about the prices and sales of the five Publisher Defendants. Random House adopted the agency model in early 2011, and promptly raised the prices of its e-books and experienced a concomitant decline in e-book sales.[57]

Random House had resisted Apple's overtures to adopt the agency model and therefore its e-books were not available in 2010 in the iBookstore. It was Cue's assessment that the iBookstore was not as successful as Apple had hoped because e-books from Random House, the largest of the Big Six, were not being sold there. Cue believes that consumers expect all the books they may want to buy to be available in a bookstore and when they cannot find what they want, they go elsewhere and may never return.

While the Publisher Defendants were pricing their e-books at or close to the $12.99 and $14.99 price caps, Amazon continued to price many Random House New Releases and NYT Bestseller e-books at $9.99, as it did with other publishers that remained on its wholesale terms. This increased Random House's sales and market share during that period.

---

[57] Dr. Ashenfelter calculated an increase in Random House's prices for e-books of 18.3% on average, and a decrease in its unit sales of e-books of 16.7%.

Apple decided to pressure Random House to join the iBookstore. As Cue wrote to Apple CEO Tim Cook, "when we get Random House, it will be over for everyone." Apple had its opportunity in the Fall of 2010, when Random House submitted some e-book apps to Apple's App Store. Cue advised Random House that Apple was only interested in doing "an overall deal" with Random House. By December, they had begun negotiations, and Random House executed an agency agreement with Apple in mid-January 2011. In an email to Jobs, Cue attributed Random House's capitulation in part to "the fact that I prevented an app from Random House from going live in the app store this week."

Q. The Publisher Defendants Require Google to Adopt an Agency Model

The decision by the Publisher Defendants and later by Random House to adopt the agency model of distribution and raise e-book prices effected a change across the entire industry. Once the Publisher Defendants agreed with Apple to move to an agency relationship for the sale of their e-books, they not only demanded that Amazon change their relationship to an agency model, they negotiated agency agreements with their other e-book distributors to eliminate all retail price competition.

One of the companies that was planning to become an e-book distributor was Google, and the Publisher Defendants demanded

that Google as well adopt an agency agreement in January 2010. Google had begun to plan its entry into the e-book business as early as 2007. Before January 2010, Google understood from its discussions with the Publisher Defendants that the parties would use the wholesale model to sell digital books. But, in January 2010, each of the Publisher Defendants did an about-face and suddenly advised Google that they were switching to an agency model and would no longer be offering books under wholesale terms. Google, like Amazon, would have preferred to use the wholesale model and set the retail prices for its e-books, but the Publisher Defendants refused to allow it that option. The Publisher Defendants conveyed to Google that their Agreements with Apple made them "unwilling to enter into non-agency agreements with Google."

R. Concluding Observations

While many of the trial's fact witnesses who are employed by Apple and the Publisher Defendants were less than forthcoming, the contemporaneous documentary record was replete with admissions about their scheme. The preceding findings have therefore come not only from the testimony presented at trial, where the witnesses were cross-examined and questioned again through re-direct examination, but has also been derived liberally from the documentary record.

Based on these documents, it is difficult for either Apple or the Publisher Defendants to deny that they worked together to achieve the twin aims of eliminating retail price competition and raising the prices for trade e-books. As Macmillan frankly acknowledged in writing to the trade in the Spring of 2010, one of its goals in moving to the agency model was to "[i]ncrease[e] prices" of e-books. As Penguin's McCall wrote, "Agency is anti-pricewar territory. We don't need to compete with other publishers on the price of our books." Penguin executives told authors after signing the Apple Agreement that they had "fought to protect high prices; . . . fought against $9.99 pricing" to demand higher, "better" prices. It continued, "who knows, it is $14.99 this year, but in a few years it may be $16.99 or $19.99." HarperCollins recognized that, with the Apple Agreements, Apple had become the "gatekeeper" on e-book pricing "for the industry." As Cue admitted at trial, raising e-book prices was simply "all part of" the bargain in creating the iBookstore.

Jobs himself was frank in explaining how this scheme worked when he spoke to biographer Walter Isaacson the day after the Launch. Jobs described it as an "a[i]kido move" to move all retailers to agency and eliminate price competition with Amazon. In Jobs's own words:

> Amazon screwed it up. It paid the wholesale price for some books, but started selling them below cost at $9.99. The publishers hated that -- they thought it would trash their ability to sell hardcover books at $28. So before Apple even got on the scene, some booksellers were starting to withhold books from Amazon. So we told the 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." But we also asked for a guarantee that if anybody else is selling the books cheaper than we are, then we can sell them at the lower price too. So they went to Amazon and said, "You're going to sign an agency contract or we're not going to give you the books."

DISCUSSION

The United States of America has brought a single claim against Apple for violation of Section 1 of the Sherman Act. The States have brought claims against Apple based on violations of the state statutes "to the extent those laws are congruent with Section 1 of the Sherman Act." Following a description of the legal standard for a Section 1 claim, this Opinion will apply that law to the facts presented at trial. After finding that the Plaintiffs' have carried their burden of showing that Apple violated Section 1, the Opinion will address the six principal arguments that Apple has presented in its defense.

A. Legal Standard

Section 1 of the Sherman Act ("Section 1") outlaws "[e]very contract, combination . . . , or conspiracy, in restraint of trade or commerce among the several States." 15 U.S.C. § 1. To establish a conspiracy in violation of Section 1, then, proof of

joint or concerted action is required. Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 761 (1984). In particular, plaintiffs must show (1) "a combination or some form of concerted action between at least two legally distinct economic entities" that, (2) "constituted an unreasonable restraint of trade either per se or under the rule of reason." Primetime 24 Joint Venture v. Nat'l Broad. Co., 219 F.3d 92, 103 (2d Cir. 2000) (citation omitted); see Capital Imaging Assocs, P.C. v. Mohawk Valley Medical Assocs, Inc., 996 F.2d 537, 542 (2d Cir. 1993). Overall, "[c]ircumstances must reveal a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement." Monsanto, 465 U.S. at 764 (citation omitted); Apex Oil Co. v. DiMauro, 822 F.2d 246, 252 (2d Cir. 1987).

Notwithstanding its broad language, Section 1 does not disallow any and all agreements; it "outlaws only unreasonable restraints." Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 885 (2007) (citation omitted). Thus, in many cases, "antitrust plaintiffs must demonstrate that a particular contract or combination is in fact unreasonable and anticompetitive before it will be found unlawful." Texaco Inc. v. Dagher, 547 U.S. 1, 5 (2006). Some agreements, however, "are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality." Id.

(citation omitted). Such agreements are illegal per se, and are not subject to the rule of reason. The per se rule thus "eliminates the need to study the reasonableness of an individual restraint in light of the real market forces at work." Leegin, 551 U.S. at 886.

By contrast, under the rule of reason, "the plaintiffs bear an initial burden to demonstrate the defendants' challenged behavior had an actual adverse effect on competition as a whole in the relevant market." Geneva Pharms Tech Corp. v. Barr Labs Inc., 386 F.3d 485, 506-07 (2d Cir. 2004) (citation omitted).

> If the plaintiffs satisfy their initial burden, the burden shifts to the defendants to offer evidence of the pro-competitive effects of their agreement. Assuming defendants can provide such proof, the burden shifts back to the plaintiffs to prove that any legitimate competitive benefits offered by defendants could have been achieved through less restrictive means. Ultimately, the fact finder must engage in a careful weighing of the competitive effects of the agreement -- both pro and con -- to determine if the effects of the challenged restraint tend to promote or destroy competition.

Id. at 507 (citation omitted).

Use of the per se rule is limited to restraints "that would always or almost always tend to restrict competition and decrease output," and is appropriate "only after courts have had considerable experience with the type of restraint at issue." Leegin, 551 U.S. at 886 (citation omitted). "Under the Sherman Act a combination formed for the purpose and with the effect of

raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal per se." United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223 (1940). Generally speaking, price-fixing agreements or agreements to divide markets that are horizontal in nature -- meaning that the parties to the agreement are "competitors at the same level of the market structure," Anderson News, L.L.C. v. American Media, Inc., 680 F.3d 162, 182 (2d Cir. 2012) (citation omitted) -- are per se unlawful. Starr v. Sony BMG Music Entm't, 592 F.3d 314, 326 n.4 (2d Cir. 2010); Leegin, 551 U.S. at 886 ("Restraints that are per se unlawful include horizontal agreements among competitors to fix prices."). In other words, "they are prohibited despite the reasonableness of the particular prices agreed upon." Starr, 592 F.3d at 326 n.4. Non-price restrictions that are otherwise lawful are also "per se unlawful if undertaken as part of an illegal scheme to fix prices." Monsanto, 465 U.S. at 760 n.6 (citation and emphasis omitted).

By contrast, vertical price restraints, such as resale price maintenance agreements, that do not involve price-fixing are subject to the rule of reason. See Leegin, 551 U.S. at 882. A manufacturer has a right to refuse to deal "with whomever it likes, as long as it does so independently." Monsanto, 465 U.S. at 761.

A plaintiff may rely on either direct or circumstantial evidence to establish that a defendant entered into an agreement in violation of the antitrust laws. Mayor and City Council of Baltimore, Md. v. Citigroup, Inc., 709 F.3d 129, 136 (2d Cir. 2013) (pleading standard). Direct evidence "would consist, for example, of a recorded phone call in which two competitors agreed to fix prices at a certain level." Id.

Because unlawful conspiracies tend to form in secret, however, proof of a conspiracy will rarely consist of explicit agreements. Rather, conspiracies "nearly always must be proven through inferences that may fairly be drawn from the behavior of the alleged conspirators." Anderson News, 680 F.3d at 183 (citation omitted). In fact, even direct evidence in antitrust cases "can sometimes require a factfinder to draw inferences to reach a particular conclusion." In re Publ'n Paper Antitrust Litig., 690 F.3d 51, 64 (2d Cir. 2012) ("Perhaps on average circumstantial evidence requires a longer chain of inferences." (citation omitted)). Circumstantial evidence is no less persuasive than direct evidence; indeed, "[c]ircumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence." Desert Palace, Inc. v. Costa, 539 U.S. 90, 100 (2003).

Thus, to prove an antitrust conspiracy, "the antitrust plaintiff should present direct or circumstantial evidence that

reasonably tends to prove that the [defendant] and others had a conscious commitment to a common scheme designed to achieve an unlawful objective." Monsanto, 465 U.S. at 764 (citation omitted). The evidence must also "prove defendants had the intent to adhere to an agreement that was designed to achieve an unlawful objective; specific intent to restrain trade is not required." Geneva Pharms, 386 F.3d at 507. Since "the essence of any violation of § 1 [of the Sherman Act] is the illegal agreement itself," Summit Health, Ltd. v. Pinhas, 500 U.S. 322, 330 (1991), the evidence must demonstrate a "meeting of the minds." Monsanto, 465 U.S. at 765. In evaluating the existence of an antitrust conspiracy, courts consider the "totality of the evidence." Publ'n Paper, 690 F.3d at 64; see 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)). Just as a conspiracy's "failure to achieve its ends" after an intended period may be "strong evidence" that the conspiracy did not in fact exist, Matsushita Electric Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 592 (1986), the success of the conspiracy in achieving its goals may confirm the very existence of the conspiracy. See Oreck Corp. v. Whirlpool Corp., 563 F.2d 54, 63 (2d Cir. 1977) ("Proof that a combination was formed for the

purpose of fixing prices and that it caused them to be fixed or contributed to that result is proof of the completion of a price-fixing conspiracy under § 1 of the Act." (citation omitted)); cf. United States v. Quinones, 511 F.3d 289, 308 (2d Cir. 2007) (defendants' cocaine purchases "were obviously relevant to proof of the existence of th[e narcotics] conspiracy" charged).

"Unambiguous evidence of an agreement to fix prices . . . is all the proof a plaintiff needs" to establish a violation of Section 1. Publ'n Paper, 690 F.3d at 63 (citation omitted). Where the evidence of conspiracy is "ambiguous," however, "antitrust law limits the range of permissible inferences" that may be drawn. Matsushita, 475 U.S. at 588; see Apex, 822 F.2d at 253. Where conduct is as consistent with permissible competition as with illegality, a plaintiff "must present evidence that tends to exclude the possibility that the alleged conspirators acted independently." Matsushita, 475 U.S. at 588 (citation omitted). Thus, "standing alone," ambiguous conduct is inadequate to support an inference of illegality. Id. Moreover, where a plaintiff's theory of recovery is implausible -- in other words, "if the claim is one that simply makes no economic sense," id. at 587 -- it takes "strong direct or circumstantial evidence to satisfy Matsushita's tends to exclude standard." Publ'n Paper, 690 F.3d at 63 (citation omitted).

"By contrast, broader inferences are permitted, and the 'tends to exclude' standard is more easily satisfied, when the conspiracy is economically sensible for the alleged conspirators to undertake and the challenged activities could not reasonably be perceived as procompetitive." Id. (citation omitted).

Even where a plaintiff relies on ambiguous evidence, however, to prove its claim, the plaintiff does not bear the burden of showing that the existence of a conspiracy is the "sole inference" to be drawn from the evidence. Id. The plaintiff is only required to present evidence that is sufficient to allow the fact-finder "to infer that the conspiratorial explanation is more likely than not." Id. (citation omitted).

Conduct that stems from independent decisions is permissible under Section 1, see Starr, 592 F.3d at 321, as are "independent responses to common stimuli," and "interdependence unaided by an advance understanding among the parties." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 556 n.4 (2007) (citation omitted). As a result, while evidence of parallel conduct is probative of an antitrust conspiracy, such evidence "alone cannot suffice." Apex, 822 F.2d at 252; Matsushita, 475 U.S. at 588. Instead, to infer a horizontal agreement through parallel conduct, a court may draw inferences from "plus factors" to rule out purely interdependent decision making by

rivals. Mayor, 709 F.3d at 136 (citation omitted). Plus factors commonly considered by courts include "a common motive to conspire, evidence that shows that the parallel acts were against the apparent individual economic self-interest of the alleged conspirators, . . . evidence of a high level of interfirm communications," id., and the "use of facilitating practices" like information sharing. Todd v. Exxon Corp., 275 F.3d 191, 198 (2d Cir. 2001). An abrupt shift from defendants' past behavior and near-unanimity of action by several defendants may also strengthen the inference. See Interstate Circuit v. United States, 306 U.S. 208, 222 (1939); Toys "R" Us, Inc. v. FTC, 221 F.3d 928, 935 (7th Cir. 2000). For instance, a "complex and historically unprecedented change[] in pricing structure made at the very same time by multiple competitors, and made for no other discernible reason," may provide sufficient evidence of an illegal conspiracy. Mayor, 709 F.3d at 137 (citation omitted) (discussion of pleading standard).

Per se price-fixing agreements may also include those where a vertical player participates in and facilitates a horizontal conspiracy. See Toys "R" Us, 221 F.3d at 934, 936. Where a vertical actor is alleged to have participated in an unlawful horizontal agreement, plaintiffs must demonstrate both that a horizontal conspiracy existed, and that the vertical player was a knowing participant in that agreement and facilitated the

scheme. See, e.g., id. at 936; Interstate Circuit, 306 U.S. at 225-29 (1939).

B. Analysis of the Evidence

The Plaintiffs have shown through compelling evidence that Apple violated Section 1 of the Sherman Act by conspiring with the Publisher Defendants to eliminate retail price competition and to raise e-book prices. There is overwhelming evidence that the Publisher Defendants joined with each other in a horizontal price-fixing conspiracy. Through that conspiracy, the Publisher Defendants raised the prices of many of their New Releases and NYT Bestsellers above the $9.99 price at which they had previously been sold through Amazon. They also raised the prices of many of their backlist e-books. The Plaintiffs have also shown that Apple was a knowing and active member of that conspiracy. Apple not only willingly joined the conspiracy, but also forcefully facilitated it.

There is little dispute that the Publisher Defendants conspired together to raise the prices of their e-books.[58] They shared a common motivation: the elimination of the "wretched"

[58] During summation Apple chose not to concede that the plaintiffs had proven at trial that the Publisher Defendants engaged in a horizontal price fixing conspiracy. Apple did not expend an effort, however, to argue that such a conspiracy did not exist or that the evidence was insufficient to find that it existed. Apple confined its argument to its purported lack of knowledge that the Publisher Defendants were conspiring with each other.

$9.99 retail price that Amazon, the chief distributor of their e-books, chose for many of their New Releases, including NYT Bestsellers. They believed that this price point in the nascent but swiftly growing e-book market would, if left unchallenged, unalterably affect the consumer perception of the value of a book and severely undermine their more profitable physical book business. To protect their then-existing business model, the Publisher Defendants agreed to raise the prices of e-books by taking control of retail pricing.

From late 2008 through 2009, the Publisher Defendants had collectively tried through a variety of means to pressure Amazon to raise the prices of their e-books. Their efforts proved futile. Then, through agency agreements that each Publisher Defendant executed with Apple over the course of just three days in January 2010, and with Amazon (and other e-retailers) in the weeks that followed, the Publisher Defendants simultaneously switched from a wholesale to an agency model for the distribution of their e-books. When the iPad went on sale and the iBookstore went live in early April 2010 (or shortly thereafter, in the case of Penguin), each of the Publisher Defendants used their new pricing authority to raise the prices of their e-books overnight and substantially.

This price-fixing conspiracy would not have succeeded without the active facilitation and encouragement of Apple.

Before Apple even met with the Publisher Defendants in mid-December 2009, it was fully aware that the Publishers were adamantly opposed to Amazon's $9.99 price point and were actively searching for an effective means, including through collective action, to pressure Amazon to raise its prices. Inspired by the impending Launch of the revolutionary iPad, scheduled for January 27, Apple seized the moment.

Apple met with the Publishers in December 2009 and heard their unanimous condemnation of the $9.99 price point and desire to raise e-book prices. Volunteering that it was willing to price e-books as high as $14.99 in an e-bookstore, Apple won their rapt attention. Apple then presented a strategy -- the agency Agreements -- that would allow the Publishers to take control of and raise e-book retail prices in a matter of weeks. Knowing full well, however, that the Publisher Defendants wanted to raise e-book retail prices significantly above the $9.99 price point, even in some instances above the retail prices of the corresponding physical book, Apple placed pricing restrictions or caps on categories of e-books to ensure that the prices in its iBookstore were "realistic" and didn't embarrass Apple. In negotiating the caps for its pricing tiers, Apple understood that it was setting the new retail prices at which e-books would be sold.

Apple had several reasons for engaging as it did with the Publisher Defendants. It wanted to announce a well-stocked iBookstore in less than two months, when it launched its iPad; it wanted to avoid competing with Amazon, an arch rival in the market, on the basis of price; and it wanted a guaranteed profit on any new business it entered. To accomplish these goals, Apple was willing to offer the Publisher Defendants a roadmap for raising retail e-book prices well above Amazon's $9.99 price point and urged the Publisher Defendants to use that roadmap to do so. In short, Apple convinced the Publisher Defendants that Apple shared their goal of raising e-book prices, and helped them to realize that goal.

Apple included the MFN, or price parity provision, in its Agreements both to protect itself against any retail price competition and to ensure that it had no retail price competition. Apple fully understood and intended that the MFN would lead the Publisher Defendants inexorably to demand that Amazon switch to an agency relationship with each of them. As Apple's Cue reminded Macmillan's Sargent, this was no more than what the Publisher Defendants had already assured Apple that they wanted to, and would, do.

Because of the MFN, Apple concluded that it did not need to include as an explicit term in its Agreements a demand that a Publisher Defendant move all of its resellers to agency. The

MFN was sufficient to force the change in model. The economics of the Agreements were, simply put, "terrible" for the Publishers. The Publisher Defendants already expected to lose revenue from their substitution of an agency model for the wholesale model of e-book distribution. Unless a Publisher Defendant followed through and transformed its relationships with Amazon and other resellers into an agency relationship, it would be in significantly worse terms financially as a result of its agency contract with Apple. As significantly, unless the Publisher Defendants joined forces and together forced Amazon onto the agency model, their expected loss of revenue would not be offset by the achievement of their ultimate goal: the protection of book value.

A chief stumbling block to raising e-book prices was the Publishers' fear that Amazon would retaliate against any Publisher who pressured it to raise prices. Each of them could also expect to lose substantial sales if they unilaterally raised the prices of their own e-books and none of their competitors followed suit. This is where Apple's participation in the conspiracy proved essential. It assured each Publisher Defendant that it would only move forward if a critical mass of the major publishing houses agreed to its agency terms. It promised each Publisher Defendant that it was getting identical terms in its Agreement in every material way. It kept each

Publisher Defendant apprised of how many others had agreed to execute Apple's Agreements. As Cue acknowledged at trial, "I just wanted to assure them that they weren't going to be alone, so that I would take the fear awa[y] of the Amazon retribution that they were all afraid of." As a result, the Publisher Defendants understood that each of them shared the same set of risks and rewards.

Working against its own internal deadline, Apple achieved for this industry in a matter of weeks what the Publisher Defendants had been unable to accomplish for months before Apple became their partner. In the words of Simon & Schuster's Reidy, Apple herded cats. Apple gave the Publishers a deadline and required them to examine with care but quickly how committed they were to challenging Amazon and altering the landscape of e-book pricing. And when it appeared a Publisher Defendant might be too scared to commit to this dramatic business change, Cue reminded that Publisher Defendant that Apple's entry into the market represented a once-in-a-lifetime opportunity to eliminate Amazon's control over pricing. As he warned Penguin just days before the Launch, "There is no one outside of us that can do this for you. If we miss this opportunity, it will likely never come again."

Without the collective action that Apple nurtured, it is unlikely any individual Publisher would have succeeded in

unilaterally imposing an agency relationship on Amazon. Working together, and equipped with Apple's agency Agreements, Apple and the Publisher Defendants moved the largest publishers of trade e-books and their distributors from a wholesale to agency model, eliminated retail price competition, and raised e-book prices.

The evidence of this conspiracy can be found in Jobs's admissions to a reporter, to James Murdoch, and to his biographer; in contemporaneous e-mails pulled from the files of Apple, the Publishers, Amazon, and others; in the web of telephone calls among Publisher Defendants' CEOs surrounding each turning point in the presentation and execution of the Agreements;[59] and as compellingly, in the circumstantial evidence. This circumstantial evidence includes the following:

[59] Apple has contended that the existence of any conversations among the Publisher Defendants CEOs during their negotiations with Apple is neither unusual nor incriminating. This is not the occasion to describe the metes and bounds of lawful communication among competitors when they are engaged in simultaneous negotiations with either a common supplier or a shared distributor. Instead, the Court focuses here on the ways in which the Publisher Defendants' frequent discussions are relevant to this Opinion, including that the Publisher Defendants' denials at trial that they discussed the Apple Agreement with one another in those communications, or that those conversations occurred at all, in the face of overwhelming evidence to the contrary, strongly supports a finding of consciousness of guilt. They knew they were coordinating their efforts to raise the e-book prices and jointly confront Amazon, and have tried to hide that fact. Moreover, the pattern of their coordination in meetings and telephone calls, and their expectation that they would not compete on price -- all of which was apparently well established before Apple reached out to them but continued throughout their negotiations with Apple -- serves as strong evidence of this conspiracy.

each of the Publisher Defendants shared the identical goal to raise the $9.99 price point to protect its physical book business; the agency Agreements represented an "abrupt shift" from the past model for the distribution of e-books; the Publisher Defendants each demanded that Amazon adopt this new model within days of each other; the agency model protected Apple from price competition; the rise in trade e-book prices to or close to the price caps established in the Agreements was large and essentially simultaneous; in adopting a model that deprived each of them of a stream of expected revenue from the sale of e-books on the wholesale model, the Publisher Defendants all acted against their near-term financial interests; and each of the Publisher Defendants acted in identical ways even though each was also afraid of retaliation by Amazon. See Toys "R" Us, 221 F.3d at 935-36; PepsiCo, Inc. v. Coca-Cola Co., 315 F.3d 101, 110 (2d Cir. 2002).

In sum, the Plaintiffs have shown not just by a preponderance of the evidence, see Herman & MacLean v. Huddleston, 459 U.S. 375, 390 (1983), but through compelling direct and circumstantial evidence that Apple participated in and facilitated a horizontal price-fixing conspiracy. As a result, they have proven a per se violation of the Sherman Act. See Arizona v. Maricopa Cnty. Med. Soc., 457 U.S. 332, 346-47 (1982); Toys "R" Us, 221 F.3d at 936. If it were necessary to

analyze this evidence under the rule of reason, however, the Plaintiffs would also prevail.

Apple has not shown that the execution of the Agreements had any pro-competitive effects.[60] The form Agreements eliminated retail price competition, and there is no evidence that the Publisher Defendants have ever competed with each other on price. To the contrary, several of the Publishers' CEOs explained that they have not competed with each other on that basis. The pro-competitive effects to which Apple has pointed, including its launch of the iBookstore, the technical novelties of the iPad, and the evolution of digital publishing more generally, are phenomena that are independent of the Agreements and therefore do not demonstrate any pro-competitive effects flowing from the Agreements. In any event, the Plaintiffs have shown that the Agreements did not promote competition, but destroyed it. The Agreements compelled the Publisher Defendants to move Amazon and other retailers to an agency model for the distribution of e-books, removed the ability of retailers to set the prices of their e-books and compete with each other on price, relieved Apple of the need to compete on price, and allowed the Publisher Defendants to raise the prices for their e-books, which they promptly did on both New Releases and NYT

[60] Plaintiffs have defined the relevant market as trade e-books in the United States; Apple does not dispute that characterization.

Bestsellers, as well as backlist titles. Apple's experts did little to counter the evidence of this across-the-board price increase in e-books sold by the Publisher Defendants and by Random House when it moved to agency.[61] Because of this rise in prices, and at least until Random House also adopted the agency model, the Publisher Defendants sold fewer e-books than they otherwise would have done. For this and many other reasons, if it were necessary to evaluate Apple's conduct under the rule of reason, Plaintiffs have carried their burden to show a violation of Section 1 of the Sherman Act under that test as well.

APPLE'S ARGUMENTS

Apple vigorously contested its liability at trial. This Opinion turns now to Apple's principal arguments in its defense.

Apple's defense has somewhat shifted over time. Apple in its opening statement identified five essential links in the chain of evidence that the Plaintiffs had to establish at trial.[62] They were:

---

[61] The testimony by Apple's experts that the prices of e-books generally, including self-published e-books, decreased on average in the years following the introduction of the iBookstore, does not affect this conclusion. The Apple experts did not offer any scientifically sound analysis of the cause for this purported price decline or seek to control for the factors that may have led to it.

[62] In its pretrial memorandum of law, Apple's defense focused almost exclusively on Monsanto's "tends to exclude" standard and its contention that Plaintiffs' evidence is insufficient to

> First is that the publishers sign Apple's agency agreements with an MFN and price caps.
>
> The second is that that MFN sharpened the publishers' incentives to demand agency from Amazon.
>
> The next is that that demand for agency convinces a company, Amazon, of the futility of continued resistance to agency.
>
> Amazon adopts agency in circumstances where absent the Apple MFN it would not have adopted agency.
>
> And the final chain in the alleged conspiracy is that the publishers raise prices to the price caps by agreement.
>
> All of these links in the chain are required for the government to meet its burden of proving that Apple participated in a price fixing scheme.

Apple also highlighted in its opening how much Apple likes low prices and that it did not know how the Publishers would price their e-books under the agency model.

Over the course of the trial, Apple abandoned each of these arguments. All of the "links" that Apple identified in its opening statement were established at trial, and Apple did not argue otherwise in its summation. Apple similarly abandoned by summation its theory that Apple was unaware that the Publisher Defendants would use their new pricing authority to raise e-book prices; over the course of the trial, Apple's witnesses admitted that they expected the Publisher Defendants to raise their

---

exclude the possibility of independent action. This remains Apple's chief argument in its defense.

e-book prices to Apple's price caps. Instead, in the end, Apple appears to make six principal arguments in its defense.

First, it relies on the Supreme Court's decision in Monsanto, 465 U.S. 752, to assert that Apple is entitled to a verdict in its favor since the evidence does not "tend to exclude" the possibility that Apple acted in a manner consistent with its lawful business interests. Second, Apple argues that it never intended to conspire with the Publisher Defendants to raise e-book prices. Third, Apple argues that the Plaintiffs have failed to show that the Publisher Defendants actually "increased" e-book prices since, in the absence of Amazon's adoption of an agency model, the Publisher Defendants would have simply withheld e-books from Amazon. Apple also offers its own reading of different portions of the trial record, and that reading will be addressed as its fourth set of contentions. Fifth, Apple presents additional legal arguments suggesting that its conduct must be analyzed under the rule of reason. Finally, Apple argues that a verdict in favor of the Plaintiffs will set a dangerous precedent and will discourage businesses from entering other markets. Each of these defenses will be discussed in turn.

A. The Monsanto Decision and Apple's Independent Business Interests

Throughout these proceedings, Apple has relied on Monsanto and its "tends to exclude" formulation as the crown jewel of its defense. According to Apple, any fact-finder in this case must begin by answering the following question: "Does the evidence show that Apple acted to facilitate a conspiracy among the Publisher Defendants to force Amazon onto agency and raise prices, or rather was its conduct just as consistent with independent, unilateral action?" If the evidence regarding participation in a conspiracy is ambiguous, then Apple contends that, under Monsanto, the fact-finder may only find Apple liable if it concludes that Apple's participation in a conspiracy is "the more likely explanation" for its conduct. Apple also asserts that when the most natural inference from the evidence is that a defendant had a legitimate, independent reason for its actions, then no fact-finder may infer that it engaged in a conspiracy.

Applying this reading of precedent, Apple argues that it had legitimate, independent business reasons for executing the Agreements with the Publisher Defendants, and that these independent business reasons necessarily render any evidence of its participation in a conspiracy ambiguous. Because the Plaintiffs have been unable to show that Apple did not have

legitimate reasons for acting as it did, Apple asserts that the Plaintiffs have failed to exclude the possibility that Apple acted lawfully. As a result, according to Apple, Monsanto dictates that a verdict be entered in its favor. Apple misreads Monsanto and its progeny. It also perceives ambiguity where none exists.

In Monsanto, 465 U.S. 752, the Supreme Court upheld a jury verdict that a manufacturer had engaged in a per se illegal vertical price-fixing scheme with "some of its distributors." The goal of the conspiracy was the termination of a rival distributor that was running a "discount operation." Id. at 756, 764-65. Because a manufacturer and its distributors "have legitimate reasons to exchange information about the prices and the reception of their products in the market," id. at 762, and because of dangers that flow from permitting an inference of conspiracy to be drawn "from highly ambiguous evidence," id. at 763, the Court held that a plaintiff must present evidence of "something more" than complaints from distributors to the manufacturer about their cost-cutting rival. Id. at 764. Using the phrase upon which Apple seizes, the Court observed that there "must be evidence that tends to exclude the possibility that the manufacturer and nonterminated distributors were acting independently." Id. (emphasis supplied). In other words, direct or circumstantial evidence must be present that "tends to

prove that the manufacturer and others had a conscious commitment to a common scheme designed to achieve an unlawful objective." Id. (citation omitted).

Applying that standard, the Court examined the evidence presented at trial, and held that the direct and circumstantial evidence supported the jury's finding that there was an agreement between the manufacturer and one or more distributors to maintain prices. Id. at 767. In doing so, it noted that the choice between "two reasonable interpretations of the testimony" is properly left for the fact-finder. Id. at 768 n.12.

Two years later, in Matsushita, 475 U.S. 574, the Court returned to this topic in the context of summary judgment practice. It observed that "anti-trust law limits the range of permissible inferences from ambiguous evidence in a § 1 case." Id. at 588. The Court explained that "if the factual context renders respondents' claim implausible -- if the claim is one that simply makes no economic sense -- respondents must come forward with more persuasive evidence to support their claim than would otherwise be necessary." Id. at 587. Moreover, where there is conduct "as consistent with permissible competition as with illegal conspiracy," that conduct "standing alone" will not support an inference of conspiracy. Id. at 588. Thus, to "survive a motion for summary judgment or for a directed verdict, a plaintiff . . . must present evidence that

tends to exclude the possibility that the alleged conspirators acted independently." Id. (citation omitted). Applying these principles to the case at hand, the Court noted that there could be no inference of a conspiracy when the accused "had no rational economic motive" to engage in a conspiracy and its conduct was "consistent with other, equally plausible explanations." Id. at 596. Therefore, to support liability, the evidence must "tend to exclude the possibility" that the accused engaged in legitimate behavior rather than engaging in "an economically senseless conspiracy." Id. at 597-98 (citation omitted).

These discussions of the "tend to exclude" formulations in Monsanto and Matsushita have occasioned commentary by academicians and courts of appeal. The Court of Appeals for the Second Circuit has warned that "[r]equiring a plaintiff to 'exclude' or 'dispel' the possibility of independent action places too heavy a burden on the plaintiff." Publ'n Paper, 690 F.3d at 63. According to the Second Circuit,

> [i]t is important not to be misled by Matsushita's statement . . . that the plaintiff's evidence, if it is to prevail, must "tend . . . to exclude the possibility that the alleged conspirators acted independently." The Court surely did not mean that the plaintiff must disprove all nonconspiratorial explanations for the defendants' conduct. Not only did the court use the word "tend," but the context made clear that the Court was simply requiring sufficient evidence to allow a reasonable fact-finder to infer that the conspiratorial explanation is more likely than not.

Id. (citing Phillip E. Areeda and Herbert Hovenkamp, Fundamentals of Antitrust Law, § 14.03(b), at 14-25 (4th ed. 2011)). Accordingly, "if a plaintiff relies on ambiguous evidence to prove its claim, the existence of a conspiracy must be a reasonable inference that the jury could draw from that evidence; it need not be the sole inference." Id. Characterizing as a "trap" the fallacy that "if no single item of evidence presented by the plaintiff points unequivocally to conspiracy, the evidence as a whole cannot defeat summary judgment," the Court of Appeals for the Seventh Circuit has opined that the question for the fact-finder is simply "whether, when the evidence was considered as a whole, it was more likely that the defendants had conspired to fix prices than that they had not conspired to fix prices." In re High Fructose Corn Syrup Antitrust Litigation, 295 F.3d 651, 655-56 (7th Cir. 2002).

For the reasons described earlier in this Opinion, there is abundant direct and circumstantial evidence, and this Court has found, that Apple knowingly and intentionally participated in and facilitated a horizontal conspiracy to eliminate retail price competition and to raise the retail prices of e-books. Apple made a conscious commitment to join a scheme with the Publisher Defendants to raise the prices of e-books. See Monsanto, 465 U.S. at 764. Apple did not and could not have

acted independently to achieve the results it achieved here. It required the coordinated effort and conscious commitment of the Publisher Defendants and Apple to change the business model for the distribution of e-books, impose that new model on Amazon against its will, and effect a significant increase in the retail prices of e-books. The finding that Apple engaged in an illegal conspiracy is based not simply on a finding that the "conspiratorial explanation is more likely than not," Publ'n Paper, 690 F.3d at 63; it is based on powerful direct evidence corroborated by compelling circumstantial evidence. Even if Apple had been successful at trial in showing that the evidence of its participation in the asserted conspiracy was equally balanced between two reasonable interpretations, Monsanto, 465 U.S. at 768 n.12, and it was not, the Plaintiffs have shown by a preponderance of the evidence that Apple violated the antitrust laws.

This conclusion is based on an evaluation of the entirety of the evidentiary record, including those portions on which Apple relies in arguing that it acted in ways that were consistent with its independent business interests. It is not surprising that Apple chose to further its own independent, economic interests. Such a motivation, however, does not insulate a defendant from liability for illegal conduct. It has long been observed that it is of "no consequence, for purposes

of determining whether there has been a combination or conspiracy under s[ection] 1 of the Sherman Act, that each party acted in its own lawful interest." United States v. General Motors Corp., 384 U.S. 127, 142 (1966).

To the extent that Apple is arguing that the evidence of its participation with the Publisher Defendants in the conspiracy is ambiguous, it is wrong. Instead, the evidence not only "tends to exclude the possibility" that Apple acted independently; it overwhelmingly demonstrates that it did not.

In asserting that its behavior was consistent with its legitimate business interests and with standard business practices, Apple emphasizes the following: it wanted to enter and compete successfully in the e-books market; it did not want to begin a business in which it would sustain losses; it wanted to avoid the windowing or withholding of e-books from its e-bookstore; the agency model, particularly one with price caps and an MFN, was a logical fit; and it was helpful to advise Publishers that it was offering the same terms to their competitors and would open the iBookstore only if it reached agreements with enough of them to have a successful e-bookstore. Apple contends that each of these practices was and is a lawful business practice. It argues that no proper inference that Apple conspired to raise price can be drawn from the several terms in the Agreements or the components of Apple's negotiating

strategy because the Supreme Court has found actions of this type essential to the operation of efficient markets.

The Plaintiffs do not argue, and this Court has not found, that the agency model for distribution of content, or any one of the clauses included in the Agreements, or any of the identified negotiation tactics is inherently illegal. Indeed, entirely lawful contracts may include an MFN, price caps, or pricing tiers. Lawful distribution arrangements between suppliers and distributors certainly include agency arrangements. It is also not illegal for a company to adopt a form "click-through" contract, negotiate with all suppliers at the same time, or share certain information with them. Indeed, as Apple indicates, many common business practices have been found necessary for the efficient distribution of goods and services. See Monsanto, 465 U.S. at 763-64. That does not, however, make it lawful for a company to use those business practices to effect an unreasonable restraint of trade. And here, the evidence taken as a whole paints quite a different picture -- a clear portrait of a conscious commitment to cross a line and engage in illegal behavior with the Publisher Defendants to eliminate retail price competition in order to raise retail prices.

Apple urges the Court to focus solely on each of the terms of the Agreements and to conclude that there is nothing

inherently illegal in those terms or the contract as a whole. By asking the Court to focus exclusively on whether the final terms of the Agreements by themselves reflect an agreement in restraint of trade, Apple ignores the six weeks of negotiations leading up to their execution, when the conspiracy and Apple's participation in it took shape, and the weeks that followed, during which time the import of the Agreements became apparent. The Court is obligated to consider the totality of the evidence. Therefore, the Agreements must be considered in the context of the entire record. When that is done, it becomes evident that the caps for the price tiers were the fiercely negotiated new retail prices for e-books and that the MFN was the term that effectively forced the Publisher Defendants to eliminate retail price competition and place all of their e-tailers on the agency model.

Apple also argues that it is particularly unfair to find that it engaged in illegal conduct since Amazon and Google, among others, used similar negotiating tactics and included nearly identical terms, including MFNs, when they subsequently executed their own agency agreements with the Publishers. There are several reasons that this is not a persuasive argument.

First, it is no defense to participation in an illegal price fixing conspiracy to suggest that others did it too. Second, focusing on the precise terms of agency agreements and

the extent to which they may have been similar is far too narrow a focus. The issue is not whether an entity executed an agency agreement or used an MFN, but whether it conspired to raise prices. Apple has pointed to no evidence that either Amazon or Google desired either to eliminate retail price competition or to raise retail prices. Quite the contrary. Amazon was adamant in its support of retail price competition and lower prices. It did not relinquish its control over retail pricing easily. As Penguin's Shanks described at trial, when Penguin demanded that Amazon yield its discretion over retail pricing, Amazon "yelled and screamed and threatened. It was a very unpleasant meeting." For its part, Google had been negotiating wholesale distribution agreements with Publishers and only switched to agency agreements at their insistence. Amazon was so hopeful that the Publisher Defendants would relent and revert to a wholesale model once they saw how much money they were losing with the agency model that it added a "model-parity" clause in its agreements.

In sum, Apple's independent business reasons for creating an e-bookstore and for adopting an agency model to do so have not created any ambiguity in the evidentiary record that should require hesitation before finding Apple liable. The totality of the evidence leads inextricably to the finding that Apple chose

to join forces with the Publisher Defendants to raise e-book prices and equipped them with the means to do so.

B. Apple's Intent

Apple's second defense is related to its first. It argues that it never intended to conspire with the Publisher Defendants to raise the retail prices of e-books. Apple emphasizes that it was the Publisher Defendants who raised the prices, and Apple should not be found liable just because those Publishers used Apple's Agreements as a tool to force an industry change to the agency model and then used their newly acquired price-setting authority to raise the retail prices of e-books.

Apple asserts it was solely focused on accomplishing its core business objectives and on providing the best possible e-reading experience for consumers. Apple identifies those business objectives as the development of an iBookstore with comprehensive content and competitive pricing.[63] At trial, its witnesses stressed the benefits that accrued to readers from its iPad (color functionality, backlit screen, and video capability) and from the iBookstore e-reader software (landscape view option, an attractive page-curl function, and an end-to-end platform to browse, buy, and read an e-book in one seamless interface).

[63] Apple uses the term "competitive" to convey that it wanted its prices to be the lowest in the marketplace, not to convey that it wanted prices arrived at through the process of competition.

These business considerations undoubtedly drove Apple's conduct throughout its negotiations with the Publisher Defendants. Of course, Apple hoped to launch a new content store that was both profitable and popular. It described with enthusiasm at trial the improvements to the iBookstore that allowed cooks to learn the proper technique for preparing boeuf bourguignon by watching Julia Child, and allowed children to run their fingers over a color touchscreen while reading the illustrated pages of Winnie the Pooh. But, as the trial evidence made abundantly clear, there was more to Apple's entry into the trade e-book market than the presentation of innovative software on a remarkable device.

Apple's entirely appropriate or even admirable motives do not preclude a finding that Apple also intentionally engaged with the Publisher Defendants in a scheme to raise e-book prices. From its very first meetings with the Publishers, Apple appealed to their desire to raise prices and offered them a vision of how they could reach that objective. By the end of the trial, Apple's witnesses no longer denied that they fully understood that the Publisher Defendants would raise e-book prices to the Agreements' pricing caps as soon as the iBookstore appeared on the market. Understanding that no one Publisher could risk acting alone in an attempt to take pricing power away from Amazon, Apple created a mechanism and environment that

enabled them to act together in a matter of weeks to eliminate all retail price competition for their e-books. The evidence is overwhelming that Apple knew of the unlawful aims of the conspiracy and joined that conspiracy with the specific intent to help it succeed. Apple's desire to create a profitable iBookstore on a superior e-reader does not obliterate the abundant record evidence that Apple made a commitment to act as the Publisher Defendants' partner in raising e-book prices materially above $9.99.

In a related argument, Apple contends that the Plaintiffs have paid unwarranted attention to the mechanism of an agency agreement and to the Agreements' MFN clause. Apple asserts that several reasons unrelated to price increases motivated its decision to endorse the agency model for distributing e-books along with an MFN clause, and that these business decisions thus cannot serve as evidence that Apple had any culpable intent to raise e-book prices. With respect to the agency model, Apple emphasizes that it was entering the e-book market at a time of turmoil, when Publishers were at war with their principal distributor. It points out that Barnes & Noble was actively considering the adoption of the agency model and that two of the Publishers -- Hachette and HarperCollins -- recommended the agency model to Apple at their December meetings.

But, the Plaintiffs have not argued that there is anything inherently wrong with an agency model or that Apple should not have advocated for its adoption. The question instead is whether competitors joined forces to eliminate price competition and raise prices and whether Apple knowingly and actively participated in that conspiracy. The Apple agency Agreements are important because they were the instrument that the conspirators chose to effect their scheme.

With respect to the MFN, Apple asserts that its sole intention in crafting that provision was to protect itself from price competition. It highlights the MFN's function in lowering consumer-facing prices, not raising them, and claims this fact undercuts any inference that the provision was intended as a mechanism to compel an industry-wide shift in price upward. But, just as Apple had multiple motivations in its negotiations, there was more than one function for the MFN. The MFN did lower the prices in the iBookstore below the price caps set in the tiers if a Publisher did not immediately move its other resellers to an agency arrangement. As described above, however, for that very same reason the MFN also forced the Publishers to convert all of their e-book distribution arrangements to agency arrangements and to raise e-book prices. Otherwise, a bad economic arrangement became a disastrous one for the Publishers. That is why Apple labeled the MFN an

"elegant" alternative to its initial demand that the Publishers move all of their e-book retailers to an agency model.[64] Without that explicit requirement, Apple achieved the same end by means of the MFN.[65]

Finally, Apple argues that the contentious nature of the negotiations -- particularly with respect to the caps on the price tiers -- proves that there was no meeting of the minds to raise prices and therefore no conspiracy. But the fact that provisions, even key provisions, in the Agreements were the focus of hard-fought negotiations does not preclude a finding of liability. As the Seventh Circuit observed, "[a] co-conspirator who used his power to guide or direct other conspirators qualifies as an organizer even though his control was not absolute. The need to negotiate some details of the conspiracy with the cartel members also does not strip a defendant of the

---

[64] Apple argued at trial that the MFN gave it more protection against price discrimination by Publishers than the requirement that the Publishers move all retailers to an agency arrangement. That is so as a theoretical matter, but there is no basis to find based on the trial record that Apple ever had reason to fear that the Publishers would use their power over retail pricing to lower prices anywhere. Instead, the evidence is that Apple feared retail price competition with Amazon. Apple preferred to compete with Amazon on the strength of its device rather than through price wars.

[65] Apple argued in summation, relying again on the Monsanto decision, that if the MFN had both illegal and legal purposes, then the existence of a lawful purpose would prevent a finding of liability. For the reasons described above, this argument misreads both the law and the record evidence.

organizer role." United States v. Andreas, 216 F.3d 645, 679-80 (7th Cir. 2000).

It is true that the Publisher Defendants pushed for price caps, and thereby e-book prices, that were higher than those Apple thought consumers would "realistically" be willing to pay. But that was in the context of their overarching agreement to raise prices above the $9.99 industry norm. It is also worth remembering that, when the Publisher Defendants pushed back during negotiations and asked for more and higher price caps, Apple agreed on January 16 to their demands. A meeting of the minds to raise e-book prices by working together could not be more clear on this record.

C. Windowing

A third defense that Apple introduced toward the end of the trial is that there was literally no "increase" in e-book prices and by definition therefore no conspiracy to raise e-book prices. It reasons that, but for its entry into the market, the Publisher Defendants would have withheld their books from Amazon. As a result, there would have been no established $9.99 price to raise. Apple argued in summation that, while its entry into the market meant that e-books were now available at $14.99 and $12.99, without their entry those e-books would not have been available at all.

This creative argument fails for several reasons. While it is difficult to know how the threats in late 2009 of four of the Publishers to withhold e-books from Amazon would have played out in 2010 if Apple had not entered the scene, there is no reason to find that windowing would have become widespread, long-lasting, or effective. Indeed, the Publishers (as well as Apple) realized that the delayed release of e-books was a foolish and even dangerous idea. The two largest Publishers -- Random House and Penguin -- never announced an intention to withhold e-books from Amazon. Those that did announce plans to window e-books only did so for 37 titles. At least one Publisher did internal research that showed that it would never make up sales lost due to the windowing of e-books. A Publisher had to assume that the lost sales were lost for good and that a competitor had gained a new reader in the process, unless the reader chose to purchase the e-book through the iBookstore or another e-tailer. The Publishers also recognized, and Apple concurred, that the delayed release of e-books encouraged piracy and posed an existential threat to the legitimate e-book industry.

Second, there was never any threat (before Apple encouraged one) to withhold all e-books. Many of the Publisher Defendants' most popular books were not, nor were they slated to be, windowed, including True Compass, the e-book Jobs bought for

$14.99 at the Launch. Moreover, the Publisher Defendants raised the prices not just of New Releases but also of their backlist e-books.

Finally, it is ironic for Apple to claim credit for the end to windowing when it was Apple that encouraged the Publisher Defendants to present Amazon with a blanket threat of windowing for a seven month period, i.e., the defined term of a New Release in the Apple Agreements. As Amazon testified, it was that threat, delivered simultaneously by five of the Big Six, that left it with no alternative but to sign agency agreements with each of them. Viewed from any perspective, Apple's conduct led to higher consumer prices for e-books.

D. Characterization of the Evidence

Confronted with the substantial evidence of its participation in a conspiracy with the Publisher Defendants, Apple has offered a counter-narrative of the events that transpired in December 2009 and January 2010. To the extent that its version of key events has not already been addressed, it will be done so here and treated as Apple's fourth principal defense. Broadly speaking, Apple contends that the trial record shows that Apple acted independently and as a lawful participant in a series of negotiations that would be unexceptional for any new market entrant.

In making these assertions Apple must surmount several hurdles. First and foremost, the Plaintiffs' reading of the evidence is consistent with the documents. There is a voluminous documentary record in this case which repeatedly demonstrates Apple's willingness to join with the Publisher Defendants to eliminate retail price competition and raise the prices for e-books. The Opinion has quoted liberally from a fraction of these documents. The attempts by several witnesses to circumnavigate this documentary record were entirely unsuccessful and informed this Court's analysis of their credibility.[66]

Second, the circumstantial evidence provides ample corroboration for the Plaintiffs' theory of the case. There is very little dispute about the circumstantial evidence, and Apple has not been able to construct a persuasive alternative reading of this evidence.

---

[66] This Opinion has already described several instances in which testimony given by Cue and Sargent was unreliable. Other witnesses who were noteworthy for their lack of credibility included Moerer, Saul, and Reidy. Their demeanor changed dramatically depending on whether Apple or the Plaintiffs were questioning them; they were adamant in denials until confronted with documents or their prior deposition testimony; instead of answering questions in a straightforward manner, they would pick apart the question and answer it narrowly or avoid answering it altogether. Thus, the findings in this Opinion are informed by the documentary record, the circumstantial evidence, including an understanding of the competitive landscape in which these events were unfolding, and that portion of each witness' testimony that appeared reliable and credible.

Finally, Apple is confronted with the fact that the conspiracy succeeded. It not only succeeded, it did so in record-setting time and at the precise moment that Apple entered the e-book market.

Apple's narrative, by contrast, ignores much of the evidence or relies on strained readings thereof. To adopt Apple's theory, a fact-finder would be confronted with the herculean task of explaining away reams of documents and blinking at the obvious. A few remaining examples of Apple's contentions concerning the evidence follow.

1. Initial Meetings with the Publishers

Apple repeatedly argued at trial that its initial round of meetings with the Publishers in mid-December 2009 was merely an information-gathering exercise. It emphasizes that no binding commitments were entered into at these meetings and that a draft contract was not even circulated until weeks after the meetings. While Apple hoped to add an announcement of the iBookstore to the Launch of the iPad on January 27, as of these meetings it had no idea whether that would be possible.

Apple's entry into the conspiracy had to start somewhere, and the evidence is that it started at those initial meetings in New York City with the Publishers. Apple is a sophisticated company and had done its homework before its team flew to New York from California. It understood the depth of the

Publishers' unhappiness with, and indeed fear of, the $9.99 price point and used that unhappiness and fear as its leverage. While the Apple team did listen in those meetings (and in doing so heard repeated expressions of anger at Amazon's pricing strategy), Apple also came prepared with a script. Using that script, across all its meetings, it set out several of its own conditions for entry into the market, but also offered the enticement that it knew would be music to the Publishers' ears: Apple was willing to sell its e-books at prices as high as $14.99. From that moment on, Apple had the Publishers' full attention.

The suggestion that Apple came to those New York meetings with no agenda is at odds with recitations of the meetings laid out in the contemporaneous documentary record. It is also at odds with common sense, and any appreciation of the daunting task that Apple had set for itself. Cue and his team are accomplished professionals. Apple had been studying the publishing industry for months. Newspapers were prominently featuring stories about the Publishers' battle with Amazon over pricing. Apple had less than two months to get commitments from the Publishers that it could announce at the Launch. Cue was personally invested in making that happen. The idea that Apple was simply a passive participant in the coordinated meetings that it had scheduled with the Publishers is not credible.

One could ask why Apple has taken pains to argue that the mid-December meetings were simply a commercial listening tour. It may matter to Apple because it is beyond dispute that Apple offered the Publishers a $14.99 price point at those meetings. Any finding that this was not a casual comment but a component of Apple's considered strategy confirms that Apple intended from the very beginning to assist the Publishers to shift the price of e-books upward.

2. Conspiracy by Telepathy

Apple asserts that there were too few meetings and telephone calls between Apple and any individual Publisher to establish its membership in the Publisher Defendants' conspiracy. Since there can be "no conspiracy by telepathy," Apple argues, there is insufficient evidence of a "meeting of the minds" to further any unlawful purpose between Apple and the Publisher Defendants.

Counting telephone calls during the key six-week period, particularly one that was interrupted by the Christmas and New Year holidays, is hardly a litmus test for knowing and intentional participation in a conspiracy. As Apple has observed, albeit in another context, it is the substance of the contacts, not their number, that counts.[67]

[67] While admitting that very few e-books were actually withheld from Amazon by the four Publishers, Apple's Cue observed at

But, it is worth observing that in the short time between December 15 and January 26, Cue made three separate trips to New York City from Cupertino. His last trip was unprecedented in length -- it lasted nine days -- and as Cue described, for that entire period, if he was not eating or sleeping, he was negotiating. He also sent members of his team to New York to meet with the Publishers when he was not there, such as Moerer's trip to New York in the days following Apple's distribution of the Draft Agreement.

Cue and the Publishers also exchanged many telephone calls. Some of the more dramatic of these calls have already been highlighted. For example, Cue called three Publishers in late December to confirm that they would be willing to adopt an agency model across all of their resellers of e-books if that were a pathway to higher prices. He told Hachette's Thomas over the telephone that Apple was providing "the best chance for publishers to challenge the 9.99 price point." Cue called Reidy on January 21 to enlist her help in convincing Macmillan's Sargent to execute the Agreement, and called Sargent to assist Macmillan's agency negotiations with Amazon.

And, of course, in this era, telephone calls are only one avenue of electronic communication. Cue and Moerer each

---

trial that what mattered was which books were withheld, not how many.

exchanged numerous e-mails with the Publishers, many of which corroborate in writing Apple's commitment to the Publisher Defendants' scheme to raise e-book prices, including Cue's January 16 e-mail to the Publisher Defendants providing them with "significantly more tiers and higher prices" for e-books; Cue's message reminding Sargent of his commitment to move Amazon to agency and asserting that he "didn't believe we are asking you to do anything, you haven't told us you are doing" in following through with that promise; and Cue's blunt appeal to HarperCollins that the "basic deal" Apple is providing to the Publishers with its Agreement is "new release hardback pricing maximums which are way higher than $9.99 -> &12.99 or $14.99 for most."

In any event, while this conspiracy was complex to execute, its terms were relatively simple and required no extended discussion. The issue was whether Apple and the Publishers would join together to eliminate Amazon's power to set retail prices and then to raise prices to the point that Apple would permit. The most hotly contested negotiations revolved around just how high those prices would go. The risks and rewards of joining the conspiratorial enterprise were also easy to understand. The evidence is overwhelming that Apple and the Publisher Defendants' "minds met" and they moved as one to achieve their conspiratorial objective.

3. Steve Jobs's Statements

Compelling evidence of Apple's participation in the conspiracy came from the words uttered by Steve Jobs, Apple's founder, CEO, and visionary. Apple has struggled mightily to reinterpret Jobs's statements in a way that will eliminate their bite. Its efforts have proven fruitless.

Jobs's statements to James Murdoch that he understood the Publishers' concerns that "Amazon's $9.99 price for new releases is eroding the value perception of their products . . . and they do not want this practice to continue," and that Apple was thus "willing to try at the [$12.99 and $14.99] prices we've proposed," underscored Apple's commitment to a scheme with the Publisher Defendants to raise e-book prices. Jobs's purchase of an e-book for $14.99 at the Launch, and his explanation to a reporter that day that Amazon's $9.99 price for the same book would be irrelevant because soon all prices will "be the same" is further evidence that Apple understood and intended that Amazon's ability to set retail prices would soon be eliminated. When Jobs told his biographer the next day that, in light of the MFN, the 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,'" Jobs was referring to the fact that Sargent was in Seattle that very day to deliver Macmillan's ultimatum to Amazon.

Apple could find no effective way at trial to escape the import of Jobs's remarks. While Apple stressed particular aspects of these statements, when taken as a whole and in context the statements remain powerful evidence of conspiratorial knowledge and intent. For example, Apple pointed to one line in Jobs's e-mail to James Murdoch where he muses about Amazon's $9.99 price point, "who knows, maybe they are right." But, focusing on that one line ignores paragraphs of statements, over two days of e-mails, in which Jobs tried to persuade Murdoch, and through him HarperCollins, to join with Apple in an effort to get control of and raise e-book prices. The sentence also does nothing to controvert Jobs's intent to raise e-book prices; it simply indicates his doubts over consumers' reaction to these higher prices. Jobs sums up his argument to Murdoch by urging him 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." In this and every other instance, Apple's efforts to explain away Jobs's remarks have been futile.

4. The Publishers Raised Prices, Not Apple

Apple argues that, even if the Agreements "sharpened" the Publishers' incentives to force Amazon to distribute their e-books as an agent, at the end of the day it was the Publishers who had to decide whether to convert to an agency distribution

system and it was the Publishers who had to decide whether to raise e-book prices once they were in charge of retail pricing. As Jobs maintained in response to consumer complaints, and as Cue asserted from the witness stand, Apple did not raise prices; the Publishers raised prices. Apple claims it should not be held liable for the "business decisions" the Publisher Defendants made in the early part of 2010.

Apple is correct that the conspiracy required the full participation of the Publisher Defendants if it were to achieve its goals. It is also correct that the Publishers wanted to change Amazon's pricing policies and to raise e-book prices, and that they had wanted to do that for many months before Apple arrived on the scene. But, those facts do not erase Apple's own intentions in entering into this scheme. Apple did not want to compete with Amazon on price and proposed to the Publishers a method through which both Apple and the Publishers could each achieve their goals.[68] Apple was an essential member of the charged conspiracy and was fully complicit in the scheme to raise e-book prices even though the Publisher Defendants also had their own roles to play.

---

[68] The record is equivocal on whether Apple itself desired higher e-book prices than those offered at Amazon. It is unequivocal though that Apple embraced higher prices so convincingly that the Publishers believed that Apple was content with, and even wanted, higher prices, and that Apple's cooperation with the Publisher Defendants enabled them to raise prices.

Apple also attempts to argue in this regard that it cannot be held responsible for the Publisher Defendants' actions because it never knew the Publishers were working together to raise prices. To the contrary, the evidence consistently points not only to Apple's awareness but also its facilitation of the Publisher Defendants' collective action. From the beginning, Apple conducted its campaign with the understanding that it wanted all six, and needed at least four, of the Publishers to join its terms. Cue urged the Publisher Defendants' CEOs to have discussions with one another to clarify aspects of the Agreements or to convince others to sign on. This enterprise depended on joint action. As Apple fully appreciated, the Publishers required the protection offered by collective action if they were to succeed in taking control over prices from Amazon and changing the public's perception about how much books should cost.

E. Per Se Liability

Apple strenuously objects to the Plaintiffs' contention that this case may be analyzed as a per se violation of the Sherman Act. It asserts that there are two reasons why this Court may only apply a rule of reason analysis. The first hinges on the fact that Apple is a vertical player vis-à-vis the Publisher Defendants, and that courts apply the rule of reason in assessing the legality of agreements between vertical players

in an industry. Second, it contends that Plaintiffs' reliance on the traditional "hub and spoke" conspiracy cases which found per se violations of the antitrust laws, such as Toys "R" Us, 221 F.3d 928, and Interstate Circuit, 306 U.S. 208, is not appropriate here because Apple was a new market entrant and not a dominant player. Both of these arguments fail.

While vertical restraints are subject to review under the rule of reason, Leegin, 551 U.S. at 907, Apple directly participated in a horizontal price-fixing conspiracy. As a result, its conduct is per se unlawful. The agreement between Apple and the Publisher Defendants is, "at root, a horizontal price restraint" subject to per se analysis. In re: Elec. Books Antitrust Litig., 859 F. Supp. 2d 671, 685 (S.D.N.Y. 2012). As such, it is not properly viewed as either a vertical price restraint or solely through the lens of traditional "hub and spoke" conspiracies.

In any event, the fact that Apple was not a dominant player in the relevant market in no way diminishes the instructive value of the traditional hub and spoke conspiracy cases here. Courts have never found that the vertical actor must be a dominant purchaser or supplier in order to be considered a traditional "hub," only that this is "generally" the case. See Howard Hess Dental Labs. Inc. v. Dentsply Int'l, Inc., 602 F.3d 237, 255 (3d Cir. 2010). Moreover, as Apple has conceded in its

filings, the "hub" defendant's liability in those cases existed because "there was no doubt . . . that the 'hub' defendant was aware of the purported scheme -- the only question was whether the horizontal defendants agreed to it." See Interstate Circuit, 306 U.S. at 222 (defendant organized and implemented the plan); Toys "R" Us, 221 F.3d at 933 (defendant communicated messages from manufacturer to manufacturer and "served as the central clearinghouse for complaints about breaches in the agreement"). Here we have every necessary component: with Apple's active encouragement and assistance, the Publisher Defendants agreed to work together to eliminate retail price competition and raise e-book prices, and again with Apple's knowing and active participation, they brought their scheme to fruition.

The observations of the Supreme Court in Interstate Circuit are equally apt here:

> [i]t was enough that, knowing that concerted action was contemplated and invited, the distributors gave their adherence to the scheme and participated in it. Each distributor was advised that the others were asked to participate; each knew that cooperation was essential to successful operation of the plan. They knew that the plan, if carried out, would result in a restraint of commerce, which . . . was unreasonable within the meaning of the Sherman Act, and knowing it, all participated in the plan.

306 U.S. at 226-27.

F. Avoiding a Dangerous Precedent

Finally, Apple warns that a ruling against Apple would set a dangerous precedent. It predicts that a finding that it violated the antitrust laws will deter entry into concentrated markets and punish innovation. It contends that its conduct was pro-competitive and created a healthier market. Censuring Apple for entering a tumultuous new market, in Apple's view, will have a "chilling and confounding . . . effect not only on commerce but specifically on content markets throughout this country."

It is certainly true that our nation's antitrust laws should be applied with care. Courts must be sensitive to the unique features of any market and the ambiguities of commercial conduct to avoid chilling lawful competition. Providing new entrants with the ability to access markets has long been a mainstay of our economy and any court should be wary of discouraging such access or interfering with the natural evolution of markets. See, e.g., United States v. Grinnell Corp., 384 U.S. 563, 589 (1966). As the Second Circuit observed in Capital Imaging, 996 F.2d 537, "[a]ntitrust law is not intended to be as available as an over-the-counter cold remedy, because were its heavy power brought into play too readily it would not safeguard competition, but destroy it." Id. at 539.

It is not entirely clear to what Apple is alluding, however, when it describes its pro-competitive behavior and

creation of healthy competition. If it is alluding to the Launch of the iPad, a revolutionary device that has encouraged innovation and competition, then its conduct can fairly be described as pro-competitive. But, this case has been only incidentally about the iPad. The iBookstore was not an essential feature of the iPad, and the iPad Launch would have occurred without any iBookstore. It was the pre-existing, remarkable features of the iPad that made the iBookstore an obvious addition to the device.

If Apple is alluding to the fact that Amazon's Kindle bookstore was the dominant e-retailer for books in 2009, and that the arrival of the iBookstore created another e-retailer, that is true. But, as this Opinion explains, Apple demanded, as a precondition of its entry into the market, that it would not have to compete with Amazon on price. Thus, from the consumer's perspective -- a not unimportant perspective in the field of antitrust -- the arrival of the iBookstore brought less price competition and higher prices.[69]

If Apple is suggesting that Amazon was engaging in illegal, monopolistic practices, and that Apple's combination with the

[69] As for some of the notable features of the iBookstore itself, features such as a page curl, Apple was not the first to invent these concepts. Nonetheless, having the creativity and commitment of Apple invested in the enhancement of a product like the iBookstore is extremely beneficial to consumers and competition.

Publisher Defendants to deprive a monopolist of some of its market power is pro-competitive and healthy for our economy, it is wrong. This trial has not been the occasion to decide whether Amazon's choice to sell NYT Bestsellers or other New Releases as loss leaders was an unfair trade practice or in any other way a violation of law. If it was, however, the remedy for illegal conduct is a complaint lodged with the proper law enforcement offices or a civil suit or both. Another company's alleged violation of antitrust laws is not an excuse for engaging in your own violations of law. Nor is suspicion that that may be occurring a defense to the claims litigated at this trial.

If Apple is suggesting that an adverse ruling necessarily implies that agency agreements, pricing tiers with caps, MFN clauses, or simultaneous negotiations with suppliers are improper, it is wrong. As explained above, the Plaintiffs have not argued and this Court has not found that any of these or other such components of Apple's entry into the market were wrongful, either alone or in combination. What was wrongful was the use of those components to facilitate a conspiracy with the Publisher Defendants.

It is doubtful that Apple is suggesting that the only way it could have entered the e-book market was to agree with the Publisher Defendants to raise e-book prices. Apple, often

through expert negotiations conducted by Cue, has entered many new content markets. It did not attempt to argue or show at trial that the price of admission to new markets must be or is participation in illegal price-fixing schemes.

While a Court must take seriously a prediction that its decision will harm our nation's economy, particularly when made by skilled counsel on behalf of an esteemed company, it is difficult to see how competition will be stifled by the ruling in this Opinion. This Opinion's findings arise from the specific events that unfolded in the trade e-book market as 2009 became 2010. It does not seek to paint with a broader brush.

In the end, it is essential to remember that the antitrust laws were enacted for "the protection of competition, not competitors." Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962). The question in this case has always been a narrow one: whether Apple participated in a price-fixing scheme in violation of this country's antitrust laws. Apple is liable here for facilitating and encouraging the Publisher Defendants' collective, illegal restraint of trade. Through their conspiracy they forced Amazon (and other resellers) to relinquish retail pricing authority and then they raised retail e-book prices. Those higher prices were not the result of regular market forces but of a scheme in which Apple was a full participant.

CONCLUSION

Based on the trial record, and for the reasons stated herein, this Court finds by a preponderance of the evidence that Apple conspired to restrain trade in violation of Section 1 of the Sherman Act and relevant state statutes to the extent those laws are congruent with Section 1. A scheduling order will follow regarding the Plaintiffs' request for injunctive relief and damages.

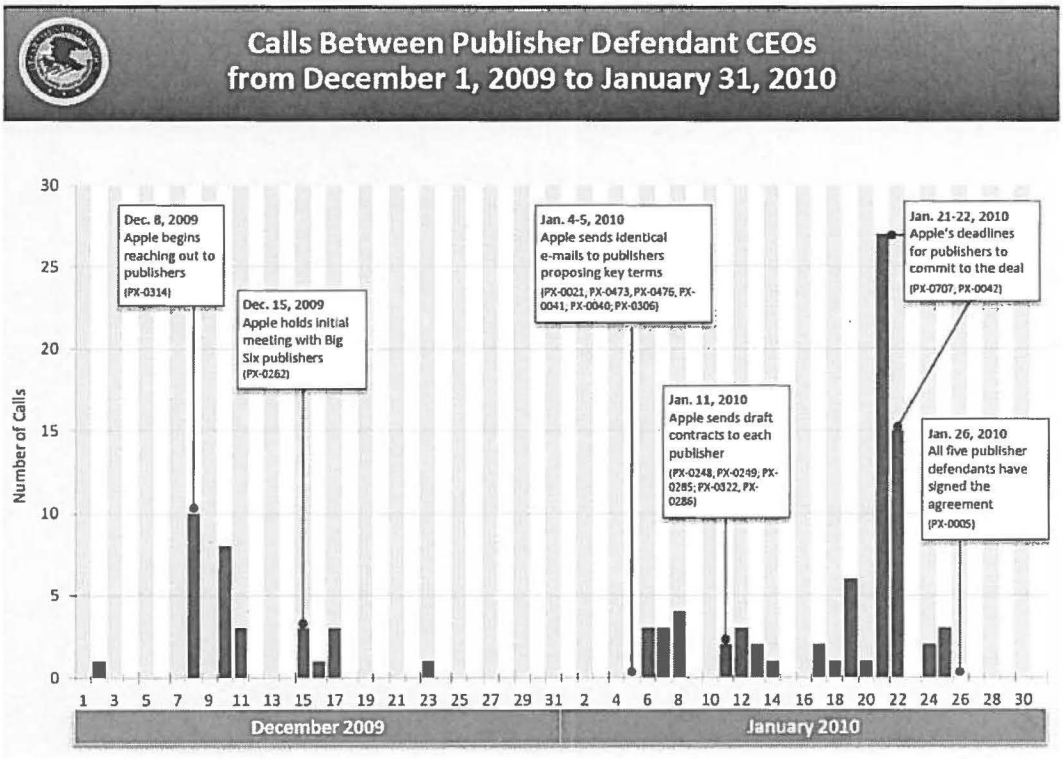
SO ORDERED:

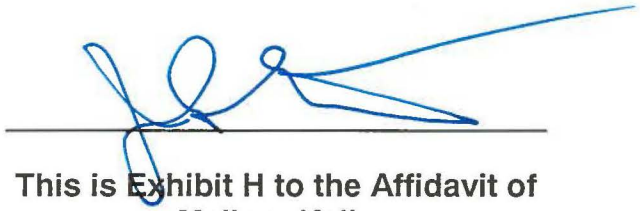
Dated: New York, New York
July 10, 2013

Denise Cote

DENISE COTE
United States District Judge

Appendix A


Calls Between Publisher Defendant CEOs from December 1, 2009 to January 31, 2010
Number of Calls
30
25
20
15
10
5
0
Dec. 8, 2009
Apple begins reaching out to publishers
(PX-0314)
Dec. 15, 2009
Apple holds initial meeting with Big Six publishers
(PX-0262)
Jan. 4-5, 2010
Apple sends identical e-mails to publishers proposing key terms
(PX-0021, PX-0473, PX-0476, PX-0041, PX-0040; PX-0306)
Jan. 11, 2010
Apple sends draft contracts to each publisher
(PX-0248, PX-0249; PX-0285; PX-0322, PX-0286)
Jan. 21-22, 2010
Apple's deadlines for publishers to commit to the deal
(PX-0707, PX-0042)
Jan. 26, 2010
All five publisher defendants have signed the agreement
(PX-0005)
1 3 5 7 9 11 13 15 17 19 21 23 25 27 29 31 2 4 6 8 10 12 14 16 18 20 22 24 26 28 30
December 2009
January 2010



This is Exhibit H to the Affidavit of
Mallory Kelly
Affirmed 28 August 2015

13-3741-cv (L)
United States v. Apple, Inc.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term 2014

(Argued: December 15, 2014 Decided: June 30, 2015)

Nos. 13-3741-cv, 13-3748-cv, 13-3783-cv, 13-3857-cv, 13-3864-cv, 13-3867-cv

---

UNITED STATES OF AMERICA, STATE OF TEXAS, STATE OF CONNECTICUT, STATE OF ALABAMA, STATE OF ALASKA, STATE OF ARIZONA, STATE OF ARKANSAS, STATE OF COLORADO, STATE OF DELAWARE, STATE OF IDAHO, STATE OF ILLINOIS, STATE OF INDIANA, STATE OF IOWA, STATE OF KANSAS, STATE OF LOUISIANA, STATE OF MARYLAND, COMMONWEALTH OF MASSACHUSETTS, STATE OF MICHIGAN, STATE OF MISSOURI, STATE OF NEBRASKA, STATE OF NEW MEXICO, STATE OF NEW YORK, STATE OF NORTH DAKOTA, STATE OF OHIO, COMMONWEALTH OF PENNSYLVANIA, STATE OF SOUTH DAKOTA, STATE OF TENNESSEE, STATE OF UTAH, STATE OF VERMONT, COMMONWEALTH OF VIRGINIA, STATE OF WEST VIRGINIA, STATE OF WISCONSIN, COMMONWEALTH OF PUERTO RICO, AND DISTRICT OF COLUMBIA,

Plaintiffs-Appellees,

-v.-

APPLE, INC., SIMON & SCHUSTER, INC., VERLAGSGRUPPE GEORG VON HOLTZBRINCK GMBH, HOLTZBRINCK PUBLISHERS, LLC, DBA MACMILLAN, SIMON & SCHUSTER DIGITAL SALES, INC.,

Defendants-Appellants,

HACHETTE BOOK GROUP, INC., HARPERCOLLINS PUBLISHERS L.L.C., THE PENGUIN GROUP, A DIVISION OF PEARSON PLC, PENGUIN GROUP (USA), INC.,

Defendants.

Before: JACOBS, LIVINGSTON, and LOHIER, *Circuit Judges.*

Defendants Apple, Macmillan, and Simon & Schuster appeal from a judgment of the United States District Court for the Southern District of New York (Cote, *J.*), entered on September 5, 2013. After a bench trial, the district court concluded that Apple violated § 1 of the Sherman Antitrust Act, 15 U.S.C. § 1 *et seq.*, by orchestrating a conspiracy among five major publishing companies to raise the retail prices of digital books, known as "ebooks." The court then issued an injunctive order, which, *inter alia*, prevents Apple from signing agreements with those five publishers that restrict its ability to set, alter, or reduce the price of ebooks, and requires Apple to apply the same terms and conditions to ebook applications sold on its devices as it does to other applications. We conclude that the district court correctly decided that Apple orchestrated a conspiracy among the publishers to raise ebook prices, that the conspiracy unreasonably restrained trade in violation of § 1 of the Sherman Act, and that the injunction is properly calibrated to protect the public from future anticompetitive harms. In addition, we reject the argument that the portion of the injunctive order preventing Apple from agreeing to restrict its pricing authority modifies Macmillan and Simon & Schuster's consent decrees or should be judicially estopped. Accordingly, the judgment of the district court is **AFFIRMED**.

Raymond J. Lohier (*Circuit Judge*) files a separate concurring opinion, joining in the judgment and in the majority opinion except for Part II.B.2.

Dennis Jacobs (*Circuit Judge*) files a separate dissenting opinion.

FOR PLAINTIFFS-APPELLEES: MALCOLM L. STEWART, Deputy Solicitor General, U.S. Department of Justice, Washington, DC, William J. Baer, Assistant

Attorney General, Mark W. Ryan, Daniel McCuaig, Kristen C. Limarzi, Robert B. Nicholson, David Seidman, Finnuala K. Tessier, Lawrence B. Buterman, Attorneys, U.S. Department of Justice Antitrust Division, Washington, DC, *for the United States*.

George Jepsen, Attorney General of Connecticut, W. Joseph Nielsen, Assistant Attorney General, Office of Attorney General of Connecticut, Hartford, CT, Greg Abbott, Attorney General of Texas, Daniel T. Hodge, First Assistant Attorney General of Texas, John Scott, Deputy Attorney General of Texas, Jonathan F. Mitchell, Solicitor General of Texas, Andrew Oldham, Deputy Solicitor General of Texas, John T. Prud'homme, Kim van Winkle, Eric Lipman, Assistant Attorneys General, Office of Attorney General of Texas, Austin, TX, *for Plaintiff-States*.

Eric T. Schneiderman, Attorney General of the State of New York, Won S. Chin, Assistant Solicitor General, Office of Attorney General of New York, New York, NY, *for the State of New York*.

FOR DEFENDANTS-APPELLANTS: THEODORE J. BOUTROS, JR., Daniel G. Swanson, Blaine H. Evanson, Gibson, Dunn & Crutcher LLP, Los Angeles, CA, Cynthia E. Richman, Gibson, Dunn & Crutcher LLP, Washington, DC, Orin S. Snyder, Gibson, Dunn & Crutcher LLP, New York, NY, *for Apple, Inc.*

EAMON P. JOYCE, Joel M. Mitnick, Mark D. Taticchi, Sidley Austin LLP, New York, NY, *for Verlagsgruppe Georg von Holtzbrinck GmbH, Holtzbrinck Publishers, LLC, d/b/a Macmillan.*

GREGORY SILBERT, Yehuda L. Buchweitz, Weil, James W. Quinn, Gotshal & Manges LLP, New York, NY, *for Simon & Schuster, Inc. and Simon & Schuster Digital Sales, Inc.*

DEBRA ANN LIVINGSTON, *Circuit Judge*:

Since the invention of the printing press, the distribution of books has involved a fundamentally consistent process: compose a manuscript, print and bind it into physical volumes, and then ship and sell the volumes to the public. In late 2007, Amazon.com, Inc. ("Amazon") introduced the Kindle, a portable device that carries digital copies of books, known as "ebooks." This innovation had the potential to change the centuries-old process for producing books by eliminating the need to print, bind, ship, and store them. Amazon began to popularize the new way to read, and encouraged consumers to buy the Kindle by offering desirable books — new releases and *New York Times* bestsellers — for $9.99. Publishing companies, which have traditionally stood at the center of the

multi-billion dollar book-producing industry, saw Amazon's ebooks, and particularly its $9.99 pricing, as a threat to their way of doing business.

By November 2009, Apple, Inc. ("Apple") had plans to release a new tablet computer, the iPad. Executives at the company saw an opportunity to sell ebooks on the iPad by creating a virtual marketplace on the device, which came to be known as the "iBookstore." Working within a tight timeframe, Apple went directly into negotiations with six of the major publishing companies in the United States. In two months, it announced that five of those companies — Hachette, Harpercollins, Macmillan, Penguin, and Simon & Schuster (collectively, the "Publisher Defendants") — had agreed to sell ebooks on the iPad under arrangements whereby the publishers had the authority to set prices, and could set the prices of new releases and *New York Times* bestsellers as high as $19.99 and $14.99, respectively. Each of these agreements, by virtue of its terms, resulted in each Publisher Defendant receiving *less* per ebook sold via Apple as opposed to Amazon, even given the higher consumer prices. Just a few months after the iBookstore opened, however, every one of the Publisher Defendants had taken control over pricing from Amazon and had raised the prices on many of their ebooks, most notably new releases and bestsellers.

The United States Department of Justice ("DOJ" or "Justice Department") and 33 states and territories (collectively, "Plaintiffs") filed suit in the United States District Court for the Southern District of New York, alleging that Apple, in launching the iBookstore, had conspired with the Publisher Defendants to raise prices across the nascent ebook market. This agreement, they argued, violated § 1 of the Sherman Antitrust Act, 15 U.S.C. § 1 *et seq.* ("Sherman Act"), and state antitrust laws. All five Publisher Defendants settled and signed consent decrees, which prohibited them, for a period, from restricting ebook retailers' ability to set prices. Then, after a three-week bench trial, the district court (Cote, *J.*) concluded that, in order to induce the Publisher Defendants to participate in the iBookstore and to avoid the necessity of itself competing with Amazon over the retail price of ebooks, Apple orchestrated a conspiracy among the Publisher Defendants to raise the price of ebooks — particularly new releases and *New York Times* bestsellers. *United States v. Apple Inc.*, 952 F. Supp. 2d 638, 647 (S.D.N.Y. 2013). The district court found that the agreement constituted a *per se* violation of the Sherman Act and, in the alternative, unreasonably restrained trade under the rule of reason. *See id.* at 694. On September 5, 2013, the district court entered final judgment on the liability finding and issued an injunctive

order that, *inter alia*, prevents Apple from entering into agreements with the Publisher Defendants that restrict its ability to set, alter, or reduce the price of ebooks, and requires Apple to apply the same terms and conditions to ebook applications sold on its devices as it does to other applications.

On appeal, Apple contends that the district court's liability finding was erroneous and that the provisions of the injunction related to its pricing authority and ebook applications are not necessary to protect the public. Two of the Publisher Defendants — Macmillan and Simon & Schuster — join the appeal, arguing that the portion of the injunction related to Apple's pricing authority either unlawfully modifies their consent decrees or should be judicially estopped. We conclude that the district court's decision that Apple orchestrated a horizontal conspiracy among the Publisher Defendants to raise ebook prices is amply supported and well-reasoned, and that the agreement unreasonably restrained trade in violation of § 1 of the Sherman Act. We also conclude that the district court's injunction is lawful and consistent with preventing future anticompetitive harms.

Significantly, the dissent *agrees* that Apple intentionally organized a conspiracy among the Publisher Defendants to raise ebook prices. Nonetheless,

it contends that Apple was entitled to do so because the conspiracy helped it become an ebook retailer. In arriving at this startling conclusion — based in large measure on an argument that Apple itself did not assert — the dissent makes two fundamental errors. The first is to insist that the vertical organizer of a horizontal price-fixing conspiracy may escape application of the *per se* rule. This conclusion is based on a misreading of Supreme Court precedent, which establishes precisely the opposite. The dissent fails to apprehend that the Sherman Act outlaws *agreements* that unreasonably restrain trade and therefore requires evaluating the nature of the restraint, rather than the identity of each party who joins in to impose it, in determining whether the *per se* rule is properly invoked. Finally (and most fundamentally) the dissent's conclusion rests on an erroneous premise: that one who organizes a horizontal price-fixing conspiracy — the "supreme evil of antitrust," *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004) — among those competing at a different level of the market has somehow done less damage to competition than its co-conspirators.

The dissent's second error is to assume, in effect, that Apple was entitled to enter the ebook retail market on its own terms, even if these terms could be

achieved only via its orchestration of and entry into a price-fixing agreement with the Publisher Defendants. The dissent tells a story of Apple organizing this price-fixing conspiracy to rescue ebook retailers from a monopolist with insurmountable retail power. But this tale is not spun from any factual findings of the district court. And the dissent's armchair analysis wrongly treats the number of ebook retailers at any moment in the emergence of a new and transformative technology for book distribution as the *sine qua non* of competition in the market for trade ebooks.

More fundamentally, the dissent's theory — that the presence of a strong competitor justifies a horizontal price-fixing conspiracy — endorses a concept of marketplace vigilantism that is wholly foreign to the antitrust laws. By organizing a price-fixing conspiracy, Apple found an easy path to opening its iBookstore, but it did so by ensuring that market-wide ebook prices would rise to a level that it, and the Publisher Defendants, had jointly agreed upon. Plainly, competition is not served by permitting a market entrant to *eliminate price competition* as a condition of entry, and it is cold comfort to consumers that they gained a new ebook retailer at the expense of passing control over all ebook prices to a cartel of book publishers — publishers who, with Apple's help,

collectively agreed on a new pricing model precisely to *raise* the price of ebooks and thus protect their profit margins and their very existence in the marketplace in the face of the admittedly strong headwinds created by the new technology.

Because we conclude that the district court did not err in deciding that Apple violated § 1 of the Sherman Act, and because we also conclude that the district court's injunction was lawful and consistent with preventing future anticompetitive harms, we affirm.

BACKGROUND

I. Factual Background[1]

We begin not with Kindles and iPads, but with printed "trade books," which are "general interest fiction and non-fiction" books intended for a broad readership. *Apple*, 952 F. Supp. 2d at 648 n.4. In the United States, the six largest publishers of trade books, known in the publishing world as the "Big Six," are Hachette, HarperCollins, Macmillan, Penguin, Random House, and Simon &

[1] The factual background presented here is drawn from the district court's factual findings or from undisputed material in the record before the district court. Because this Court reviews the district court's factual findings for "clear error," we must assess whether "its view of the evidence is plausible in light of the entire record." *Cosme v. Henderson*, 287 F.3d 152, 158 (2d Cir. 2002). In light of this obligation, the dissent is wrong to suggest that citations to the record are inappropriate or misleading. When a fact comes from the district court's opinion, we cite that opinion; when one comes from the record, we cite the joint appendix ("J.A.").

Schuster. Together, the Big Six publish many of the biggest names in fiction and non-fiction; during 2010, their titles accounted for over 90% of the *New York Times* bestsellers in the United States. *Id.* at 648 n.5.

For decades, trade book publishers operated under a fairly consistent business model. When a new book was ready for release to the public, the publisher would sell hardcover copies to retailers at a "wholesale" price and recommend resale to consumers at a markup, known as the "list" price. After the hardcover spent enough time on the shelves — often a year — publishers would release a paperback copy at lower "list" and "wholesale" prices. In theory, devoted readers would pay the higher hardcover price to read the book when it first came out, while more casual fans would wait for the paperback.

A. Amazon's Kindle

On November 19, 2007, Amazon released the Kindle: a portable electronic device that allows consumers to purchase, download, and read ebooks. At the time, there was only one other ereader available in the emerging ebook market, and Amazon's Kindle quickly gained traction. In 2007, ebook revenue in North America was only $70 million, a tiny amount relative to the approximately $30 billion market for physical trade books. The market was growing, however; in

2008 ebook revenue was roughly $140 million and, by the time Barnes & Noble, Inc. (Barnes & Noble) launched its Nook ereader in November 2009, Amazon was responsible for 90% of all ebook sales. *Apple*, 952 F. Supp. 2d at 648-49.

Amazon followed a "wholesale" business model similar to the one used with print books: publishers recommended a digital list price and received a wholesale price for each ebook that Amazon sold. In exchange, Amazon could sell the publishers' ebooks on the Kindle and determine the retail price. At least early on, publishers tended to recommend a digital list price that was about 20% lower than the print list price to reflect the fact that, with an ebook, there is no cost for printing, storing, packaging, shipping, or returning the books.

Where Amazon departed from the publishers' traditional business model was in the sale of new releases and *New York Times* bestsellers. Rather than selling more expensive versions of these books upon initial release (as publishers encouraged by producing hardcover books before paperback copies), Amazon set the Kindle price at one, stable figure — $9.99. At this price, Amazon was selling "certain" new releases and bestsellers at a price that "roughly matched," or was slightly lower than, the wholesale price it paid to the publishers. *Apple*, 952 F. Supp. 2d at 649. David Naggar, a Vice President in charge of Amazon's

Kindle content, described this as a "classic loss-leading strategy" designed to encourage consumers to adopt the Kindle by discounting new releases and *New York Times* bestsellers and selling other ebooks without the discount. J.A. 1485. The district court also referred to this as a "loss leader[]" strategy, *Apple*, 952 F. Supp. 2d at 650, 657, 708, and explained that Amazon "believed [the $9.99] pricing would have long-term benefits for its consumers," *id.* at 649. Contrary to the dissent's portrayal of the opinion, the district court did *not* find that Amazon used the $9.99 price point to "assure[] its domination" in the ebook market, or that its pricing strategy acted as a "barrier to entry" for other retailers. Dissenting Op. at 6-7. Indeed, in November 2009 — just a few months before Apple's launch of the iBookstore — Barnes & Noble entered the ebook retail market by launching the Nook, *Apple*, 952 F. Supp. 2d at 649 n.6, and as early as 2007 Google Inc. ("Google") had been planning to enter the market using a wholesale model, *id.* at 686.

B. The Publishers' Reactions

Despite the small number of ebook sales compared to the overall market for trade books, top executives in the Big Six saw Amazon's $9.99 pricing strategy as a threat to their established way of doing business. Those executives

included: Hachette and Hachette Livre Chief Executive Officers ("CEOs") David Young and Arnaud Nourry; HarperCollins CEO Brian Murray; Macmillan CEO John Sargent; Penguin USA CEO David Shanks; Random House Chief Operating Officer Madeline McIntosh; and Simon & Schuster President and CEO Carolyn Reidy. In the short term, these members of the Big Six thought that Amazon's lower-priced ebooks would make it more difficult for them to sell hardcover copies of new releases, "which were often priced," as the district court noted, "at thirty dollars or more," *Apple*, 952 F. Supp. 2d at 649, as well as *New York Times* bestsellers. Further down the road, the publishers feared that consumers would become accustomed to the uniform $9.99 price point for these ebooks, permanently driving down the price they could charge for print versions of the books. Moreover, if Amazon became powerful enough, it could demand lower wholesale prices from the Big Six or allow authors to publish directly with Amazon, cutting out the publishers entirely. As Hachette's Young put it, the idea of the "wretched $9.99 price point becoming a de facto standard" for ebooks "sickened" him. J.A. 289.

The executives of the Big Six also recognized that their problem was a collective one. Thus, an August 2009 Penguin strategy report (concluded only a

few months before Apple commenced its efforts to launch the iBookstore) noted that "[c]ompetition for the attention of readers will be most intense from digital companies whose objective may be to [cut out] traditional publishers altogether. . . . It will not be possible for any individual publisher to mount an effective response, because of both the resources necessary and the risk of retribution, so the industry needs to develop a common strategy." J.A. 287. Similarly, Reidy from Simon & Schuster opined in September 2009 that the publishers had "no chance of success in getting Amazon to change its pricing practices" unless they acted with a "critical mass," and expressed the "need to gather more troops and ammunition" before implementing a move against Amazon. J.A. 290 (internal quotation marks omitted).

Conveniently, the Big Six operated in a close-knit industry and had no qualms communicating about the need to act together. As the district court found (based on the Publisher Defendants' own testimony), "[o]n a fairly regular basis, roughly once a quarter, the CEOs of the [Big Six] held dinners in the private dining rooms of New York restaurants, without counsel or assistants present, in order to discuss the common challenges they faced." *Apple*, 952 F. Supp. 2d at 651. Because they "did not compete with each other on price," but

over authors and agents, the publishers "felt no hesitation in freely discussing Amazon's prices with each other and their joint strategies for raising those prices." *Id.* Those strategies included eliminating the discounted wholesale price for ebooks and possibly creating an alternative ebook platform.

The most significant attack that the publishers considered and then undertook, however, was to withhold new and bestselling books from Amazon until the hardcover version had spent several months in stores, a practice known as "windowing." Members of the Big Six both kept one another abreast of their plans to window, and actively pushed others toward the strategy.[2] By December 2009, the *Wall Street Journal* and *New York Times* were reporting that four of the Big Six had announced plans to delay ebook releases until after the print release, and the two holdouts — Penguin and Random House — faced pressure from their peers.

---

[2] Citing one example, the district court referenced a fall 2009 email in which Hachette's Young informed his colleague Nourry of Simon & Schuster's windowing plans, advising "[c]ompletely confidentially, Carolyn [Reidy] has told me that they [Simon & Schuster] are delaying the new Stephen King, with his full support, but will not be announcing this until the day after Labor Day." *Apple*, 952 F. Supp. 2d at 652 (first and second alterations in original) (internal quotation marks omitted). The district court went on to observe that Young, "[u]nderstanding the impropriety of this exchange of confidential information with a competitor, . . . advised Nourry that 'it would be prudent for you to double delete this from your email files when you return to your office.'" *Id.*

Ultimately, however, the publishers viewed even this strategy to save their business model as self-destructive. Employees inside the publishing companies noted that windowing encouraged piracy, punished ebook consumers, and harmed long-term sales. One author wrote to Sargent in December 2009 that the "old model has to change" and that it would be better to "embrace e-books," publish them at the same time as the hardcovers, "and pray to God they both sell like crazy." J.A. 325. Sargent agreed, but expressed the hope that ebooks could eventually be sold for between $12.95 and $14.95. "The question is," he mused, "how to get there?" J.A. 325.

C. Apple's Entry into the ebook Market

Apple is one of the world's most innovative and successful technology companies. Its hardware sells worldwide and supports major software marketplaces like iTunes and the App Store. But in 2009, Apple lacked a dedicated marketplace for ebooks or a hardware device that could offer an outstanding reading experience. The pending release of the iPad, which Apple intended to announce on January 27, 2010, promised to solve that hardware deficiency.

Eddy Cue, Apple's Senior Vice President of Internet Software and Services and the director of Apple's digital content stores, saw the opportunity for an ebook marketplace on the iPad. By February 2009, Cue and two colleagues — Kevin Saul and Keith Moerer — had researched the ebook market and concluded that it was poised for rapid expansion in 2010 and beyond. While Amazon had an estimated 90% market share in trade ebooks, Cue believed that Apple could become a powerful player in the market in large part because consumers would be able to do many tasks on the iPad, and would not want to carry a separate Kindle for reading alone. In an email to Apple's then-CEO, Steve Jobs, he discussed the possibility of Amazon selling ebooks through an application on the iPad, but felt that "it would be very easy for [Apple] to compete with and . . . trounce Amazon by opening up our own ebook store" because "[t]he book publishers would do almost anything for [Apple] to get into the ebook business." J.A. 282.

Jobs approved Cue's plan for an ebook marketplace — which came to be known as the iBookstore — in November 2009. Although the iPad would go to market with or without the iBookstore, Apple hoped to announce the ebook marketplace at the January 27, 2010 iPad launch to "ensure maximum consumer

exposure" and add another "dramatic component" to the event. *Apple*, 952 F. Supp. 2d at 655. This left Cue and his team only two months amidst the holiday season both to create a business model for the iBookstore and to assemble a group of publishers to participate. Cue also had personal reasons to work quickly. He knew that Jobs was seriously ill, and that, by making the iBookstore a success, he could help Jobs achieve a longstanding goal of creating a device that provides a superior reading experience.

Operating under a tight timeframe, Cue, Saul, and Moerer streamlined their efforts by focusing on the Big Six publishers. They began by arming themselves with some important information about the state of affairs within the publishing industry. In particular, they learned that the publishers feared that Amazon's pricing model could change their industry, that several publishers had engaged in simultaneous windowing efforts to thwart Amazon, and that the industry as a whole was in a state of turmoil. "Apple understood," as the district court put it, "that the Publishers wanted to pressure Amazon to raise the $9.99 price point for e-books, that the Publishers were searching for ways to do that, and that they were willing to coordinate their efforts to achieve that goal." *Id.* at 656. For its part, as the district court found, Apple was willing to sell ebooks at

higher prices, but "had decided that it would not open the iBookstore if it could not make money on the store and compete effectively with Amazon." *Id.*

D. Apple's Negotiations with the Publishers

1. Initial Meetings

Apple held its first meetings with each of the Big Six between December 15 and 16. The meetings quickly confirmed Cue's suspicions about the industry. As he wrote to Jobs after speaking with three of the publishers, "[c]learly, the biggest issue is new release pricing" and "Amazon is definitely not liked much because of selling below cost for NYT Best Sellers." J.A. 326-27. Many publishers also emphasized that they were searching for a strategy to regain control over pricing. Apple informed each of the Big Six that it was negotiating with the other major publishers, that it hoped to begin selling ebooks within the next 90 days, and that it was seeking a critical mass of participants in the iBookstore and would launch only if successful in reaching this goal. Apple informed the publishers that it did not believe the iBookstore would succeed unless publishers agreed both not to window books and to sell ebooks at a discount relative to their physical counterparts. Apple noted that ebook prices in the iBookstore needed to be comparable to those on the Kindle, expressing the view, as Reidy recorded,

that it could not "tolerate a market where the product is sold significantly more cheaply elsewhere." *Apple*, 952 F. Supp. 2d at 657 (internal quotation marks omitted). Most importantly for the publishers, however, Cue's team also expressed Apple's belief that Amazon's $9.99 price point was not ingrained in consumers' minds, and that Apple could sell new releases and *New York Times* bestsellers for somewhere between $12.99 and $14.99. In return, Apple requested that the publishers decrease their wholesale prices so that the company could make a small profit on each sale.

These meetings spurred a flurry of communications reporting on the "[t]errific news[,]" as Reidy put it in an email to Leslie Moonves, her superior at parent company CBS Corporation ("CBS"), that Apple "was not interested in a low price point for digital books" and didn't want "Amazon's $9.95 [sic] to continue." *Apple*, 952 F. Supp. 2d at 658 (first alteration in original) (internal quotation marks omitted). Significantly, these communications included numerous exchanges *between* executives at different Big Six publishers who, the district court found, "hashed over their meetings with Apple with one another." *Id.* The district court found that the frequent telephone calls among the Publisher

Defendants during the period of their negotiations with Apple "represented a departure from the ordinary pattern of calls among them." *Id.* at 655 n.14.

2. The Agency Model

Meanwhile, Cue, Moerer, and Saul returned to Apple's headquarters to develop a business model for the iBookstore. Although the team was optimistic about the initial meetings, they remained concerned about whether the publishers would reduce wholesale prices on new releases and bestsellers by a large enough margin to allow Apple to offer competitive prices and still make a profit. One strategy that the team considered was to ask publishers for a 25% wholesale discount on all of these titles, so if a physical book sold at $12 wholesale (the going rate for the majority of *New York Times* bestsellers) Apple could purchase the ebook version for $9 and offer it on the iBookstore at a small markup. But Cue was aware that some publishers had increased Amazon's digital wholesale prices in 2009 in an unsuccessful effort to convince Amazon to change its pricing. *Id.* at 650; J.A. 1771. Cue felt it would be difficult to negotiate wholesale prices down far enough "for [Apple] to generally compete profitably with Amazon's below-cost pricing on the most popular e-books." J.A. 1772. As Cue saw it, Apple's most valuable bargaining chip came from the fact that the

publishers were desperate "for an alternative to Amazon's pricing policies and excited about . . . the prospect that [Apple's] entry [into the ebook market] would give them leverage in their negotiations with Amazon." *Apple*, 952 F. Supp. 2d at 659.

It was at this point that Cue's team, recognizing its opportunity, abandoned the wholesale business model for a new, agency model.[3] Unlike a wholesale model, in an agency relationship the *publisher* sets the price that consumers will pay for each ebook. Then, rather than the retailer paying the publisher for each ebook that it sells, the publisher pays the retailer a fixed percentage of each sale. In essence, the retailer receives a commission for distributing the publisher's ebooks. Under the system Apple devised, publishers would have the freedom to set ebook prices in the iBookstore, and would keep 70% of each sale. The remaining 30% would go to Apple as a commission.

This switch to an agency model obviated Apple's concerns about negotiating wholesale prices with the Big Six while ensuring that Apple profited on every sale. It did not, however, solve all of the company's problems. Because the agency model handed the publishers control over pricing, it created the risk

[3] Notably, the possibility of an agency arrangement was first mentioned by Hachette and HarperCollins as a way "to fix Amazon pricing." J.A. 346.

that the Big Six would sell ebooks in the iBookstore at far higher prices than Kindle's $9.99 offering. If the prices were too high, Apple could be left with a brand new marketplace brimming with titles, but devoid of customers.

To solve this pricing problem, Cue's team initially devised two strategies. First, they realized that they could maintain "realistic prices" by establishing price caps for different types of books. J.A. 359. Of course, these caps would need to be *higher* than Amazon's $9.99 price point, or Apple would face the same difficult price negotiations that it sought to avoid by switching away from the wholesale model. But at this point Apple was not content to open its iBookstore offering prices higher than the competition. For as the district court found, if the Publisher Defendants "wanted to end Amazon's $9.99 pricing," Apple similarly desired "that there be no price competition at the retail level." *Apple*, 952 F. Supp. 2d at 647.

Apple next concluded, then, as the district court found, that "[t]o ensure that the iBookstore would be competitive at higher prices, Apple . . . needed to eliminate all retail price competition." *Id.* at 659. Thus, rather than simply agreeing to price caps above Amazon's $9.99 price point, Apple created a second requirement: publishers must switch all of their other ebook retailers —

including Amazon — to an agency pricing model. The result would be that Apple would not need to compete with Amazon on price, and publishers would be able to eliminate Amazon's $9.99 pricing. Or, as Cue would later describe the plan to executives at Simon & Schuster, Macmillan, and Random House, the plan "solve[d] [the] Amazon issue" by allowing the publishers to wrest control over pricing from Amazon.[4] *Id.* at 661 (internal quotation marks omitted).

On January 4 and 5, Apple sent essentially identical emails to each member of the Big Six to explain its agency model proposal. Each email described the commission split between Apple and the publishers and recommended three price caps: $14.99 for hardcover books with list prices above $35; $12.99 for hardcover books with list prices below $35; and $9.99 for all other trade books. The emails also explained that, "to sell ebooks at realistic prices . . . all [other] resellers of new titles need to be in [the] agency model" as well. J.A. 360. Or, as Cue told Reidy, "all publishers" would need to move "all retailers" to an agency model. J.A. 2060.

---

[4] Cue testified at trial that his reference to "solv[ing] the Amazon issue" denoted the proposal to price ebooks in the iBookstore above $9.99, and was not a reference to raising prices across the industry or wresting control over pricing from Amazon. In this and other respects, the district court found Cue's testimony to be "not credible" — a determination that, on this record, is in no manner erroneous, much less clearly so. *Id.* at 661 n.19. As the district court put it, "Apple's pitch to the Publishers was — from beginning to end — a vision for a new industry-wide price schedule." *Id.*

3. The "Most-Favored-Nation" Clause

Cue's thoughts on the agency model continued to evolve after the emails on January 4 and 5. Most significantly, Saul — Cue's in-house counsel — devised an alternative to explicitly requiring publishers to switch other retailers to agency. This alternative involved the use of a "most-favored nation" clause ("MFN Clause" or "MFN"). In general, an MFN Clause is a contractual provision that requires one party to give the other the best terms that it makes available to any competitor. In the context of Apple's negotiations, the MFN Clause mandated that, "[i]f, for any particular New Release in hardcover format, the . . . Customer Price [in the iBookstore] at any time is or becomes higher than a customer price offered by any other reseller . . . , then [the] Publisher shall designate a new, lower Customer Price [in the iBookstore] to meet such lower [customer price]." J.A. 559. Put differently, the MFN would require the publisher to offer any ebook in Apple's iBookstore for no more than what the same ebook was offered elsewhere, such as from Amazon.

On January 11, Apple sent each of the Big Six a proposed eBook Agency Distribution Agreement (the "Contracts"). As described in the January 4 and 5 emails, these Contracts would split the proceeds from each ebook sale between

the publisher and Apple, with the publisher receiving 70%, and would set price caps on ebooks at $14.99, $12.99, and $9.99 depending on the book's hardcover price. But unlike the initial emails, the Contracts contained MFN Clauses in place of the requirement that publishers move all other retailers to an agency model. Apple then assured each member of the Big Six that it was being offered the same terms as the others.

The Big Six understood the economic incentives that the MFN Clause created. Suppose a new hardcover release sells at a list price of $25, and a wholesale price of $12.50. With Amazon, the publishers had been receiving the wholesale price (or a slightly lower digital wholesale price) for every ebook copy of the volume sold on Kindle, even if Amazon ultimately sold the ebook for less than that wholesale price. Under Apple's initial agency model — with price caps but no MFN Clause — the publishers already stood to make *less* money per ebook with Apple. Because Apple capped the ebook price of a $25 hardcover at $12.99 and took 30% of that price, publishers could only expect to make $8.75 per sale. But what the publishers sacrificed in short-term revenue, they hoped to gain in long-term stability by acquiring more control over pricing and, accordingly, the ability to protect their hardcover sales.

The MFN Clause changed the situation by making it imperative, not merely desirable, that the publishers wrest control over pricing from ebook retailers generally. Under the MFN, if Amazon stayed at a wholesale model and continued to sell ebooks at $9.99, the publishers would be forced to sell in the iBookstore, too, at that same $9.99 price point. The result would be the worst of both worlds: *lower* short-term revenue and *no* control over pricing. The publishers recognized that, as a practical matter, this meant that the MFN Clause would force them to move Amazon to an agency relationship. As Reidy put it, her company would need to move all its other ebook retailers to agency "unless we wanted to make even less money" in this growing market. *Apple*, 952 F. Supp. 2d at 666 (internal quotation marks omitted). This situation also gave each of the publishers a stake in Apple's quest to have a critical mass of publishers join the iBookstore because, "[w]hile no one Publisher could effect an industry-wide shift in prices or change the public's perception of a book's value, if they moved together they could." *Id.* at 665; *see also* J.A. 1981.

Apple understood this dynamic as well. As the district court found, "Apple did not change its thinking" when it replaced the explicit requirement that the publishers move other retailers to an agency model with the MFN.

Indeed, in the following weeks, Apple assiduously worked to make sure that the shift to agency occurred. *Apple*, 952 F. Supp. 2d at 663. But Apple also understood that, as Cue bluntly put it, "any decent MFN forces the model" away from wholesale and to agency. *Id.* (internal quotation marks omitted). Or as the district court found, "the MFN protected Apple from retail price competition as it punished a Publisher if it failed to impose agency terms on other e-tailers." *Id.* at 665.

Thus, the terms of the negotiation between Apple and the publishers became clear: Apple wanted quick and successful entry into the ebook market and to eliminate retail price competition with Amazon. In exchange, it offered the publishers an opportunity "to confront Amazon as one of an organized group . . . united in an effort to eradicate the $9.99 price point." *Id.* at 664. Both sides needed a critical mass of publishers to achieve their goals. The MFN played a pivotal role in this *quid pro quo* by "stiffen[ing] the spines of the [publishers] to ensure that they would demand new terms from Amazon," and protecting Apple from retail price competition. *Id.* at 665.

4. Final Negotiations

The proposed Contracts sparked intense negotiations as Cue's team raced to assemble enough publishers to announce the iBookstore by January 27. The publishers' first volley was to push back on Apple's price caps, which they recognized would become the "standard across the industry" for pricing.[5] J.A. 571. In a set of meetings between January 13 and 14, the majority of the Big Six expressed a general willingness to adopt an agency model, but refused to do so with the price limits Apple demanded. Cue responded by asking Jobs for permission to create a more lenient price cap system. Under this new regime, *New York Times* bestsellers could sell for $14.99 if the hardcover was listed above $30, and for $12.99 if listed below that price. As for new releases, a $12.99 cap would apply to hardcovers priced between $25 and $27.50; a $14.99 cap would apply to hardcovers selling for up to $30; and, if the hardcover sold for over $30, publishers could sell the ebook for between $16.99 and $19.99. Jobs responded that he could "live with" the pricing "as long as [the publishers] move Amazon to the agen[cy] model too." J.A. 499.

---

[5] As one HarperCollins executive put it, the "upshot" of moving to the agency model and adopting price caps was that "Apple would control price and that price would be standard across the industry." *Apple*, 952 F. Supp. 2d at 670 (internal quotation marks omitted).

Cue proposed this new pricing regime to the Big Six on January 16 and, with only 11 days remaining before the iPad launch, turned up the pressure. In each email conveying the new prices, Cue reminded the publishers that, if they did not agree to the iBookstore by the 27th, other companies, including Amazon and Barnes & Noble, would certainly build their own book store apps for the iPad. Correspondence from within the publishing companies also shows that Cue promoted the proposal as the "best chance for publishers to challenge the 9.99 price point," and emphasized that Apple would "not move forward with the store [unless] 5 of the 6 [major publishers] signed the agreement." J.A. 522-23. As Cue said at trial, he attempted to "assure [the publishers] that they weren't going to be alone, so that [he] would take the fear awa[y] of the Amazon retribution that they were all afraid of." J.A. 2068 (internal quotation marks omitted). "The Apple team reminded the Publishers," as the district court found, "that this was a rare opportunity for them to achieve control over pricing." *Apple*, 952 F. Supp. 2d at 664.

By January 22, two publishers — Simon & Schuster and Hachette — had verbally committed to join the iBookstore, while a third, Penguin, had agreed to Apple's terms in principle. As for the others, Cue was frustrated that they kept

"chickening out" because of the "dramatic business change" that Apple was proposing. J.A. 547. To make matters worse, "[p]ress reports on January 18 and 19 alerted the publishing world and Amazon to the Publishers' negotiations with Apple," *Apple*, 952 F. Supp. 2d at 670-71, and Amazon learned from Random House that it was facing "pressure from other publishers . . . to move to [the] agency model because Apple had made it clear that unless all of the Big Six participated, they wouldn't bother with building a bookstore," J.A. 1520. Representatives from Amazon descended on New York for a set of long-scheduled meetings with the publishers. As the district court found, "[i]n separate conversations on January 20 and over the next few days, the Publisher Defendants all told Amazon that they wanted to change to an agency distribution model with Amazon." *Apple*, 952 F. Supp. 2d at 672.

Macmillan, however, presented an issue for Apple. The district court found that at a January 20 lunch between John Sargent and Amazon, Sargent "announced that Macmillan was planning to offer Amazon the option to choose either an agency [or wholesale] model." *Id.* But at dinner with Cue that night, according to the district court, Cue made sure that Sargent understood the consequences of the MFN, explaining "that Macmillan had no choice but to move

Amazon to an agency model if it wanted to sign an agency agreement with Apple."[6] *Id.* The next day, Sargent emailed Cue to express his continued reservations about switching Macmillan's other retailers to an agency relationship.

With the iPad launch fast approaching, Cue enlisted the help of others. Cue had received an email from Simon & Schuster's Carolyn Reidy, who had already verbally committed to Apple's terms and whom Cue would later call the "real leader of the book industry," moments after hearing from Sargent. J.A. 621. Cue then spoke with Reidy for twenty minutes before reaching out to Brian Murray, who, as the district court found, "was fully supportive of the requirement that all e-tailers be moved to an agency model." *Apple*, 952 F. Supp. 2d at 673 n.39. After the discussions, Cue asked Sargent to speak with both Reidy and Murray. Sargent complied, and "spoke to both Murray and Reidy by telephone for eight and fifteen minutes, respectively." *Id.* at 673. Minutes later, Sargent called the Amazon representative to inform him that Macmillan planned to sign an agreement that "required" the company to conduct business with

[6] Although Cue denied discussing the MFN that night, the district court found this testimony not credible in light of Cue's deposition testimony and his contemporaneous email to Jobs that Sargent had "legal concerns over the price-matching." *Apple*, 952 F. Supp. 2d at 672 n.38 (internal quotation marks omitted). This determination was not clearly erroneous.

Amazon through an agency model. *Id.* By January 23, Macmillan had verbally agreed to join the iBookstore.

Cue followed a similar strategy with Penguin. While Penguin's CEO David Shanks agreed to Apple's terms on January 22, he informed Cue that he would join the iBookstore only if four other publishers agreed to participate. By January 25, Apple had signatures from three publishers but Penguin was still noncommittal. Cue called Shanks, and the two spoke for twenty minutes. "Less than an hour [later], Shanks called Reidy to discuss Penguin's status in its negotiations with Apple." *Id.* at 675. Penguin signed the Contract that afternoon.

HarperCollins was the fifth, and final, publisher to agree in principle to Apple's proposal. Murray, its CEO, "remained unhappy over the size of Apple's commission and the existence of price caps." *Id.* at 673 n.39. Unable to negotiate successfully with Murray, Cue asked Jobs to contact James Murdoch, the CEO of the publisher's parent company, and "tell him we have 3 signed so there is no leap of faith here." *Id.* at 675 (internal quotation marks omitted). After a series of emails, Jobs summarized Apple's position to Murdoch:

> [W]e simply don't think the ebook market can be successful with pricing higher than $12.99 or $14.99. Heck, Amazon is selling these books at $9.99, and who knows, maybe they are right and we will fail even at $12.99. But we're willing to try at the prices we've

> proposed. . . . As I see it, [HarperCollins] has the following choices: (1) Throw in with [A]pple and see if we can all make a go of this to create a real mainstream ebooks market at $12.99 and $14.99. (2) Keep going with Amazon at $9.99. You will make a bit more money in the short term, but in the medium term Amazon will tell you they will be paying you 70% of $9.99. They have shareholders too. (3) Hold back your books from Amazon. Without a way for customers to buy your ebooks, they will steal them.

Id. at 677. Cue also emailed Murray to inform him that four other publishers had signed their agreements. Murray then called executives at both Hachette and Macmillan before agreeing to Apple's terms.

As the district court found, during the period in January during which Apple concluded its agreements with the Publisher Defendants, "Apple kept the Publisher Defendants apprised about who was in and how many were on board."[7] *Id.* at 673. The Publisher Defendants also kept in close communication. As the district court noted, "[i]n the critical negotiation period, over the three days between January 19 and 21, Murray, Reidy, Shanks, Young, and Sargeant called one another 34 times, with 27 calls exchanged on January 21 alone." *Id.* at 674.

[7] Indeed, on the morning of January 21, Apple's initial deadline for the publishers to commit to agency, Simon & Schuster's Reidy emailed Cue to get "an update on your progress in herding us cats." J.A. 543.

By the January 27 iPad launch, five of the Big Six — Hachette, HarperCollins, Macmillan, Penguin, and Simon & Schuster — had agreed to participate in the iBookstore. The lone holdout, Random House, did not join because its executives believed it would fare better under a wholesale pricing model and were unwilling to make a complete switch to agency pricing. Steve Jobs announced the iBookstore as part of his presentation introducing the iPad. When asked after the presentation why someone should purchase an ebook from Apple for $14.99 as opposed to $9.99 with Amazon or Barnes & Noble, Jobs confidently replied, "[t]hat won't be the case . . . the price will be the same. . . . [P]ublishers will actually withhold their [e]books from Amazon . . . because they are not happy with the price."[8] A day later, Jobs told his biographer the publishers' position with Amazon: "[y]ou're going to sign an agency contract or we're not going to give you the books." J.A. 891 (internal quotation marks omitted).

[8] On January 29, Simon & Schuster's general counsel wrote to Reidy that she "[could not] believe that Jobs made [this] statement," which she considered "[i]ncredibly stupid." J.A. 638.

E. Negotiations with Amazon

Jobs's boast proved to be prophetic. While the Publisher Defendants were signing Apple's Contracts, they were also informing Amazon that they planned on changing the terms of their agreements with it to an agency model. However, their move against Amazon began in earnest on January 28, the day after the iPad launch. That afternoon, John Sargent flew to Seattle to deliver an ultimatum on behalf of Macmillan: that Amazon would switch its ebook sales agreement with Macmillan to an agency model or suffer a seven-month delay in its receipt of Macmillan's new releases.[9] Amazon responded by removing the option to purchase Macmillan's print and ebook titles from its website.

Sargent, as the district court found, had informed Cue of his intention to confront Amazon before ever leaving for Seattle.[10] *Apple*, 952 F. Supp. 2d at 678. On his return, he emailed Cue to inform him about Amazon's decision to remove

---

[9] As the district court found, "[s]even months was no random period — it was the number of months for which titles were designated New Release titles under the Apple Agreement and restrained by the Apple price caps and MFN." *Apple*, 952 F. Supp. 2d at 679.

[10] At trial, Cue claimed he had no advance knowledge of Sargent's plan to go to Seattle, but the district court found this testimony to be incredible. Sargent had emailed Cue about his trip days before the meeting took place. Moreover, on January 28, the day of the meeting, Jobs told his biographer that the 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.'" *Apple*, 952 F. Supp. 2d at 678 n.47. The district court's assessment of Cue's credibility was not clearly erroneous.

Macmillan ebooks from Kindle, adding a note to say that he wanted to "make sure you are in the loop." J.A. 640. Sargent also wrote a public letter to Macmillan's authors and agents, describing the Amazon negotiations. Hachette's Arnaud Nourry emailed the CEO of Macmillan's parent company to express his "personal support" for Macmillan's actions and to "ensure [him] that [he was] not going to find [his] company alone in the battle." J.A. 643. A Penguin executive wrote to express similar support for Macmillan's position.

The district court found that while Amazon was "opposed to adoption of the agency model and did not want to cede pricing authority to the Publishers," it knew that it could not prevail in this position against five of the Big Six. *Apple*, 952 F. Supp. 2d at 671, 680. When Amazon told Macmillan that it would be willing to negotiate agency terms, Sargent sent Cue an email titled "URGENT!!" that read: "Hi Eddy, I am gonna need to figure out our final agency terms of sale tonight. Can you call me please?" J.A. 642. Cue and Sargent spoke that night and, while Cue denied at trial that the conversation concerned Macmillan's negotiations with Amazon, the district court found that "his denial was not

credible."[11] *Apple*, 952 F. Supp. 2d at 681 n.52. By February 5, Amazon had agreed to agency terms with Macmillan.

The other publishers who had joined the iBookstore quickly followed Macmillan's lead. On February 11, Reidy wrote to the head of CBS that Simon & Schuster was beginning agency negotiations with Amazon. She informed him that she was trying to "delay" negotiations because it was "imperative . . . that the other publishers with whom Apple has announced deals push for resolution on their term changes" at the same time, "thus not leaving us out there alone." J.A. 701. Each of the Publisher Defendants then informed Amazon that they were under tight deadlines to negotiate new agency agreements, and kept one another informed about the details of their negotiations. As David Naggar, one of Amazon's negotiators, testified, whenever Amazon "would make a concession on an important deal point," it would "come back to us from another publisher asking for the same thing or proposing similar language." J.A. 1491.

Once again, Apple closely monitored the negotiations with Amazon. The Publisher Defendants would inform Cue when they had completed agency agreements, and his team monitored price changes on the Kindle. When

[11] As the district court noted, Macmillan had executed its Contract with Apple a week earlier, so that "the only final agency terms still under discussion were with Amazon." *Apple*, 952 F. Supp. 2d at 681 n.52.

Penguin languished behind the others, Cue informed Jobs that Apple was "changing a bunch of Penguin titles to 9.99" in the iBookstore "because they didn't get their Amazon deal done." *Apple*, 952 F. Supp. 2d at 682 (internal quotation marks omitted). By March 2010, Macmillan, HarperCollins, Hachette, and Simon & Schuster had completed agency agreements with Amazon. When Penguin completed its deal in June, the company's executive proudly announced to Cue that "[t]he playing field is now level." *Id.* (internal quotation marks omitted).[12]

F. Effect on Ebook Prices

As Apple and the Publisher Defendants expected, the iBookstore price caps quickly became the benchmark for ebook versions of new releases and *New York Times* bestsellers. In the five months following the launch of the iBookstore, the publishers who joined the marketplace and switched Amazon to an agency model priced 85.7% of new releases on Kindle and 92.1% of new releases on the iBookstore at, or just below, the price caps. *Apple*, 952 F. Supp. 2d at 682. Prices for *New York Times* bestsellers took a similar leap as publishers began to sell

[12] Eventually, the Publisher Defendants negotiated agency agreements with Barnes & Noble, and later Google. Random House also adopted the agency model, and joined the iBookstore, in early 2011.

96.8% of their bestsellers on Kindle and 99.4% of their bestsellers on the iBookstore at, or just below, the Apple price caps. *Id.* During that same time period, Random House, which had not switched to an agency model, saw virtually no change in the prices for its new releases or *New York Times* bestsellers.

The Apple price caps also had a ripple effect on the rest of the Publisher Defendants' catalogues. Recognizing that Apple's price caps were tied to the price of hardcover books, many of these publishers increased the prices of their newly released *hardcover* books to shift the ebook version into a higher price category. *Id.* at 683. Furthermore, because the Publisher Defendants who switched to the agency model expected to make less money per sale than under the wholesale model, they also increased the prices on their ebooks that were *not* new releases or bestsellers to make up for the expected loss of revenue.[13] Based on data from February 2010 — just before the Publisher Defendants switched Amazon to agency pricing — to February 2011, an expert retained by the Justice Department observed that the weighted average price of the Publisher Defendants' new releases increased by 24.2%, while bestsellers increased by

[13] The five Publisher Defendants accounted for 48.8% of all retail trade ebook sales in the United States during the first quarter of 2010.

40.4%, and other ebooks increased by 27.5%, for a total weighted average ebook price increase of 23.9%.[14] Indeed, even Apple's expert agreed, noting that, over a two-year period, the Publisher Defendants increased their average prices for hardcovers, new releases, and other ebooks.

Increasing prices reduced demand for the Publisher Defendants' ebooks. According to one of Plaintiffs' experts, the publishers who switched to agency sold 77,307 fewer ebooks over a two-week period after the switch to agency than in a comparable two-week period before the switch, which amounted to selling 12.9% fewer units. *Id.* at 684. Another expert relied on data from Random House to estimate how many ebooks the Publisher Defendants who switched Amazon to agency would have sold had they stayed with the wholesale model, and concluded that the agency switch and price increases led to 14.5% fewer sales. *Id.*

Significantly, these changes took place against the backdrop of a rapidly changing ebook market. Amazon introduced the Kindle in November 2007, just over two years before Apple launched the iPad in January 2010. During that short period, Apple estimated that the market grew from $70 million in ebook

[14] A weighted average price controls for the fact that different ebooks sell in different quantities by dividing the total price that consumers paid for ebooks by the total number of ebooks sold.

sales in 2007 to $280 million in 2009, and the company projected those figures to grow significantly in following years. Apple's expert witnesses argued that overall ebook sales continued to grow in the two years after the creation of the iBookstore and that the average ebook price fell during those years. But as Plaintiffs' experts pointed out, the ebook market had been expanding rapidly even before Apple's entry and average prices had been falling as lower-end publishers entered the market and larger numbers of old books became available in digital form. "Apple's experts did not present any analysis that attempted to control for the many changes that the e-book market was experiencing during these early years of its growth," *Apple*, 952 F. Supp. 2d at 685, nor did they estimate how the market would have grown *but for* Apple's agreement with the Publisher Defendants to switch to an agency model and raise prices. To the contrary, the undisputed fact that the Publisher Defendants raised prices on their ebooks, which accounted for roughly 50% of the trade ebook market in the first quarter of 2010, necessitated "a finding that the actions taken by Apple and the Publisher Defendants led to an increase in the price of e-books." *Id.*

Finally, in response to the dissent's claim that Apple's conduct "deconcentrat[ed] . . . the e-book retail market" and thus was "pro-competitive,"

Dissenting Op. at 31, it is worth noting that the district court's economic analysis and the parties' submissions at trial focused entirely on the price and sales figures for trade ebooks. This is because both parties agreed that the relevant market in this case is "the trade e-books market, not the e-reader market or the 'e-books system' market." *United States v. Apple, Inc.*, 889 F. Supp. 2d 623, 642 (S.D.N.Y. 2012); *Apple*, 952 F. Supp. 2d at 694 n.60. The district court did not analyze the state of competition between ebook *retailers* or determine that Amazon's pricing policy acted, as the dissent accuses, as a "barrier[] to entry" for other potential retailers. Dissenting Op. at 24, 30.

II. Procedural History

On April 11, 2012, Plaintiffs filed a pair of civil antitrust actions in the United States District Court for the Southern District of New York. The complaints alleged that Apple and the Publisher Defendants — Hachette, HarperCollins, Macmillan, Penguin, and Simon & Schuster — conspired to raise, fix, and stabilize the retail price for newly released and bestselling trade ebooks in violation of § 1 of the Sherman Act and various state laws. The litigation then proceeded along two separate trajectories, one for the Publisher Defendants and the other for Apple.

A. Publisher Defendants

Hachette, HarperCollins, and Simon & Schuster agreed to settle with DOJ by signing consent decrees on the same day that the Justice Department filed its complaint. Pursuant to the Tunney Act, 15 U.S.C. § 16 *et seq.*, "at least 60 days prior to the effective date" of a consent judgment, the United States must file a "competitive impact statement," which includes, *inter alia*, "the nature and purpose of the proceeding," "a description of the practices or events giving rise to the alleged violation of the antitrust laws," and an explanation of the relief obtained by the consent judgment "and the anticipated effects on competition of such relief." *Id.* § 16(b). In compliance with these requirements, DOJ issued a competitive impact statement that outlined the remedies it planned to impose on Hachette, HarperCollins, and Simon & Schuster. Two of those proposed remedies required that, for two years, the three publishers "not restrict, limit, or impede an E-book Retailer'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," and that they not "enter into any agreement" with retailers that limit such practices. J.A. 1126-27.

After the 60-day comment period, the Justice Department moved in the district court for a decision that "the entry of the judgment is in the public interest," 15 U.S.C. § 16(e), and for approval of the consent decree. In defense of the two-year limitations provisions, DOJ explained that the Publisher Defendants had used retail price restrictions to "effectuat[e] the conspiracy" and that two years was sufficient to "allow movement in the marketplace away from collusive conditions" without "alter[ing] the ultimate development of the competitive landscape in the still-evolving e-books industry." J.A. 1054-55. On September 5, 2012, the district court approved the consent decree and found the two-year ban on retail-price restrictions "wholly appropriate given the Settling Defendants' alleged abuse of such provisions . . . , the Government's recognition that such terms are not intrinsically unlawful, and the nascent state of competition in the e-books industry." J.A. 1088.

The remaining Publisher Defendants, Penguin and Macmillan, settled in quick succession. On December 18, 2012, Penguin agreed to a consent decree with essentially the same terms that Hachette, HarperCollins, and Simon & Schuster received. A few months later, in February 2013, Macmillan also agreed to settle. The terms of Macmillan's consent decree contained slight

modifications. Rather than delaying the prohibition on retail discounts until the court approved the decree, DOJ required Macmillan to begin compliance within three days of signing the decree. In exchange, the Justice Department agreed to back-date the beginning of the limitations period to December 18, 2012 and to reduce its length from two years to 23 months, explaining that "[c]onsumers are better served by bringing more immediate retail price competition to the market" and that a "23-month cooling-off period is sufficient" to restore competition. J.A. 1162-63. The district court approved Penguin's consent decree on May 17, 2013, and Macmillan's on August 12, 2013.

B. Apple

Unlike the Publisher Defendants, Apple opted to take the case to trial. Fact and expert discovery concluded on March 22, 2013 and, after filing pretrial motions, the parties agreed to a bench trial on Apple's liability and injunctive relief, to be followed by a separate trial on damages on the state claims if the states prevailed.

On July 10, 2013, after conducting a three-week bench trial, the district court concluded that Apple had violated § 1 of the Sherman Act and various state antitrust laws. In brief, the court found that Apple "orchestrat[ed]" a conspiracy

among the Publisher Defendants to "eliminate retail price competition [in the e-book market] in order to raise the retail prices of e-books." *Apple*, 952 F. Supp. 2d at 697. Because this conspiracy consisted of a group of competitors — the Publisher Defendants — assembled by Apple to increase prices, it constituted a "horizontal price-fixing conspiracy" and was a *per se* violation of the Sherman Act. *Id.* at 694. It concluded, moreover, that even if the agreement to raise prices and eliminate retail price competition were analyzed under the rule of reason, it would still constitute an unreasonable restraint of trade in violation of § 1. *Id.* In the district court's view, Plaintiffs' experts persuasively demonstrated that the agreement facilitated an "across-the board price increase in e-books sold by the Publisher Defendants" and a corresponding drop in sales. *Id.* Apple, on the other hand, failed to show that "the execution of the Agreements," as opposed to the launch of the iPad and "evolution of digital publishing more generally" (which were independent of the Agreements), "had any pro-competitive effects." *Id.*

After the district court issued its liability decision, the parties submitted briefing on injunctive relief. The court conducted a hearing on the issue and, on September 5, 2013, issued a final injunctive order against Apple and entered final

judgment. The injunctive order consists of four categories of relief: (1) "Prohibited Conduct," which prevents Apple from enforcing MFNs with ebook publishers, retaliating against publishers for signing agreements with other retailers, or agreeing with any of the Publisher Defendants to restrict, limit, or impede Apple's ability to set ebook retail prices; (2) "Required Conduct," which, among other things, forces Apple to modify its agency agreements with the Publisher Defendants and to treat ebook apps sold in the iTunes store like any other app sold there; (3) "Antitrust Compliance," which requires Apple to improve its internal system for preventing antitrust violations; and (4) "External Compliance Monitor[ing]," which allows the court to appoint an external monitor to ensure Apple's compliance with the injunctive order.

After the entry of the district court's injunctive order, Apple, Macmillan, and Simon & Schuster filed this appeal. The parties have not yet conducted a trial to assess the damages stemming from the state antitrust claims.

DISCUSSION

To hold a defendant liable for violating § 1 of the Sherman Act, a district court must find "a combination or some form of concerted action between at least two legally distinct economic entities" that "constituted an unreasonable restraint of trade." *Capital Imaging Assocs. v. Mohawk Valley Med. Assocs.*, 996 F.2d 537, 542 (2d Cir. 1993); *see* 15 U.S.C. § 1. On appeal, Apple challenges numerous aspects of the district court's § 1 analysis and also contends that the injunctive order that the district court imposed on the company is unlawful. Macmillan and Simon & Schuster have joined Apple's challenge to the injunction, arguing that it impermissibly interferes with their consent decrees and is barred by the doctrine of judicial estoppel. We conclude that the district court's liability determination was sound and its injunctive order lawful. We therefore affirm the judgment of the district court.

I. Standard of Review

Following a bench trial, this Court reviews the "district court's findings of fact for clear error" and its "conclusions of law and mixed questions *de novo*." *Connors v. Conn. Gen. Life Ins. Co.*, 272 F.3d 127, 135 (2d Cir. 2001); *see* Fed. R. Civ. P. 52(a). The district court's evidentiary rulings and its fashioning of equitable

relief are reviewed for abuse of discretion. *See Zerega Ave. Realty Corp. v. Hornbeck Offshore Transp., LLC*, 571 F.3d 206, 212-13 (2d Cir. 2009) (evidentiary rulings); *Abrahamson v. Bd. of Educ. Of the Wappingers Falls Cent. Sch. Dist.*, 374 F.3d 66, 76 (2d Cir. 2004) (equitable relief).

II. Apple's Liability Under § 1

This appeal requires us to address the important distinction between "horizontal" agreements to set prices, which involve coordination "between competitors at the same level of [a] market structure," and "vertical" agreements on pricing, which are created between parties "at different levels of [a] market structure." *Anderson News, L.L.C. v. Am. Media, Inc.*, 680 F.3d 162, 182 (2d Cir. 2012) (internal quotation marks omitted). Under § 1 of the Sherman Act, the former are, with limited exceptions, *per se* unlawful, while the latter are unlawful only if an assessment of market effects, known as a rule-of-reason analysis, reveals that they unreasonably restrain trade. *See Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 893 (2007).

Although this distinction is sharp in theory, determining the orientation of an agreement can be difficult as a matter of fact and turns on more than simply identifying whether the participants are at the same level of the market structure.

For instance, courts have long recognized the existence of "hub-and-spoke" conspiracies in which an entity at one level of the market structure, the "hub," coordinates an agreement among competitors at a different level, the "spokes." *Howard Hess Dental Labs. Inc. v. Dentsply Int'l, Inc.*, 602 F.3d 237, 255 (3d Cir. 2010); *see also Toys "R" Us, Inc. v. FTC*, 221 F.3d 928, 932-34 (7th Cir. 2000). These arrangements consist of *both* vertical agreements between the hub and each spoke and a horizontal agreement among the spokes "to adhere to the [hub's] terms," often because the spokes "would not have gone along with [the vertical agreements] except on the understanding that the other [spokes] were agreeing to the same thing." VI Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 1402c (3d ed. 2010) (citing *PepsiCo, Inc. v. Coca-Cola Co.*, 315 F.3d 101 (2d Cir. 2002)); *see also* Am. Bar Ass'n, *Antitrust Law Developments* 24-26 (6th ed. 2007); XII Areeda & Hovenkamp, *supra*, ¶ 2004c.[15]

Apple characterizes its Contracts with the Publisher Defendants as a series of parallel but independent vertical agreements, a characterization that forms the basis for its two primary arguments against the district court's decision. First,

[15] In this sense, the "hub-and-spoke" metaphor is somewhat inaccurate – the plaintiff must also prove the existence of a "rim" to the wheel in the form of an agreement among the horizontal competitors. *See Dickson v. Microsoft Corp.*, 309 F.3d 193, 203-04 (4th Cir. 2002).

Apple argues that the district court impermissibly inferred its involvement in a horizontal price-fixing conspiracy from the Contracts themselves. Because (in Apple's view) the Contracts were vertical, lawful, and in Apple's independent economic interest, the mere fact that Apple agreed to the same terms with multiple publishers cannot establish that Apple consciously organized a conspiracy among the Publisher Defendants to raise consumer-facing ebook prices — even if the *effect* of its Contracts was to raise those prices. Second, Apple argues that, even if it did orchestrate a horizontal price-fixing conspiracy, its conduct should not be subject to *per se* condemnation. According to Apple, proper application of the rule of reason reveals that its conduct was not unlawful.

For the reasons set forth below, we reject these arguments. On this record, the district court did not err in determining that Apple orchestrated an agreement with and among the Publisher Defendants, in characterizing this agreement as a horizontal price fixing-conspiracy, or in holding that the conspiracy unreasonably restrained trade in violation of § 1 of the Sherman Act.

A. The Conspiracy with the Publisher Defendants

Section 1 of the Sherman Act bans restraints on trade "effected by a contract, combination, or conspiracy." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 553

(2007) (internal quotation marks omitted). The first "crucial question in a Section 1 case is therefore whether the challenged conduct 'stem[s] from independent decision or from an agreement, tacit or express.'" *Starr v. Sony BMG Music Entm't*, 592 F.3d 314, 321 (2d Cir. 2010) (alteration in original) (quoting *Theatre Enters., Inc. v. Paramount Film Distrib. Corp.*, 346 U.S. 537, 540 (1954)).

Identifying the existence and nature of a conspiracy requires determining whether the evidence "reasonably tends to prove that the [defendant] and others had a conscious commitment to a common scheme designed to achieve an unlawful objective." *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984) (internal quotation marks omitted). Parallel action is not, by itself, sufficient to prove the existence of a conspiracy; such behavior could be the result of "coincidence, independent responses to common stimuli, or mere interdependence unaided by an advance understanding among the parties." *Twombly*, 550 U.S. at 556 n.4 (internal quotation marks omitted). Indeed, parallel behavior that does not result from an agreement is not unlawful even if it is anticompetitive. *See In re Text Messaging Antitrust Litig.*, 782 F.3d 867, 873-79 (7th Cir. 2015); *In re Flat Glass Antitrust Litig.*, 385 F.3d 350, 360-61 (3d Cir. 2004). Accordingly, to prove an antitrust conspiracy, "a plaintiff must show the

existence of additional circumstances, often referred to as 'plus' factors, which, when viewed in conjunction with the parallel acts, can serve to allow a fact-finder to infer a conspiracy." *Apex Oil Co. v. DiMauro*, 822 F.2d 246, 253 (2d Cir. 1987).

These additional circumstances can, of course, consist of "direct evidence that the defendants entered into an agreement" like "a recorded phone call in which two competitors agreed to fix prices." *Mayor & City Council of Baltimore, Md. v. Citigroup, Inc.*, 709 F.3d 129, 136 (2d Cir. 2013). But plaintiffs may also "present circumstantial facts supporting the *inference* that a conspiracy existed." *Id.* Circumstances that may raise an inference of conspiracy include "a common motive to conspire, evidence that shows that the parallel acts were against the apparent individual economic self-interest of the alleged conspirators, and evidence of a high level of interfirm communications." *Id.* (internal quotation marks omitted). Parallel conduct alone may support an inference of conspiracy, moreover, if it consists of "complex and historically unprecedented changes in pricing structure made at the very same time by multiple competitors, and made for no other discernible reason." *Id.* at 137 (internal quotation marks omitted).

Because of the risk of condemning parallel conduct that results from independent action and not from an actual unlawful agreement, the Supreme Court has cautioned against drawing an inference of conspiracy from evidence that is equally consistent with independent conduct as with illegal conspiracy — or, as the Court has called it, "ambiguous" evidence. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 597 n.21 (1986). Thus, a finding of conspiracy requires "evidence that tends to exclude the possibility" that the defendant was "acting independently." *Monsanto*, 465 U.S. at 764. This requirement, however, "[does] not mean that the plaintiff must disprove all nonconspiratorial explanations for the defendants' conduct"; rather, the evidence need only be sufficient "to allow a reasonable fact finder to infer that the conspiratorial explanation is more likely than not." *In re Publ'n Paper Antitrust Litig.*, 690 F.3d 51, 63 (2d Cir. 2012) (quoting Phillip E. Areeda & Herbert Hovenkamp, *Fundamentals of Antitrust Law* § 14.03(b), at 14-25 (4th ed. 2011)); *accord Matsushita*, 475 U.S. at 588 (requiring that "the inference of conspiracy is reasonable in light of the competing inferences of independent action"); *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 655-56 (7th Cir. 2002).

Apple portrays its Contracts with the Publisher Defendants as, at worst, "unwittingly facilitat[ing]" their joint conduct. Apple Br. at 23. All Apple did, it claims, was attempt to enter the market on profitable terms by offering contractual provisions — an agency model, the MFN Clause, and tiered price caps — which ensured the company a small profit on each ebook sale and insulated it from retail price competition. This had the *effect* of raising prices because it created an incentive for the Publisher Defendants to demand that Amazon adopt an agency model and to seize control over consumer-facing ebook prices industry-wide. But although Apple knew that its contractual terms would entice the Publisher Defendants (who wanted to do away with Amazon's $9.99 pricing) to seek control over prices from Amazon and other ebook retailers, Apple's success in capitalizing on the Publisher Defendants' preexisting incentives, it contends, does not suggest that it joined a *conspiracy* among the Publisher Defendants to raise prices. In sum, Apple's basic argument is that because its Contracts with the Publisher Defendants were fully consistent with its independent business interests, those agreements provide only "ambiguous" evidence of a § 1 conspiracy, and the district court therefore erred under *Matsushita* and *Monsanto* in inferring such a conspiracy.

We disagree. At the start, Apple's benign portrayal of its Contracts with the Publisher Defendants is not persuasive — not because those Contracts themselves were independently unlawful, but because, in context, they provide strong evidence that Apple consciously orchestrated a conspiracy among the Publisher Defendants. As explained below, and as the district court concluded, Apple understood that its proposed Contracts were attractive to the Publisher Defendants *only* if they collectively shifted their relationships with Amazon to an agency model — which Apple knew would result in higher consumer-facing ebook prices. In addition to these Contracts, moreover, ample additional evidence identified by the district court established both that the Publisher Defendants' shifting to an agency model with Amazon was the result of express collusion among them and that Apple consciously played a key role in organizing that collusion. The district court did not err in concluding that Apple was more than an innocent bystander.

Apple offered each Big Six publisher a proposed Contract that would be attractive only if the publishers acted collectively. Under Apple's proposed agency model, the publishers stood to make *less* money per sale than under their wholesale agreements with Amazon, but the Publisher Defendants were willing

to stomach this loss because the model allowed them to sell new releases and bestsellers for more than $9.99. Because of the MFN Clause, however, each new release and bestseller sold in the iBookstore would cost only $9.99 as long as Amazon continued to sell ebooks at that price. So in order to receive the perceived benefit of Apple's proposed Contracts, the Publisher Defendants had to switch *Amazon* to an agency model as well — something no individual publisher had sufficient leverage to do on its own. Thus, each Publisher Defendant would be able to accomplish the shift to agency — and therefore have an incentive to sign Apple's proposed Contracts — *only* if it acted in tandem with its competitors. *See Starr*, 592 F.3d at 324; *Flat Glass*, 385 F.3d at 360-61; *see also* J.A. 1974 (noting that the agreements would "not fix the publishers' problems" if they could not move Amazon to an agency model). By the very act of signing a Contract with Apple containing an MFN Clause, then, each of the Publisher Defendants signaled a clear commitment to move against Amazon, thereby facilitating their collective action. As the district court explained, the MFNs "stiffened the spines" of the Publisher Defendants. *Apple*, 952 F. Supp. 2d at 665.

As a sophisticated negotiator, Apple was fully aware that its proposed Contracts would entice a critical mass of publishers only if these publishers

perceived an opportunity collectively to shift Amazon to agency.[16] In fact, this was the very purpose of the MFN, which Apple's Saul devised as an elegant alternative to a provision that would have explicitly *required* the publishers to adopt an agency model with other retailers. As Cue put it, the MFN "force[d] the model" from wholesale to agency. J.A. 865. Indeed, the MFN's capacity for forcing collective action by the publishers was precisely what enabled Jobs to predict with confidence that "the price will be the same" on the iBookstore and the Kindle when he announced the launch of the iPad — the same, Jobs said, because the publishers would make Amazon "sign . . . agency contract[s]" by threatening to withhold their ebooks. J.A. 891. Apple was also fully aware that once the Publisher Defendants seized control over consumer-facing ebook prices, those prices would rise. It knew from the outset that the publishers hated Amazon's $9.99 price point, and it put price caps in its agreements because it specifically anticipated that once the publishers gained control over prices, they

[16] Apple's argument on appeal that it did not have sufficient market power to coordinate the Publisher Defendants is beside the point. Market power may afford one means by which a company can coerce others to comply with its wishes, but brute force is not the only way to foster an agreement. Here, both Apple and the Publisher Defendants understood that Apple was in a position to "solve" the publishers' "Amazon problem" by helping them eliminate what they saw as a mortal threat to their businesses — namely, the $9.99 price point.

would push them higher than $9.99, higher than Apple itself deemed "realistic." *Apple*, 952 F. Supp. 2d at 692 (internal quotation marks omitted).

On appeal, Apple nonetheless defends the Contracts that it proposed to the publishers as an "aikido move" that shrewdly leveraged market conditions to its own advantage. Apple Br. at 17. "[A]ikido move" or not, the attractiveness of Apple's offer to the Publisher Defendants hinged on whether it could successfully help organize them to force Amazon to an agency model and then to use their newfound collective control to raise ebook prices. The Supreme Court has defined an agreement for Sherman Act § 1 purposes as "a conscious commitment to a common scheme designed to achieve an unlawful objective." *Monsanto*, 465 U.S. at 764 (internal quotation marks omitted). Plainly, this use of the promise of higher prices as a bargaining chip to induce the Publisher Defendants to participate in the iBookstore constituted a conscious commitment to the goal of raising ebook prices. "Antitrust law has never required identical *motives* among conspirators" when their independent reasons for joining together lead to collusive action. *Spectators' Commc'n Network Inc. v. Colonial Country Club*, 253 F.3d 215, 220 (5th Cir. 2001) (emphasis added). Put differently, "independent reasons" can also be "interdependent," and the fact that Apple's conduct was in

its own economic interest in no way undermines the inference that it entered an agreement to raise ebook prices. VI Areeda & Hovenkamp, *supra*, ¶ 1413a (internal quotation marks omitted).

Nor was the Publisher Defendants' joint action against Amazon a result of parallel decisionmaking. As we have explained, conduct resulting solely from competitors' independent business decisions — and not from any "agreement" — is not unlawful under § 1 of the Sherman Act, even if it is anticompetitive. *See Text Messaging*, 782 F.3d at 873-79. But to generate a permissible inference of agreement, a plaintiff need only present sufficient evidence that such agreement was more likely than not. On this record, the district court had ample basis to conclude that it was not equally likely that the near-simultaneous signing of Apple's Contracts by multiple publishers — which led to all of the Publisher Defendants moving against Amazon — resulted from the parties' independent decisions, as opposed to a "meeting of [the] minds." *Monsanto*, 465 U.S. at 765; *see Toys "R" Us*, 221 F.3d at 935-36 (holding that exclusive-dealing agreements between a retailer and manufacturers that were contrary to the manufacturers' individual self-interest but consistent with their collective interest supported the inference of a horizontal conspiracy in which the retailer participated); VI Areeda

& Hovenkamp, *supra*, ¶ 1425a, d ("[A] conspiracy may be inferred if a defendant's action would have been contrary to its self-interest in the absence of advance agreement." *Id.* ¶ 1425a). That the Publisher Defendants were in constant communication regarding their negotiations with both Apple and Amazon can hardly be disputed. Indeed, Apple never seriously argues that the Publisher Defendants were not acting in concert.

Even so, Apple claims, it cannot have organized the conspiracy among the Publisher Defendants if it merely "unwittingly facilitated [their] joint conduct." Apple Br. at 23. But this argument founders — and dramatically so — on the factual findings of the district court. As the district court explained, Apple's Contracts with the publishers "must be considered in the context of the entire record." *Apple*, 952 F. Supp. 2d at 699. Even if Apple was unaware of the extent of the Publisher Defendants' coordination when it first approached them,[17] its

[17] Apple endeavors to draw the district court's factfinding into doubt by asserting, erroneously, that the "bedrock of the court's entire decision" hinges on its supposed determination that Apple, knowing that the publishers had been coordinating beforehand, joined a preexisting conspiracy to raise prices at its initial meetings with the Publisher Defendants — a proposition that, it says, is unsupported by the record. The district court, however, did *not* find that Apple joined an ongoing conspiracy in late 2009, but merely observed that Apple went into its initial meetings with the understanding that the Publisher Defendants disliked, and were trying to fight, Amazon's $9.99 pricing, and so would be receptive to the news that Apple was open to higher prices. *See Apple*, 952 F. Supp. 2d at 703. *These* findings were amply supported

subsequent communications with them as negotiations progressed show that Apple consciously played a key role in organizing their express collusion. From the outset, Cue told the publishers that Apple would launch its iBookstore only if a sufficient number of them agreed to participate and that each publisher would receive identical terms, assuring them that a critical mass of major publishers would be prepared to move against Amazon. Later on, Cue and his team kept the publishers updated about how many of their peers signed Apple's Contracts, and reminded them that it was offering "the best chance for publishers to challenge the 9.99 price point" before it became "cement[ed]" in "consumer expectations." J.A. 522. When time ran short, Apple coordinated phone calls between the publishers who had agreed and those who remained on the fence.[18]

---

and help explain how the agreement among Apple and the Publisher Defendants thereafter emerged.

[18] Apple takes issue with the district court's conclusion that Apple was aware of, and facilitated, communication between the Publisher Defendants. But the district court found that Cue believed Reidy was a "leader" in the publishing industry and that, on at least two occasions toward the end of the negotiating period, Cue called a recalcitrant executive, who then spoke to Reidy before agreeing to Apple's terms. *See Apple*, 952 F. Supp. 2d at 659-60; J.A. 2019-20. Reidy herself adverted to Cue's role in "herding us cats." J.A. 543. Moreover, the publishing executives frequently denied having *any* conversations about Apple during this period, despite strong documentary and phone record evidence to the contrary. The district court found that these denials lacked credibility and "strongly support[ed] a finding of consciousness of guilt." *Apple*, 952 F. Supp. 2d at 693 n.59. This view of the facts is not clearly erroneous.

As Cue said at trial, Apple endeavored to "assure [the publishers] that they weren't going to be alone, so that [Apple] would take the fear awa[y] of the Amazon retribution that they were all afraid of." J.A. 2068.

Apple's involvement in the conspiracy continued even past the signing of its agency agreements. Before Sargent flew to Seattle to meet with Amazon, he told Cue. Apple stayed abreast of the Publisher Defendants' progress as they set coordinated deadlines with Amazon and shared information with one another during negotiations. Apple's communications with the Publisher Defendants thus went well beyond legitimately "exchang[ing] information" within "the normal course of business," *Monsanto*, 465 U.S. at 762-63 (internal quotation marks omitted), or "friendly banter among business partners," Apple Br. at 38; *see Monsanto*, 465 U.S. at 765-66 (concluding that message about getting "the market place in order" could lead to inference of conspiracy (internal quotation marks omitted)); *see also Starr*, 592 F.3d at 324; *Apex Oil*, 822 F.2d at 255-57.

Apple responds to this evidence — which the experienced judge who oversaw the trial characterized repeatedly as "overwhelming" — by explaining how each piece of evidence standing alone is "ambiguous" and therefore insufficient to support an inference of conspiracy. We are not persuaded. In

antitrust cases, "[t]he 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." *Cont'l Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962). Combined with the unmistakable purpose of the Contracts that Apple proposed to the publishers, and with the collective move against Amazon that inevitably followed the signing of those Contracts, the emails and phone records demonstrate that Apple *agreed* with the Publisher Defendants, within the meaning of the Sherman Act, to raise consumer-facing ebook prices by eliminating retail price competition. The district court did not err in rejecting Apple's argument that the evidence of its orchestration of the Publisher Defendants' conspiracy was "ambiguous."

Given the record and the district court's factual findings, we do not share Apple and its amici's concern that we will stifle productive enterprise by inferring an agreement among Apple and the Publisher Defendants on the basis of otherwise lawful contract terms, such as an agency model and MFNs. To begin with, it is well established that vertical agreements, lawful in the abstract, can in context "be useful evidence for a plaintiff attempting to prove the existence of a horizontal cartel," *Leegin*, 551 U.S. at 893, particularly where

multiple competitors sign vertical agreements that would be against their own interests were they acting independently, *see, e.g., Interstate Circuit v. United States*, 306 U.S. 208, 222 (1939); *Toys "R" Us*, 221 F.3d at 935-36. The MFNs in Apple's Contracts created a set of economic incentives pursuant to which the Contracts were only attractive to the Publisher Defendants to the extent they acted collectively. That these contract terms had such an effect under the particular circumstances of this case — and therefore furnish part of the evidence of Apple's agreement with the Publisher Defendants — says nothing about their broader legality. It should be self-evident that our analysis is informed by the particular context in which Apple's contract terms were deployed. In any event, we are breaking no new ground in concluding that MFNs, though surely proper in many contexts, can be "misused to anticompetitive ends in some cases." *Blue Cross & Blue Shield United of Wis. v. Marshfield Clinic*, 65 F.3d 1406, 1415 (7th Cir. 1995); *see Starr*, 592 F.3d at 324 (finding MFN evidence of conspiracy). Under the right circumstances, an MFN can "facilitate anticompetitive horizontal coordination" by "reduc[ing] [a company's] incentive to deviate from a coordinated horizontal arrangement." Jonathan B. Baker, *Vertical Restraints with Horizontal Consequences: Competitive Effects of "Most-Favored-Customer" Clauses*, 64

Antitrust L.J. 517, 520-21 (1996); *see also* Jonathan B. Baker & Judith A. Chevalier, *The Competitive Consequences of Most-Favored-Nation Provisions*, Antitrust, Spring 2013, at 20-26, *available at* http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1280&context=facsch_lawrev.[19]

In short, we have no difficulty on this record rejecting Apple's argument that the district court erred in concluding that Apple "conspir[ed] with the Publisher Defendants to eliminate retail price competition and to raise e-book prices." *Apple*, 952 F. Supp. 2d at 691. Having concluded that the district court correctly identified an agreement between Apple and the Publisher Defendants to raise consumer-facing ebook prices, we turn to Apple's and the dissent's arguments that this agreement did not violate § 1 of the Sherman Act.

---

[19] Nor does our holding remotely suggest that price caps are always unlawful, which they are not. *See State Oil Co. v. Khan*, 522 U.S. 3 (1997) (holding that vertical maximum price-fixing agreements should be analyzed under the rule of reason). Apple required price caps because it knew that once the Publisher Defendants moved on Amazon to seize control over ebook prices, they would raise them. Apple wanted to ensure that the Publisher Defendants set "realistic prices" that reflected the lower costs of producing ebooks. J.A. 359. The Publisher Defendants and Apple understood that these caps would become the "standard across the industry." J.A. 573. The price negotiations therefore reflected a common understanding that prices would rise, but a difference of opinion among the co-conspirators over *how high* they could reasonably go. *See United States v. Andreas*, 216 F.3d 645, 680 (7th Cir. 2000) ("The need to negotiate some details of the conspiracy with the cartel members . . . does not strip a defendant of the organizer role.").

B. Unreasonable Restraint of Trade

"Although the Sherman Act, by its terms, prohibits every agreement 'in restraint of trade,' [the Supreme] Court has long recognized that Congress intended to outlaw only unreasonable restraints." *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997). Thus, to succeed on an antitrust claim, a plaintiff must prove that the common scheme designed by the conspirators "constituted an unreasonable restraint of trade either per se or under the rule of reason." *Capital Imaging*, 996 F.2d at 542.

In antitrust cases, "[*p*]*er se* and rule-of-reason analysis are . . . two methods of determining whether a restraint is 'unreasonable,' *i.e.*, whether its anticompetitive effects outweigh its procompetitive effects." *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 342 (1990). Because this balancing typically requires case-by-case analysis, "most antitrust claims are analyzed under [the] 'rule of reason,' according to which the finder of fact must decide whether the questioned practice imposes an unreasonable restraint on competition." *Khan*, 522 U.S. at 10; *see also Gatt Commc'ns, Inc. v. PMC Assocs., L.L.C.*, 711 F.3d 68, 75 n.8 (2d Cir. 2013). However, some restraints "have such predictable and pernicious anticompetitive effect, and such limited potential for procompetitive

benefit, that they are deemed unlawful *per se*." *Khan*, 522 U.S. at 10. This rule "reflect[s] a longstanding judgment" that case-by-case analysis is unnecessary for certain practices that, "by their nature[,] have a substantial potential" to unreasonably restrain competition. *FTC v. Sup. Ct. Trial Lawyers Ass'n*, 493 U.S. 411, 433 (1990) (internal quotation marks omitted).

Horizontal price-fixing conspiracies traditionally have been, and remain, the "archetypal example" of a *per se* unlawful restraint on trade. *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 647 (1980). By contrast, the Supreme Court in recent years has clarified that vertical restraints — including those that restrict prices — should generally be subject to the rule of reason. *See Leegin*, 551 U.S. at 882 (holding that the rule of reason applies to vertical minimum price-fixing); *Khan*, 522 U.S. at 7 (holding that the rule of reason applies to vertical maximum price-fixing).

In this case, the district court held that the agreement between Apple and the Publisher Defendants was unlawful under the *per se* rule; in the alternative, even assuming that a rule-of-reason analysis was required, the district court concluded that the agreement was still unlawful. *See Apple*, 952 F. Supp. 2d at 694. On appeal, we consider three primary arguments against application of the

per se rule. First, Apple and our dissenting colleague argue that the *per se* rule is inappropriate in this case because Apple's Contracts with the Publisher Defendants were vertical, not horizontal. Even if the challenged agreement here was horizontal, Apple argues next, it promoted "enterprise and productivity." Finally, Apple contends that even if the agreement was horizontal, it was not, in fact, a "price-fixing" conspiracy of the kind that deserves *per se* condemnation. We address, and reject, these arguments in turn. Because the ebook industry, however, is new and at least arguably involves some new ways of doing business, I also consider, writing only for myself, Apple's rule-of reason argument.

1. Whether the *Per Se* Rule Applies

a. Horizontal Agreement

In light of our conclusion that the district court did not err in determining that Apple organized a price-fixing conspiracy among the Publisher Defendants, Apple and the dissent's initial argument against the *per se* rule — that Apple's conduct must be subject to rule-of-reason analysis because it involved merely multiple independent, vertical agreements with the Publisher Defendants — cannot succeed.

"The true test of legality" under § 1 of the Sherman Act "is whether the *restraint imposed* is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition." *Bd. of Trade of City of Chi. v. United States*, 246 U.S. 231, 238 (1918) (emphasis added). By agreeing to orchestrate a horizontal price-fixing conspiracy, Apple committed itself to "achiev[ing] [that] unlawful objective," *Monsanto*, 465 U.S. at 764 (internal quotation marks omitted): namely, collusion with and among the Publisher Defendants to set ebook prices. This type of agreement, moreover, is a restraint "that would always or almost always tend to restrict competition and decrease output." *Leegin*, 551 U.S. at 886 (internal quotation marks omitted).

The response, raised by Apple and our dissenting colleague, that Apple engaged in "vertical conduct" that is unfit for *per se* condemnation therefore misconstrues the Sherman Act analysis. It is the type of restraint Apple agreed to impose that determines whether the *per se* rule or the rule of reason is appropriate. These rules are means of evaluating "whether [a] *restraint* is unreasonable," not the reasonableness of a particular defendant's role in the scheme. *Atl. Richfield*, 495 U.S. at 342 (emphasis added) (internal quotation marks omitted); *see also Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Okla.*,

468 U.S. 85, 103 (1984) ("Both per se rules and the Rule of Reason are employed to form a judgment about the competitive significance of the restraint." (internal quotation marks omitted)).

Consistent with this principle, the Supreme Court and our Sister Circuits have held all participants in "hub-and-spoke" conspiracies liable when the objective of the conspiracy was a *per se* unreasonable restraint of trade. *See* Richard A. Posner, *The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality*, 48 U. Chi. L. Rev. 6, 22 (1981) ("[C]ases in which dealers or distributors collude . . . among themselves and bring in the manufacturer to enforce their cartel, . . . can be dealt with under the conventional rules applicable to horizontal price-fixing conspiracies.). In *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, for example, the Supreme Court considered whether a prominent retailer of electronic appliances could be held liable under § 1 of the Sherman Act for fostering an agreement with and among its distributors to have those companies boycott a competing retailer. 359 U.S. 207 (1959). The Court characterized this arrangement as a "[g]roup boycott[]" supported by a "wide combination consisting of manufacturers, distributors and a retailer." *Id.* at 212-13. It then decided that, if the combination were proved at trial, holding the

retailer liable would be appropriate because "[g]roup boycotts, or concerted refusals by traders to deal with other traders," are *per se* unreasonable restraints of trade. *Id.* at 212.

The Supreme Court followed a similar approach in *United States v. General Motors Corp.*, 384 U.S. 127 (1966), when it considered whether § 1 prohibited a car manufacturer, General Motors, from coordinating a group of dealerships to prevent other dealers from selling cars at discount prices. The majority called this arrangement a "classic conspiracy in restraint of trade" and refused to entertain General Motors' request to consider the company's reasons for creating the conspiracy. *Id.* at 140. The Court explained that "[t]here can be no doubt that the effect of the combination . . . here was to restrain trade and commerce within the meaning of the Sherman Act" because "[e]limination, by joint collaborative action, of discounters from access to the market is a per se violation of the Act." *Id.* at 145; *see, e.g., Toys "R" Us*, 221 F.3d at 936; *Denny's Marina, Inc. v. Renfro Prods., Inc.*, 8 F.3d 1217, 1220-21 (7th Cir. 1993); *United States v. MMR Corp. (LA)*, 907 F.2d 489, 498 (5th Cir. 1990); *see also* Albert Foer & Randy Stutz, *Private Enforcement of Antitrust Law in the United States* 29 (2012).

Because the reasonableness of a restraint turns on its anticompetitive effects, and not the identity of each actor who participates in imposing it, Apple and the dissent's observation that the Supreme Court has refused to apply the *per se* rule to certain vertical agreements is inapposite. The rule of reason is unquestionably appropriate to analyze an agreement between a manufacturer and its distributors to, for instance, limit the price at which the distributors sell the manufacturer's goods or the locations at which they sell them. *See Leegin*, 551 U.S. at 881; *Cont'l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 57 (1977). These vertical restrictions "are widely used in our free market economy," can enhance interbrand competition, and do not inevitably have a "pernicious effect on competition." *Cont'l T.V.*, 433 U.S. at 57-58 (internal quotation marks omitted). But the relevant "agreement in restraint of trade" in this case is not Apple's vertical Contracts with the Publisher Defendants (which might well, if challenged, have to be evaluated under the rule of reason); it is the horizontal agreement that Apple organized among the Publisher Defendants to raise ebook prices. As explained below, horizontal agreements with the purpose and effect of raising prices are *per se* unreasonable because they pose a "threat to the central nervous system of the economy," *United States v. Socony-Vacuum Oil Co.*, 310 U.S.

150, 224 n.59 (1940); that threat is just as significant when a vertical market participant organizes the conspiracy. Indeed, as the dissent notes, the Publisher Defendants' coordination to fix prices is uncontested on appeal. *See* Dissenting Op. at 23. The competitive effects of that *same restraint* are no different merely because a different conspirator is the defendant.

Accordingly, when the Supreme Court has applied the rule of reason to vertical agreements, it has explicitly distinguished situations in which a vertical player organizes a horizontal cartel. For instance, in *Business Electronics Corp. v. Sharp Electronics Corp.*, the Court concluded that an agreement "between a manufacturer and a dealer to terminate" another dealer is a "vertical nonprice restraint" that should be evaluated under the rule of reason. 485 U.S. 717, 726 (1988). The Court distinguished *General Motors* and *Klor's* on the grounds that "both cases involved horizontal combinations," *id.* at 734, and noted that "a facially vertical restraint imposed by a manufacturer only because it has been coerced by a 'horizontal carte[l]' . . . is in reality a horizontal restraint," *id.* at 730 n.4 (alteration in original). More recently, in *NYNEX Corp. v. Discon, Inc.*, the Court ruled that "a buyer's decision to buy from one seller rather than another" is subject to analysis under the rule of reason. 525 U.S. 128, 130 (1998). In

arriving at this conclusion, the Court took care to distinguish, rather than overturn, *Klor's*, noting that *per se* liability was appropriate for the organizer of the conspiracy in that case because the agreement at issue was not "simply a 'vertical' agreement between supplier and customer, but [also] a 'horizontal' agreement among competitors." *Id.* at 136 (citing *Bus. Elecs. Corp.*, 485 U.S. at 734).

The Court's decision in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, is no different. 551 U.S. 877 (2007). In *Leegin*, a leather manufacturer entered into separate agreements with each of its retailers, which required them to sell its goods at certain prices. The plaintiff — a retailer who refused to comply with the requirement — argued that these resale price maintenance agreements constituted *per se* violations of the Sherman Act. The Supreme Court disagreed, concluding that "vertical price restraints are to be judged by the rule of reason." *Id.* at 882. Its analysis was careful to distinguish between vertical restraints and horizontal ones. Vertical price restraints are unfit for the *per se* rule because they can be used to encourage retailers to invest in promoting a product by ensuring that other retailers will not undercut their prices for that good. *See id.* at 890-92. However, vertical price restraints can also be used to organize horizontal cartels

to increase prices, which are, "and ought to be, *per se* unlawful." *Id.* at 893. When used for such a purpose, the vertical agreement may be "useful evidence . . . to prove the existence of a horizontal cartel." *Id.*; *see also* VI Areeda & Hovenkamp, *supra*, ¶ 1402c. The Court made clear that it was addressing only the lawfulness of the manufacturer's vertical agreements and not the plaintiff's claim that the manufacturer also "participated in an unlawful horizontal cartel with competing retailers." *Id.* at 907-08; *see also PSKS, Inc. v. Leegin Creative Leather Prods., Inc.*, 615 F.3d 412 (5th Cir. 2010) (considering plaintiff's "hub-and-spoke" theory on remand).

Our dissenting colleague suggests that *Leegin* also "rejected *per se* liability for hub-and-spokes agreements." Dissenting Op. at 18. This position relies on a single sentence from the opinion's analysis of how vertical resale price restraints can harm competition, which states that, if a "vertical agreement setting minimum resale prices is entered upon to facilitate" a horizontal cartel, it "would need to be held unlawful under the rule of reason." *Leegin*, 551 U.S. at 893. If the Supreme Court meant to overturn *General Motors* and *Klor's* — precedents that it has consistently reaffirmed — this cryptic sentence was certainly an odd way to accomplish that result. The Supreme Court "does not normally overturn, or so

dramatically limit, earlier authority *sub silentio*." *Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 18 (2000); *see also, e.g., Nestor v. Pratt & Whitney*, 466 F.3d 65, 72 n.8 (2d Cir. 2006) ("It is not within our purview to anticipate whether the Supreme Court may one day overrule its existing precedent." (quoting *United States v. Santiago*, 268 F.3d 151, 155 n.6 (2d Cir. 2001) (internal quotation marks omitted))).

We need not worry about the possibility that *Leegin* covertly changed the law governing hub-and-spoke conspiracies, however, because the passage relied upon by the dissent is entirely consistent with holding the "hub" in such a conspiracy liable for the horizontal agreement that it joins. A horizontal conspiracy can use vertical agreements to facilitate coordination without the other parties to those agreements knowing about, or agreeing to, the horizontal conspiracy's goals. For example, a cartel of manufacturers could ensure compliance with a scheme to fix prices by having every member "require its dealers to adhere to specified resale prices." VIII Areeda & Hovenkamp, *supra*, ¶ 1606b. Because it may be difficult to distinguish such facilitating practices from procompetitive vertical resale price agreements, the quoted passage from *Leegin* notes that those "vertical agreement[s] . . . would need to be held unlawful under

the rule of reason." 551 U.S. at 893. But there is no such possibility for confusion in the hub-and-spoke context, where the vertical organizer has not only committed to vertical agreements, but has also agreed to participate in the horizontal conspiracy. In that situation, the court need not consider whether the vertical agreements restrained trade because all participants agreed to the horizontal restraint, which is "and ought to be, *per se* unlawful." *Id.*[20]

In short, the relevant "agreement in restraint of trade" in this case is the price-fixing conspiracy identified by the district court, not Apple's vertical contracts with the Publisher Defendants. How the law might treat Apple's vertical agreements in the absence of a finding that Apple agreed to create the

---

[20] Since *Leegin*, the Sixth Circuit has acknowledged that plaintiffs can "establish[] a *per se* violation [of the Sherman Act] under the hub and spoke theory." *Total Benefits Planning Agency, Inc. v. Anthem Blue Cross & Blue Shield*, 552 F.3d 430, 435 n.3 (6th Cir. 2008). To the extent that the Third Circuit decided otherwise in *Toledo Mack Sales & Serv., Inc. v. Mack Trucks, Inc.*, 530 F.3d 204, 225 (3d Cir. 2008), its more recent opinions cast doubt on that decision. In *In re Insurance Brokerage Antitrust Litigation*, for example, the court noted that "hub-and-spoke conspiracies" have "a long history in antitrust jurisprudence," and cited *Total Benefits* for the position that "[t]he critical issue for establishing a *per se* violation with the hub and spoke system is how the spokes are connected to each other." 618 F.3d 300, 327 (3d Cir. 2010) (internal quotation marks omitted). The court also acknowledged that "[t]he anticompetitive danger inherent" in alleged horizontal collusion "is not necessarily mitigated by the fact that" a broker at a different level of the market structure "managed the details of each bid, nor by the likelihood that the horizontal collusion would not have occurred without the broker's involvement." *Id.* at 338. The panel in *Insurance Brokerage*, however, had no occasion to revisit *Toledo Mack* because the plaintiffs had failed to establish a horizontal agreement — the "rim" in the hub-and-spokes conspiracy. *Id.* at 362.

horizontal restraint is irrelevant. Instead, the question is whether the vertical organizer of a horizontal conspiracy designed to raise prices has agreed to a restraint that is any less anticompetitive than its co-conspirators, and can therefore escape *per se* liability. We think not. Even in light of this conclusion, however, we must address two additional arguments that Apple raises against application of the *per se* rule.

b. "Enterprise and Productivity"

Apple seeks refuge from the *per se* rule by invoking a line of cases in which courts have permitted defendants to introduce procompetitive justifications for horizontal price-fixing arrangements that would ordinarily be condemned *per se* if those agreements "when adopted could reasonably have been believed to promote 'enterprise and productivity.'" Apple Br. at 50 (quoting *In re Sulfuric Acid Antitrust Litig.*, 703 F.3d 1004, 1011 (7th Cir. 2012)) (internal quotation mark omitted). The decisions falling in this line are narrow, and they do not support Apple's position. In *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.* ("*BMI*"), the defendants were corporations formed by copyright owners to negotiate "blanket licenses" allowing licensees to perform any of the licensed works for a flat fee. 441 U.S. 1, 4-6 (1979). Although this scheme literally

amounted to "price fixing" by the defendants' members, the Court upheld it under the rule of reason because blanket licenses were the only way to eliminate the "prohibitive" cost of each copyright owner's individually negotiating licenses, monitoring licensees' use of their work, and enforcing the licenses' terms. *Id.* at 20-21. In *National Collegiate Athletic Ass'n v. Board of Regents of the University of Oklahoma ("NCAA")*, the Court relied on *BMI* in applying the rule of reason to (but ultimately striking down) restrictions placed by the National Collegiate Athletic Association ("NCAA") on the number of football games that its members could agree with television networks to broadcast. 468 U.S. 85, 103 (1984). Many of the NCAA's restrictions on its members were "essential if the product [amateur athletics] is to be available at all," so a "fair evaluation" of the broadcast restrictions' "competitive character require[d] consideration of the NCAA's justifications for the restraints." *Id.* at 101, 103.

The Supreme Court has characterized these decisions as limited to situations where the "restraints on competition are essential if the product is to be available at all." *Am. Needle, Inc. v. Nat'l Football League*, 560 U.S. 183, 203 (2010) (quoting *NCAA*, 468 U.S. at 101) (internal quotation marks omitted). But even if read broadly, these cases, and others in this category, apply the rule of

reason only when the restraint at issue was imposed in connection with some kind of potentially efficient joint venture. XI Areeda & Hovenkamp, *supra*, ¶ 1908b; *see, e.g.*, *Sulfuric Acid*, 703 F.3d at 1013 (describing joint venture formed by defendants). Put differently, a participant in a price-fixing agreement may invoke only certain, limited *kinds* of "enterprise and productivity" to receive the rule of reason's advantages. As the Supreme Court has explained — including in *BMI* itself, *see* 441 U.S. at 8 & n.11 — the *per se* rule would lose all the benefits of being "*per se*" if conspirators could seek to justify their conduct on the basis of its purported competitive benefits in every case. Here, there was no joint venture or other similar productive relationship between any of the participants in the conspiracy that Apple joined. Apple also does not claim, nor could it, that creating an ebook retail market is possible only if the participating publishers coordinate with one another on price.

c. Price-Fixing Conspiracy

As noted, the Supreme Court has for nearly 100 years held that horizontal collusion to raise prices is the "archetypal example" of a *per se* unlawful restraint of trade. *Catalano*, 446 U.S. at 647. If successful, these conspiracies concentrate the power to set prices among the conspirators, including the "power to control

the market and to fix arbitrary and unreasonable prices." *United States v. Trenton Potteries Co.*, 273 U.S. 392, 397 (1927). And even if unsuccessful or "not . . . aimed at complete elimination of price competition," the conspiracies pose a "threat to the central nervous system of the economy" by creating a dangerously attractive opportunity for competitors to enhance their power at the expense of others. *Socony-Vacuum Oil*, 310 U.S. at 224 n.59 (1940). Thus:

> [P]rice-fixing cartels are condemned per se because the conduct is tempting to businessmen but very dangerous to society. The conceivable social benefits are few in principle, small in magnitude, speculative in occurrence, and always premised on the existence of price-fixing power which is likely to be exercised adversely to the public. . . . And even if power is usually established while any defenses are not, litigation will be complicated, condemnation delayed, would be price-fixers encouraged to hope for escape, and criminal punishment less justified. Deterrence of a generally pernicious practice would be weakened.

Trial Lawyers Ass'n, 493 U.S. at 434 n.16 (quoting 7 Philip Areeda, *Antitrust Law* ¶ 1509, at 412-13 (1986)).

Apple and its amici argue that the horizontal agreement among the publishers was not actually a "price-fixing" conspiracy that deserves *per se* treatment in the first place. But it is well established that *per se* condemnation is not limited to agreements that literally set or restrict prices. Instead, any conspiracy "formed for the purpose and with the effect of raising, depressing,

fixing, pegging, or stabilizing the price of a commodity . . . is illegal per se," and the precise "machinery employed . . . is immaterial." *Socony-Vacuum Oil*, 310 U.S. at 223; *see also Catalano*, 446 U.S. at 647-48 (collecting cases); XII Areeda & Hovenkamp, *supra*, ¶ 2022a, d. The conspiracy among Apple and the Publisher Defendants comfortably qualifies as a horizontal price-fixing conspiracy.

As we have already explained, the Publisher Defendants' primary objective in expressly colluding to shift the entire ebook industry to an agency model (with Apple's help) was to eliminate Amazon's $9.99 pricing for new releases and bestsellers, which the publishers believed threatened their short-term ability to sell hardcovers at higher prices and the long-term consumer perception of the price of a new book. They had grown accustomed to a business in which they rarely competed with one another on price and could, at least partially, control the price of new releases and bestsellers by releasing hardcover copies before paperbacks. Amazon, and the ebook, upset that model, and reduced prices to consumers by eliminating the need to print, store, and ship physical volumes. Its $9.99 price point for new releases and bestsellers represented a small loss on a small percentage of its sales designed to encourage consumers to adopt the new technology.

Faced with downward pressure on prices but unconvinced that withholding books from Amazon was a viable strategy, the Publisher Defendants — their coordination orchestrated by Apple — combined forces to grab control over price. Collectively, the Publisher Defendants accounted for 48.8% of ebook sales in 2010. J.A. 1571. Once organized, they had sufficient clout to demand control over pricing, in the form of agency agreements, from Amazon and other ebook distributors. This control over pricing facilitated their ultimate goal of raising ebook prices to the price caps. *See* VIII Areeda & Hovenkamp, *supra*, ¶ 1606b ("Even when specific prices are not agreed upon, an express horizontal agreement that each manufacturer will use resale price maintenance or other distribution restraints should be illegal. Its only business function is to facilitate price coordination among manufacturers."). In other words, the Publisher Defendants took by collusion what they could not win by competition. And Apple used the publishers' frustration with Amazon's $9.99 pricing as a bargaining chip in its negotiations and structured its Contracts to coordinate their push to raise prices throughout the industry. A coordinated effort to raise prices across the relevant market was present in every chapter of this story.

This conspiracy to raise prices also had its intended effect. Immediately after the Publisher Defendants switched Amazon to an agency model, they increased the Kindle prices of 85.7% of their new releases and 96.8% of their *New York Times* bestsellers to within 1% of the Apple price caps. They also increased the prices of their other ebook offerings. Within two weeks of the move to agency, the weighted average price of the Publisher Defendants' ebooks — which accounted for just under half of all ebook sales in 2010 — had increased by 18.6%, while the prices for Random House and other publishers remained relatively stable.

This sudden increase in prices reduced ebook sales by the Publisher Defendants and proved to be durable. One analysis compared two-week periods before and after the Publisher Defendants took control over pricing and found that they sold 12.9% fewer ebooks after the switch. Another expert for Plaintiffs conducted a regression analysis, which showed that, over a six-month period following the switch, the Publisher Defendants sold 14.5% fewer ebooks than they would have had the price increases not occurred. Nonetheless, ebook prices for the Publisher Defendants over those six months, controlling for other factors, remained 16.8% higher than before the switch. And even Apple's expert

produced a chart showing that the Publisher Defendants' prices for new releases, bestsellers, and other offerings remained elevated a full two years after they took control over pricing.

Apple points out that, in the two years following the conspiracy, prices across the ebook market as a whole fell slightly and total output increased. However, when the agreement at issue involves price fixing, the Supreme Court has consistently held that courts need not even conduct an extensive analysis of "market power" or a "detailed market analysis" to demonstrate its anticompetitive character. *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 460 (1986); *see also Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 692-93 (1978). The district court's assessment of Apple's and the Publisher Defendants' motives, coupled with the unambiguous increase in the prices of their ebooks, was sufficient to confirm that price fixing was the goal, and the result, of the conspiracy. *See Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 779-80 (1999).

Moreover, Apple's evidence regarding long-term growth and prices in the ebook industry is not inconsistent with the conclusion that the price-fixing conspiracy succeeded in actually raising prices. The popularization of ebooks fundamentally altered the publishing industry by eliminating many of the

marginal costs associated with selling books. When Apple launched the iBookstore just two years after Amazon introduced the Kindle, the ebook market was *already* experiencing rapid growth and falling prices, and those trends were expected to continue. J.A. 1630, 1647. The district court found that the Publisher Defendants' collective move to retake control of prices — and to eliminate Amazon's $9.99 price point for new releases and *New York Times* bestsellers — tapped the brakes on those trends, causing prices to rise across their offerings and slowing their sales growth relative to other publishers.[21] No court can presume to know the proper price of an ebook, but the long judicial experience applying the Sherman Act has shown that "[a]ny combination which tampers with price structures . . . would be directly interfering with the free play of market forces." *Socony-Vacuum Oil*, 310 U.S. at 221; *see also Arizona v. Maricopa Cnty. Med. Soc'y*, 457 U.S. 332, 346 (1982). By setting new, durable prices through

[21] Significantly, the Publisher Defendants are all major producers of new releases and *New York Times* bestsellers, and they collectively increased prices in those categories. Those prices remained high notwithstanding the influx of new publishers and low-cost ebooks, to the detriment of consumers interested in that segment of the market. *See 42nd Parallel N. v. E St. Denim Co.*, 286 F.3d 401, 405-06 (7th Cir. 2002) ("The key inquiry in a market power analysis is whether the defendant has the ability to raise prices without losing its business." (internal quotation marks omitted)); *K.M.B. Warehouse Distribs., Inc. v. Walker Mfg. Co.*, 61 F.3d 123, 128-29 (2d Cir. 1995); *cf.* U.S. Dep't of Justice & Fed. Trade Comm'n, *Horizontal Merger Guidelines* § 6.1 (2010) (noting that, "[i]n differentiated product industries, some products can be very close substitutes . . . while other products are more distant substitutes").

collusion rather than competition, Apple and the Publisher Defendants imposed their view of proper pricing, supplanting the market's free play. This evidence, viewed in conjunction with the district court's findings as to and analysis of the conspiracy's history and purpose, is sufficient to support the conclusion that the agreement to raise ebook prices was a *per se* unlawful price-fixing conspiracy.

2. Rule of Reason

As explained above, neither Apple nor the dissent has presented any particularly strong reason to think that the conspiracy we have identified should be spared *per se* condemnation. My concurring colleague would therefore affirm the district court's decision on that basis alone. I, too, believe that *per se* condemnation is appropriate in this case and view Apple's sloganeering references to "innovation" as a distraction from the straightforward nature of the conspiracy proven at trial. Nonetheless, I am mindful of Apple's argument that the nascent ebook industry has some new and unusual features and that the *per se* rule is not fit for "business relationships where the economic impact of certain practices is not immediately obvious." *Leegin*, 551 U.S. at 887 (internal quotation marks omitted); *accord Major League Baseball Props., Inc. v. Salvino, Inc.*, 542 F.3d 290, 316 (2d Cir. 2008) ("*Per se* treatment is not appropriate . . . where the

economic and competitive effects of the challenged practice are unclear."); *Sulfuric Acid*, 703 F.3d at 1011 ("It is a bad idea to subject a novel way of doing business . . . to per se treatment under antitrust law."). I therefore assume, for the sake of argument, that it is appropriate to apply the rule of reason and to analyze the competitive effects of Apple's horizontal agreement with the Publisher Defendants.

Notably, however, the ample evidence here concerning the purpose and effects of Apple's agreement with the Publisher Defendants affects the scope of the rule-of-reason analysis called for in this case. Under a prototypically robust rule-of-reason analysis, the plaintiff must demonstrate an "*actual* adverse effect" on competition in the relevant market before the "burden shifts to the defendants to offer evidence of the pro-competitive effects of their agreement." *Geneva Pharms. Tech. Corp. v. Barr Labs. Inc.*, 386 F.3d 485, 506-07 (2d Cir. 2004) (internal quotation marks omitted). The factfinder then weighs the competing evidence "to determine if the effects of the challenged restraint tend to promote or destroy competition." *Id.* at 507. But not every case that requires rule of reason analysis "is a candidate for plenary market examination." *Cal. Dental Ass'n*, 526 U.S. at

779. "What is required, rather, is an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint." *Id.* at 781.

To that end, the Supreme Court has applied an abbreviated version of the rule of reason — otherwise known as "quick look" review — to agreements whose anticompetitive effects are easily ascertained. *See id.* at 779. This "quick look" effectively relieves the plaintiff of its burden of providing a robust market analysis, *see id.*, by shifting the inquiry directly to a consideration of the defendant's procompetitive justifications. *See* XI Areeda & Hovenkamp, *supra*, ¶ 1914d ("[W]hen the restraint appears 'on its face' to be one that tends to . . . increase price," an abbreviated rule-of-reason analysis "operates to shift the burden of proof rather than to cut off the inquiry, as is usually true in a per se case."). Thus, in *NCAA*, the Supreme Court refrained from applying the *per se* rule to the challenged television broadcast restrictions, but it did not require an "elaborate industry analysis . . . to demonstrate [their] anticompetitive character." 468 U.S. at 109 (internal quotation marks omitted). And in *Indiana Federation of Dentists*, the Court did not apply the *per se* rule to a group boycott when, in the relevant market, the economic impact was "not immediately obvious," but it nonetheless dispensed with a full analysis of the agreement's

anticompetitive character. 476 U.S. at 459; *see also Major League Baseball*, 542 F.3d at 317; *United States v. Brown Univ.*, 5 F.3d 658, 669 (3d Cir. 1993).

Here, the same evidence supporting our determination that *per se* condemnation is the correct way to dispose of this appeal also supports at most a "quick look" inquiry under the rule of reason. Contrary to the dissent's suggestion, this approach does not somehow "taint" the rule-of-reason analysis. The dissent concedes that the conscious object of Apple's signing its Contracts with the Publisher Defendants was to organize a horizontal conspiracy among them to raise consumer-facing ebook prices. *See* Dissenting Op. at 26 (noting that "price increases" were "the expected result" of the defendants' agreement). It is unsurprising in these circumstances that we are easily able to discern the anticompetitive effects of that horizontal conspiracy. A quick-look approach operates only to shift the rule-of-reason analysis directly to Apple's procompetitive justifications for organizing the conspiracy; I do not give those defenses any shorter shrift than I otherwise would under a more robust analysis. My rejection of Apple's defenses thus has nothing to do with my application of the quick-look approach and everything to do with how unpersuasive those defenses are.

a. Market Entry

Apple's initial argument that its agreement with the Publisher Defendants was procompetitive (an argument presented principally in an amicus brief adopted wholeheartedly by the dissent) is that by eliminating Amazon's $9.99 price point, the agreement enabled Apple and other ebook retailers to enter the market and challenge Amazon's dominance. But this defense — that higher prices enable more competitors to enter a market — is no justification for a horizontal price-fixing conspiracy. As the Supreme Court has cogently explained:

> [I]n 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.

Catalano, 446 U.S. at 649.

Nor does this argument become stronger when it is asserted, as here, that a horizontal cartel at one level of the market promoted market entry at another, enhancing competition. My dissenting colleague's view that "deconcentrating,"

Dissenting Op. at 27, Amazon's share of retail ebook sales justifies *concentrating* power over pricing in the hands of the Publisher Defendants reflects a basic misunderstanding of the nature of the competition that antitrust law protects. New entrants to a market are desirable to the extent that consumers would choose to buy their products at the price offered. When a market is concentrated and an incumbent firm is charging supracompetitive prices, a new entrant can benefit consumers by undercutting the incumbent's prices, thus offering better value for the same goods. Dominant firms who want to deter competition — so that they can keep charging supracompetitive prices — may erect barriers to entry to keep these new competitors out, and the dissent is quite right that these barriers are generally undesirable.

Market dominance may, however, arise "as a consequence of a superior product, business acumen, or historic accident," and is "not only not unlawful; it is an important element of the free market system." *Trinko*, 540 U.S. at 407 (internal quotation marks omitted). The ability to provide goods at particularly low prices is one way that a firm can gain such an edge in the marketplace. Competitors are, of course, entitled to challenge dominant firms by offering, among other things, superior products and lower prices. But success is not

guaranteed. A dominant firm charging low prices may have proven itself more efficient than its competitors, such that a potential new entrant's inability to earn a profit would result not from any artificial "barriers to entry," but rather from the fact that, in light of the value proposition offered by the dominant firm, consumers would not choose to buy the new entrant's products at the price it is willing and able to offer. *See* Einer Elhauge, *United States Antitrust Law and Economics* 2 (2d ed. 2011) ("If a firm makes a better mousetrap, and the world beats a path to its door, it may drive out all rivals and establish a monopoly; but that is a good result, not a bad one.").

From this perspective, the dissent's contention that Apple could not have entered the ebook retail market without the price-fixing conspiracy, because it could not have profited either by charging more than Amazon or by following Amazon's pricing, is a complete non sequitur. The posited dilemma is the whole point of competition: if Apple could not turn a profit by selling new releases and bestsellers at $9.99, or if it could not make the iBookstore and iPad so attractive that consumers would pay *more* than $9.99 to buy and read those ebooks on its platform, then there was no place for its platform in the ebook retail market. Neither the district court nor Plaintiffs had an obligation to identify a "viable

alternative" for Apple's profitable entry because Apple had no entitlement to enter the market on its preferred terms. Dissenting Op. at 35.

Although low prices that deter new entry may simply reflect the dominant firm's efficiency, it is true that below-cost pricing can, under certain circumstances, be anticompetitive. The dissent suggests that Amazon's pricing gave it an unfair advantage, so that even if Apple had priced ebooks at an efficient level (whatever that might have been), it still would not have been able to enter the market on a profitable basis. But Amazon was taking a risk by engaging in loss-leader pricing, losing money on some sales in order to encourage readers to adopt the Kindle. "That below-cost pricing may impose painful losses on its target is of no moment to the antitrust laws if competition is not injured: It is axiomatic that the antitrust laws were passed for 'the protection of *competition*, not *competitors*.'" *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 224 (1993) (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962)). Because lower prices improve consumer welfare (all else being equal), below-cost pricing is unlawfully anticompetitive only if there is a "dangerous probability" that the firm engaging in it will later recoup its losses by raising prices to monopoly levels after driving its rivals out of the market. *Id.* If

Apple and the Publisher Defendants thought that Amazon's conduct was truly anticompetitive under this standard, they could have sued under § 2 of the Sherman Act. (Whether DOJ would have pursued its own enforcement action is of unclear relevance given the availability of a private remedy.) Failing that, Amazon's pricing was part of the competitive landscape that competing ebook retailers had to accept.[22]

Instead, the dissent invites conduct that is strictly prohibited by the Sherman Act — horizontal collusion to fix prices — to cure a perceived abuse of market power. Whatever its merit in the abstract, that preference for collusion over dominance is wholly foreign to antitrust law. *See Trinko*, 540 U.S. at 408 (referring to collusion as the "supreme evil of antitrust"). Because of the long-term threat to competition, the Sherman Act does not authorize horizontal price conspiracies as a form of marketplace vigilantism to eliminate perceived "ruinous competition" or other "competitive evils." *Maricopa Cnty. Med. Soc'y*, 457 U.S. at 346 (quoting *Socony-Vacuum Oil*, 310 U.S. at 221). Indeed, the attempt to justify a conspiracy to raise prices "on the basis of the potential threat that

[22] While the dissent accuses us of supposing that "competition should be genteel, lawyer-designed, and fair under sporting rules," Dissenting Op. at 5, it is the dissent's position that would have ebook consumers subsidize Apple's entry into the market by paying more for ebooks so that Apple would not have to compete on price.

competition poses . . . is nothing less than a frontal assault on the basic policy of the Sherman Act." *Nat'l Soc'y of Prof'l Eng'rs*, 435 U.S. at 695. And it is particularly ironic that the "terms" that Apple was able to insist upon by organizing a cartel of Publisher Defendants to move against Amazon — namely, the elimination of retail price competition — accomplished the precise opposite of what new entrants to concentrated markets are ordinarily supposed to provide. In short, Apple and the dissent err first in equating a symptom (a single-retailer market) with a disease (a lack of competition), and then err again by prescribing the disease itself as the cure.

The dissent's "frontal assault" on competition law is not only wrong as a legal matter for all the reasons just given; it is also, despite its professed fidelity to the district court's view of the facts, premised on various mischaracterizations of the record. Put simply, it is far from clear that either Apple itself or other ebook retailers could not have entered the ebook retail market without Apple's efforts with the Publisher Defendants to eliminate price competition. As the district court noted, "[Apple] did not attempt to argue or show at trial that the price of admission to new markets must be or is participation in illegal price-fixing schemes" and did not "suggest[] that the only way it could have entered

the e-book market was to agree with the Publisher Defendants to raise e-book prices." *Apple*, 952 F. Supp. 2d at 708.

The district court's statement that Apple feared "losing money if it tried or was forced to match Amazon's pricing," *Id.* at 658 — the peg on which the dissent largely hangs its argument — is hardly a conclusive finding that Apple would have lost money had it entered a market that featured retail price competition. Barnes & Noble, for its part, had chosen to enter and stay in the market in the face of Amazon's pricing. Google, too, had plans to enter the ebook market before Apple launched the iBookstore. Moreover, the district court never found that Apple could not have entered the market on a wholesale model while charging *more* than Amazon for new releases and bestsellers. To fill this hole in its theory, the dissent suggests that Apple would have "impair[ed] its brand" by charging more than Amazon. Dissenting Op. at 34 (internal quotation marks omitted). But putting aside the fact that Apple's perception of its brand value is irrelevant — does the dissent really think it is desirable to require more efficient competitors to charge the same as their less efficient rivals solely so the latter will be spared the indignity of not charging the best price? — the district court actually found that Apple believed it would have been "unrealistic[]" to

charge more than its *price caps* after switching to an agency model, *Apple*, 952 F. Supp. 2d at 692, a finding that says nothing about what Apple would have been willing to charge under a wholesale model.

The record makes clear the flaws in the dissent's argument. When Cue was still contemplating a wholesale model, his objective was not for Apple's pricing to match Amazon's precisely, but rather for that pricing to be "generally competitive." J.A. 1758. And had Apple opted to compete on both price and platform but concluded that it could not match Amazon's $9.99 pricing, some consumers might well have paid somewhat more to read new releases and bestsellers on the iPad, a revolutionary ereader boasting many more features than the Kindle.[23] The iPad was coming to market with or without a price-fixing

---

[23] A prediction that consumers would have paid more to read ebooks on the iPad than on the Kindle because of the iPad's improved reading experience or other attractive features does not somehow suggest that ebooks are "Veblen goods [or] Giffen goods." Dissenting Op. at 33 n.7. The dissent also suggests that Apple could not have depended on the iPad's hardware advantages as part of a strategy to charge more than Amazon because antitrust law would have required it to open up the iPad to a Kindle app. *Id.* at 34. But for a unilateral refusal to deal to be unlawful, the defendant must have monopoly power, which Apple plainly did not. *See, e.g., United States v. Microsoft Corp.*, 253 F.3d 34, 51 (D.C. Cir. 2001) (en banc) ("While merely possessing monopoly power is not itself an antitrust violation, it is a necessary element of a monopolization charge." (citation omitted)); Elhauge, *supra*, at 268 ("A firm that lacks dominant market power . . . can unilaterally choose with whom they deal without fear of antitrust liability."); *see also Trinko*, 540 U.S. at 408 ("Under certain circumstances, a refusal to cooperate with rivals can constitute anticompetitive conduct and violate § 2. We have been very cautious in recognizing such exceptions, because of the uncertain virtue of

conspiracy, and some iPad owners who wanted to read ebooks surely would not have wanted to buy a separate Kindle solely to benefit from Amazon's $9.99 pricing for new releases and bestsellers. (Whether Apple would have viewed its profits under that scenario as large enough to justify entry is not an antitrust concern.)

In actuality, the district court's fact-finding illustrates that Apple organized the Publisher Defendants' price-fixing conspiracy not because it was a necessary precondition to market entry, but because it was a convenient bargaining chip. Apple was operating under a looming deadline and recognized that, by aligning its interests with those of the Publisher Defendants and offering them a way to raise prices across the ebook market, it could gain quick entry into the market on extremely favorable terms, including the elimination of retail price competition from Amazon. But the offer to orchestrate a horizontal conspiracy to raise prices is not a legitimate way to sweeten a deal.

The facts also do not support the conclusion that Amazon's market position would have discouraged other ebook retailers from entering the market absent the price-fixing conspiracy orchestrated by Apple. Amazon popularized

---

forced sharing and the difficulty of identifying and remedying anticompetitive conduct by a single firm.").

ebooks with the launch of the Kindle in late 2007, and enjoyed a strong market position because of its innovation. *Cf. Trinko*, 540 U.S. at 407 (noting that the opportunity to gain market power "induces risk taking that produces innovation and economic growth"). Barnes & Noble was Amazon's first major competitor, and when it entered the market — on a wholesale model — with the introduction of the Nook in 2009, it began to erode Amazon's market share. The iPad itself also promised to introduce more competition with or without Apple's iBookstore by providing a platform for companies to build ebook marketplaces without investing in tablet development. These new entrants gave publishers more leverage to negotiate for alternative sales models or different pricing. Indeed, publishers were already in separate discussions about an agency model with Barnes & Noble before Apple offered a way to swap the rigors of competition for the comfort of collusion.

To summarize, the district court made no finding that a horizontal conspiracy to eliminate price competition in the ebook retail market was necessary to bring more retailers into the market to challenge Amazon, nor does the record evidence support this conclusion. More importantly, even if there *were* such evidence, the fact that a competitor's entry into the market is

contingent on a horizontal conspiracy to raise prices only means (absent monopolistic conduct by the market's dominant firm, which cannot lawfully be challenged by collusion) that the competitor is inefficient, *i.e.*, that its entry will not enhance consumer welfare. For these reasons, I would reject the argument that Apple's entry into the market represented an important procompetitive benefit of the horizontal price-fixing conspiracy it orchestrated.

b. Other Justifications

Apart from its and other retailers' entry into the market, Apple points to other purported procompetitive benefits of its agreement with the Publisher Defendants, namely, eventual price decreases in the ebook industry and the various technological innovations embedded in the iPad. The district court correctly concluded that Apple failed to establish a connection between these benefits and the conspiracy among Apple and the Publisher Defendants. *Apple*, 952 F. Supp. 2d at 694; *see NCAA*, 468 U.S. at 113-15 (concluding that the need to coordinate to produce intercollegiate athletics was not related to coordination on television rights); XI Areeda & Hovenkamp, *supra*, ¶ 1908b.

While it may be true that ebook prices eventually declined industry-wide, new publishers were adopting the digital format and prices were falling even

before Apple's entry into the market. Apple did not introduce any admissible evidence linking the continued influx of new titles into the ebook market to its agreement with the Publisher Defendants.[24] Nor did it provide an explanation for how this price-fixing agreement altered the business and pricing decisions of other publishers in a procompetitive direction. The district court's refusal to give Apple credit for these trends was therefore proper.

The technological innovations embedded in the iPad are similarly unrelated to Apple's agreement with the Publisher Defendants. The iPad's backlit touchscreen, audio and video capabilities, and ability to offer consumers a number of services on a single device revolutionized tablet computing. But, as

---

[24] Apple sought to introduce expert testimony from Dr. Michelle Burtis, which it believed would link continued long-term growth and price changes to its launch of the iBookstore. However, the district court excluded this testimony on the grounds that Dr. Burtis "did not offer any scientifically sound analysis of the cause for this purported price decline or seek to control for the factors that may have led to it." *Apple*, 952 F. Supp. 2d at 694 n.61. This was no abuse of discretion. *See Zerega Ave. Realty*, 571 F.3d at 212-13. "[T]he proponent of expert testimony has the burden of establishing by a preponderance of the evidence" that the expert's opinion is based on sufficient facts, is the product of reliable principles and methods, and applies those principles and methods reliably to the facts at hand. *United States v. Williams*, 506 F.3d 151, 160 (2d Cir. 2007); *see* Fed. R. Evid. 702. Dr. Burtis merely compared the average ebook prices from the two years before Apple's entry into the market with the average prices two years after. She did not account for the rapid growth and change in that industry or explain the process she used to determine whether Apple's agency agreements were responsible for lower prices. *See Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997); *United States v. Dukagjini*, 326 F.3d 45, 54 (2d Cir. 2003). The district court therefore acted well within its discretion in excluding Dr. Burtis's testimony.

Apple's witnesses testified, the company had every intention of bringing the iPad to market with or without the iBookstore. Moreover, Apple was not the only entity that could use the iPad's new features to enhance the ebook experience—other retailers, or the publishers themselves, could have designed and launched ebook applications on the platform. The district court was correct not to score these hardware innovations as procompetitive benefits of the agreement between Apple and the Publisher Defendants to raise prices.

Accordingly, I agree with the district court's decision that, under the rule of reason, the horizontal agreement to raise consumer-facing ebook prices that Apple orchestrated unreasonably restrained trade. But given the clear applicability of the *per se* rule in this context, the analysis here is largely offered in response to the dissent. I also confidently join with my concurring colleague in affirming the district court's conclusion that Apple committed a *per se* violation of § 1 of the Sherman Act.

III. The Injunctive Order

Next, Apple and two of the Publisher Defendants — Macmillan and Simon & Schuster — challenge specific portions of the district court's September 5, 2013 injunctive order. In particular, Macmillan and Simon & Schuster ask us to vacate

the provision which prohibits Apple, for a period of time, from entering agreements with the Publisher Defendants that restrict its ability to set ebook prices. S.P.A. 205. Apple separately seeks vacatur of a provision requiring it to apply the same terms and conditions to ebook applications in its App Store as it does to other applications, and of the district court's decision to appoint a compliance monitor. We address each of the parties' arguments in turn.

A. Macmillan and Simon & Schuster

In the September 5, 2013 injunctive order, the district court mandated that "Apple shall not enter into or maintain 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." S.P.A. 205. This prohibition began upon entry of the order and expires at different times for each of the Publisher Defendants. The earliest expiration date lifts the ban for agreements between Apple and Hachette beginning 24 months after entry of the injunctive order. Expiration dates for agreements with each of the other Publisher Defendants are then set in six-month intervals, with Simon & Schuster's ban expiring 36 months after entry of the final judgment and Macmillan's ban ending after 48 months.

Macmillan and Simon & Schuster seek vacatur of this prohibition. Both publishers are subject to separate consent decrees, which prohibit them from signing agreements with *any* ebook retailers which restrict the retailer's ability to "set, alter, or reduce" ebook prices, "or to offer price discounts." J.A. 1126; J.A. 1148. The prohibition lasts two years for Simon & Schuster and 23 months for Macmillan. According to both Publisher Defendants, the district court's injunctive order against Apple, in light of these consent decrees, is unlawful for two reasons. First, they contend that the injunctive order impermissibly *modifies* their consent decrees by extending the time during which they cannot negotiate to restrict the price at which Apple sells ebooks.[25] Second, they argue that DOJ should have been judicially estopped from seeking a prohibition on agreements limiting Apple's discounting authority that lasts longer than two years because, in the filings in support of the consent decrees, it argued that two years was a sufficient amount of time to restore competition in the ebook market. Neither objection is persuasive.

---

[25] Macmillan also contends that the injunctive order broadens the restrictions imposed by its consent decree because the decree allows the company to set certain limits on price discounts, which it can no longer set for ebooks sold by Apple.

We begin with the argument that the injunctive order impermissibly amended the Publisher Defendants' consent decrees. Federal Rule of Civil Procedure 60(b) establishes the grounds for seeking "relief from a final judgment, order, or proceeding," Fed. R. Civ. P. 60(b), including modifications of consent decrees. *Rufo v. Inmates of Suffolk Cnty. Jail*, 502 U.S. 367, 378-79 (1992); *United States v. Eastman Kodak Co.*, 63 F.3d 95, 101 (2d Cir. 1995). The rule adopts a flexible approach, enumerating specific reasons for modification while also allowing alterations for "any other reason that justifies relief." Fed. R. Civ. P. 60(b). "[A] party seeking an alteration" under this catch-all provision bears the "burden of establishing that a significant change in circumstances warrants the modification." *United States v. Sec'y of Hous. & Urban Dev.*, 239 F.3d 211, 217 (2d Cir. 2001).

The Publisher Defendants' argument rests on the premise that the district court's injunctive order modified their consent decrees and therefore should have complied with Rule 60(b)'s requirements. The premise is incorrect. Macmillan's and Simon & Schuster's consent decrees prohibit them from restricting any retailer's authority to set prices. The injunctive order does not alter the terms of those decrees. Instead, it provides relief against a *different* party

by limiting Apple's authority to negotiate away its ability to set prices in agreements with any of the Publisher Defendants. The fact that the order also has the effect of preventing the Publisher Defendants from restricting Apple's pricing authority does not render it "[r]elief from a final judgment, order, or proceeding" requiring a motion under Rule 60(b). Fed. R. Civ. P. 60(b). A consent decree is "enforced as [an] order[]," but "construed largely as [a] contract[]." *SEC v. Citigroup Global Mkts., Inc.*, 752 F.3d 285, 297 (2d Cir. 2014) (internal quotation marks omitted). Its scope must be discerned within its "four corners, and not by reference to what might satisfy the purposes of one of the parties to it." *United States v. Armour & Co.*, 402 U.S. 673, 682 (1971); *see also Perez v. Danbury Hosp.*, 347 F.3d 419, 424 (2d Cir. 2003). An injunctive order against an entity that is not party to the consent decree and neither changes the terms of nor interprets the decree does not modify the contract and therefore does not require a Rule 60(b) motion. Indeed, as a practical matter, injunctions often alter the options available to other parties. Rule 60(b) does not hold district courts issuing injunctions to a higher standard simply because the injunction may affect rights addressed in a different party's consent decree.

Macmillan and Simon & Schuster's judicial estoppel argument fares no better. Judicial estoppel is "invoked by a court at its discretion," and is designed to "protect the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment." *New Hampshire v. Maine*, 532 U.S. 742, 749-50 (2001) (citation omitted) (internal quotation marks omitted). While the propriety of applying estoppel depends heavily on the "specific factual context[]" before the court, we typically consider whether the party's argument is "clearly inconsistent with its earlier position," whether the party "succeeded in persuading a court to accept" that earlier position, and whether the "party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped. *Id.* at 750-51 (internal quotation marks omitted); *see also Adelphia Recovery Trust v. Goldman, Sachs & Co.*, 748 F.3d 110, 116 (2d Cir. 2014). "[R]elief is granted only when the . . . impact on judicial integrity is certain." *Republic of Ecuador v. Chevron Corp.*, 638 F.3d 384, 397 (2d Cir. 2011) (internal quotation marks omitted).

We conclude that DOJ's arguments in support of the injunctive order were neither so clearly inconsistent with its earlier arguments nor so unfairly

detrimental to the Publisher Defendants as to warrant judicial estoppel. In support of the consent decrees, the Justice Department argued that a two-year ban on restricting retailers' abilities to set prices was sufficient to "allow movement in the marketplace away from collusive conditions." J.A. 1055. It then pushed for a longer, five-year restriction on agreements specifically with Apple. While facially inconsistent, we have emphasized the need to "carefully consider the contexts in which apparently contradictory statements are made to determine if there is, in fact, direct and irreconcilable contradiction." *Rodal v. Anesthesia Grp. of Onondaga, P.C.*, 369 F.3d 113, 119 (2d Cir. 2004). And here, context is particularly important. The consent decrees ban certain agreements between the Publisher Defendants and *any* retailers. The injunctive order, on the other hand, pertained only to the Publisher Defendants' agreements with Apple. Given the extensive factfinding at trial about the relationship that Apple developed with the Publisher Defendants and its willingness to coordinate their conspiracy, DOJ had a basis for distinguishing the length of the restrictions in the consent decrees from those in the injunctive order. This was not a case of a party reversing courses, to the detriment of the legal system, "simply because his interests have changed." *New Hampshire*, 532 U.S. at 749.

Furthermore, the district court did not approve the Justice Department's request for a five-year ban on all discounting restrictions between Apple and the Publisher Defendants. Instead, the injunctive order adopts an interval-based system, which prevents Apple from agreeing to limit its pricing authority for between 24 and 48 months depending on the Publisher Defendant. The district court imposed this interval system so "there would be no point in time when Apple would be renegotiating with all of the publisher defendants at once[, and] no one point in time when [a] publisher defendant[] could be assured that it was taking the same bargaining position as its peers vis-à-vis Apple." J.A. 2376. This independent rationale for the injunctive order ensures that DOJ's argument did not produce "inconsistent results" or compromise the integrity of the judicial process. *Simon v. Safelite Glass Corp.*, 128 F.3d 68, 72 (2d Cir. 1997).

B. Apple

Apple, like Macmillan and Simon & Schuster, objects to the portion of the injunctive order preventing it from agreeing to limit its pricing authority. In addition, the company asks us to vacate another provision, which requires it to "apply the same terms and conditions to the sale or distribution of an E-book App through Apple's App Store as [it] applies to all other apps sold or distributed through [the] App Store." S.P.A. 207. Apple contends that neither provision is necessary to protect the public.[26] We disagree.

---

[26] Apple also argues that the district court's decision to appoint a monitor to supervise the company's compliance with the injunction went beyond its powers under the Sherman Act and violated both Federal Rule of Civil Procedure 53 and separation-of-powers principles. Apple devoted only two conclusory sentences to these three separate facial challenges to the district court's authority. We therefore deem the arguments forfeited and do not consider them. *Frank v. United States*, 78 F.3d 815, 833 (2d Cir. 1996) ("Issues not sufficiently argued are in general deemed waived and will not be considered on appeal."), *vacated on other grounds*, 521 U.S. 1114 (1997); *Zhang v. Gonzales*, 426 F.3d 540, 545 n.7 (2d Cir. 2005). We also note that, following Rule 53's amendment in 2003, the Advisory Committee stated that "[r]eliance on a master" appointed under that Rule "is appropriate when a complex decree requires complex policing, particularly when a party has proved resistant or intransigent," and that both the Supreme Court and this Court have approved such appointments. Fed. R. Civ. P. 53 advisory committee's note (2003 Amendments) (citing *Local 38 of the Sheet Metal Workers' Int'l Ass'n v. E.E.O.C.*, 478 U.S. 421, 481-82 (1986)); *see also Republic of the Philippines v. N.Y. Land Co.*, 852 F.2d 33, 36-37 (2d Cir. 1988) (collecting cases). In light of this background, it would be inappropriate to excuse Apple's failure to argue and for this panel to entertain its facial challenges to the district court's authority on the scant briefing before us.

Judge Jacobs, who sat on a separate panel of this Court that considered an as-applied challenge to the monitor's conduct, contends that "the injunction warps the role

"A Government plaintiff, unlike a private plaintiff, must seek to obtain relief necessary to protect the public from *further* anticompetitive conduct and to redress anticompetitive harm." *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 170 (2004) (emphasis added). Thus, "[w]hen the purpose to restrain trade appears from a clear violation of law, it is not necessary that all untraveled roads to that end be left open and that only the worn one be closed." *Int'l Salt Co. v. United States*, 332 U.S. 392, 400 (1947), *abrogated on other grounds by Ill. Tool Works Inc. v. Independent Ink, Inc.*, 547 U.S. 28 (2006). The district court has "large discretion to model [its] judgments to fit the exigencies of the particular case," *id.*, and "all doubts" about the remedy are to be "resolved in [the Government's] favor," *United States v. E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 334 (1961).

The district court was well within its discretion to restrict Apple's ability to give up its pricing authority and to require that Apple treat ebook applications the same way that it treats other applications. Apple relinquished its authority to

---

of a neutral, court-appointed referee into that of an adversary party." Dissenting Op. at 36. Whatever the merits of this argument, it is not properly before us on this appeal. Here, Apple has asserted only (and without argumentation of any sort) that appointing a monitor, *in general*, violates the Sherman Act, Rule 53, and separation-of-powers principles. The dissent's position eschews that broad facial challenge and instead focuses on the conduct of the monitor in this *particular* case, drawing entirely on a record not before this panel, but presented to a *separate* panel in another appeal. *See United States v. Apple Inc.*, 2015 WL 3405534 (2d Cir. 2015). We do not believe it is proper to resolve this appeal with reference to arguments that Apple has failed to make.

set prices as part of its conspiracy with the Publisher Defendants. By delaying Apple's ability to renegotiate similar restrictions and arranging for the restrictions to expire at different times for each Publisher Defendant, the injunctive order ensured that Apple and the Publisher Defendants would not be able to use that same strategy as part of a new conspiracy. The provision requiring ebook applications in the App Store to receive the same terms and conditions as other applications furthers that goal. The district court expressed concern that Apple and the Publisher Defendants may use ebook applications to circumvent the injunction's rules about Apple's pricing authority, or that Apple may impose restrictions on ebook applications to punish publishers who refused to act in concert with their competitors. For instance, the court found evidence that Random House eventually joined the iBookstore on Apple's desired terms in part because Apple prevented the company from launching an ebook application in the App Store. The district court was therefore correct to decide that these provisions of the injunctive order were "necessary to protect the public from further anticompetitive conduct." *F. Hoffmann-La Roche*, 542 U.S. at 170.

CONCLUSION

We have considered the appellants' remaining arguments and find them to be without merit. Because we conclude that Apple violated § 1 of the Sherman Act by orchestrating a horizontal conspiracy among the Publisher Defendants to raise ebook prices, and that the injunctive relief ordered by the district court is appropriately designed to guard against future anticompetitive conduct, the judgment of the district court is **AFFIRMED**.

United States Court of Appeals for the Second Circuit
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, NY 10007

ROBERT A. KATZMANN
CHIEF JUDGE

CATHERINE O'HAGAN WOLFE
CLERK OF COURT

Date: June 30, 2015
Docket #: 13-3741cv
Short Title: United States of America v. Apple, Inc.

DC Docket #: 12-cv-2826
DC Court: SDNY (NEW YORK CITY) DC Docket #: 12-cv-2826
DC Court: SDNY (NEW YORK CITY) DC Docket #: 12-cv-3394
DC Court: SDNY (NEW YORK CITY) DC Docket #: 12-cv-3394
DC Court: SDNY (NEW YORK CITY) DC Docket #: 13-cv-3394
DC Court: SDNY (NEW YORK CITY)
DC Judge: Cote

BILL OF COSTS INSTRUCTIONS

The requirements for filing a bill of costs are set forth in FRAP 39. A form for filing a bill of costs is on the Court's website.

The bill of costs must:
* be filed within 14 days after the entry of judgment;
* be verified;
* be served on all adversaries;
* not include charges for postage, delivery, service, overtime and the filers edits;
* identify the number of copies which comprise the printer's unit;
* include the printer's bills, which must state the minimum charge per printer's unit for a page, a cover, foot lines by the line, and an index and table of cases by the page;
* state only the number of necessary copies inserted in enclosed form;
* state actual costs at rates not higher than those generally charged for printing services in New York, New York; excessive charges are subject to reduction;
* be filed via CM/ECF or if counsel is exempted with the original and two copies.

United States Court of Appeals for the Second Circuit
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, NY 10007

ROBERT A. KATZMANN
CHIEF JUDGE

CATHERINE O'HAGAN WOLFE
CLERK OF COURT

Date: June 30, 2015
Docket #: 13-3741cv
Short Title: United States of America v. Apple, Inc.

DC Docket #: 12-cv-2826
DC Court: SDNY (NEW YORK CITY) DC Docket #: 12-cv-2826
DC Court: SDNY (NEW YORK CITY) DC Docket #: 12-cv-3394
DC Court: SDNY (NEW YORK CITY) DC Docket #: 12-cv-3394
DC Court: SDNY (NEW YORK CITY) DC Docket #: 13-cv-3394
DC Court: SDNY (NEW YORK CITY)
DC Judge: Cote

VERIFIED ITEMIZED BILL OF COSTS

Counsel for

_____

respectfully submits, pursuant to FRAP 39 (c) the within bill of costs and requests the Clerk to prepare an itemized statement of costs taxed against the

_____

and in favor of

_____

for insertion in the mandate.

Docketing Fee _____

Costs of printing appendix (necessary copies _____) _____

Costs of printing brief (necessary copies _____ ____) _____

Costs of printing reply brief (necessary copies _____) _____

(VERIFICATION HERE)

_____

Signature

United States Court of Appeals for the Second Circuit
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, NY 10007

ROBERT A. KATZMANN
CHIEF JUDGE

CATHERINE O'HAGAN WOLFE
CLERK OF COURT

Date: June 30, 2015
Docket #: 13-3741cv
Short Title: United States of America v. Apple, Inc.

DC Docket #: 12-cv-2826
DC Court: SDNY (NEW YORK CITY) DC Docket #: 12-cv-2826
DC Court: SDNY (NEW YORK CITY) DC Docket #: 12-cv-3394
DC Court: SDNY (NEW YORK CITY) DC Docket #: 12-cv-3394
DC Court: SDNY (NEW YORK CITY) DC Docket #: 13-cv-3394
DC Court: SDNY (NEW YORK CITY)
DC Judge: Cote

NOTICE OF DECISION

The court has issued a decision in the above-entitled case. It is available on the Court's website http://www.ca2.uscourts.gov.

Judgment was entered on June 30, 2015; and a mandate will later issue in accordance with FRAP 41.

If pursuant to FRAP Rule 39 (c) you are required to file an itemized and verified bill of costs you must do so, with proof of service, within 14 days after entry of judgment. The form, with instructions, is also available on Court's website.

Inquiries regarding this case may be directed to 212-857-8523.

Lohier, *Circuit Judge*, concurring in part and concurring in the judgment:

I join in the majority opinion except for part II.B.2 relating to the application of the rule of reason. In my view, Apple's appeal rises or falls based on the application of the per se rule. That rule clearly applies to the central agreement in this case (and the only agreement alleged to be unlawful): the publishers' horizontal agreement to fix ebook prices. Cf. Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 893 (2007) (vertical agreements "may . . . be useful evidence for a plaintiff attempting to prove the existence of a horizontal cartel"). I would affirm on that basis alone.

That said, I recognize that the publisher defendants, who used Apple both as powerful leverage against Amazon and to keep each other in collusive check, may appear to be more culpable than Apple. And there is also some surface appeal to Apple's argument that the ebook market, in light of Amazon's virtually uncontested dominance, needed more competition. But more corporate bullying is not an appropriate antidote to corporate bullying. It cannot have been lawful for Apple to respond to a competitor's dominant market power by helping rival corporations (the publishers) fix prices, as the District Court found happened here. However sympathetic Apple's plight and the publishers' predicament may

have been, I am persuaded that permitting "marketplace vigilantism," Majority Op. at 9, would do far more harm to competition than good, would be disastrous as a policy matter, and is in any event not sanctioned by the Sherman Act.

DENNIS JACOBS, Circuit Judge, dissenting:

I respectfully dissent.

This appeal is taken by Apple Inc. from a judgment in the United States District Court for the Southern District of New York (Cote, J.), awarding an antitrust injunction in favor of the United States, 31 states, the District of Columbia, and the Commonwealth of Puerto Rico. The plaintiffs' claims are premised on Apple's conduct as a prospective retailer of e-books. I vote to reverse.

* * *

I have no quarrel with the district court's conscientious findings of fact; I affirmatively rely on them, and cite them throughout. The 156 pages of findings track communications and interactions that happened over the 48-day course of events, detail by detail. See United States v. Apple Inc., 952 F. Supp. 2d 638, 655-81 (S.D.N.Y. 2013) ("Apple I"). All that is needed to decide the case, however, are the schematic facts that show the architecture of the horizontal and vertical arrangements and the dynamics of the competitive forces. They are set out in a

nutshell in the following paragraphs, and at somewhat greater length in the Background section of this opinion.

As Apple was preparing the launch of its first iPad tablet in 2009, the company recognized that the device could support e-books, and gave consideration to including an e-book retail platform. However, Amazon had preceded Apple in the market, had established a 90 percent ascendency in sales of e-books, and was effectively excluding new entrants by offering bestsellers at a price ($9.99) that for many books was below the prices Amazon was paying publishers.

Although Apple was positioned to enter the retail market, it was unwilling to do so on terms that would incur a loss on e-book sales (as would happen if it met Amazon's below-cost price), or that would impair its brand and likely fail (as would happen if it charged more than Amazon). So, as a condition to its entry as a competing buyer for the publishers' wares, Apple insisted that the publishers agree to a distribution model that would lower that barrier to retail entry.

The new distribution model was implemented by several terms in Apple's contracts with publishers: agency pricing, tiered price caps, and a most-favored-nation clause. It is conceded that none of those terms is, standing alone, illegal.

Apple also encouraged publishers to implement agency pricing in their contracts with other retailers. Although publishers were unhappy about Amazon's below-cost price for e-books (which eroded the publishers' hardcover sales) no one publisher alone could counter Amazon. In short order, five of the country's six largest publishers agreed to Apple's terms and jointly pressured Amazon to adopt agency pricing. The publishers thereby prevailed in what the district court found to be a horizontal price-fixing conspiracy. The barrier to entry thus removed, Apple entered the retail market as a formidable competitor. In the deconcentrated market, Amazon's 90 percent market share is now 60 percent.

(I acknowledge that, in adducing facts found by the district court, this opinion unavoidably casts imputations on Amazon. Fairness requires acknowledgment that Amazon has not appeared in this litigation and has not had a full opportunity to dispute the district court's findings or characterizations. Moreover, the fact of Amazon's monopoly alone would not support an inference that Amazon's behavior was in any way unlawful.)

The Department of Justice, 31 states, the District of Columbia, and the Commonwealth of Puerto Rico sued Apple and the five publishers for conspiracy in unreasonable restraint of trade, in violation of § 1 of the Sherman Antitrust

Act, 15 U.S.C. § 1. The publishers settled, and Apple proceeded to a bench trial. The district court ruled that Apple's conduct as a vertical enabler of the publishers' horizontal price conspiracy constituted a violation *per se* of § 1, and that (in any event) Apple's conduct would also violate § 1 under the rule of reason. On this appeal, a majority affirms only on the ground of liability *per se*. See Op. of Judge Lohier, ante, at 1. Since I would reverse, I consider as well the rule of reason. Judge Livingston's opinion argues (for herself alone) that the judgment could be affirmed on that alternative ground.

The district court committed three decisive errors:

- The district court ruled (and the majority affirms) that a vertical enabler of a horizontal price-fixing conspiracy is in *per se* violation of the antitrust laws. However, the Supreme Court teaches that a vertical agreement designed to facilitate a horizontal cartel "would need to be held unlawful *under the rule of reason*." Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 893 (2007) (emphasis added). **(POINT I)**
- The district court's alternative ruling under the rule of reason was pre-determined by its (erroneous) *per se* ruling. Thus the district court assessed

impacts on competition without recognizing that Apple's role as a vertical player differentiated it from the publishers. The court should instead have considered Apple as a competitor on the distinct horizontal plane of retailers, where Apple competed with Amazon (and smaller players such as Barnes & Noble). **(POINT II)**

- Apple's conduct, assessed under the rule of reason on the horizontal plane of retail competition, was unambiguously and overwhelmingly pro-competitive. Apple was a major potential competitor in a market dominated by a 90 percent monopoly, and was justifiably unwilling to enter a market on terms that would assure a loss on sales or exact a toll on its reputation. In that connection, the district court erroneously deemed the monopolist's $9.99 price as categorically good for competition because it was lower than cost, and because e-book prices rose after the monopoly was broken. **(POINT III)**

A further and pervasive error (by the district court and by my colleagues on this appeal) is the implicit assumption that competition should be genteel, lawyer-designed, and fair under sporting rules, and that antitrust law is offended by gloves-off competition.

BACKGROUND

From the 2007 inception of the U.S. retail market for e-books through 2009, Amazon "dominated the e-book retail market, selling nearly 90% of all e-books." Apple I, 952 F. Supp. 2d at 649. It assured its domination by charging its retail customers $9.99 for new releases and bestsellers, below the wholesale price that Amazon was paying to publishers. Id. at 649-50, 708. The popular media reported that Amazon "takes a loss on the sale of the most popular e-books." Id. at 652. That pricing deterred potential retail competitors from entering the relevant market--"trade e-books in the United States"[1]--because an entrant "would run the risk of losing money if it tried or was forced to match Amazon's pricing to remain competitive." Id. at 658.

Amazon's below-cost pricing was also a threat to publishers, because at a $9.99 price point, e-books cannibalized sales of (more profitable) hardcover editions. Id. at 649. Although the major publishers believed Amazon's below-cost pricing was "predatory," id. at 653, each publisher understood that it was powerless to take on Amazon, id. at 650. Publishers feared that Amazon might

---

[1] The parties did not dispute this market definition. Apple I, 952 F. Supp. 2d at 694 n.60.

"compete directly with publishers by negotiating directly with authors and literary agents for rights," id. at 649, and might "retaliate" against insubordinate publishers "by removing the 'buy buttons' on the Amazon site that allow customers to purchase books . . . or by eliminating [a publisher's] products from its site altogether," id. at 679. One publisher, Macmillan, suffered such retaliation when Amazon removed the "buy buttons" for print and e-book versions of Macmillan titles. Id.

Amazon's 90 percent market share constituted a monopoly under antitrust law. See, e.g., Am. Tobacco Co. v. United States, 328 U.S. 781, 797 (1946) (characterizing as "a substantial monopoly" a market share of "over 80% of the field"); 3B Areeda & Hovenkamp, Antitrust Law ¶ 801 (3d ed. 2008). Amazon's below-cost pricing was a barrier to entry by Apple in 2009, when it contemplated entry into the e-book retail market via the iPad.[2] Apple I, 952 F. Supp. 2d at 654,

---

[2] While the district court did not use the label "barrier to entry," its findings of fact made the point clearly. In finding that a new entrant to e-book retail in 2009 "would run the risk of losing money if it tried or was forced to match Amazon's pricing to remain competitive," Apple I, 952 F. Supp. 2d at 658, the district court left no doubt that the effect of Amazon's below-cost pricing regime was to "impede entry and protect existing market power"--the basic operation of a barrier to entry, 2B Areeda & Hovenkamp, supra, ¶ 420c, at 78.

The majority disputes whether there was any barrier to entry under Amazon's below-cost pricing regime, because at least one competitor attempted

658. Apple nevertheless undertook to develop an e-book retail platform in time for the iPad's launch, scheduled for January 27, 2010. Id. at 654-55. However, "Apple did not have to open an e-bookstore when it launched the iPad"; and it was willing to enter the market only on the condition that its e-book retail business would be profitable, such that Apple could "compete effectively with Amazon" without adopting a loss-leadership and below-cost pricing strategy. Id. at 656-59.

Apple opened extensive negotiations with publishers to determine how if at all it could enter the e-book retail market. Id. at 655-57. Apple met with the leaders of the six largest publishing houses in the United States: Hachette, HarperCollins, Macmillan, Penguin, Random House, and Simon & Schuster. Id. at 647, 655. At the outset, Apple understood that the publishers were unhappy with Amazon's below-cost pricing of e-books; so Apple knew that the publishers

---

to join the market. See Op. of Judge Livingston, ante, at 13 (for the Court), 100. Even if that entrant had any chance of success (nobody contends that it sold a meaningful number of e-books, or made any money, or reduced Amazon's mammoth market share to less than 90 percent), that fact need not imply ease of entry because "a barrier may protect a market incumbent without completely excluding entry." 2B Areeda & Hovenkamp, supra, ¶ 420a, at 73.

"were willing to coordinate their efforts" to combat the $9.99 price point. Id. at 656.

After some weeks, Apple and several publishers devised a new model for e-book distribution. Amazon had been paying a wholesale price for each e-book, and reselling (often at a loss) for a retail price of its choosing. Apple's distribution contracts would adopt an agency system: publishers would set the retail prices of e-books sold through Apple's platform and Apple would take a fixed-percent commission on each sale. Id. at 659. However, the agency model would expose Apple (or any retailer) to risk, because publishers might protect hardcover sales by setting retail prices for e-books so high that Apple would appear out of touch with consumers aware of Amazon's $9.99 price. Id. Apple's solution was twofold. First, the proposed agency contract included a most favored nation ("MFN") clause, under which publishers must price their new releases in Apple's store at or below the lowest price offered by any other e-book retailer. Id. at 662. The district court found that the MFN clause "effectively forced" each publisher that signed Apple's agency contract to move its other retailers onto the agency model. Id. at 664. That is because, once Apple's cost was set as a percentage of the retail price, the publishers would suffer if Apple

matched Amazon's $9.99 retail price. Second, the proposed contract included maximum prices for various categories of e-books. Id. at 661-62. The district court found that these tiered price caps had the effect of setting anchor prices across the e-book industry. Id. at 670. Nonetheless, as the district court observed, these terms are *not* inherently illegal, and "entirely lawful contracts may include an MFN, price caps, or pricing tiers." Id. at 698.

As Apple negotiated with publishers to sign the agency contract, it told each major publisher that all signing publishers would receive the same terms. Id. at 667. In the end, five of the six largest publishers signed Apple's agency contract. Id. at 673. (Only Random House, the country's largest, did not. Id.) As the district court found, the five signatories represented "over 48% of all e-books in the United States" when they signed Apple's agency contract. Id. at 648. Apple unveiled its e-book retail platform--the "iBookstore"--at the first public demonstration of the iPad on January 27, 2010. Id. at 678-79.

After the publishers signed on to Apple's agency contract, they had to focus on Amazon's adoption of the agency model because otherwise (as explained above) the MFN clause would allow Apple to match Amazon's price for bestsellers, and pay the publishers no more than a percentage commission on

$9.99. However, "the [p]ublishers feared retaliation from Amazon unless they acted in unison," id. at 670, and "needed reassurance that they would not be alone," id. at 674. An Apple executive liaised with each of the five signatory publishers, to encourage a "united front" in their negotiations with Amazon, and to keep the publishers "apprised about who was in and how many were on board." Id. at 673. The publishers also communicated directly with each other. Id. at 674-77. When Amazon realized that the five publishers were acting in concert, it acceded and signed the agency contracts. Id. at 680-82.

Those are the findings on which Apple was adjudged to have committed an antitrust violation. The putative violation amounted to: (a) embedding the agency model (complete with MFN clauses and price caps) in Apple's own contracts with publishers and (b) encouraging the publishers to coordinate horizontally in their efforts to push the industry-wide adoption of the agency model. Apple and the publishers shared the motive to increase the publishers' pricing power in order to deprive Amazon of its monopoly. They succeeded: as the district court noted earlier in this litigation, "Amazon's market share in e-books decreased from 90 to 60 percent in the two years following the

introduction of agency pricing." United States v. Apple, Inc., 889 F. Supp. 2d 623, 640 (S.D.N.Y. 2012).

* * *

The foregoing Background accepts and relies upon the district court's findings of fact. One cannot say the same of Judge Livingston's opinion, which supports its legal conclusions and its market analysis with novel findings made now on appeal, i.e., remand by other means. A few examples:

- The notion that Amazon's below-cost pricing was loss-leadership "designed to encourage consumers to adopt the Kindle," Op. of Judge Livingston, ante, at 13 (for the Court), is a novelty, supported by neither the fact findings nor the record. At any rate, the effect of e-book pricing outside of the relevant market is irrelevant.
- The majority asserts that Amazon's below-cost pricing was limited to only "a small loss" on only "a small percentage of its sales." Id. at 85 (for the Court). These observations are apparently drawn from a submission by Amazon, downplaying the anti-competitive effects of its monopoly-protective pricing. The district court did not rely on these statistics, presumably because they are misleading and self-serving: they ignore that

the minority of titles comprising new releases and bestsellers naturally have an outsize impact on the industry. Accordingly, the district court found that the below-cost pricing had consequences on the market, namely that a new entrant "would run the risk of losing money if it tried or was forced to match Amazon's pricing to remain competitive." Apple I, 952 F. Supp. 2d at 658.

- I can find no record support for the narrative that Amazon's market share was eroding before Apple's entry, that the iPad "promised to introduce more competition with or without Apple's iBookstore," and that the publishers thereby enjoyed increased negotiating leverage. Op. of Judge Livingston, ante, at 103-04. Similarly, the assertion that Barnes & Noble disrupted Amazon's dominance in the e-book market, see id. at 103, is supported neither by the district court's findings nor by the record.

By contrast, my antitrust analysis relies on the findings made by the district court, and incorporates no others, in order (a) to avoid factual disputes with my colleagues, (b) to defer to the district court's thorough fact findings in

arriving at my legal conclusions, and (c) to respect the limited role of appellate courts.

DISCUSSION

I

The district court's principal legal error, from which other errors flow, is its conclusion that Apple violated § 1 under the *per se* rule. Having found that the publishers' coordinated strategy was a horizontal price-fixing conspiracy, and that Apple had facilitated that conspiracy in its vertical relationship with the publishers, see Apple I, 952 F. Supp. 2d at 691, the district court drew the legal conclusion that these facts established a *per se* violation of the Sherman Act by Apple. This appeal turns on whether purely vertical participation in and facilitation of a horizontal price-fixing conspiracy gives rise to *per se* liability.

Section 1 of the Sherman Act "outlaw[s] only *unreasonable* restraints"; so a court weighing an alleged violation "presumptively applies rule of reason analysis, under which antitrust plaintiffs must demonstrate that a particular contract or combination is in fact unreasonable and anticompetitive before it will be found unlawful." Texaco Inc. v. Dagher, 547 U.S. 1, 5 (2006) (quoting State Oil

Co. v. Khan, 522 U.S. 3, 10 (1997)). The exception, liability *per se*, is reserved for those categories of behavior so definitively and universally anti-competitive that a court's consideration of market forces and reasonableness would be pointless. Id. Traditionally, restraints that are *per se* unlawful take the form of horizontal agreements "raising, depressing, fixing, pegging, or stabilizing the price of a commodity." United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223 (1940).

Among modern cases, the *per se* rule takes aim exclusively at *horizontal* agreements, because "competition among the manufacturers of the same [product] . . . is the primary concern of antitrust law." Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 52 n.19 (1977). Accordingly, the trend of antitrust law has been a steady constriction of the *per se* rule in the context of vertical relationships. See, e.g., Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 901 (2007) (holding that vertical agreements for minimum prices are not *per se* violations); State Oil Co., 522 U.S. at 7 (holding that vertical agreements for maximum prices are not *per se* violations); Continental T.V., 433 U.S. at 59 (holding that vertical non-price restraints are not *per se* violations); White Motor Co. v. United States, 372 U.S. 253, 261-64 (1963) (holding that vertical territorial

restraints are not *per se* violations). The cases have "continued to temper, limit, or overrule once strict prohibitions on vertical restraints." Leegin, 551 U.S. at 901.

A vertical relationship that facilitates a horizontal price conspiracy does not amount to a *per se* violation. In another age, the Supreme Court treated such a hub-and-spokes conspiracy as a *per se* violation. See Interstate Circuit, Inc. v. Paramount Pictures Distrib. Co., 306 U.S. 208, 226-27 (1939). But the *per se* rule has been in steady retreat.

The most recent and explicit signal is given in Leegin, which explains that "the Sherman Act's prohibition on 'restraints of trade' evolves to meet the dynamics of present economic conditions," such that "the boundaries of the doctrine of *per se* illegality should not be immovable." 551 U.S. at 899-900 (alterations omitted). Leegin held that a manufacturer did not commit a *per se* violation of § 1 when it agreed with several retailers on a minimum price that the retailers could charge--a holding that overruled a century-old principle articulated in Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911). See Leegin, 551 U.S. at 881. Leegin reasoned that Dr. Miles had "treated vertical agreements a manufacturer makes with its distributors as analogous to a horizontal combination among competing distributors," but that, "[i]n later cases,

. . . the Court rejected the approach of reliance on rules governing horizontal restraints when defining rules applicable to vertical ones." Leegin, 551 U.S. at 888. Dr. Miles was held to be inconsistent with "[o]ur recent cases[,] [which] formulate antitrust principles in accordance with the appreciated differences in economic effect between vertical and horizontal agreements, differences the Dr. Miles Court failed to consider." Id.

Although the express holding of Leegin does not extend beyond the overruling of Dr. Miles, the Court's analysis reinforces the doctrinal shift that subjects an ever-broader category of vertical agreements to review under the rule of reason. The Court first stated the subsisting scope of *per se* liability:

> A horizontal cartel among competing manufacturers or competing retailers that decreases output or reduces competition in order to increase price is, and ought to be, *per se* unlawful.

Leegin, 551 U.S. at 893. The Court then rejected *per se* liability for hub-and-spokes agreements, in wording that prescribes rule-of-reason review of vertical dealings that facilitate *per se* unlawful horizontal agreements (the type of agreement that the district court found Apple had undertaken):

> To the extent a vertical agreement setting minimum resale prices is entered upon to *facilitate* either type of cartel [among

> manufacturers or among retailers], it, too, *would need to be held unlawful under the rule of reason.*

Id. (emphasis added). After Leegin, we cannot apply the *per se* rule to a vertical facilitator of a horizontal price-fixing conspiracy; such an actor must be held liable, if at all, "under the rule of reason." Id.

Leegin is animated by the "appreciated differences in economic effect between vertical and horizontal agreements." Id. at 888. Since every challenged restraint is thus classified as either horizontal or vertical, one may draw certain reliable inferences: vertical agreements are not presumptively subject to *per se* liability; the vertical nature of the agreement is its salient feature; the influence of a vertical arrangement on a horizontal cartel (on another plane of competition) does not render the vertical arrangement *per se* unlawful.

Our only sister circuit to have considered this wording from Leegin arrived at the conclusion I draw. In Toledo Mack Sales & Service, Inc. v. Mack Trucks, Inc., 530 F.3d 204, 225 (3d Cir. 2008), a manufacturer used its contracts with distributors to facilitate and enforce a horizontal conspiracy (among the distributors) that was itself illegal *per se*. See id. at 210. The Third Circuit held that Leegin's instruction--that the vertical arrangement "would need to be held

unlawful under the rule of reason"--prescribed the rule of reason as the proper analysis for whether the vertical conduct violated § 1. See id. at 225.

Taking the opposite tack, the majority opinion on this appeal insists that a vertical facilitator of a horizontal conspiracy is liable *per se*, even after Leegin. In support of that argument, the majority cites seven cases that pre-date Leegin.[3] Op. of Judge Livingston, ante, at 73-77 (for the Court). The majority cites only one post-Leegin case that considers this question: namely, the Third Circuit's analysis of a conspiracy that involved both vertical *and* horizontal relationships, concluding that the horizontal relationships violated § 1 *per se* and that pursuant

---

[3] The cases are cited by the majority in this order: Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959); United States v. General Motors Corp., 384 U.S. 127 (1966); Toys "R" Us, Inc. v. FTC, 221 F.3d 928 (7th Cir. 2000); Denny's Marina, Inc. v. Renfro Productions, Inc., 8 F.3d 1217 (7th Cir. 1993); United States v. MMR Corp., 907 F.2d 489 (5th Cir. 1990); Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717 (1988); NYNEX Corp. v. Discon, Inc., 525 U.S. 128 (1998).

Just as unhelpfully, the majority cites dicta from a Sixth Circuit case affirming the dismissal of a lawsuit that alleged a hub-and-spokes conspiracy. See Total Benefits Planning Agency, Inc. v. Anthem Blue Cross & Blue Shield, 552 F.3d 430 (6th Cir. 2008). The majority cites the case as if its holding supports the continued legitimacy of the hub-and-spokes theory after Leegin, a flawed interpretation given the Sixth Circuit's disposition on the hub-and-spokes claim. Id. at 435 (holding that plaintiffs inadequately alleged a *horizontal* conspiracy and that, after Leegin, "all *vertical* price restraints are to be judged under the rule-of-reason standard" (emphasis added)).

to Leegin the vertical relationships "would have to be analyzed under the traditional rule of reason."[4] In re Ins. Brokerage Antitrust Litig., 618 F.3d 300, 318 (3d Cir. 2010).

The majority's holding in this case therefore creates a circuit split, and puts us on the wrong side of it.

"[H]orizontal agreements *as a class* deserve stricter scrutiny than . . . vertical agreements," because horizontal agreements "pose the most significant dangers of competitive harm." 11 Areeda & Hovenkamp, supra, ¶ 1902a, at 232. Horizontal price conspiracies are illegal *per se* because motives of horizontal

---

[4] The Third Circuit analyzed a network of restraints, including a conspiracy among insurance brokers, a conspiracy among insurers, and agreements that connected the brokers and insurers. The court explained Leegin's impact this way:

> Under the Supreme Court's jurisprudence, virtually all vertical agreements now receive a traditional rule-of-reason analysis. See Leegin, 551 U.S. 877. In the factual context of this case, a horizontal agreement means . . . an agreement among either the brokers or the insurers in the global conspiracy. Agreements between brokers and insurers, on the other hand, are vertical and would have to be analyzed under the traditional rule of reason.

In re Ins. Brokerage Antitrust Litig., 618 F.3d 300, 318-19 (3d Cir. 2010) (internal citation and footnote omitted).

players are aligned and dominant and create irresistible temptations. See, e.g., Adam Smith, The Wealth of Nations 207 (Collier 1902) (1776) ("People of the same trade seldom meet together . . . , but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices.").

Collusion among competitors does not describe Apple's conduct or account for its motive. Apple's conduct had no element of collusion with a horizontal rival. Its own rival in competition was (and presumably is) Amazon; and that competition takes place on a horizontal plane distinct from the plane of the horizontal conspiracy among the publishers. All Apple's energy--all it did that has been condemned in this case--was directed to weakening its competitive rival, and pushing it aside to make room for Apple's entry. On the only horizontal plane that matters to Apple's e-book business, Apple was in competition and never in collusion. So it does not do to deem Apple's conduct anti-competitive just because the publishers' horizontal conspiracy was found to be illegal *per se*.

"[V]ertical agreements are a customary and even indispensable part of the market system" and so do not represent the same presumptive threat to competition. 11 Areeda & Hovenkamp, supra, ¶ 1902d, at 240. Even a vertical

agreement designed to decrease competition among competitors does not pose the threat to market competition that is posed by a horizontal agreement, for two reasons: (1) market forces (such as countervailing measures by competitors) are categorically more effective in countering anti-competitive vertical agreements, and (2) vertical agreements are so fundamental to the operation of the market that uncertainty about the legality of vertical arrangements would impose vast costs on markets. Id. at 240-41. Such market realities are driving the evolution of antitrust law, which has "rejected the approach of reliance on rules governing horizontal restraints when defining rules applicable to vertical ones." Leegin, 551 U.S. at 888.

The present case illustrates why *per se* treatment is not given to vertical agreements that facilitate horizontal conspiracies. Assuming (as is uncontested on appeal) that the publishers violated § 1 *per se* through their coordination, Apple's promotion of that horizontal conspiracy was limited to vertical dealings.

The *per se* rule is inapplicable here for another independent reason: The *per se* rule does not apply to arrangements with which the courts are not already well-experienced. Leegin, 551 U.S. at 887. As the government conceded at oral argument, no court has previously considered a restraint of this kind. Several

features make it sui generis: (a) a vertical relationship (b) facilitating a horizontal conspiracy (c) to overcome barriers to entry in a market dominated by a single firm (d) in an industry created by an emergent technology.

As I undertake to show in my analysis under the rule of reason, below, the restrictive market conditions Apple faced and the pro-competitive results of Apple's conduct make its vertical dealings categorically reasonable. Even if one tests that conclusion under the rule of reason, the analysis is sufficiently complex and yields such substantial pro-competitive results that *per se* liability is an abdication of the duty to distinguish reasonable restraints from those that are unreasonable.

II

Having concluded first that Apple's conduct was anti-competitive *per se,* corollary errors followed when the district court turned to the rule of reason. Once a court finds that a party acted unreasonably *per se* in a set of transactions, an epiphany is required for the court to conclude that the same party acted reasonably doing the same acts in the same role at the same time. The influence arising from the district court's *per se* accusation of wrongdoing infected all

analysis that followed. Once Apple was deemed to have joined a conspiracy that was illegal *per se*, its goal, motive, and conduct seemingly needed (and got) no additional scrutiny--legal or moral or economic.

Having confirmed Apple's *per se* liability by conflating the horizontal plane of competition among publishers with the horizontal plane of competition among retailers, the district court committed the same error in its rule of reason analysis. Thus the district court (as explained below) overstated the anti-competitive nature of Apple's vertical dealings and overlooked the pro-competitive effects on retail competition--the horizontal plane on which Apple does e-book business. "The district court did not analyze the state of competition between ebook retailers," as the majority concedes. Op. of Judge Livingston, ante, at 44 (for the Court) (emphasis omitted). Exactly.

Judge Livingston's opinion succumbs to the same fallacy by declaring the majority's own *per se* analysis so overwhelming that full rule-of-reason scrutiny requires no more than a "quick look." Quick-look analysis is an appropriate tool only when "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect." Cal. Dental Ass'n v. FTC, 526 U.S. 756, 770 (1999). Quick-look analysis is

not a tool for cutting corners. Judge Livingston's opinion justifies quick-look analysis by referring to e-book price increases that form the majority's earlier argument for the application of the *per se* rule, see Op. of Judge Livingston, ante, at 93--price increases that, at any rate, are the expected result when monopolistic below-cost pricing dissipates.

In form and substance, Judge Livingston's analysis demonstrates that when one starts with a finding of unreasonableness *per se*, the rule of reason analysis is tainted. It is called confirmation bias. The characterization of Apple's conduct as "vigilantism" is telling. Op. of Judge Livingston, ante, at 9 (for the Court), 98. Use of that word either assumes the conclusion that the conduct is illegal, or else confuses it with self-help (which used to be a virtue).

III

On this appeal, we have reached no majority as to the rule of reason. Judge Livingston writes for herself alone that, as an alternative to the *per se* rule, she would also affirm under the rule of reason; without a second judge supporting this conclusion, it is dicta, because our affirmance is based on the *per se* theory adopted by two judges. Unlike my colleagues, I must address the rule of reason,

because my vote to reverse depends on my conclusion that this alternative theory of liability is every bit as untenable as liability *per se*.

Analysis under the rule of reason--whether conducted in full or by an *untainted* quick look--compels the conclusion that Apple did not violate § 1 of the Sherman Act. The issue is decided by comparing (a) the restrictive effect of Apple's dealings with (b) the pro-competitive result of deconcentrating a market that had been dominated by a monopolist and insulated from competition through below-cost pricing.

Under the rule of reason, the initial burden rests with the plaintiffs "to demonstrate the defendants' challenged behavior had an *actual* adverse effect on competition as a whole in the relevant market." Geneva Pharms. Tech. Corp. v. Barr Labs. Inc., 386 F.3d 485, 506-07 (2d Cir. 2004) (internal quotation marks omitted). Upon plaintiffs' showing of such an effect, "the burden shifts to the defendants to offer evidence of the pro-competitive effects of their agreement," and then "the burden shifts back to the plaintiffs to prove that any legitimate competitive benefits offered by defendants could have been achieved through less restrictive means." Id. The reasonableness of the restraint then boils down

to whether the dominant effect of the agreement is to promote competition or restrain it. Id.

Analysis begins with an accounting of anti-competitive effects. Apple's vertical conduct consisted of negotiating the terms of its own contracts. Of course, every contract is a restraint of trade to some extent, see Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 98 (1984); so this fact alone is neither here nor there.

The agency agreement that Apple signed with each publisher was innocuous: as the parties agree, each term--including the agency structure, MFN clause, and price caps--is absolutely legal. The district court so found expressly:

> The Plaintiffs do not argue, and this Court has not found, that the agency model for distribution of content, or any one of the clauses included in the Agreements, or any of the identified negotiation tactics is inherently illegal. Indeed, entirely lawful contracts may include an MFN, price caps, or pricing tiers.

Apple I, 952 F. Supp. 2d at 698. The main restraint resulting from Apple's vertical conduct was the shifting of pricing power from e-book retailers to e-book publishers. And this effect operated as a restraint only in the sense that Amazon faced pressure to adopt an agency model and to charge prices set by the five

publishers, which of course remained in competition with each other, and with the publishers who account for the remaining 52 percent of the industry.

The district court opinion and the plaintiffs' briefs fixate on the idea that Apple ended Amazon's $9.99 price for most new releases and bestsellers, and that consumers would have preferred a lower price. But the consumer's near-term preference for low prices is not an object of antitrust law. See Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 237 (1993). The district court charts the short-term price developments, treating the end of below-cost pricing as anti-competitive and observing with disapproval the natural tendency for prices to rise to competitive levels. The rule of reason promotes competition; it can be safely assumed that if competition sharpens, prices will take care of themselves.

As to the pro-competitive effects, the rule of reason must take account primarily of the deconcentrating of the e-book retail market. The benefit of increasing the number of firms in a market derives from the "inverse correlation between concentration and competition." Eleanor M. Fox, Economic Concentration, Efficiencies and Competition: Social Goals and Political Choices, in Industrial Concentration and the Market System 137, 149 (Eleanor M. Fox &

James T. Halverson eds., 1979). As the district court found, Apple was weighing its entry into the retail e-book market, and the agency structure was the only way Apple would enter the market. Nobody has proposed--before *or* since Apple's entry--any "less restrictive means" by which Apple could have achieved the same competitive benefits. See Geneva Pharms., 386 F.3d at 507 (plaintiffs' burden to prove viable and less restrictive alternative). Apple's challenged conduct broke Amazon's monopoly, immediately deconcentrated the e-book retail market, added a platform for reading e-books, and removed barriers to entry by others. And removal of a barrier to entry reduces for the long term a market's vulnerability to monopolization.[5] These effects sound in the basic goals of antitrust law. Even if only quick-look analysis were appropriate in this case, these effects would vindicate Apple's conduct. (Judge Livingston's opinion discounts this pro-competitive effect by noting the open question whether "below-cost pricing is unlawfully anti-competitive," thereby suggesting that

---

[5] Generally speaking, entry barriers permit monopolization and monopoly power allows a firm to erect entry barriers. See, e.g., Port Dock & Stone Corp. v. Oldcastle Ne., Inc., 507 F.3d 117, 125 (2d Cir. 2007); United States v. Microsoft Corp., 253 F.3d 34, 82 (D.C. Cir. 2001) (en banc); see also Mobil Oil Corp. v. Fed. Power Comm'n, 417 U.S. 283, 302 n.23 (1974). Each is less likely to arise when the other is absent from a market.

Apple's dismantling of the entry barrier could be pro-competitive only if the barrier was itself a Sherman Act violation. Op. of Judge Livingston, ante, at 97. But it is no matter whether the insuperable barrier that Apple tore down had been raised lawfully or not.)

Another pro-competitive effect is the encouragement of innovation, a hallmark and benefit of competition. Apple began retailing e-books in conjunction with its release of the iPad, a device that integrated cutting-edge functions and applications, just one of which was the capacity for users to buy and read e-books. It is impossible to know the likely course of innovation, and pro-competitive effects of innovation cannot be measured; nevertheless, the encouragement of innovation must be afforded considerable weight under the rule of reason. See generally 2B Areeda & Hovenkamp, supra, ¶ 407. Apple's business is not the technology of the clothespin.

The restraint of Apple's vertical conduct was no more than a slight offset to the competitive benefits that now pervade the relevant market.[6]

---

[6] Amazons's below-cost prices also threatened the market for hard-copy books, see Apple I, 952 F. Supp. 2d at 649, and thus the royalties of authors, who may well consider that they have some role in this industry.

How else could the competitive benefits have been realized in this market? In the course of this litigation, three theories have been offered for how Apple could have entered the e-book market on less restrictive terms. Each theory misapprehends the market or the law, or both. The absence of alternative means bespeaks the reasonableness of the measures Apple took.

Theory 1: Apple could have competed with Amazon on Amazon's terms, using wholesale contracts and below-cost pricing. This was never an option. The district court found as fact that: a new entrant into the e-book retail market "would run the risk of losing money if it tried or was forced to match Amazon's pricing to remain competitive," Apple I, 952 F. Supp. 2d at 658; Apple was "not willing" to engage in below-cost pricing, id. at 657; and Apple could have avoided this money-losing price structure simply by forgoing entry to the market, see id. at 659. Even if Apple had been willing to adopt below-cost pricing, the result at best would have been duopoly, and the hardening of the existing barrier to entry. Antitrust law disfavors a durable duopoly nearly as much as monopoly itself. See 6 Areeda & Hovenkamp, supra, ¶ 1429.

Theory 2: Apple could have entered the e-book retail market using the wholesale model and charged higher prices than Amazon's. The district court foreclosed this

theory as well; it found that Apple refused to impair its brand by charging "what it considered unrealistically high prices." Apple I, 952 F. Supp. 2d at 659. Even if Apple had been willing to tarnish its brand by offering bad value for money, the notion that customers would actually have bought e-books from Apple at the higher price defies the law of demand. Higher prices may stimulate sales of certain wines and perfumes--not e-books.[7]

Nor could Apple justify higher prices for the e-books by competing on the basis of its new hardware, the iPad, because there is inter-operability among platforms. And if Apple had attempted to pursue this hardware-based competition by programming its iPad to run the iBookstore but to reject Amazon's Kindle application, Apple might have been exposed to an entirely different antitrust peril. See United States v. Microsoft Corp., 253 F.3d 34, 50-80 (D.C. Cir. 2001) (en banc); Google Android, No. 40099 (Eur. Comm'n Apr. 15, 2015) (antitrust proceedings brought by European Commissioner for

---

[7] In economic terms, e-books are subject to the law of demand and therefore have negative price elasticity of demand. See generally N. Gregory Mankiw, Principles of Economics 67 (6th ed. 2012). E-books are neither Veblen goods nor Giffen goods, nor do they have perfectly inelastic demand. See id. at 92-93, 453-54, 835; Laurie Simon Bagwell & B. Douglas Bernheim, Veblen Effects in a Theory of Conspicuous Consumption, 86 Am. Econ. Rev. 349 (1996).

Competition against Google for favoring Google's own applications on mobile devices that use Google's operating system).

Theory 3: Apple could have asked the Department of Justice to act against Amazon's monopoly. Counsel for the United States actually proposed this at oral argument. At the same time, however, he conceded that the Department of Justice had already "noticed" Amazon's e-book pricing and had chosen not to challenge it because the government "regarded it as good for consumers." Any request from Apple would therefore have been futile. True, Apple could not have known that the Antitrust Division would have adopted the position that below-cost pricing is not a concern of antitrust policy: who could have guessed that the government would adopt a policy that is primitive as a matter of antitrust doctrine and illiterate as a matter of economics? Nevertheless, hindsight reveals that government antitrust enforcement against Amazon was not an option.

More fundamentally, litigation is not a *market* alternative. This observation has especial force in markets that are undergoing rapid technological advance, where the competitive half-life of a product is considerably more brief than the span of antitrust litigation. A requirement that potential market entrants litigate

instead of enter the market on restrictive (but legal and reasonable) terms, would license monopoly for the duration.

* * *

Apple took steps to compete with a monopolist and open the market to more entrants, generating only minor competitive restraints in the process. Its conduct was eminently reasonable; no one has suggested a viable alternative. "What could be more perverse than an antitrust doctrine that discouraged new entry into highly concentrated markets?" In re Text Messaging Antitrust Litig., 782 F.3d 867, 874 (7th Cir. 2015).

Application of the rule of reason easily absolves Apple of antitrust liability. That is why at oral argument the government analogized this case to a drug conspiracy, in which every player is a criminal--at every level, on every axis, whether big or small, whether new entrant or recidivist. The government found the analogy useful--and necessary--because in an all-criminal industry there is no justification or harbor under a rule of reason.

IV

Because I see no antitrust violation, I need not consider Apple's separate challenge to the injunction itself. My colleagues, for their own good reasons, do not reach that challenge either. Yet the injunction and its shortcomings bear upon the institutional interest of the courts; and Apple's challenge deserves some response. In my view, the injunction warps the role of a neutral, court-appointed referee into that of an adversary party, with predictable consequences.

The monitor is an arm of the district court, and owes loyalty in that direction only. See Fed. R. Civ. P. 53(a). But the injunction redirects the loyalty of the monitor to Apple's chief adversary in the litigation, the Department of Justice. Under the injunction, the DOJ recommends the monitor (Injunction ¶ VI(A)), approves the monitor's fees (id. ¶ VI(I)), and mediates disputes between the monitor and Apple (id. ¶¶ VI(E), (H)). Thus the injunction first creates a neutral fact-finding office, and then gives an adversary the ability to decide who holds the office, how much he gets paid (out of the other side's pocket), and how broadly he may reach and inquire. Reciprocally, the monitor is directed to inform the government if he "discovers or receives evidence that suggests" further antitrust violations, whether or not related to this litigation.

(Id. ¶ VI(F).) This is a device that must misfire.

As events have happened (and were seemingly fore-ordained) the monitor has reason to look to the DOJ with gratitude and loyalty. The DOJ recommended Michael Bromwich as monitor, and the district court appointed him. United States v. Apple Inc., --- F.3d ----, 2015 WL 3405534, at *2 (2d Cir. May 28, 2015). Without a meaningful cap on his fee, Bromwich proposed that defendant Apple compensate him at $1,265 per hour--an eye-popping rate for service as an agent of a court. Id. at *3. (Because Bromwich lacks antitrust expertise, he proposed to add an actual antitrust lawyer to the team at $1,025 an hour. Id.) When Apple challenged that tariff as unreasonable, Bromwich explained that the injunction gave Apple no standing to object: "the fees and expenses to be paid to the monitor and his team are not set by Apple; they are set by the monitor, with approval reserved for the DOJ and the Plaintiff States." Id. (quoting Bromwich). Bromwich was right, which is telling: the injunction contemplated no role for the judge.

Once the Department of Justice selected him and approved his hourly fee, Bromwich drew up his own mandate. Although the injunction contemplated that the monitor would check sufficiency of an antitrust policy that Apple was to

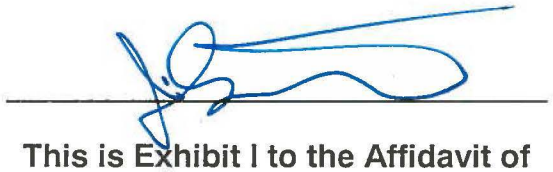
prepare in 90 days (and Apple's compliance with it), Bromwich started his inquiry immediately on his appointment; he multiplied interviews, document inspections, and discontents; he demanded to interview Apple executives without the presence of Apple's chosen counsel; and he took aim at the competitive culture of the corporation generally--a culture that is obviously aggressive, but just as obviously no business of the courts. See id. at *2-3, *7.

Having thus been selected by an adversary party, paid at a rate approved by the adversary party, and directed to look to the adversary party for the mediation of disputes, Bromwich was (in every respect important to a lawyer) retained and run by the adversary. Apple had an unenviable choice: it could accept scrutiny by a lawyer whose incentives were corrupted by the injunction that created his office, or attack the fee and the widening scope of inquiry, thereby sharpening the confrontations created by the mechanics of the injunction

A magistrate judge has cut Bromwich's hourly fee. Id. at *6 n.4. And a panel of this Court has construed narrowly the scope of the monitor's inquiries. Id. at *4. But the structural defect of the injunction remains: allowing an arm of the court to serve as agent of an adversary party. It would take strong stuff for a lawyer to transcend the worldly incentives of this injunction: unlimited work at

the (now cut) rate of $1,000 an hour, paid by a solvent party that may expect retaliation for protesting, in order to perform a monitorship subject to extension by the court for reasons that will be influenced by input from the monitor himself.

An injunction that thus blurs the lines of the adversary system does no good for the reputation of the courts.



This is Exhibit I to the Affidavit of
Mallory Kelly
Affirmed 28 August 2015

Copy T

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

v.

APPLE, INC.,
HACHETTE BOOK GROUP, INC.,
HARPERCOLLINS PUBLISHERS L.L.C.,
VERLAGSGRUPPE GEORG VON HOLTZBRINCK GMBH,
HOLTZBRINCK PUBLISHERS, LLC d/b/a MACMILLAN,
THE PENGUIN GROUP, A DIVISION OF PEARSON PLC,
PENGUIN GROUP (USA), INC., and
SIMON & SCHUSTER, INC.,

Defendants.

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

FINAL JUDGMENT
AS TO DEFENDANTS HACHETTE, HARPERCOLLINS, AND SIMON & SCHUSTER

WHEREAS, Plaintiff, the United States of America filed its Complaint on April 11, 2012, alleging that Defendants conspired to raise retail prices of E-books in violation of Section 1 of the Sherman Act, as amended, 15 U.S.C. § 1, and Plaintiff and Settling Defendants, by their respective attorneys, have consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law;

AND WHEREAS, this Final Judgment does not constitute any admission by Settling Defendants that the law has been violated or of any issue of fact or law, other than that the jurisdictional facts as alleged in the Complaint are true;

AND WHEREAS, Settling Defendants agree to be bound by the provisions of this Final Judgment pending its approval by the Court;

AND WHEREAS, Plaintiff requires Settling Defendants to agree to undertake certain actions and refrain from certain conduct for the purpose of remedying the loss of competition alleged in the Complaint;

AND WHEREAS, Settling Defendants have represented to the United States that the actions and conduct restrictions can and will be undertaken and that they will later raise no claim of hardship or difficulty as grounds for asking the Court to modify any of the provisions contained below;

NOW THEREFORE, before any testimony is taken, without trial or adjudication of any issue of fact or law, and upon consent of Settling Defendants, it is ORDERED, ADJUDGED, AND DECREED:

I. JURISDICTION

This Court has jurisdiction over the subject matter of this action and over the Settling Defendants. The Complaint states a claim upon which relief may be granted against Settling Defendants under Section 1 of the Sherman Act, as amended, 15 U.S.C. § 1.

II. DEFINITIONS

As used in this Final Judgment:

A. "Agency Agreement" means an agreement between an E-book Publisher and an E-book Retailer under which the E-book Publisher Sells E-books to consumers through the E-book Retailer, which under the agreement acts as an agent of the E-book Publisher and is paid a commission in connection with the Sale of one or more of the E-book Publisher's E-books.

B. "Apple" means Apple, Inc., a California corporation with its principal place of business in Cupertino, California, its successors and assigns, and its parents, subsidiaries, divisions, groups, affiliates, partnerships, and joint ventures, and their directors, officers, managers, agents, and employees.

C. "Department of Justice" means the Antitrust Division of the United States Department of Justice.

D. "E-book" means an electronically formatted book designed to be read on a computer, a handheld device, or other electronic devices capable of visually displaying E-books. For purposes of this Final Judgment, the term E-book does not include (1) an audio book, even if delivered and stored digitally; (2) a standalone specialized software application or "app" sold through an "app store" rather than through an e-book store (*e.g.*, through Apple's "App Store" rather than through its "iBookstore" or "iTunes") and not designed to be executed or read by or through a dedicated E-book reading device; or (3) a media file containing an electronically formatted book for which most of the value to consumers is derived from audio or video content contained in the file that is not included in the print version of the book.

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. For purposes of this Final Judgment, Publisher Defendants and all other Persons whose primary business is book publishing are not E-book Retailers.

G. "Hachette" means Hachette Book Group, Inc., a Delaware corporation with its principal place of business in New York, New York, its successors and assigns, and its subsidiaries, divisions, groups, and partnerships, and their directors, officers, managers, agents, and employees.

H. "HarperCollins" means HarperCollins Publishers L.L.C., a Delaware limited liability company with its principal place of business in New York, New York, its successors and assigns, and its subsidiaries, divisions, groups, and partnerships, and their directors, officers, managers, agents, and employees.

I. "Including" means including, but not limited to.

J. "Macmillan" means (1) Holtzbrinck Publishers, LLC d/b/a Macmillan, a New York limited liability company with its principal place of business in New York, New York; and (2) Verlagsgruppe Georg von Holtzbrinck GmbH, a German corporation with its principal place of business in Stuttgart, Germany, their successors and assigns, and their parents, subsidiaries, divisions, groups, affiliates, and partnerships, and their directors, officers, managers, agents, and employees.

K. "Penguin" means (1) Penguin Group (USA), Inc., a Delaware corporation with its principal place of business in New York, New York, and (2) The Penguin Group, a division of

U.K. corporation Pearson PLC with its principal place of business in London, England, their successors and assigns, and their parents, subsidiaries, divisions, groups, affiliates, and partnerships, and their directors, officers, managers, agents, and employees.

L. "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.

M. "Price MFN" means a term in an agreement between an E-book Publisher and an E-book Retailer under which

1. 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.

2. the Wholesale Price at which the E-book Publisher Sells one or more E-books to that E-book Retailer for Sale to consumers depends in any way on the Wholesale Price at which the E-book Publisher Sells the same E-book(s) to any other E-book Retailer for Sale to consumers; or

3. the revenue share or commission that E-book Retailer receives from the E-book Publisher in connection with the Sale of one or more E-books to consumers depends in any way on the revenue share or commission that (a) any other E-book Retailer receives from the E-book Publisher in connection with the Sale of the same E-book(s) to consumers, or (b) that

E-book Retailer receives from any other E-book Publisher in connection with the Sale of one or more of the other E-book Publisher's E-books.

For purposes of this Final Judgment, it will not constitute a Price MFN under subsection 3 of this definition if a Settling Defendant agrees, at the request of an E-book Retailer, to meet more favorable pricing, discounts, or allowances offered to the E-book Retailer by another E-book Publisher for the period during which the other E-book Publisher provides that additional compensation, so long as that agreement is not or does not result from a pre-existing agreement that requires the Settling Defendant to meet all requests by the E-book Retailer for more favorable pricing within the terms of the agreement.

N. "Publisher Defendants" means Hachette, HarperCollins, Macmillan, Penguin, and Simon & Schuster. Where this Final Judgment imposes an obligation on Publisher Defendants to engage in or refrain from engaging in certain conduct, that obligation shall apply to each Publisher Defendant individually and to any joint venture or other business arrangement established by any two or more Publisher Defendants.

O. "Purchase" means a consumer's acquisition of one or more E-books as a result of a Sale.

P. "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.

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

R. "Settling Defendants" means Hachette, HarperCollins, and Simon & Schuster. Where the Final Judgment imposes an obligation on Settling Defendants to engage in or refrain from engaging in certain conduct, that obligation shall apply to each Settling Defendant individually and to any joint venture other business arrangement established by a Settling Defendant and one or more Publisher Defendants.

S. "Simon & Schuster" means Simon & Schuster, Inc., a New York corporation with its principal place of business in New York, New York, its successors and assigns, and its subsidiaries, divisions, groups, and partnerships, and their directors, officers, managers, agents, and employees.

T. "Wholesale Price" means (1) the net amount, after any discounts or other adjustments (not including promotional allowances subject to Section 2(d) of the Robinson-Patman Act, 15 U.S.C. § 13(d)), that an E-book Retailer pays to an E-book Publisher for an E-book that the E-book Retailer Sells to consumers; or (2) the Retail Price at which an E-book Publisher, under an Agency Agreement, Sells an E-book to consumers through an E-book Retailer minus the commission or other payment that E-book Publisher pays to the E-book Retailer in connection with or that is reasonably allocated to that Sale.

III. APPLICABILITY

This Final Judgment applies to Settling Defendants and all other Persons in active concert or participation with any of them who receive actual notice of this Final Judgment by personal service or otherwise.

IV. REQUIRED CONDUCT

A. Within seven days after entry of this Final Judgment, each Settling Defendant shall terminate any agreement with Apple relating to the Sale of E-books that was executed prior to the filing of the Complaint.

B. For each agreement between a Settling Defendant and an E-book Retailer other than Apple that (1) restricts, limits, or impedes the E-book Retailer'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; or (2) contains a Price MFN, the Settling Defendant shall notify the E-book Retailer, within ten days of the filing of the Complaint, that the E-book Retailer may terminate the agreement with thirty-days notice and shall, thirty days after the E-book Retailer provides such notice, release the E-book Retailer from the agreement. For each such agreement that the E-book Retailer has not terminated within thirty days after entry of this Final Judgment, each Settling Defendant shall, as soon as permitted under the agreement, take each step required under the agreement to cause the agreement to be terminated and not renewed or extended.

C. Settling Defendants shall notify the Department of Justice in writing at least sixty days in advance of the formation or material modification of any joint venture or other business arrangement relating to the Sale, development, or promotion of E-books in the United States in which a Settling Defendant and at least one other E-book Publisher (including another Publisher Defendant) are participants or partial or complete owners. Such notice shall describe the joint venture or other business arrangement, identify all E-book Publishers that are parties to it, and attach the most recent version or draft of the agreement, contract, or other document(s) formalizing

the joint venture or other business arrangement. Within thirty days after a Settling Defendant provides notification of the joint venture or business arrangement, the Department of Justice may make a written request for additional information. If the Department of Justice makes such a request, the Settling Defendant shall not proceed with the planned formation or material modification of the joint venture or business arrangement until thirty days after substantially complying with such additional request(s) for information. The failure of the Department of Justice to request additional information or to bring an action under the antitrust laws to challenge the formation or material modification of the joint venture shall neither give rise to any inference of lawfulness nor limit in any way the right of the United States to investigate the formation, material modification, or any other aspects or activities of the joint venture or business arrangement and to bring actions to prevent or restrain violations of the antitrust laws.

The notification requirements of this Section IV.C shall not apply to ordinary course business arrangements between a Publisher Defendant and another E-book Publisher (not a Publisher Defendant) that do not relate to the Sale of E-books to consumers, or to business arrangements the primary or predominant purpose or focus of which involves: (i) E-book Publishers co-publishing one or more specifically identified E-book titles or a particular author's E-books; (ii) a Settling Defendant licensing to or from another E-book Publisher the publishing rights to one or more specifically identified E-book titles or a particular author's E-books; (iii) a Settling Defendant providing technology services to or receiving technology services from another E-book Publisher (not a Publisher Defendant) or licensing rights in technology to or from another E-book Publisher; or (iv) a Settling Defendant distributing E-books published by another E-book Publisher (not a Publisher Defendant).

D. Each Settling Defendant shall furnish to the Department of Justice (1) within seven days after entry of this Final Judgment, one complete copy of each agreement, executed, renewed, or extended on or after January 1, 2012, between the Settling Defendant and any E-book Retailer relating to the Sale of E-books, and, (2) thereafter, on a quarterly basis, each such agreement executed, renewed, or extended since the Settling Defendant's previous submission of agreements to the Department of Justice.

V. PROHIBITED CONDUCT

A. For two years, Settling Defendants shall not restrict, limit, or impede an E-book Retailer'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, such two-year period to run separately for each E-book Retailer, at the option of the Settling Defendant, from either:

1. the termination of an agreement between the Settling Defendant and the E-book Retailer that restricts, limits, or impedes the E-book Retailer'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; or

2. the date on which the Settling Defendant notifies the E-book Retailer in writing that the Settling Defendant will not enforce any term(s) in its agreement with the E-book Retailer that restrict, limit, or impede the E-book Retailer from setting, altering, or reducing the Retail Price of one or more E-books, or from offering price discounts or any other form of promotions to encourage consumers to Purchase one or more E-books.

Each Settling Defendant shall notify the Department of Justice of the option it selects for each E-book Retailer within seven days of making its selection.

B. For two years after the filing of the Complaint, Settling Defendants shall not enter into any agreement with any E-book Retailer that restricts, limits, or impedes the E-book Retailer from setting, altering, or reducing the Retail Price of one or more E-books, or from offering price discounts or any other form of promotions to encourage consumers to Purchase one or more E-books.

C. Settling Defendants shall not enter into any agreement with an E-book Retailer relating to the Sale of E-books that contains a Price MFN.

D. Settling Defendants shall not retaliate against, or urge any other E-book Publisher or E-book Retailer to retaliate against, an E-book Retailer for engaging in any activity that the Settling Defendants are prohibited by Sections V.A, V.B, and VI.B.2 of this Final Judgment from restricting, limiting, or impeding in any agreement with an E-book Retailer. After the expiration of prohibitions in Sections V.A and V.B of this Final Judgment, this Section V.D shall not prohibit any Settling Defendant from unilaterally entering into or enforcing any agreement with an E-book Retailer that restricts, limits, or impedes the E-book Retailer from setting, altering, or reducing the Retail Price of any of the Settling Defendant's E-books or from offering price discounts or any other form of promotions to encourage consumers to Purchase any of the Settling Defendant's E-books.

E. Settling Defendants shall not enter into or enforce any agreement, arrangement, understanding, plan, program, combination, or conspiracy with any E-book Publisher (including another Publisher Defendant) to raise, stabilize, fix, set, or coordinate the Retail Price or

Wholesale Price of any E-book or fix, set, or coordinate any term or condition relating to the Sale of E-books.

This Section V.E shall not prohibit a Settling Defendant from entering into and enforcing agreements relating to the distribution of another E-book Publisher's E-books (not including the E-books of another Publisher Defendant) or to the co-publication with another E-book Publisher of specifically identified E-book titles or a particular author's E-books, or from participating in output-enhancing industry standard-setting activities relating to E-book security or technology.

F. A Settling Defendant (including each officer of each parent of the Settling Defendant who exercises direct control over the Settling Defendant's business decisions or strategies) shall not convey or otherwise communicate, directly or indirectly (including by communicating indirectly through an E-book Retailer with the intent that the E-book Retailer convey information from the communication to another E-book Publisher or knowledge that it is likely to do so), to any other E-book Publisher (including to an officer of a parent of a Publisher Defendant) any competitively sensitive information, including:

1. its business plans or strategies;
2. its past, present, or future wholesale or retail prices or pricing strategies for books sold in any format (*e.g.*, print books, E-books, or audio books);
3. any terms in its agreement(s) with any retailer of books Sold in any format; or
4. any terms in its agreement(s) with any author.

This Section V.F shall not prohibit a Settling Defendant from communicating (a) in a manner and through media consistent with common and reasonable industry practice, the cover prices or wholesale or retail prices of books sold in any format to potential purchasers of those books; or (b) information the Settling Defendant needs to communicate in connection with (i) its enforcement or assignment of its intellectual property or contract rights, (ii) a contemplated merger, acquisition, or purchase or sale of assets, (iii) its distribution of another E-book Publisher's E-books, or (iv) a business arrangement under which E-book Publishers agree to co-publish, or an E-book Publisher agrees to license to another E-book Publisher the publishing rights to, one or more specifically identified E-book titles or a particular author's E-books.

VI. PERMITTED CONDUCT

A. Nothing in this Final Judgment shall prohibit a Settling Defendant unilaterally from compensating a retailer, including an E-book Retailer, for valuable marketing or other promotional services rendered.

B. Notwithstanding Sections V.A and V.B of this Final Judgment, a Settling Defendant may enter into Agency Agreements with E-book Retailers under which the aggregate dollar value of the price discounts or any other form of promotions to encourage consumers to Purchase one or more of the Settling Defendant's E-books (as opposed to advertising or promotions engaged in by the E-book Retailer not specifically tied or directed to the Settling Defendant's E-books) is restricted; *provided that* (1) such agreed restriction shall not interfere with the E-book Retailer's ability to reduce the final price paid by consumers to purchase the Settling Defendant's E-books by an aggregate amount equal to the total commissions the Settling Defendant pays to the E-book Retailer, over a period of at least one year, in connection with the

Sale of the Settling Defendant's E-books to consumers; (2) the Settling Defendant shall not restrict, limit, or impede the E-book Retailer's use of the agreed funds to offer price discounts or any other form of promotions to encourage consumers to Purchase one or more E-books; and (3) the method of accounting for the E-book Retailer's promotional activity does not restrict, limit, or impede the E-book Retailer from engaging in any form of retail activity or promotion.

VII. ANTITRUST COMPLIANCE

Within thirty days after entry of this Final Judgment, each Settling Defendant shall designate its general counsel or chief legal officer, or an employee reporting directly to its general counsel or chief legal officer, as Antitrust Compliance Officer with responsibility for ensuring the Settling Defendant's compliance with this Final Judgment. The Antitrust Compliance Officer shall be responsible for the following:

A. furnishing a copy of this Final Judgment, within thirty days of its entry, to each of the Settling Defendant's officers and directors, and to each of the Settling Defendant's employees engaged, in whole or in part, in the distribution or Sale of E-books;

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 VII.A of this Final Judgment;

C. ensuring that each person identified in Sections VII.A and VII.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;

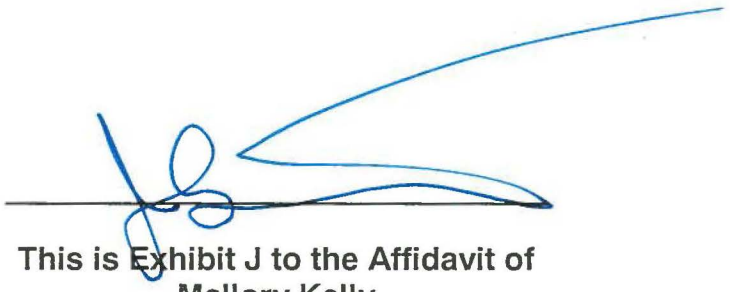
D. obtaining, within sixty days after entry of this Final Judgment and on each anniversary of the entry of this Final Judgment, from each person identified in Sections VII.A and VII.B of this Final Judgment, and thereafter maintaining, a certification that each such person (a) has read, understands, 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 an annual antitrust compliance audit covering each person identified in Sections VII.A and VII.B of this Final Judgment, and maintaining all records pertaining to such audits;

F. communicating annually to the Settling Defendant'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 the Settling Defendant's conduct to assure compliance with this Final Judgment; and, within seven days of taking such corrective actions, providing to the Department of Justice a description of the actual or potential violation of this Final Judgment and the corrective actions taken;

H. furnishing to the Department of Justice on a quarterly basis electronic copies of any non-privileged communications with any Person containing allegations of Settling Defendants' noncompliance with any provisions of this Final Judgment;



This is Exhibit J to the Affidavit of
Mallory Kelly
Affirmed 28 August 2015

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) ECF Case

~~[PROPOSED]~~ FINAL JUDGMENT AS TO DEFENDANTS VERLAGSGRUPPE GEORG VON HOLTZBRINCK GMBH & HOLTZBRINCK PUBLISHERS, LLC D/B/A MACMILLAN

WHEREAS, Plaintiff, the United States of America filed its Complaint on April 11, 2012, alleging that Defendants conspired to raise retail prices of E-books in violation of Section 1 of the Sherman Act, as amended, 15 U.S.C. § 1, and Plaintiff and Macmillan, by their respective attorneys, have consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law;

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

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

AND WHEREAS, Plaintiff requires Macmillan to agree to undertake certain actions and refrain from certain conduct for the purpose of remedying the loss of competition alleged in the Complaint;

AND WHEREAS, Macmillan has represented to the United States that the actions and conduct restrictions can and will be undertaken and that it will later raise no claim of hardship or difficulty as grounds for asking the Court to modify any of the provisions contained below;

NOW THEREFORE, before any testimony is taken, without trial or adjudication of any issue of fact or law, and upon consent of Macmillan, it is ORDERED, ADJUDGED, AND DECREED:

I. JURISDICTION

This Court has jurisdiction over the subject matter of this action and over Macmillan. The Complaint states a claim upon which relief may be granted against Macmillan under Section 1 of the Sherman Act, as amended, 15 U.S.C. § 1.

II. DEFINITIONS

As used in this Final Judgment:

A. "Agency Agreement" means an agreement between an E-book Publisher and an E-book Retailer under which the E-book Publisher Sells E-books to consumers through the E-book Retailer, which under the agreement acts as an agent of the E-book Publisher and is paid a commission in connection with the Sale of one or more of the E-book Publisher's E-books.

B. "Apple" means Apple, Inc., a California corporation with its principal place of business in Cupertino, California, its successors and assigns, and its parents, subsidiaries, divisions, groups, affiliates, partnerships, and joint ventures, and their directors, officers, managers, agents, and employees.

C. "Department of Justice" means the Antitrust Division of the United States Department of Justice.

D. "E-book" means an electronically formatted book designed to be read on a computer, a handheld device, or other electronic devices capable of visually displaying E-books. For purposes of this Final Judgment, the term E-book does not include (1) an audio book, even if delivered and stored digitally; (2) a standalone specialized software application or "app" sold through an "app store" rather than through an e-book store (*e.g.*, through Apple's "App Store" rather than through its "iBookstore" or "iTunes") and not designed to be executed or read by or through a dedicated E-book reading device; (3) a media file containing an electronically formatted book for which most of the value to consumers is derived from audio or video content contained in the file that is not included in the print version of the book; or (4) the electronically formatted version of a book marketed solely for use in connection with academic coursework.

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. For purposes of this Final Judgment, Publisher Defendants and all other Persons whose primary business is book publishing are not E-book Retailers.

G. "Hachette" means Hachette Book Group, Inc., a Delaware corporation with its principal place of business in New York, New York, its successors and assigns, and its subsidiaries, divisions, groups, and partnerships, and their directors, officers, managers, agents, and employees.

H. "HarperCollins" means HarperCollins Publishers L.L.C., a Delaware limited liability company with its principal place of business in New York, New York, its successors and assigns, and its subsidiaries, divisions, groups, and partnerships, and their directors, officers, managers, agents, and employees.

I. "Including" means including, but not limited to.

J. "Macmillan" means (1) Holtzbrinck Publishers, LLC d/b/a Macmillan, a New York limited liability company with its principal place of business in New York, New York ("Holtzbrinck"), its successors and assigns, and its subsidiaries, divisions, groups, and partnerships, and their directors, officers, managers, agents, and employees; and (2) Verlagsgruppe Georg von Holtzbrinck GmbH, a German corporation with its principal place of business in Stuttgart, Germany ("VGvH"), its successors and assigns, and its divisions, groups, and partnerships, and their directors, officers, managers, agents, and employees. Where the Final Judgment imposes an obligation on Macmillan to engage in or refrain from engaging in certain conduct, that obligation shall apply to Macmillan and to any joint venture or other business arrangement established by Macmillan and one or more Publisher Defendants.

K. "Penguin" means (1) Penguin Group (USA), Inc., a Delaware corporation with its principal place of business in New York, New York; (2) The Penguin Group, a division of U.K. corporation Pearson plc with its principal place of business in London, England; (3) The Penguin

Publishing Company Ltd, a company registered in England and Wales with its principal place of business in London, England; and (4) Dorling Kindersley Holdings Limited, a company registered in England and Wales with its principal place of business in London, England; and each of their respective successors and assigns (expressly including 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.); each of their respective subsidiaries, divisions, groups, and partnerships; and each of their respective directors, officers, managers, agents, and employees.

L. "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.

M. "Price MFN" means a term in an agreement between an E-book Publisher and an E-book Retailer under which

1. 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;

2. the Wholesale Price at which the E-book Publisher Sells one or more E-books to that E-book Retailer for Sale to consumers depends in any way on the Wholesale Price at which the E-book Publisher Sells the same E-book(s) to any other E-book Retailer for Sale to consumers; or

3. the revenue share or commission that E-book Retailer receives from the E-book Publisher in connection with the Sale of one or more E-books to consumers depends in any way on the revenue share or commission that (a) any other E-book Retailer receives from the E-book Publisher in connection with the Sale of the same E-book(s) to consumers, or (b) that E-book Retailer receives from any other E-book Publisher in connection with the Sale of one or more of the other E-book Publisher's E-books.

For purposes of this Final Judgment, it will not constitute a Price MFN under subsection 3 of this definition if Macmillan agrees, at the request of an E-book Retailer, to meet more favorable pricing, discounts, or allowances offered to the E-book Retailer by another E-book Publisher for the period during which the other E-book Publisher provides that additional compensation, so long as that agreement is not or does not result from a pre-existing agreement that requires Macmillan to meet all requests by the E-book Retailer for more favorable pricing within the terms of the agreement.

N. "Publisher Defendants" means Hachette, HarperCollins, Macmillan, Penguin, and Simon & Schuster. Where this Final Judgment imposes an obligation on Publisher Defendants to engage in or refrain from engaging in certain conduct, that obligation shall apply to each Publisher Defendant individually and to any joint venture or other business arrangement established by any two or more Publisher Defendants.

O. "Purchase" means a consumer's acquisition of one or more E-books as a result of a Sale.

P. "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.

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

R. "Simon & Schuster" means Simon & Schuster, Inc., a New York corporation with its principal place of business in New York, New York, its successors and assigns, and its subsidiaries, divisions, groups, and partnerships, and their directors, officers, managers, agents, and employees.

S. "Wholesale Price" means (1) the net amount, after any discounts or other adjustments (not including promotional allowances subject to Section 2(d) of the Robinson-Patman Act, 15 U.S.C. § 13(d)), that an E-book Retailer pays to an E-book Publisher for an E-book that the E-book Retailer Sells to consumers; or (2) the Retail Price at which an E-book Publisher, under an Agency Agreement, Sells an E-book to consumers through an E-book Retailer minus the commission or other payment that E-book Publisher pays to the E-book Retailer in connection with or that is reasonably allocated to that Sale.

III. APPLICABILITY

This Final Judgment applies to Holtzbrinck and VGvH, acting individually or in concert, and all other Persons in active concert or participation with Holtzbrinck or VGvH who receive actual notice of this Final Judgment by personal service or otherwise.

IV. REQUIRED CONDUCT

A. Within three business days after Macmillan's stipulation to the entry of this Final Judgment, Macmillan shall notify each E-book Retailer with which Holtzbrinck has an agreement relating to the Sale of E-books that Holtzbrinck will no longer enforce any term or terms in any

such agreement that restrict, limit, or impede the E-book Retailer'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, except to the extent consistent with Section VI.B of this Final Judgment.

B. For each agreement between Holtzbrinck and an E-book Retailer that contains a Price MFN, Holtzbrinck shall notify the E-book Retailer within three business days after Macmillan's stipulation to the entry of this Final Judgment that the E-book Retailer may terminate the agreement with thirty-days notice and shall, thirty days after the E-book Retailer provides such notice, release the E-book Retailer from the agreement. For each such agreement that the E-book Retailer has not terminated within ten days after entry of this Final Judgment, Holtzbrinck shall, as soon as permitted under the agreement, take each step required under the agreement to cause the agreement to be terminated and not renewed or extended.

C. Holtzbrinck shall notify the Department of Justice in writing at least sixty days in advance of the formation or material modification of any joint venture or other business arrangement relating to the Sale, development, or promotion of E-books in the United States in which Holtzbrinck and at least one other E-book Publisher (including another Publisher Defendant) are participants or partial or complete owners. Such notice shall describe the joint venture or other business arrangement, identify all E-book Publishers that are parties to it, and attach the most recent version or draft of the agreement, contract, or other document(s) formalizing the joint venture or other business arrangement. Within thirty days after Holtzbrinck provides notification of the joint venture or business arrangement, the Department of Justice may make a written request for additional information. If the Department of Justice makes such a request,

Holtzbrinck shall not proceed with the planned formation or material modification of the joint venture or business arrangement until thirty days after substantially complying with such additional request(s) for information. The failure of the Department of Justice to request additional information or to bring an action under the antitrust laws to challenge the formation or material modification of the joint venture shall neither give rise to any inference of lawfulness nor limit in any way the right of the United States to investigate the formation, material modification, or any other aspects or activities of the joint venture or business arrangement and to bring actions to prevent or restrain violations of the antitrust laws.

The notification requirements of this Section IV.C shall not apply to ordinary course business arrangements between Holtzbrinck and another E-book Publisher (not a Publisher Defendant) that do not relate to the Sale of E-books to consumers, or to business arrangements the primary or predominant purpose or focus of which involves: (i) E-book Publishers co-publishing one or more specifically identified E-book titles or a particular author's E-books; (ii) Holtzbrinck licensing to or from another E-book Publisher the publishing rights to one or more specifically identified E-book titles or a particular author's E-books; (iii) Holtzbrinck providing technology services to or receiving technology services from another E-book Publisher (not a Publisher Defendant) or licensing rights in technology to or from another E-book Publisher; or (iv) Holtzbrinck distributing E-books published by another E-book Publisher (not a Publisher Defendant).

D. Macmillan shall furnish to the Department of Justice (1) by February 15, 2013, one complete copy of each agreement, executed, renewed, or extended on or after January 1, 2012, between Holtzbrinck and any E-book Retailer relating to the Sale of E-books, and, (2) thereafter,

on a quarterly basis, each such agreement executed, renewed, or extended since Macmillan's previous submission of agreements to the Department of Justice.

V. PROHIBITED CONDUCT

A. Until December 18, 2014, Holtzbrinck shall not restrict, limit, or impede an E-book Retailer'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.

B. Until December 18, 2014, Holtzbrinck shall not enter into any agreement with any E-book Retailer that restricts, limits, or impedes the E-book Retailer from setting, altering, or reducing the Retail Price of one or more E-books, or from offering price discounts or any other form of promotions to encourage consumers to Purchase one or more E-books.

C. Holtzbrinck shall not enter into any agreement with an E-book Retailer relating to the Sale of E-books that contains a Price MFN.

D. Macmillan shall not retaliate against, or urge any other E-book Publisher or E-book Retailer to retaliate against, an E-book Retailer for engaging in any activity that Holtzbrinck is prohibited by Sections V.A, V.B, and VI.B.2 of this Final Judgment from restricting, limiting, or impeding in any agreement with an E-book Retailer. After the expiration of prohibitions in Sections V.A and V.B of this Final Judgment, this Section V.D shall not prohibit Holtzbrinck from unilaterally entering into or enforcing any agreement with an E-book Retailer that restricts, limits, or impedes the E-book Retailer from setting, altering, or reducing the Retail Price of any of Holtzbrinck's E-books or from offering price discounts or any other form of promotions to encourage consumers to Purchase any of Holtzbrinck's E-books.

E. Holtzbrinck shall not enter into or enforce any agreement, arrangement, understanding, plan, program, combination, or conspiracy with any E-book Publisher (including another Publisher Defendant) to raise, stabilize, fix, set, or coordinate the Retail Price or Wholesale Price of any E-book or fix, set, or coordinate any term or condition relating to the Sale of E-books.

This Section V.E shall not prohibit Holtzbrinck from entering into and enforcing agreements relating to the distribution of another E-book Publisher's E-books (not including the E-books of another Publisher Defendant) or to the co-publication with another E-book Publisher of specifically identified E-book titles or a particular author's E-books, or from participating in output-enhancing industry standard-setting activities relating to E-book security or technology.

F. Holtzbrinck (and each officer of VGvH who exercises direct control over Holtzbrinck's business decisions or strategies) shall not convey or otherwise communicate, directly or indirectly (including by communicating indirectly through an E-book Retailer with the intent that the E-book Retailer convey information from the communication to another E-book Publisher or knowledge that it is likely to do so), to any other E-book Publisher (including to an officer of a parent of a Publisher Defendant) any competitively sensitive information, including:

1. its business plans or strategies;

2. its past, present, or future wholesale or retail prices or pricing strategies for books sold in any format (*e.g.*, print books, E-books, or audio books);

3. any terms in its agreement(s) with any retailer of books Sold in any format; or

4. any terms in its agreement(s) with any author.

This Section V.F shall not prohibit Holtzbrinck from communicating (a) in a manner and through media consistent with common and reasonable industry practice, the cover prices or wholesale or retail prices of books sold in any format to potential purchasers of those books; or (b) information Holtzbrinck needs to communicate in connection with (i) its enforcement or assignment of its intellectual property or contract rights, (ii) a contemplated merger, acquisition, or purchase or sale of assets, (iii) its distribution of another E-book Publisher's E-books, or (iv) a business arrangement under which E-book Publishers agree to co-publish, or an E-book Publisher agrees to license to another E-book Publisher the publishing rights to, one or more specifically identified E-book titles or a particular author's E-books.

VI. PERMITTED CONDUCT

A. Nothing in this Final Judgment shall prohibit Macmillan unilaterally from compensating a retailer, including an E-book Retailer, for valuable marketing or other promotional services rendered.

B. Notwithstanding Sections V.A and V.B of this Final Judgment, Holtzbrinck may enter into Agency Agreements with E-book Retailers under which the aggregate dollar value of the price discounts or any other form of promotions to encourage consumers to Purchase one or more of Holtzbrinck's E-books (as opposed to advertising or promotions engaged in by the E-book Retailer not specifically tied or directed to Holtzbrinck's E-books) is restricted; *provided that* (1) such agreed restriction shall not interfere with the E-book Retailer's ability to reduce the final price paid by consumers to purchase Holtzbrinck's E-books by an aggregate amount equal to the total commissions Holtzbrinck pays to the E-book Retailer, over a period of at least one year, in connection with the Sale of Holtzbrinck's E-books to consumers; (2) Holtzbrinck shall not restrict,

limit, or impede the E-book Retailer's use of the agreed funds to offer price discounts or any other form of promotions to encourage consumers to Purchase one or more E-books; and (3) the method of accounting for the E-book Retailer's promotional activity does not restrict, limit, or impede the E-book Retailer from engaging in any form of retail activity or promotion.

VII. ANTITRUST COMPLIANCE

Within thirty days after entry of this Final Judgment, Macmillan shall designate Holtzbrinck's general counsel or chief legal officer, or an employee reporting directly to its general counsel or chief legal officer, as Antitrust Compliance Officer with responsibility for ensuring Macmillan's compliance with this Final Judgment. The Antitrust Compliance Officer shall be responsible for the following:

A. furnishing a copy of this Final Judgment, within thirty days of its entry, to each of Holtzbrinck's officers and directors, to each of Holtzbrinck's employees engaged, in whole or in part, in the distribution or Sale of E-books, and to each of VGvH's officers, directors, or employees involved in the development of Holtzbrinck's plans or strategies relating to E-books;

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 VII.A of this Final Judgment;

C. ensuring that each person identified in Sections VII.A and VII.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 entry of this Final Judgment and on each anniversary of the entry of this Final Judgment, from each person identified in Sections VII.A and VII.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 an annual antitrust compliance audit covering each person identified in Sections VII.A and VII.B of this Final Judgment, and maintaining all records pertaining to such audits;

F. communicating annually to Holtzbrinck's employees and to all VGvH employees identified in Sections VII.A and VII.B of this Final Judgment 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 Macmillan's conduct to assure compliance with this Final Judgment; and, within seven days of taking such corrective actions, providing to the Department of Justice a description of the actual or potential violation of this Final Judgment and the corrective actions taken;

H. furnishing to the Department of Justice on a quarterly basis electronic copies of any non-privileged communications with any Person containing allegations of Macmillan's noncompliance with any provisions of this Final Judgment;

I. maintaining, and furnishing to the Department of Justice on a quarterly basis, a log of all oral and written communications, excluding privileged or public communications, between or among (1) any of Macmillan's officers, directors, or employees involved in the development of Holtzbrinck's plans or strategies relating to E-books, and (2) any person employed by or associated with another Publisher Defendant, relating, in whole or in part, to the distribution or sale in the United States of books sold in any format, including 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 (for a collection of communications solely concerning a single business arrangement that is specifically exempted from the reporting requirements of Section IV.C of this Final Judgment, Macmillan may provide a summary of the communications rather than logging each communication individually); and

J. providing to the Department of Justice annually, on or before the anniversary of the entry of this Final Judgment, a written statement as to the fact and manner of Macmillan's compliance with Sections IV, V, and VII of this Final Judgment.

VIII. COMPLIANCE INSPECTION

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 Department of Justice, including consultants and other persons retained by the Department of Justice, shall, upon written request of an authorized representative of the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to Macmillan, be permitted:

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

2. to interview, either informally or on the record, Macmillan'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 Macmillan.

B. Upon the written request of an authorized representative of the Assistant Attorney General in charge of the Antitrust Division, Macmillan shall submit written reports or respond to written interrogatories, under oath if requested, relating to any of the matters contained in this Final Judgment as may be requested. Written reports authorized under this paragraph may, in the sole discretion of the United States, require Macmillan to conduct, at their 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 to any person other than an authorized representative of the executive branch of the United States, except in the course of legal proceedings to which the United States is a party (including 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 Macmillan to the United States, Macmillan 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 Macmillan 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 shall give Macmillan ten calendar days notice prior to divulging such material in any civil or administrative proceeding.

IX. RETENTION OF JURISDICTION

This Court retains jurisdiction to enable any party 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 any of its provisions, to enforce compliance, and to punish violations of its provisions.

X. NO LIMITATION ON GOVERNMENT RIGHTS

Nothing in this Final Judgment shall limit the right of the United States to investigate and bring actions to prevent or restrain violations of the antitrust laws concerning any past, present, or future conduct, policy, or practice of Macmillan.

XI. EXPIRATION OF FINAL JUDGMENT

Unless this Court grants an extension, this Final Judgment shall expire five years from the date of its entry.

XII. PUBLIC INTEREST DETERMINATION

Entry of this Final Judgment is in the public interest. The parties have complied with the requirements of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16, including making copies available to the public of this Final Judgment, the Competitive Impact Statement, and any comments thereon and the United States' responses to comments. Based upon the record before

the Court, which includes the Competitive Impact Statement and any comments and response to comments filed with the Court, entry of this Final Judgment is in the public interest.

Date: August 12, 2013

Court approval subject to procedures set forth in the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16

United States District Judge

United States District Court
Southern District of New York
Office of the Clerk
U.S. Courthouse
500 Pearl Street, New York, N.Y. 10007-1213

Date:

In Re:

-v-

Case #: ( )

Dear Litigant,

Enclosed is a copy of the judgment entered in your case.

Your attention is directed to Rule 4(a)(1) of the Federal Rules of Appellate Procedure, which requires that if you wish to appeal the judgment in your case, you must file a notice of appeal within 30 days of the date of entry of the judgment (60 days if the United States or an officer or agency of the United States is a party).

If you wish to appeal the judgment but for any reason you are unable to file your notice of appeal within the required time, you may make a motion for an extension of time in accordance with the provision of Fed. R. App. P. 4(a)(5). That rule requires you to show "excusable neglect" or "good cause" for your failure to file your notice of appeal within the time allowed. Any such motion must first be served upon the other parties and then filed with the Pro Se Office no later than 60 days from the date of entry of the judgment (90 days if the United States or an officer or agency of the United States is a party).

The enclosed Forms 1, 2 and 3 cover some common situations, and you may choose to use one of them if appropriate to your circumstances.

The Filing fee for a notice of appeal is $5.00 and the appellate docketing fee is $450.00 payable to the "Clerk of the Court, USDC, SDNY" by certified check, money order or cash. **No personal checks are accepted.**

Ruby J. Krajick, Clerk of Court

by: _____

, Deputy Clerk

United States District Court
Southern District of New York
Office of the Clerk
U.S. Courthouse
500 Pearl Street, New York, N.Y. 10007-1213

----------X

-V-

NOTICE OF APPEAL

civ. ( )

----------X

Notice is hereby given that _____ (party)
hereby appeals to the United States Court of Appeals for the Second Circuit from the Judgment [describe it]

entered in this action on the _____ (day) day of _____ (month), _____ (year).

_____
(Signature)

_____
(Address)

_____
(City, State and Zip Code)

Date: _____ ( ) _____ - _____
(Telephone Number)

Note: You may use this form to take an appeal provided that it is received by the office of the Clerk of the District Court within 30 days of the date on which the judgment was entered (60 days if the United States or an officer or agency of the United States is a party).

FORM 1

United States District Court
Southern District of New York
Office of the Clerk
U.S. Courthouse
500 Pearl Street, New York, N.Y. 10007-1213

----------X

-V-

MOTION FOR EXTENSION OF TIME TO FILE A NOTICE OF APPEAL

civ. ( )

----------X

Pursuant to Fed. R. App. P. 4(a)(5), _____ respectfully
(party)
requests leave to file the within notice of appeal out of time.

_____
(party)
desires to appeal the judgment in this action entered on _____ but failed to file a
(day)
notice of appeal within the required number of days because:

[Explain here the "excusable neglect" or "good cause" which led to your failure to file a notice of appeal within the required number of days.]

_____
(Signature)

_____
(Address)

_____
(City, State and Zip Code)

Date: _____ ( ) _____-_____
(Telephone Number)

Note: You may use this form, together with a copy of Form 1, if you are seeking to appeal a judgment and did not file a copy of Form 1 within the required time. If you follow this procedure, these forms must be received in the office of the Clerk of the District Court no later than 60 days of the date which the judgment was entered (90 days if the United States or an officer or agency of the United States is a party).

District Court will receive it within the 30 days of the date on which the judgment was entered (60 days if the United States or an officer or agency of the United States is a party).

FORM 3

United States District Court
Southern District of New York
Office of the Clerk
U.S. Courthouse
500 Pearl Street, New York, N.Y. 10007-1213

_____X

-V-

AFFIRMATION OF SERVICE

civ. ( )

_____X

I, _____, declare under penalty of perjury that I have served a copy of the attached _____

_____

upon _____

_____

whose address is: _____

_____

Date: _____
New York, New York

_____
(Signature)

_____
(Address)

_____
(City, State and Zip Code)

FORM 4

APPEAL FORMS

```
ERROR: syntaxerror
OFFENDING COMMAND:              OS/2 s-    <   Vcvt   ,          ˜fpgmˆf          1headˇ[

STACK:

-mark-
/sfnts
false
```

This is Exhibit K to the Affidavit of
Mallory Kelly
Affirmed 28 August 2015

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 (DLC) ECF Case

~~PROPOSED~~ FINAL JUDGMENT AS TO DEFENDANTS THE PENGUIN GROUP, A DIVISION OF PEARSON PLC, AND PENGUIN GROUP (USA), INC.

WHEREAS, Plaintiff, the United States of America filed its Complaint on April 11, 2012, alleging that Defendants conspired to raise retail prices of E-books in violation of Section 1 of the Sherman Act, as amended, 15 U.S.C. § 1, and Plaintiff and Penguin, by their respective attorneys, have consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law;

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

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

AND WHEREAS, Plaintiff requires Penguin to agree to undertake certain actions and refrain from certain conduct for the purpose of remedying the loss of competition alleged in the Complaint;

AND WHEREAS, Penguin has represented to the United States that the actions and conduct restrictions can and will be undertaken and that it will later raise no claim of hardship or difficulty as grounds for asking the Court to modify any of the provisions contained below;

NOW THEREFORE, before any testimony is taken, without trial or adjudication of any issue of fact or law, and upon consent of Penguin, it is ORDERED, ADJUDGED, AND DECREED:

I. JURISDICTION

This Court has jurisdiction over the subject matter of this action and over Penguin. The Complaint states a claim upon which relief may be granted against Penguin under Section 1 of the Sherman Act, as amended, 15 U.S.C. § 1.

II. DEFINITIONS

As used in this Final Judgment:

A. "Agency Agreement" means an agreement between an E-book Publisher and an E-book Retailer under which the E-book Publisher Sells E-books to consumers through the E-book Retailer, which under the agreement acts as an agent of the E-book Publisher and is paid a commission in connection with the Sale of one or more of the E-book Publisher's E-books.

B. "Apple" means Apple, Inc., a California corporation with its principal place of business in Cupertino, California, its successors and assigns, and its parents, subsidiaries, divisions, groups, affiliates, partnerships, and joint ventures, and their directors, officers, managers, agents, and employees.

C. "Department of Justice" means the Antitrust Division of the United States Department of Justice.

D. "E-book" means an electronically formatted book designed to be read on a computer, a handheld device, or other electronic devices capable of visually displaying E-books. For purposes of this Final Judgment, the term E-book does not include (1) an audio book, even if delivered and stored digitally; (2) a standalone specialized software application or "app" sold through an "app store" rather than through an e-book store (*e.g.*, through Apple's "App Store" rather than through its "iBookstore" or "iTunes") and not designed to be executed or read by or through a dedicated E-book reading device; or (3) a media file containing an electronically formatted book for which most of the value to consumers is derived from audio or video content contained in the file that is not included in the print version of the book.

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. For purposes of this Final Judgment, Publisher Defendants and all other Persons whose primary business is book publishing are not E-book Retailers.

G. "Hachette" means Hachette Book Group, Inc., a Delaware corporation with its principal place of business in New York, New York, its successors and assigns, and its

subsidiaries, divisions, groups, and partnerships, and their directors, officers, managers, agents, and employees.

H. "HarperCollins" means HarperCollins Publishers L.L.C., a Delaware limited liability company with its principal place of business in New York, New York, its successors and assigns, and its subsidiaries, divisions, groups, and partnerships, and their directors, officers, managers, agents, and employees.

I. "Including" means including, but not limited to.

J. "Macmillan" means (1) Holtzbrinck Publishers, LLC d/b/a Macmillan, a New York limited liability company with its principal place of business in New York, New York; and (2) Verlagsgruppe Georg von Holtzbrinck GmbH, a German corporation with its principal place of business in Stuttgart, Germany, their successors and assigns, and their parents, subsidiaries, divisions, groups, affiliates, and partnerships, and their directors, officers, managers, agents, and employees.

K. "Penguin" means (1) Penguin Group (USA), Inc., a Delaware corporation with its principal place of business in New York, New York; (2) The Penguin Group, a division of U.K. corporation Pearson plc with its principal place of business in London, England; (3) The Penguin Publishing Company Ltd, a company registered in England and Wales with its principal place of business in London, England; and (4) Dorling Kindersley Holdings Limited, a company registered in England and Wales with its principal place of business in London, England; and each of their respective successors and assigns (expressly including Penguin Random House and any similar joint venture between Penguin and Random House Inc.); each of their respective subsidiaries, divisions, groups, partnerships; and each of their respective directors, officers, managers, agents,

and employees. Where Section IV.A, IV.B, IV.D, or VII imposes an obligation on Penguin to engage in certain conduct by either a date certain or by a specified day after entry of this Final Judgment, any successor or assign whose acquisition of or combination or other relationship with Penguin is consummated after entry of this Final Judgment shall meet each such obligation within thirty days after consummation. The prohibitions of Section V.A of this Final Judgment shall expire for any successor or assign of Penguin on the dates on which such prohibitions would have expired for Penguin had the acquisition, combination, or other relationship not occurred. Where the Final Judgment imposes an obligation on Penguin to engage in or refrain from engaging in certain conduct, that obligation shall apply to Penguin and to any joint venture or other business arrangement established by Penguin and one or more Publisher Defendants.

L. "Penguin Random House" means the joint venture entities, which will operate under the name "Penguin Random House," that will be formed pursuant to the Contribution Agreement, dated October 29, 2012, by and between Pearson plc and Bertelsmann SE & Co. KGaA.

M. "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.

N. "Price MFN" means a term in an agreement between an E-book Publisher and an E-book Retailer under which

1. 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;

2. the Wholesale Price at which the E-book Publisher Sells one or more E-books to that E-book Retailer for Sale to consumers depends in any way on the Wholesale Price at which the E-book Publisher Sells the same E-book(s) to any other E-book Retailer for Sale to consumers; or

3. the revenue share or commission that E-book Retailer receives from the E-book Publisher in connection with the Sale of one or more E-books to consumers depends in any way on the revenue share or commission that (a) any other E-book Retailer receives from the E-book Publisher in connection with the Sale of the same E-book(s) to consumers, or (b) that E-book Retailer receives from any other E-book Publisher in connection with the Sale of one or more of the other E-book Publisher's E-books.

For purposes of this Final Judgment, it will not constitute a Price MFN under subsection 3 of this definition if Penguin agrees, at the request of an E-book Retailer, to meet more favorable pricing, discounts, or allowances offered to the E-book Retailer by another E-book Publisher for the period during which the other E-book Publisher provides that additional compensation, so long as that agreement is not or does not result from a pre-existing agreement that requires Penguin to meet all requests by the E-book Retailer for more favorable pricing within the terms of the agreement.

O. "Publisher Defendants" means Hachette, HarperCollins, Macmillan, Penguin, and Simon & Schuster. Where this Final Judgment imposes an obligation on Publisher Defendants to engage in or refrain from engaging in certain conduct, that obligation shall apply to each Publisher Defendant individually and to any joint venture or other business arrangement established by any two or more Publisher Defendants.

P. "Purchase" means a consumer's acquisition of one or more E-books as a result of a Sale.

Q. "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.

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

S. "Simon & Schuster" means Simon & Schuster, Inc., a New York corporation with its principal place of business in New York, New York, its successors and assigns, and its subsidiaries, divisions, groups, and partnerships, and their directors, officers, managers, agents, and employees.

T. "Wholesale Price" means (1) the net amount, after any discounts or other adjustments (not including promotional allowances subject to Section 2(d) of the Robinson-Patman Act, 15 U.S.C. § 13(d)), that an E-book Retailer pays to an E-book Publisher for an E-book that the E-book Retailer Sells to consumers; or (2) the Retail Price at which an E-book Publisher, under an Agency Agreement, Sells an E-book to consumers through an E-book Retailer

minus the commission or other payment that E-book Publisher pays to the E-book Retailer in connection with or that is reasonably allocated to that Sale.

III. APPLICABILITY

This Final Judgment applies to Penguin and all other Persons in active concert or participation with Penguin who receive actual notice of this Final Judgment by personal service or otherwise.

IV. REQUIRED CONDUCT

A. Within seven days after entry of this Final Judgment, Penguin shall terminate any agreement with Apple relating to the Sale of E-books that was executed prior to Penguin's stipulation to the entry of this Final Judgment.

B. For each agreement between Penguin and an E-book Retailer other than Apple that (1) restricts, limits, or impedes the E-book Retailer'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; or (2) contains a Price MFN, Penguin shall notify the E-book Retailer, by January 8, 2013, that the E-book Retailer may terminate the agreement with thirty-days notice and shall, thirty days after the E-book Retailer provides such notice, release the E-book Retailer from the agreement. For each such agreement that the E-book Retailer has not terminated within ten days after entry of this Final Judgment, Penguin shall, as soon as permitted under the agreement, take each step required under the agreement to cause the agreement to be terminated and not renewed or extended.

C. Penguin shall notify the Department of Justice in writing at least sixty days in advance of the formation or material modification of any joint venture or other business

arrangement relating to the Sale, development, or promotion of E-books in the United States in which Penguin and at least one other E-book Publisher (including another Publisher Defendant) are participants or partial or complete owners. Such notice shall describe the joint venture or other business arrangement, identify all E-book Publishers that are parties to it, and attach the most recent version or draft of the agreement, contract, or other document(s) formalizing the joint venture or other business arrangement. Within thirty days after Penguin provides notification of the joint venture or business arrangement, the Department of Justice may make a written request for additional information. If the Department of Justice makes such a request, Penguin shall not proceed with the planned formation or material modification of the joint venture or business arrangement until thirty days after substantially complying with such additional request(s) for information. The failure of the Department of Justice to request additional information or to bring an action under the antitrust laws to challenge the formation or material modification of the joint venture shall neither give rise to any inference of lawfulness nor limit in any way the right of the United States to investigate the formation, material modification, or any other aspects or activities of the joint venture or business arrangement and to bring actions to prevent or restrain violations of the antitrust laws.

The notification requirements of this Section IV.C shall not apply to ordinary course business arrangements between Penguin and another E-book Publisher (not a Publisher Defendant) that do not relate to the Sale of E-books to consumers, or to business arrangements the primary or predominant purpose or focus of which involves: (i) E-book Publishers co-publishing one or more specifically identified E-book titles or a particular author's E-books; (ii) Penguin licensing to or from another E-book Publisher the publishing rights to one or more specifically

identified E-book titles or a particular author's E-books; (iii) Penguin providing technology services to or receiving technology services from another E-book Publisher (not a Publisher Defendant) or licensing rights in technology to or from another E-book Publisher; or (iv) Penguin distributing E-books published by another E-book Publisher (not a Publisher Defendant). The notification requirements of this Section IV.C shall also not apply to the formation of Penguin Random House, review of which is pending before the Department of Justice.

D. Penguin shall furnish to the Department of Justice (1) by January 8, 2013, one complete copy of each agreement, executed, renewed, or extended on or after January 1, 2012, between Penguin and any E-book Retailer relating to the Sale of E-books, and, (2) thereafter, on a quarterly basis, each such agreement executed, renewed, or extended since Penguin's previous submission of agreements to the Department of Justice.

V. PROHIBITED CONDUCT

A. For two years, Penguin shall not restrict, limit, or impede an E-book Retailer'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, such two-year period to run separately for each E-book Retailer, at Penguin's option, from either:

1. the termination of an agreement between Penguin and the E-book Retailer that restricts, limits, or impedes the E-book Retailer'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; or

2. the date on which Penguin notifies the E-book Retailer in writing that Penguin will not enforce any term(s) in its agreement with the E-book Retailer that restrict, limit,

or impede the E-book Retailer from setting, altering, or reducing the Retail Price of one or more E-books, or from offering price discounts or any other form of promotions to encourage consumers to Purchase one or more E-books.

Penguin shall notify the Department of Justice of the option it selects for each E-book Retailer within seven days of making its selection.

B. For two years after Penguin's stipulation to the entry of this Final Judgment, Penguin shall not enter into any agreement with any E-book Retailer that restricts, limits, or impedes the E-book Retailer from setting, altering, or reducing the Retail Price of one or more E-books, or from offering price discounts or any other form of promotions to encourage consumers to Purchase one or more E-books.

C. Penguin shall not enter into any agreement with an E-book Retailer relating to the Sale of E-books that contains a Price MFN.

D. Penguin shall not retaliate against, or urge any other E-book Publisher or E-book Retailer to retaliate against, an E-book Retailer for engaging in any activity that Penguin is prohibited by Sections V.A, V.B, and VI.B.2 of this Final Judgment from restricting, limiting, or impeding in any agreement with an E-book Retailer. After the expiration of prohibitions in Sections V.A and V.B of this Final Judgment, this Section V.D shall not prohibit Penguin from unilaterally entering into or enforcing any agreement with an E-book Retailer that restricts, limits, or impedes the E-book Retailer from setting, altering, or reducing the Retail Price of any of Penguin's E-books or from offering price discounts or any other form of promotions to encourage consumers to Purchase any of Penguin's E-books.

E. Penguin shall not enter into or enforce any agreement, arrangement, understanding, plan, program, combination, or conspiracy with any E-book Publisher (including another Publisher Defendant) to raise, stabilize, fix, set, or coordinate the Retail Price or Wholesale Price of any E-book or fix, set, or coordinate any term or condition relating to the Sale of E-books.

This Section V.E shall not prohibit Penguin from entering into and enforcing agreements relating to the distribution of another E-book Publisher's E-books (not including the E-books of another Publisher Defendant) or to the co-publication with another E-book Publisher of specifically identified E-book titles or a particular author's E-books, or from participating in output-enhancing industry standard-setting activities relating to E-book security or technology.

F. Penguin (including each officer of each parent of Penguin who exercises direct control over Penguin's business decisions or strategies) shall not convey or otherwise communicate, directly or indirectly (including by communicating indirectly through an E-book Retailer with the intent that the E-book Retailer convey information from the communication to another E-book Publisher or knowledge that it is likely to do so), to any other E-book Publisher (including to an officer of a parent of a Publisher Defendant) any competitively sensitive information, including:

1. its business plans or strategies;

2. its past, present, or future wholesale or retail prices or pricing strategies for books sold in any format (*e.g.*, print books, E-books, or audio books);

3. any terms in its agreement(s) with any retailer of books Sold in any format; or

4. any terms in its agreement(s) with any author.

This Section V.F shall not prohibit Penguin from communicating (a) in a manner and through media consistent with common and reasonable industry practice, the cover prices or wholesale or retail prices of books sold in any format to potential purchasers of those books; or (b) information Penguin needs to communicate in connection with (i) its enforcement or assignment of its intellectual property or contract rights, (ii) a contemplated merger, acquisition, or purchase or sale of assets, (iii) its distribution of another E-book Publisher's E-books, or (iv) a business arrangement under which E-book Publishers agree to co-publish, or an E-book Publisher agrees to license to another E-book Publisher the publishing rights to, one or more specifically identified E-book titles or a particular author's E-books.

VI. PERMITTED CONDUCT

A. Nothing in this Final Judgment shall prohibit Penguin unilaterally from compensating a retailer, including an E-book Retailer, for valuable marketing or other promotional services rendered.

B. Notwithstanding Sections V.A and V.B of this Final Judgment, Penguin may enter into Agency Agreements with E-book Retailers under which the aggregate dollar value of the price discounts or any other form of promotions to encourage consumers to Purchase one or more of Penguin's E-books (as opposed to advertising or promotions engaged in by the E-book Retailer not specifically tied or directed to Penguin's E-books) is restricted; *provided that* (1) such agreed restriction shall not interfere with the E-book Retailer's ability to reduce the final price paid by consumers to purchase Penguin's E-books by an aggregate amount equal to the total commissions Penguin pays to the E-book Retailer, over a period of at least one year, in connection with the Sale of Penguin's E-books to consumers; (2) Penguin shall not restrict, limit, or impede the E-book

Retailer's use of the agreed funds to offer price discounts or any other form of promotions to encourage consumers to Purchase one or more E-books; and (3) the method of accounting for the E-book Retailer's promotional activity does not restrict, limit, or impede the E-book Retailer from engaging in any form of retail activity or promotion.

VII. ANTITRUST COMPLIANCE

Within thirty days after entry of this Final Judgment, Penguin shall designate its general counsel or chief legal officer, or an employee reporting directly to its general counsel or chief legal officer, as Antitrust Compliance Officer with responsibility for ensuring Penguin's compliance with this Final Judgment. The Antitrust Compliance Officer shall be responsible for the following:

A. furnishing a copy of this Final Judgment, within thirty days of its entry, to each of Penguin's officers and directors, and to each of Penguin's employees engaged, in whole or in part, in the distribution or Sale of E-books;

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 VII.A of this Final Judgment;

C. ensuring that each person identified in Sections VII.A and VII.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 entry of this Final Judgment and on each anniversary of the entry of this Final Judgment, from each person identified in Sections VII.A and VII.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 an annual antitrust compliance audit covering each person identified in Sections VII.A and VII.B of this Final Judgment, and maintaining all records pertaining to such audits;

F. communicating annually to Penguin'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 Penguin's conduct to assure compliance with this Final Judgment; and, within seven days of taking such corrective actions, providing to the Department of Justice a description of the actual or potential violation of this Final Judgment and the corrective actions taken;

H. furnishing to the Department of Justice on a quarterly basis electronic copies of any non-privileged communications with any Person containing allegations of Penguin's noncompliance with any provisions of this Final Judgment;

I. maintaining, and furnishing to the Department of Justice on a quarterly basis, a log of all oral and written communications, excluding privileged or public communications, between or among (1) any of Penguin's officers, directors, or employees involved in the development of Penguin's plans or strategies relating to E-books, and (2) any person employed by or associated with another Publisher Defendant, relating, in whole or in part, to the distribution or sale in the United States of books sold in any format, including 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 (for a collection of communications solely concerning a single business arrangement that is specifically exempted from the reporting requirements of Section IV.C of this Final Judgment, Penguin may provide a summary of the communications rather than logging each communication individually); and

J. providing to the Department of Justice annually, on or before the anniversary of the entry of this Final Judgment, a written statement as to the fact and manner of Penguin's compliance with Sections IV, V, and VII of this Final Judgment.

VIII. COMPLIANCE INSPECTION

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 Department of Justice, including consultants and other persons retained by the Department of Justice, shall, upon written request of an authorized representative of the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to Penguin, be permitted:

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

2. to interview, either informally or on the record, Penguin'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 Penguin.

B. Upon the written request of an authorized representative of the Assistant Attorney General in charge of the Antitrust Division, Penguin shall submit written reports or respond to written interrogatories, under oath if requested, relating to any of the matters contained in this Final Judgment as may be requested. Written reports authorized under this paragraph may, in the sole discretion of the United States, require Penguin to conduct, at their 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 to any person other than an authorized representative of the executive branch of the United States, except in the course of legal proceedings to which the United States is a party (including 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 Penguin to the United States, Penguin 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 Penguin 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 shall give Penguin ten calendar days notice prior to divulging such material in any civil or administrative proceeding.

IX. RETENTION OF JURISDICTION

This Court retains jurisdiction to enable any party 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 any of its provisions, to enforce compliance, and to punish violations of its provisions.

X. NO LIMITATION ON GOVERNMENT RIGHTS

Nothing in this Final Judgment shall limit the right of the United States to investigate and bring actions to prevent or restrain violations of the antitrust laws concerning any past, present, or future conduct, policy, or practice of Penguin.

XI. EXPIRATION OF FINAL JUDGMENT

Unless this Court grants an extension, this Final Judgment shall expire five years from the date of its entry.

XII. PUBLIC INTEREST DETERMINATION

Entry of this Final Judgment is in the public interest. The parties have complied with the requirements of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16, including making copies available to the public of this Final Judgment, the Competitive Impact Statement, and any comments thereon and the United States' responses to comments. Based upon the record before

the Court, which includes the Competitive Impact Statement and any comments and response to comments filed with the Court, entry of this Final Judgment is in the public interest.

Date: May 17, 2013

Court approval subject to procedures set forth in the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16

United States District Judge

United States District Court
Southern District of New York
Office of the Clerk
U.S. Courthouse
500 Pearl Street, New York, N.Y. 10007-1213

Date:

In Re:

-v-

Case #: ( )

Dear Litigant,

Enclosed is a copy of the judgment entered in your case.

Your attention is directed to Rule 4(a)(1) of the Federal Rules of Appellate Procedure, which requires that if you wish to appeal the judgment in your case, you must file a notice of appeal within 30 days of the date of entry of the judgment (60 days if the United States or an officer or agency of the United States is a party).

If you wish to appeal the judgment but for any reason you are unable to file your notice of appeal within the required time, you may make a motion for an extension of time in accordance with the provision of Fed. R. App. P. 4(a)(5). That rule requires you to show "excusable neglect" or "good cause" for your failure to file your notice of appeal within the time allowed. Any such motion must first be served upon the other parties and then filed with the Pro Se Office no later than 60 days from the date of entry of the judgment (90 days if the United States or an officer or agency of the United States is a party).

The enclosed Forms 1, 2 and 3 cover some common situations, and you may choose to use one of them if appropriate to your circumstances.

The Filing fee for a notice of appeal is $5.00 and the appellate docketing fee is $450.00 payable to the "Clerk of the Court, USDC, SDNY" by certified check, money order or cash. **No personal checks are accepted.**

Ruby J. Krajick, Clerk of Court

by: _____

, Deputy Clerk

United States District Court
Southern District of New York
Office of the Clerk
U.S. Courthouse
500 Pearl Street, New York, N.Y. 10007-1213

_____X

-V-

NOTICE OF APPEAL

civ. ( )

_____X

Notice is hereby given that _____
(party)
hereby appeals to the United States Court of Appeals for the Second Circuit from the Judgment [describe it]

entered in this action on the _____ day of _____, _____.
(day) (month) (year)

_____
(Signature)

_____
(Address)

_____
(City, State and Zip Code)

Date: _____ ( ) _____ - _____
(Telephone Number)

Note: You may use this form to take an appeal provided that it is received by the office of the Clerk of the District Court within 30 days of the date on which the judgment was entered (60 days if the United States or an officer or agency of the United States is a party).

FORM 1

United States District Court
Southern District of New York
Office of the Clerk
U.S. Courthouse
500 Pearl Street, New York, N.Y. 10007-1213

_____X

-V-

MOTION FOR EXTENSION OF TIME TO FILE A NOTICE OF APPEAL

civ. ( )

_____X

Pursuant to Fed. R. App. P. 4(a)(5), _____ respectfully
(party)
requests leave to file the within notice of appeal out of time.

_____
(party)
desires to appeal the judgment in this action entered on _____ but failed to file a
(day)
notice of appeal within the required number of days because:

[Explain here the "excusable neglect" or "good cause" which led to your failure to file a notice of appeal within the required number of days.]

_____
(Signature)

_____
(Address)

_____
(City, State and Zip Code)

Date: _____ ( ) _____ - _____
(Telephone Number)

Note: You may use this form, together with a copy of Form 1, if you are seeking to appeal a judgment and did not file a copy of Form 1 within the required time. If you follow this procedure, these forms must be received in the office of the Clerk of the District Court no later than 60 days of the date which the judgment was entered (90 days if the United States or an officer or agency of the United States is a party).

District Court will receive it within the 30 days of the date on which the judgment was entered (60 days if the United States or an officer or agency of the United States is a party).

FORM 3

United States District Court
Southern District of New York
Office of the Clerk
U.S. Courthouse
500 Pearl Street, New York, N.Y. 10007-1213

_____X

-V-

AFFIRMATION OF SERVICE

civ. ( )

_____X

I, _____, declare under penalty of perjury that I have served a copy of the attached _____

_____

upon _____

_____

whose address is: _____

_____

Date: _____
New York, New York

_____
(Signature)

_____
(Address)

_____
(City, State and Zip Code)

FORM 4

APPEAL FORMS

FORM 2

United States District Court
Southern District of New York
Office of the Clerk
U.S. Courthouse
500 Pearl Street, New York, N.Y. 10007-1213

_____X

-V-

NOTICE OF APPEAL
AND
MOTION FOR EXTENSION OF TIME

civ. ( )

_____X

1. Notice is hereby given that _____ hereby appeals to
(party)
the United States Court of Appeals for the Second Circuit from the judgment entered on _____.
[Give a description of the judgment]

2. In the event that this form was not received in the Clerk's office within the required time

_____ respectfully requests the court to grant an extension of time in
(party)
accordance with Fed. R. App. P. 4(a)(5).

a. In support of this request, _____ states that
(party)
this Court's judgment was received on _____ and that this form was mailed to the
(date)
court on _____.
(date)

_____
(Signature)

_____
(Address)

_____
(City, State and Zip Code)

Date: _____ ( ) _____ - _____
(Telephone Number)

Note: You may use this form if you are mailing your notice of appeal and are not sure the Clerk of the

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 (DLC) ECF Case

~~[PROPOSED]~~ FINAL JUDGMENT AS TO DEFENDANTS THE PENGUIN GROUP, A DIVISION OF PEARSON PLC, AND PENGUIN GROUP (USA), INC.

WHEREAS, Plaintiff, the United States of America filed its Complaint on April 11, 2012, alleging that Defendants conspired to raise retail prices of E-books in violation of Section 1 of the Sherman Act, as amended, 15 U.S.C. § 1, and Plaintiff and Penguin, by their respective attorneys, have consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law;

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

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

AND WHEREAS, Plaintiff requires Penguin to agree to undertake certain actions and refrain from certain conduct for the purpose of remedying the loss of competition alleged in the Complaint;

AND WHEREAS, Penguin has represented to the United States that the actions and conduct restrictions can and will be undertaken and that it will later raise no claim of hardship or difficulty as grounds for asking the Court to modify any of the provisions contained below;

NOW THEREFORE, before any testimony is taken, without trial or adjudication of any issue of fact or law, and upon consent of Penguin, it is ORDERED, ADJUDGED, AND DECREED:

I. JURISDICTION

This Court has jurisdiction over the subject matter of this action and over Penguin. The Complaint states a claim upon which relief may be granted against Penguin under Section 1 of the Sherman Act, as amended, 15 U.S.C. § 1.

II. DEFINITIONS

As used in this Final Judgment:

A. "Agency Agreement" means an agreement between an E-book Publisher and an E-book Retailer under which the E-book Publisher Sells E-books to consumers through the E-book Retailer, which under the agreement acts as an agent of the E-book Publisher and is paid a commission in connection with the Sale of one or more of the E-book Publisher's E-books.

B. "Apple" means Apple, Inc., a California corporation with its principal place of business in Cupertino, California, its successors and assigns, and its parents, subsidiaries, divisions, groups, affiliates, partnerships, and joint ventures, and their directors, officers, managers, agents, and employees.

C. "Department of Justice" means the Antitrust Division of the United States Department of Justice.

D. "E-book" means an electronically formatted book designed to be read on a computer, a handheld device, or other electronic devices capable of visually displaying E-books. For purposes of this Final Judgment, the term E-book does not include (1) an audio book, even if delivered and stored digitally; (2) a standalone specialized software application or "app" sold through an "app store" rather than through an e-book store (*e.g.*, through Apple's "App Store" rather than through its "iBookstore" or "iTunes") and not designed to be executed or read by or through a dedicated E-book reading device; or (3) a media file containing an electronically formatted book for which most of the value to consumers is derived from audio or video content contained in the file that is not included in the print version of the book.

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. For purposes of this Final Judgment, Publisher Defendants and all other Persons whose primary business is book publishing are not E-book Retailers.

G. "Hachette" means Hachette Book Group, Inc., a Delaware corporation with its principal place of business in New York, New York, its successors and assigns, and its

subsidiaries, divisions, groups, and partnerships, and their directors, officers, managers, agents, and employees.

H. "HarperCollins" means HarperCollins Publishers L.L.C., a Delaware limited liability company with its principal place of business in New York, New York, its successors and assigns, and its subsidiaries, divisions, groups, and partnerships, and their directors, officers, managers, agents, and employees.

I. "Including" means including, but not limited to.

J. "Macmillan" means (1) Holtzbrinck Publishers, LLC d/b/a Macmillan, a New York limited liability company with its principal place of business in New York, New York; and (2) Verlagsgruppe Georg von Holtzbrinck GmbH, a German corporation with its principal place of business in Stuttgart, Germany, their successors and assigns, and their parents, subsidiaries, divisions, groups, affiliates, and partnerships, and their directors, officers, managers, agents, and employees.

K. "Penguin" means (1) Penguin Group (USA), Inc., a Delaware corporation with its principal place of business in New York, New York; (2) The Penguin Group, a division of U.K. corporation Pearson plc with its principal place of business in London, England; (3) The Penguin Publishing Company Ltd, a company registered in England and Wales with its principal place of business in London, England; and (4) Dorling Kindersley Holdings Limited, a company registered in England and Wales with its principal place of business in London, England; and each of their respective successors and assigns (expressly including Penguin Random House and any similar joint venture between Penguin and Random House Inc.); each of their respective subsidiaries, divisions, groups, partnerships; and each of their respective directors, officers, managers, agents,

and employees. Where Section IV.A, IV.B, IV.D, or VII imposes an obligation on Penguin to engage in certain conduct by either a date certain or by a specified day after entry of this Final Judgment, any successor or assign whose acquisition of or combination or other relationship with Penguin is consummated after entry of this Final Judgment shall meet each such obligation within thirty days after consummation. The prohibitions of Section V.A of this Final Judgment shall expire for any successor or assign of Penguin on the dates on which such prohibitions would have expired for Penguin had the acquisition, combination, or other relationship not occurred. Where the Final Judgment imposes an obligation on Penguin to engage in or refrain from engaging in certain conduct, that obligation shall apply to Penguin and to any joint venture or other business arrangement established by Penguin and one or more Publisher Defendants.

L. "Penguin Random House" means the joint venture entities, which will operate under the name "Penguin Random House," that will be formed pursuant to the Contribution Agreement, dated October 29, 2012, by and between Pearson plc and Bertelsmann SE & Co. KGaA.

M. "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.

N. "Price MFN" means a term in an agreement between an E-book Publisher and an E-book Retailer under which

1. 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;

2. the Wholesale Price at which the E-book Publisher Sells one or more E-books to that E-book Retailer for Sale to consumers depends in any way on the Wholesale Price at which the E-book Publisher Sells the same E-book(s) to any other E-book Retailer for Sale to consumers; or

3. the revenue share or commission that E-book Retailer receives from the E-book Publisher in connection with the Sale of one or more E-books to consumers depends in any way on the revenue share or commission that (a) any other E-book Retailer receives from the E-book Publisher in connection with the Sale of the same E-book(s) to consumers, or (b) that E-book Retailer receives from any other E-book Publisher in connection with the Sale of one or more of the other E-book Publisher's E-books.

For purposes of this Final Judgment, it will not constitute a Price MFN under subsection 3 of this definition if Penguin agrees, at the request of an E-book Retailer, to meet more favorable pricing, discounts, or allowances offered to the E-book Retailer by another E-book Publisher for the period during which the other E-book Publisher provides that additional compensation, so long as that agreement is not or does not result from a pre-existing agreement that requires Penguin to meet all requests by the E-book Retailer for more favorable pricing within the terms of the agreement.

O. "Publisher Defendants" means Hachette, HarperCollins, Macmillan, Penguin, and Simon & Schuster. Where this Final Judgment imposes an obligation on Publisher Defendants to engage in or refrain from engaging in certain conduct, that obligation shall apply to each Publisher Defendant individually and to any joint venture or other business arrangement established by any two or more Publisher Defendants.

P. "Purchase" means a consumer's acquisition of one or more E-books as a result of a Sale.

Q. "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.

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

S. "Simon & Schuster" means Simon & Schuster, Inc., a New York corporation with its principal place of business in New York, New York, its successors and assigns, and its subsidiaries, divisions, groups, and partnerships, and their directors, officers, managers, agents, and employees.

T. "Wholesale Price" means (1) the net amount, after any discounts or other adjustments (not including promotional allowances subject to Section 2(d) of the Robinson-Patman Act, 15 U.S.C. § 13(d)), that an E-book Retailer pays to an E-book Publisher for an E-book that the E-book Retailer Sells to consumers; or (2) the Retail Price at which an E-book Publisher, under an Agency Agreement, Sells an E-book to consumers through an E-book Retailer

minus the commission or other payment that E-book Publisher pays to the E-book Retailer in connection with or that is reasonably allocated to that Sale.

III. APPLICABILITY

This Final Judgment applies to Penguin and all other Persons in active concert or participation with Penguin who receive actual notice of this Final Judgment by personal service or otherwise.

IV. REQUIRED CONDUCT

A. Within seven days after entry of this Final Judgment, Penguin shall terminate any agreement with Apple relating to the Sale of E-books that was executed prior to Penguin's stipulation to the entry of this Final Judgment.

B. For each agreement between Penguin and an E-book Retailer other than Apple that (1) restricts, limits, or impedes the E-book Retailer'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; or (2) contains a Price MFN, Penguin shall notify the E-book Retailer, by January 8, 2013, that the E-book Retailer may terminate the agreement with thirty-days notice and shall, thirty days after the E-book Retailer provides such notice, release the E-book Retailer from the agreement. For each such agreement that the E-book Retailer has not terminated within ten days after entry of this Final Judgment, Penguin shall, as soon as permitted under the agreement, take each step required under the agreement to cause the agreement to be terminated and not renewed or extended.

C. Penguin shall notify the Department of Justice in writing at least sixty days in advance of the formation or material modification of any joint venture or other business

arrangement relating to the Sale, development, or promotion of E-books in the United States in which Penguin and at least one other E-book Publisher (including another Publisher Defendant) are participants or partial or complete owners. Such notice shall describe the joint venture or other business arrangement, identify all E-book Publishers that are parties to it, and attach the most recent version or draft of the agreement, contract, or other document(s) formalizing the joint venture or other business arrangement. Within thirty days after Penguin provides notification of the joint venture or business arrangement, the Department of Justice may make a written request for additional information. If the Department of Justice makes such a request, Penguin shall not proceed with the planned formation or material modification of the joint venture or business arrangement until thirty days after substantially complying with such additional request(s) for information. The failure of the Department of Justice to request additional information or to bring an action under the antitrust laws to challenge the formation or material modification of the joint venture shall neither give rise to any inference of lawfulness nor limit in any way the right of the United States to investigate the formation, material modification, or any other aspects or activities of the joint venture or business arrangement and to bring actions to prevent or restrain violations of the antitrust laws.

The notification requirements of this Section IV.C shall not apply to ordinary course business arrangements between Penguin and another E-book Publisher (not a Publisher Defendant) that do not relate to the Sale of E-books to consumers, or to business arrangements the primary or predominant purpose or focus of which involves: (i) E-book Publishers co-publishing one or more specifically identified E-book titles or a particular author's E-books; (ii) Penguin licensing to or from another E-book Publisher the publishing rights to one or more specifically

identified E-book titles or a particular author's E-books; (iii) Penguin providing technology services to or receiving technology services from another E-book Publisher (not a Publisher Defendant) or licensing rights in technology to or from another E-book Publisher; or (iv) Penguin distributing E-books published by another E-book Publisher (not a Publisher Defendant). The notification requirements of this Section IV.C shall also not apply to the formation of Penguin Random House, review of which is pending before the Department of Justice.

D. Penguin shall furnish to the Department of Justice (1) by January 8, 2013, one complete copy of each agreement, executed, renewed, or extended on or after January 1, 2012, between Penguin and any E-book Retailer relating to the Sale of E-books, and, (2) thereafter, on a quarterly basis, each such agreement executed, renewed, or extended since Penguin's previous submission of agreements to the Department of Justice.

V. PROHIBITED CONDUCT

A. For two years, Penguin shall not restrict, limit, or impede an E-book Retailer'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, such two-year period to run separately for each E-book Retailer, at Penguin's option, from either:

1. the termination of an agreement between Penguin and the E-book Retailer that restricts, limits, or impedes the E-book Retailer'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; or

2. the date on which Penguin notifies the E-book Retailer in writing that Penguin will not enforce any term(s) in its agreement with the E-book Retailer that restrict, limit,

or impede the E-book Retailer from setting, altering, or reducing the Retail Price of one or more E-books, or from offering price discounts or any other form of promotions to encourage consumers to Purchase one or more E-books.

Penguin shall notify the Department of Justice of the option it selects for each E-book Retailer within seven days of making its selection.

B. For two years after Penguin's stipulation to the entry of this Final Judgment, Penguin shall not enter into any agreement with any E-book Retailer that restricts, limits, or impedes the E-book Retailer from setting, altering, or reducing the Retail Price of one or more E-books, or from offering price discounts or any other form of promotions to encourage consumers to Purchase one or more E-books.

C. Penguin shall not enter into any agreement with an E-book Retailer relating to the Sale of E-books that contains a Price MFN.

D. Penguin shall not retaliate against, or urge any other E-book Publisher or E-book Retailer to retaliate against, an E-book Retailer for engaging in any activity that Penguin is prohibited by Sections V.A, V.B, and VI.B.2 of this Final Judgment from restricting, limiting, or impeding in any agreement with an E-book Retailer. After the expiration of prohibitions in Sections V.A and V.B of this Final Judgment, this Section V.D shall not prohibit Penguin from unilaterally entering into or enforcing any agreement with an E-book Retailer that restricts, limits, or impedes the E-book Retailer from setting, altering, or reducing the Retail Price of any of Penguin's E-books or from offering price discounts or any other form of promotions to encourage consumers to Purchase any of Penguin's E-books.

E. Penguin shall not enter into or enforce any agreement, arrangement, understanding, plan, program, combination, or conspiracy with any E-book Publisher (including another Publisher Defendant) to raise, stabilize, fix, set, or coordinate the Retail Price or Wholesale Price of any E-book or fix, set, or coordinate any term or condition relating to the Sale of E-books.

This Section V.E shall not prohibit Penguin from entering into and enforcing agreements relating to the distribution of another E-book Publisher's E-books (not including the E-books of another Publisher Defendant) or to the co-publication with another E-book Publisher of specifically identified E-book titles or a particular author's E-books, or from participating in output-enhancing industry standard-setting activities relating to E-book security or technology.

F. Penguin (including each officer of each parent of Penguin who exercises direct control over Penguin's business decisions or strategies) shall not convey or otherwise communicate, directly or indirectly (including by communicating indirectly through an E-book Retailer with the intent that the E-book Retailer convey information from the communication to another E-book Publisher or knowledge that it is likely to do so), to any other E-book Publisher (including to an officer of a parent of a Publisher Defendant) any competitively sensitive information, including:

1. its business plans or strategies;

2. its past, present, or future wholesale or retail prices or pricing strategies for books sold in any format (*e.g.*, print books, E-books, or audio books);

3. any terms in its agreement(s) with any retailer of books Sold in any format; or

4. any terms in its agreement(s) with any author.

This Section V.F shall not prohibit Penguin from communicating (a) in a manner and through media consistent with common and reasonable industry practice, the cover prices or wholesale or retail prices of books sold in any format to potential purchasers of those books; or (b) information Penguin needs to communicate in connection with (i) its enforcement or assignment of its intellectual property or contract rights, (ii) a contemplated merger, acquisition, or purchase or sale of assets, (iii) its distribution of another E-book Publisher's E-books, or (iv) a business arrangement under which E-book Publishers agree to co-publish, or an E-book Publisher agrees to license to another E-book Publisher the publishing rights to, one or more specifically identified E-book titles or a particular author's E-books.

VI. PERMITTED CONDUCT

A. Nothing in this Final Judgment shall prohibit Penguin unilaterally from compensating a retailer, including an E-book Retailer, for valuable marketing or other promotional services rendered.

B. Notwithstanding Sections V.A and V.B of this Final Judgment, Penguin may enter into Agency Agreements with E-book Retailers under which the aggregate dollar value of the price discounts or any other form of promotions to encourage consumers to Purchase one or more of Penguin's E-books (as opposed to advertising or promotions engaged in by the E-book Retailer not specifically tied or directed to Penguin's E-books) is restricted; *provided that* (1) such agreed restriction shall not interfere with the E-book Retailer's ability to reduce the final price paid by consumers to purchase Penguin's E-books by an aggregate amount equal to the total commissions Penguin pays to the E-book Retailer, over a period of at least one year, in connection with the Sale of Penguin's E-books to consumers; (2) Penguin shall not restrict, limit, or impede the E-book

Retailer's use of the agreed funds to offer price discounts or any other form of promotions to encourage consumers to Purchase one or more E-books; and (3) the method of accounting for the E-book Retailer's promotional activity does not restrict, limit, or impede the E-book Retailer from engaging in any form of retail activity or promotion.

VII. ANTITRUST COMPLIANCE

Within thirty days after entry of this Final Judgment, Penguin shall designate its general counsel or chief legal officer, or an employee reporting directly to its general counsel or chief legal officer, as Antitrust Compliance Officer with responsibility for ensuring Penguin's compliance with this Final Judgment. The Antitrust Compliance Officer shall be responsible for the following:

A. furnishing a copy of this Final Judgment, within thirty days of its entry, to each of Penguin's officers and directors, and to each of Penguin's employees engaged, in whole or in part, in the distribution or Sale of E-books;

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 VII.A of this Final Judgment;

C. ensuring that each person identified in Sections VII.A and VII.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 entry of this Final Judgment and on each anniversary of the entry of this Final Judgment, from each person identified in Sections VII.A and VII.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 an annual antitrust compliance audit covering each person identified in Sections VII.A and VII.B of this Final Judgment, and maintaining all records pertaining to such audits;

F. communicating annually to Penguin'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 Penguin's conduct to assure compliance with this Final Judgment; and, within seven days of taking such corrective actions, providing to the Department of Justice a description of the actual or potential violation of this Final Judgment and the corrective actions taken;

H. furnishing to the Department of Justice on a quarterly basis electronic copies of any non-privileged communications with any Person containing allegations of Penguin's noncompliance with any provisions of this Final Judgment;

I. maintaining, and furnishing to the Department of Justice on a quarterly basis, a log of all oral and written communications, excluding privileged or public communications, between or among (1) any of Penguin's officers, directors, or employees involved in the development of Penguin's plans or strategies relating to E-books, and (2) any person employed by or associated with another Publisher Defendant, relating, in whole or in part, to the distribution or sale in the United States of books sold in any format, including 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 (for a collection of communications solely concerning a single business arrangement that is specifically exempted from the reporting requirements of Section IV.C of this Final Judgment, Penguin may provide a summary of the communications rather than logging each communication individually); and

J. providing to the Department of Justice annually, on or before the anniversary of the entry of this Final Judgment, a written statement as to the fact and manner of Penguin's compliance with Sections IV, V, and VII of this Final Judgment.

VIII. COMPLIANCE INSPECTION

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 Department of Justice, including consultants and other persons retained by the Department of Justice, shall, upon written request of an authorized representative of the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to Penguin, be permitted:

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

2. to interview, either informally or on the record, Penguin'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 Penguin.

B. Upon the written request of an authorized representative of the Assistant Attorney General in charge of the Antitrust Division, Penguin shall submit written reports or respond to written interrogatories, under oath if requested, relating to any of the matters contained in this Final Judgment as may be requested. Written reports authorized under this paragraph may, in the sole discretion of the United States, require Penguin to conduct, at their 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 to any person other than an authorized representative of the executive branch of the United States, except in the course of legal proceedings to which the United States is a party (including 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 Penguin to the United States, Penguin 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 Penguin 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 shall give Penguin ten calendar days notice prior to divulging such material in any civil or administrative proceeding.

IX. RETENTION OF JURISDICTION

This Court retains jurisdiction to enable any party 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 any of its provisions, to enforce compliance, and to punish violations of its provisions.

X. NO LIMITATION ON GOVERNMENT RIGHTS

Nothing in this Final Judgment shall limit the right of the United States to investigate and bring actions to prevent or restrain violations of the antitrust laws concerning any past, present, or future conduct, policy, or practice of Penguin.

XI. EXPIRATION OF FINAL JUDGMENT

Unless this Court grants an extension, this Final Judgment shall expire five years from the date of its entry.

XII. PUBLIC INTEREST DETERMINATION

Entry of this Final Judgment is in the public interest. The parties have complied with the requirements of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16, including making copies available to the public of this Final Judgment, the Competitive Impact Statement, and any comments thereon and the United States' responses to comments. Based upon the record before

the Court, which includes the Competitive Impact Statement and any comments and response to comments filed with the Court, entry of this Final Judgment is in the public interest.

Date: May 17, 2013

Court approval subject to procedures set forth in the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16

United States District Judge

United States District Court
Southern District of New York
Office of the Clerk
U.S. Courthouse
500 Pearl Street, New York, N.Y. 10007-1213

Date:

In Re:

-v-

Case #: ( )

Dear Litigant,

Enclosed is a copy of the judgment entered in your case.

Your attention is directed to Rule 4(a)(1) of the Federal Rules of Appellate Procedure, which requires that if you wish to appeal the judgment in your case, you must file a notice of appeal within 30 days of the date of entry of the judgment (60 days if the United States or an officer or agency of the United States is a party).

If you wish to appeal the judgment but for any reason you are unable to file your notice of appeal within the required time, you may make a motion for an extension of time in accordance with the provision of Fed. R. App. P. 4(a)(5). That rule requires you to show "excusable neglect" or "good cause" for your failure to file your notice of appeal within the time allowed. Any such motion must first be served upon the other parties and then filed with the Pro Se Office no later than 60 days from the date of entry of the judgment (90 days if the United States or an officer or agency of the United States is a party).

The enclosed Forms 1, 2 and 3 cover some common situations, and you may choose to use one of them if appropriate to your circumstances.

The Filing fee for a notice of appeal is $5.00 and the appellate docketing fee is $450.00 payable to the "Clerk of the Court, USDC, SDNY" by certified check, money order or cash. **No personal checks are accepted.**

Ruby J. Krajick, Clerk of Court

by: _____

, Deputy Clerk

United States District Court
Southern District of New York
Office of the Clerk
U.S. Courthouse
500 Pearl Street, New York, N.Y. 10007-1213

_____X

-V-

NOTICE OF APPEAL

civ. ( )

_____X

Notice is hereby given that _____
(party)
hereby appeals to the United States Court of Appeals for the Second Circuit from the Judgment [describe it]

entered in this action on the _____ day of _____, _____.
(day) (month) (year)

_____
(Signature)

_____
(Address)

_____
(City, State and Zip Code)

Date: _____ ( ) _____ - _____
(Telephone Number)

Note: You may use this form to take an appeal provided that it is received by the office of the Clerk of the District Court within 30 days of the date on which the judgment was entered (60 days if the United States or an officer or agency of the United States is a party).

FORM 1

United States District Court
Southern District of New York
Office of the Clerk
U.S. Courthouse
500 Pearl Street, New York, N.Y. 10007-1213

_____X

-V-

MOTION FOR EXTENSION OF TIME TO FILE A NOTICE OF APPEAL

civ. ( )

_____X

Pursuant to Fed. R. App. P. 4(a)(5), _____ respectfully
(party)

requests leave to file the within notice of appeal out of time.

_____
(party)

desires to appeal the judgment in this action entered on _____ but failed to file a
(day)

notice of appeal within the required number of days because:

[Explain here the "excusable neglect" or "good cause" which led to your failure to file a notice of appeal within the required number of days.]

_____
(Signature)

_____
(Address)

_____
(City, State and Zip Code)

Date: _____ ( ) _____ - _____
(Telephone Number)

Note: You may use this form, together with a copy of Form 1, if you are seeking to appeal a judgment and did not file a copy of Form 1 within the required time. If you follow this procedure, these forms must be received in the office of the Clerk of the District Court no later than 60 days of the date which the judgment was entered (90 days if the United States or an officer or agency of the United States is a party).

District Court will receive it within the 30 days of the date on which the judgment was entered (60 days if the United States or an officer or agency of the United States is a party).

FORM 3

United States District Court
Southern District of New York
Office of the Clerk
U.S. Courthouse
500 Pearl Street, New York, N.Y. 10007-1213

_____X

AFFIRMATION OF SERVICE

-V-

civ. ( )

_____X

I, _____, declare under penalty of perjury that I have served a copy of the attached _____

_____

upon _____

_____

whose address is: _____

_____

Date: _____
New York, New York

_____
(Signature)

_____
(Address)

_____
(City, State and Zip Code)

FORM 4

APPEAL FORMS

FORM 2

United States District Court
Southern District of New York
Office of the Clerk
U.S. Courthouse
500 Pearl Street, New York, N.Y. 10007-1213

_____X

-V-

NOTICE OF APPEAL
AND
MOTION FOR EXTENSION OF TIME

civ. ( )

_____X

1. Notice is hereby given that _____ hereby appeals to
(party)
the United States Court of Appeals for the Second Circuit from the judgment entered on _____.
[Give a description of the judgment]

2. In the event that this form was not received in the Clerk's office within the required time

_____ respectfully requests the court to grant an extension of time in
(party)
accordance with Fed. R. App. P. 4(a)(5).

a. In support of this request, _____ states that
(party)
this Court's judgment was received on _____ and that this form was mailed to the
(date)
court on _____.
(date)

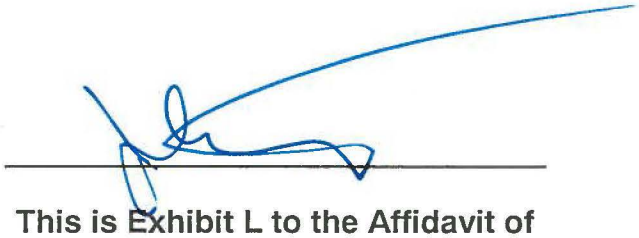
_____
(Signature)

_____
(Address)

_____
(City, State and Zip Code)

Date: _____ ( ) _____ - _____
(Telephone Number)

Note: You may use this form if you are mailing your notice of appeal and are not sure the Clerk of the



This is Exhibit L to the Affidavit of
Mallory Kelly
Affirmed 28 August 2015

Competition Bureau

Competition Bureau Takes Action to Promote Competition for ebooks

Four major publishers agree to take steps that are expected to lower ebook prices in Canada

February 7, 2014 — OTTAWA, ON — Competition Bureau

The Competition Bureau has reached an agreement with four major ebook publishers that is expected to lower the price of ebooks in Canada.

Following an 18-month investigation into the ebook industry in Canada, the Bureau has signed a consent agreement with Hachette Book Group, HarperCollins, Macmillan and Simon & Schuster. Canadian consumers will benefit from the agreement registered with the Competition Tribunal today, in that the Bureau expects that competition among retailers will increase, resulting in lower prices for ebooks.

The four publishers have agreed to remove or amend clauses in their distribution agreements with individual ebook retailers that the Bureau believes have the effect of restricting retail price competition, which will allow retailers to offer discounts on ebooks.

The Bureau alleges that the publishers engaged in conduct that resulted in reduced competition for ebooks in Canada, contrary to the civil competitor collaboration provision in section 90.1 of the *Competition Act*.

The Bureau's investigation into the ebook industry in Canada continues at this time.

Quick Facts

- Hachette Book Group, HarperCollins, Macmillan and Simon & Schuster publish many of the bestselling ebooks in Canada.
- Similar settlements reached in the United States in 2012 and 2013 resulted in lower prices for ebooks in the US. The Bureau's monitoring of the effects of the US settlement shows that discounts of 20 per cent, and sometimes higher, can now be found on certain bestselling ebooks.

Quotes

> "This agreement should benefit Canadian consumers by lowering the price of ebooks in Canada. Businesses operating in the digital economy must realize that anti-competitive activity will not be tolerated, whether it occurs in the physical world or the digital one."
>
> John Pecman,
> Commissioner of Competition

Related Information

- The **consent agreement** available on the Competition Tribunal's website.

Contacts

For media enquiries, please contact:
Media Relations
Telephone: 819-994-5945
Email: **media@cb-bc.gc.ca**

Government of Canada / Gouvernement du Canada

Canada

For general enquiries, please contact:
Information Centre
Competition Bureau
Telephone: 819-997-4282
Toll free: 1-800-348-5358
TTY (hearing impaired): 1-800-642-3844
www.competitionbureau.gc.ca
Enquiries/Complaints
Stay connected

The Competition Bureau, as an independent law enforcement agency, ensures that Canadian businesses and consumers prosper in a competitive and innovative marketplace.

This is Exhibit M to the Affidavit of
Mallory Kelly
Affirmed 28 August 2015

File No. CT-2014-

COMPETITION TRIBUNAL

IN THE MATTER OF the *Competition Act,* R.S.C. 1985, c. C-34, as amended;

AND IN THE MATTER OF an inquiry commenced under section 10 of the *Competition Act,* relating to certain alleged anti-competitive conduct in the markets for E-books in Canada;

AND IN THE MATTER OF the filing and registration of a consent agreement pursuant to section 105 of the *Competition Act;*

AND IN THE MATTER OF an application under section 106(2) of the *Competition Act,* by Kobo Inc. to rescind or vary the Consent Agreement between the Commissioner of Competition and Hachette Book Group Canada Ltd., Hachette Book Group, Inc., Hachette Digital, Inc.; HarperCollins Canada Limited; Holtzbrinck Publishers, LLC; and Simon & Schuster Canada, a division of CBS Canada Holdings Co. filed and registered with the Competition Tribunal on February 7, 2014, under section 105 of the *Competition Act.*

BETWEEN:

KOBO INC.

Applicant/Moving Party

- and -

THE COMMISSIONER OF COMPETITION,
HACHETTE BOOK GROUP CANADA LTD.,
HACHETTE BOOK GROUP, INC.,
HACHETTE DIGITAL INC.,
HARPERCOLLINS CANADA LIMITED,
HOLTZBRINCK PUBLISHERS, LLC, and
SIMON & SCHUSTER CANADA, A DIVISION OF
CBS CANADA HOLDINGS CO.

Respondents/Responding Parties

AFFIDAVIT OF MICHAEL TAMBLYN

WEIRFOULDS LLP
Barristers & Solicitors
4100 - 66 Wellington Street West
P.O.Box 35, Toronto-Dominion Centre
Toronto, ON M5K 1B7

Nikiforos Iatrou
Mandy L. Seidenberg
Bronwyn Roe

Tel: 416-365-1110
Fax: 416-365-1876
niatrou@weirfoulds.com
mseidenberg@weirfoulds.com
broe@weirfoulds.com

Lawyers for the Applicant

I, MICHAEL TAMBLYN, of the City of Toronto in the Province of Ontario, MAKE OATH AND SAY:

1. I am the Chief Content Officer at Kobo Inc. ("**Kobo**"), and as such I have personal knowledge of the matters set out below.

Kobo's Background and E-book Operations

2. Kobo is an E-book[1] company with its headquarters in Toronto, Ontario. One of Kobo's primary business operations is as a retailer of E-books. Kobo also develops and retails E-book reading devices ("**E-readers**") and creates free application software for reading E-books on computers and mobile devices.

3. Kobo sells E-books to users who read them either on devices equipped with the Kobo app or on Kobo or other compatible E-readers. There are over 18.4 million users of Kobo E-readers and E-reading applications worldwide. Kobo currently offers these customers access to over 4 million E-books.

4. Kobo commenced operations in February 2009 as Shortcovers, which was, at that time, a division of Indigo Books & Music Inc. ("**Indigo**"). The division was then spun off in December 2009 as an independent company, Kobo., which is now a wholly-owned subsidiary of Rakuten, Inc.

Kobo's Contractual Relationships with Publishers in Canada

5. The E-book titles Kobo sells originate from a broad international base of publishers. Kobo currently offers content from publishers based in Canada, the US, Australia, New Zealand, Germany, France, Spain, Italy, Portugal, Slovenia, the Netherlands and the UK. Kobo has agreements that grant it rights to sell E-books in Canada. Some of these agreements are with publishers, others are with authors directly, with agents holding rights on behalf of authors, or with distributors (collectively, "**Publishers**"). As a result of these agreements, Kobo obtains access to and the right to sell the E-book content of approximately 15,000 rights holders.

---

[1] All defined terms are consistent with the definitions in the Consent Agreement filed February 7, 2014, unless otherwise defined in this Affidavit.

6. Publishers seeking to sell E-books through Kobo typically opt to negotiate either wholesale or agency terms. Kobo continues to sign agreements under both models. Negotiation and modification of contractual terms for both agency and wholesale agreements is common. These negotiations are done one-on-one between Kobo and each Publisher. These are "vertical" agreements, in that Kobo does not compete with Publishers.

7. Wholesale agreements are typically non-exclusive agreements whereby Kobo acquires from the Publisher the right to sell the E-book at a price set by Kobo. Typically, the Publisher sets a suggested retail price for the title, and Kobo pays the Publisher 50% of the suggested retail price for each E-book Kobo sells. Within this model, Kobo determines the price to be paid by the customer and provides the Publisher with a monthly sales report, identifying for the Publisher how many copies of that E-book Kobo has sold.

8. Agency Agreements are typically agreements whereby Kobo is appointed as a non-exclusive agent for the marketing and delivery of E-books on the Publisher's behalf. In these arrangements, the Publisher sets the price at which the E-book must be sold, and Kobo receives a commission for each E-book it sells. Typically, that commission is 30% of the price paid by the customer.

9. Copies of all of Kobo's agreements with the Consenting Publishers have been provided on a confidential basis to the Competition Bureau ("**Bureau**") as part of the Bureau's investigation into the E-book industry. All of these agreements are Agency Agreements. Kobo will seek the permission of the Consenting Publishers to allow it to provide copies to the Tribunal in advance of the hearing of this Motion.

The Agency Model in the US and the US Settlement Agreements

10. Agency Agreements in the E-book industry originated in the US prior to becoming part of the E-book landscape in Canada.

11. The United States Department of Justice ("**US DOJ**") investigated certain Publishers in the United States (the "**US Publishers**") and brought a case against E-book retailer Apple Inc., alleging that it had conspired with the US Publishers to eliminate retail price competition in order to raise E-book prices. The US District Court of the Southern District

of New York found that the defendant US Publishers had conspired with each other to eliminate retail price competition in order to raise E-book prices, and that Apple Inc. played a central role in facilitating and executing that conspiracy. That decision is currently under appeal. A copy of an article describing the case is attached hereto as **Exhibit "A"**. A copy of the decision is attached hereto as **Exhibit "B"**.

12. The US Publishers—the US branches of Macmillan, Simon & Schuster, Hachette, Penguin, and HarperCollins—avoided trial by reaching settlements with the US DOJ (the "**Settlement Agreements**"). The Settlement Agreements were reflected in judgments of the US District Court for the Southern District of New York (the "**Final Judgments**").

13. A copy of the Final Judgment against Hachette, HarperCollins, and Simon & Schuster, entered September 6, 2012, is attached hereto as **Exhibit "C"**. A copy of the Final Judgment against Macmillan, entered August 12, 2013, is attached hereto as **Exhibit "D"**.

14. The Final Judgments effectively required the US Publishers to terminate any agreements with E-book Retailers that:

    (a) restricted the ability of E-book Retailers 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 (i.e., Agency Agreements); and/or

    (b) contained clauses which, broadly speaking, made the price at which an E-book Retailer sells an E-book, or the revenue share or commission that an E-book Retailer receives for the sale of E-books to consumers, dependent in any way on the prices or revenue shares or commissions of any other E-book Retailer (known as "**Price MFN**" clauses).

15. The implementation of the Settlement Agreements was staggered. In each case, "**Stipulations**" were filed, after which the US Publishers had a certain amount of time to send notices to E-book Retailers that the E-book Retailers could terminate their agreements. Then, within a certain number of days after the Final Judgment was entered, the US Publishers had to take steps to terminate (or allow to lapse) any agreement that the E-book Retailers had not terminated earlier. In each case, there were

five to six months between the filing of the Stipulation and the entering of the Final Judgment.

16. Given the staggered timing of the Settlement Agreements, the process of implementing the Settlement Agreements took 16 months.

The Effects of the US Settlement Agreements on Kobo and the E-book Market

17. As a result of the Settlement Agreements, several of Kobo's contracts with Publishers for the sale of E-books in the US were altered, including its contracts with Hachette, HarperCollins, Simon & Schuster, and Macmillan. Contracts that were previously Agency Agreements were shifted to an "**Agency Lite**" model, whereby Publishers continue to set the Retail Price of **E**-books, but the E-book Retailer is permitted to reduce the final price paid by customers, within certain limits.

18. The move to an Agency Lite model has had a negative impact on Kobo's US market share and revenues.

19. Since the entry of Agency Lite, Kobo has shed significant revenues as it has been forced to discount titles to match the deep discounting that some US competitors have engaged in. Despite these efforts to protect its market share by lowering prices, Kobo has seen its position in the US market dwindle. At this time, Kobo has stopped making significant investments in the US market. It has closed its one office there, has not replaced US sales staff, and is generally focusing on other markets.

20. The experiences of Sony and Barnes & Noble further illustrate the profitability challenges faced in the E-book market following the shift to Agency Lite.

21. Sony announced its exit from the E-book market in the US. It was reported in online media in October 2013 that Sony has confirmed it has no intention of selling its new PRS-T3 E-reader in the US. Sony's public relations department is quoted as stating, "Sony will not be offering the Reader PRS-T3 in the United States. In response to the region's market changes, Sony will be focusing instead on mobile and tablet devices, including the Xperia Tablet Z and Xperia Z smartphone." Sony removed the E-reader section from its US website entirely. Kobo has recently acquired Sony's E-reader business and will be transferring Sony's customers to Kobo's infrastructure. Four media reports of Sony's exit of the US market are attached hereto as **Exhibit "E"**.

22. Barnes & Noble's NOOK E-book division experienced EBITDA losses of $476M for the 2013 fiscal year. In Q1 2014, NOOK reported a decrease in revenue of 20.2% from the previous year's Q1 and experienced EBITDA losses of $55M. In Q2 2014, NOOK reported a decrease in revenue of 32.2% from Q2 2013, and experienced EBITDA losses of $45M. Barnes & Noble press releases dated June 25, 2013, August 20, 2013, and November 26, 2013, respectively, highlighting these losses are attached hereto as **Exhibit "F"**. A Bloomberg Businessweek article about NOOK's decline is attached hereto as **Exhibit "G"**.

23. Sony and Barnes & Noble's difficulties illustrate that even large, established companies face incredible challenges in a market where the Agency model is prohibited.

The Canadian E-Books Investigation and the Consent Agreement

24. The Commissioner of Competition ("**Commissioner**") commenced an investigation into the E-book industry in Canada in or around August 2012. This investigation is ongoing. Between November 2012 and February 2014, Kobo voluntarily provided information to the Bureau regarding the E-book industry in Canada to assist with the Bureau's investigation. It cooperated fully with all Bureau requests for data and answers.

25. Following 18 months of investigation, the Commissioner entered into a Consent Agreement (the "**Consent Agreement**") on February 6, 2014, with four publishers (the "**Consenting Publishers**"): Hachette Book Group Canada Ltd., Hachette Book Group, Inc., Hachette Digital Inc.; HarperCollins Canada Limited; Holtzbrinck Publishers, LLC; and Simon & Schuster Canada, a Division of CBS Canada Holdings Co. The Commissioner filed the Consent Agreement on February 7, 2014.

26. A copy of the Bureau's Press Release dated February 7, 2014, announcing the Consent Agreement is attached hereto as **Exhibit "H"**. A copy of the Consent Agreement is attached hereto as **Exhibit "I"**.

27. The material details of the Consent Agreement are described in Kobo's Section 106 Application.

28. Since that time, Kobo has begun to receive amendment/termination notices. Attached hereto as **Exhibit "J"** are notices from Hachette and Simon & Schuster dated February 18, 2014.

The Projected Effects of the Termination of Agency Model in Canada

29. The effect on Kobo in Canada will be magnified compared to that in the US, given Kobo's origins and focus on the Canadian market. Canada is Kobo's single largest market.

30. *[REDACTED]*

It should be noted that it is the E-retailer, i.e. Kobo, who will absorb these losses. The Publishers will receive the same price for their books under an Agency Lite model as they would have under an Agency model. It is, in my view, wrong for Kobo to bear these losses, given that Kobo has done nothing wrong, nor has it been alleged to have ever done anything wrong by the Canadian or US antitrust authorities.

31. Of further concern is that switching four Publishers simultaneously to a new contract model has never been done before. As noted above, the Settlement Agreements were implemented over a 16-month period; here, the Consenting Publishers have been given only 40 days.

32. While we have developed a contingency plan to address such a switch, the plan will involve a great deal of staff time, and involves the risk that, in such abridged timeframes, errors may occur. Changing Publisher accounts to reflect updated contracts is an involved process. Once a new agreement has been negotiated and signed, Kobo must engage in a multi-step process to reconfigure the Publisher accounts and update all titles in a Publisher account's catalogue. The 40-day timeline also obviates any possibility of Kobo actually being able to negotiate any terms that could help to mitigate the significant losses it is about to suffer.

33. I understand that a key issue that underpins a case under section 90.1 of the *Competition Act* is whether there is an agreement or arrangement among competitors. In this case, having been the one "on the ground" negotiating the shift to Agency in

Canada, I can speak firsthand to the fact that the shift to Agency in Canada occurred in a very different manner than it is alleged to have happened in the US.

(a) In the US, the shift occurred simultaneously, with all of the publishers moving to Agency on the very same day. In Canada, the shift occurred in a staggered manner.

(b) In the US, the shift to Agency was alleged to have been designed to ensure that Apple would enter the market before the launch of the iPad. In Canada, by the time the agency agreements began to be entered into, the iPad and iBookstore had already launched.

(c) Amazon was present in the US, and pricing at unsustainably low prices, prior to the launch of Agency. In Canada, Amazon was not active in the market at the time that Kobo shifted to Agency.

(d) Perhaps most importantly, while in the US the shift to Agency was very much a process that was brought to Kobo by the Publishers, in Canada, Kobo had to press several Publishers to move to the Agency model. Having been at the negotiating table for those discussions, my impression was not that the Agency model was something that had been concocted by the Publishers and was being imposed on Kobo. To the contrary, with both Simon & Schuster and HarperCollins, Kobo had to press to keep the Publishers moving toward Agency. While I have not reviewed all of my files, I have found at least some correspondence to help illustrate the push that Kobo was making for this model.

To that end, I attach as **Exhibit "K"** a letter of Heather Reisman, dated March 29, 2011 to HarperCollins. I also attach as **Exhibit "L"** an email exchange between Simon & Schuster and me. Both are illustrative of the fact that the Agency model with these Publishers came about as a result of Kobo's desires, not out of a backroom deal among the Publishers.

[REDACTED]

SWORN before me at the City of Toronto on February **, 2014.

_____

Commissioner for Taking Affidavits

_____

(Signature of Deponent)

TO: **Competition Tribunal**
90 Sparks Street, Suite 600
Ottawa, ON K1P 5B4

AND TO: **Jonathan Chaplan**
Parul Shah
Competition Bureau Legal Services
Place du Portage, Phase 1
50 Victoria Street, 21st Floor
Gatineau, Quebec K1A 0C9

Tel: (819) 994-7714
Fax: (819) 953-9267
Jonathan.Chaplan@bc-cb.gc.ca
Parul.Shah@bc-cb.gc.ca

Lawyers for the Respondent
Commissioner of Competition

AND TO: **Linda Plumpton**
James Gotowiec
Torys LLP
30th Floor, 79 Wellington Street West
Box 270, TD South Tower
Toronto, ON M5K 1N2

Tel: 416-865-8193
Fax: 416-865-7380
lplumpton@torys.com
jgotowiec@torys.com

Lawyers for the Respondents Hachette Book Group Canada Ltd., Hachette Book Group, Inc. and Hachette Digital, Inc.

AND TO: **Katherine L. Kay**
Danielle Royal
Stikeman Elliott LLP
5300 Commerce Court West
199 Bay Street
Toronto, ON M5L 1B9

Tel: 416-869-5507
Fax: 416-947-0866
kkay@stikeman.com
droyal@stikeman.com

Lawyers for the Respondents
HarperCollins Canada Limited

AND TO: **Randal Hughes**
Emrys Davis
Bennett Jones LLP
3400 One First Canadian Place
P.O.Box 130
Toronto, ON M5X 1A4

Tel: 416-777-7471
Fax: 416-863-1716
hughesr@bennettjones.com
davise@bennettjones.com

Lawyers for the Respondents
Holtzbrinck Publishers, LLC

AND TO: **Peter Franklyn**
Mahmud Jamal
Osler, Hoskin & Harcourt LLP
First Canadian Place
100 King Street West
Toronto, ON M5X 1B8

Tel: 416.362.2111
Fax: 416.862.6666
pfranklyn@osler.com
mjamal@osler.com

Lawyers for the Respondents
Simon & Schuster Canada, a division of
CBS Canada Holdings Co.

File No. CT-2014-

COMPETITION TRIBUNAL

IN THE MATTER OF the *Competition Act,* R.S.C. 1985, c. C-34, as amended;

AND IN THE MATTER OF an inquiry commenced under section 10 of the *Competition Act,* relating to certain alleged anti-competitive conduct in the markets for E-books in Canada;

AND IN THE MATTER OF the filing and registration of a consent agreement pursuant to section 105 of the *Competition Act;*

AND IN THE MATTER OF an application under section 106(2) of the *Competition Act,* by Kobo Inc. to rescind or vary the Consent Agreement between the Commissioner of Competition and Hachette Book Group Canada Ltd., Hachette Book Group, Inc., Hachette Digital, Inc.; HarperCollins Canada Limited; Holtzbrinck Publishers, LLC; and Simon & Schuster Canada, a division of CBS Canada Holdings Co. filed and registered with the Competition Tribunal on February 7, 2014, under section 105 of the *Competition Act.*

BETWEEN:

KOBO INC.

Applicant

- and -

THE COMMISSIONER OF COMPETITION, HACHETTE BOOK GROUP CANADA LTD., HACHETTE BOOK GROUP, INC., HACHETTE DIGITAL INC., HARPERCOLLINS CANADA LIMITED, HOLTZBRINCK PUBLISHERS, LLC, and SIMON & SCHUSTER CANADA, A DIVISION OF CBS CANADA HOLDINGS CO.

Respondents

AFFIDAVIT OF MICHAEL TAMBLYN

WEIRFOULDS LLP
Barristers & Solicitors
4100 - 66 Wellington Street West
P.O.Box 35, Toronto-Dominion Centre
Toronto, ON M5K 1B7

Nikiforos Iatrou
Mandy L. Seidenberg
Bronwyn Roe

Tel: 416-365-1110
Fax: 416-365-1876
niatrou@weirfoulds.com
mseidenberg@weirfoulds.com
broe@weirfoulds.com

Lawyers for the Applicant

File No. CT-2014-002

COMPETITION TRIBUNAL

IN THE MATTER OF the *Competition Act*, R.S.C. 1985, c. C-34, as amended;

AND IN THE MATTER OF an inquiry commenced under section 10 of the *Competition Act*, relating to certain alleged anti-competitive conduct in the markets for Ebooks in Canada;

AND IN THE MATTER OF the filing and registration of a consent agreement pursuant to section 105 of the *Competition Act*;

AND IN THE MATTER OF an application under section 106(2) of the *Competition Act*, by Kobo Inc. to rescind or vary the Consent Agreement between the Commissioner of Competition and Hachette Book Group Canada Ltd., Hachette Book Group Inc., Hachette Digital, Inc.; HarperCollins Canada Limited; Holtzbrinck Publishers, LLC; and Simon & Schuster Canada, a division of CBS Canada Holdings Co. filed and registered with the Competition Tribunal on February 7, 2014, under section 105 of the *Competition Act*.

B E T W E E N:

KOBO INC.

Applicant

- and -

THE COMMISSIONER OF COMPETITION,
HACHETTE BOOK GROUP CANADA LTD.,
HACHETTE BOOK GROUP, INC.,
HACHETTE DIGITAL INC.,
HARPERCOLLINS CANADA LIMITED,
HOLTZBRINCK PUBLISHERS, LLC, and
SIMON & SCHUSTER CANADA, A DIVISION OF CBS CANADA HOLDINGS CO.

Respondents

AFFIDAVIT OF MALLORY KELLY
Affirmed 28 August 2015

DEPARTMENT OF JUSTICE
COMPETITION BUREAU LEGAL SERVICES
50 Victoria Street, 22nd Floor
Gatineau, Quebec K1A 0C9

John L. Syme (LSUC# 29333H)
Jean-Sébastien Gallant (LSUC# 29333H)
Esther Rossman (LSUC# 54414R)

Tel: (819) 953-3903
Fax: (819) 953-9267
John.Syme@cb-bc.gc.ca

Counsel to the Commissioner of Competition