UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, Plaintiff, v. APPLE INC., *et al.*, Defendants.	12 Civ. 2826 (DLC)
THE STATE OF TEXAS, THE STATE OF CONNECTICUT, *et al.*, Plaintiffs, v. PENGUIN GROUP (USA) INC., *et al.*, Defendants.	12 Civ. 03394 (DLC)

APPLE INC.'S OPPOSITION
TO PLAINTIFFS' PRE-TRIAL MEMORANDUM OF LAW

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Page

PRELIMINARY STATEMENT

The evidentiary record the parties submitted proves that Apple did not conspire with any publisher to raise prices in the e-book industry. Plaintiffs cherry-pick quotes taken out of context and repackage them to tell a false narrative. Plaintiffs ignore inconvenient facts and fill factual holes with speculation. Plaintiffs' legal analysis is also wrong. They misstate Supreme Court and Second Circuit authority. Without these sleights-of-hand, the case against Apple collapses.

Apple has presented overwhelming evidence—including fourteen declarations, numerous documents, and plaintiffs' experts' binding admissions—proving that:

- In mid-December 2009, Apple held introductory meetings with publishers to explore an e-bookstore. *E.g.*, Cue Decl. ¶¶ 38–40; Sargent Decl. ¶ 22; *see also* Reidy Decl. ¶¶ 19–25, Young Decl. ¶ 23–25. Informal conversations continued; the parties "did not reach any agreements." Cue Decl. ¶ 62; *see also*, *e.g.*, Reidy Decl. ¶ 24 (Cue spoke with Reidy by phone to "*share some broad ideas* for a potential deal") (emphasis added); DX-121.
- In late December 2009, Apple concluded that the agency model, with publishers setting prices within limits, was the best means for Apple to "open a successful, profitable e-book business." Cue Decl. ¶ 53.
- After sending its draft contracts on January 11, 2010, Apple negotiated separate agency agreements on terms consistent with its established business principles. *See* Cue Decl. ¶¶ 21, 50, 76; Moerer Decl. ¶ 37. Although Apple was the first to sign an agency agreement with a publisher, retailers—Amazon, Barnes & Noble ("B&N")—and publishers were discussing agency and other profit sharing models for e-books before Apple.[1]
- The Apple agency agreements addressed pricing only *on Apple's e-bookstore*. Cue Decl. ¶¶ 57, 59, 66; Moerer Decl. ¶¶ 26, 28, 30. They did not address, much less set, e-book pricing *industry-wide*. *E.g.*, DX-257, at APLEBOOK-00013066-67 (HarperCollins ("HC") final agency agreement setting all terms on "an electronic store owned or controlled by Apple").
- Apple designed its MFN to lower prices on its e-bookstore. Cue Decl. ¶ 66; Saul Decl. ¶ 3. There is no evidence that the MFN was designed to—or could—increase industry e-book

[1] *E.g.*, Horner Decl. ¶¶ 8–11 (B&N explored other pricing models in spring/summer 2009), 17–18 (B&N proposed agency to publishers by December 2009); DX-055 (B&N "socializing" an agency model by December 4, 2009); DX-536 (internal B&N meeting on December 11, 2009 to set up logistics for agency); DX-199 (RH report that Amazon would "be open for evaluation" of agency model on January 20, 2010); DX-264 (January 2010 Amazon summary of discussions with publishers about agency and other models—for example, Macmillan planned to offer both agency and reseller models); Reidy Decl. ¶¶ 16–17 (B&N approached Simon & Schuster ("S&S") about an agency model, and S&S used a model akin to an agency model with online library Scribd); Young Decl. ¶¶ 16–17.

prices.

- Apple's MFN did not dictate or constrain how a publisher could conduct business with other retailers. Cue Decl. ¶¶ 66–71; Moerer Decl. ¶¶ 27–33; Saul Decl. ¶ 3. Apple expressly told publishers, notably Random House ("RH") and Macmillan, that their relationships with other retailers were irrelevant to Apple.[2]
- Apple's MFN and price caps were not the product of collusion or conspiracy. AF ¶¶ 110, 115. Apple proposed those terms to advance its independent business goals (Cue Decl. ¶¶ 21, 65–66; Saul Decl. ¶ 3), and the publishers actively resisted, *e.g.*, AF ¶¶ 118 (Hachette), 123 (Macmillan), 127 (S&S), 138 (HC).
- In particular, Apple's agency agreements did not—and could not—"force" Amazon to move to agency. In January 2010, Amazon and B&N began parallel discussions with publishers about agency. *E.g.*, Horner Decl. ¶¶ 20–28; DX-264 (January 2010 draft Amazon summary of discussions with publishers about agency). Apple was unaware of these parallel discussions. Cue Decl. ¶¶ 100–103.
- Amazon's reconstruction of events is at odds with their prior deposition testimony and the evidence. AF ¶¶ 172–219. For example, the January 31, 2010 "Jedi Mind Tricks" e-mail between Amazon's Laura Porco and her former colleague, RH's Madeline McIntosh, shows that Amazon was not "cornered" into accepting agency and had anticipated the possibility of the market moving to another business model long before Apple approached publishers about e-books. DX-278; McIntosh Decl. ¶ 20.
- Apple's negotiation approach was aligned with its core business principles and legitimate interests (Cue Decl. ¶¶ 7–14, 92–97; Moerer Decl. ¶ 37), industry practice, and case law. There was nothing wrong with Apple's offering similar terms, meeting with each publisher during the same time frame, or providing updates about how many had committed to the iBookstore. AF ¶¶ 145–52; *e.g.*, *In re Elevator Antitrust Litig.*, 502 F.3d 47, 51 (2d Cir. 2007) ("Similar contract terms can reflect similar bargaining power and commercial goals"). Apple employed these strategies to get the publishers to sign the *Apple* agreements—not to "coordinate" publishers with respect to how they might deal with *other retailers*.

Plaintiffs ask the Court to ignore the overwhelming evidence of Apple's independent action because "direct evidence" of Apple's participation in a conspiracy to fix industry-wide e-book prices supposedly exists. But the selective quotations plaintiffs cite as "direct evidence" are more "smoke and mirrors" than the "smoking gun" that the case law requires.

This is a circumstantial case governed by *Monsanto Co. v. Spray-Rite Services Corp.*,

[2] Cue Decl. ¶ 68–69; Moerer Decl. ¶¶ 27–28; DX-140 (Cue explains that Apple does not care about the model RH uses with other retailers so long as Apple is protected by the MFN); McIntosh Decl. ¶¶ 12–13; DX-169; Saul Decl. ¶ 13; Sargent Decl. ¶ 30; DX-205 ("[Apple's MFN] says that for new releases in hardcover that you don't window, you would set a customer price in our deal that matches a lower retail price out there (if any), which could be through a distributor under an agency deal or wholesale").

465 U.S. 752 (1984), and controlling Second Circuit authority.[3] These cases mandate an inquiry into the possibility that the challenged contract terms and negotiation approach were in Apple's *independent* economic interests. Br. 20–23. The evidence is overwhelming—not just possible—that Apple acted for its own valid business reasons and *not* to "raise consumer prices market-wide." P. Br. 31. Plaintiffs' experts do not even contest this. AF ¶ 291.

Plaintiffs ask this Court to infer Apple's participation in a conspiracy from (1) its MFN and price cap terms and (2) negotiations with publishers. Plaintiffs' strained inference—cobbled together from snippets of e-mails and out-of-context deposition testimony—does not come close to meeting that burden. Nor do plaintiffs meet their burden by asking the Court to speculate when evidence is lacking. *See*, *e.g.*, P. Br. 15 ("it *appears* that Mr. Cue *may* have forced the issue") (emphasis added).

Because the *Monsanto* "tends to exclude" standard is fatal to their case, plaintiffs offer a fundamentally incorrect reading of antitrust conspiracy law. For example, plaintiffs use brackets and word substitutions to change the holding of *United States v. General Motors Corp.*, 384 U.S. 127 (1966), *see* P. Br. 32, and to make it appear that the Supreme Court ruled that evidence of defendants' independent business interests is unimportant in evaluating the conduct of a vertical player. Plaintiffs omit the fact that *Monsanto*, decided 18 years later, *is* a vertical case. Plaintiffs also misleadingly invoke *In re Publication Paper Antitrust Litigation*, 690 F.3d 51 (2d Cir. 2012). But *Publication Paper* only confirms that *Monsanto* governs.

Plaintiffs continue to portray this as an "unremarkable and obvious" price-fixing case, where Apple's entry should be condemned without further analysis under the *per se* rule. What

[3] *See*, *e.g.*, *H.L. Hayden Co. v. Siemens Med. Sys., Inc.*, 879 F.2d 1005, 1014 (2d Cir. 1989); *Burlington Coat Factory Warehouse Corp. v. Esprit de Corp.*, 769 F.2d 919, 924 (2d Cir. 1985).

is obvious, however, is that Apple has not fixed prices with its competitors. What is remarkable is that the government seeks to impose grave legal consequences on an inherently pro-competitive act—entry—accomplished via agency, an MFN, and price caps, none of which is *per se* unlawful. To warrant *per se* condemnation, labels are not enough: a restraint must exhibit no capacity for increasing competition and must be of a type the courts have judged time after time to be unredeemably anticompetitive. *State Oil v. Khan*, 522 U.S. 3, 10 (1997). Clearly, that is not the case here. Apple's entry increased competition. More prices fell in the market than rose after agency. Output, choice, selection and quality improved markedly. To equate Apple's role here with that of a "price fixer," to condemn its actions without full analysis, would chill the very conduct the antitrust laws are intended to safeguard and promote.

Apple was an entrant, not a "ringmaster" or a "hub." Unlike the hub in *Interstate Circuit v. United States*, 306 U.S. 208 (1939), Apple had no stranglehold over its suppliers. Unlike the ringmaster in *Toys "R" Us, Inc. v. FTC*, 221 F.3d 928 (7th Cir. 2000) ("*TRU*"), Apple was no "giant" in the relevant market. In each of those cases, the defendant engaged in a harsh exercise of its raw market power unaccompanied by any remotely procompetitive business activity. In this case, by stark contrast, Apple needed to launch a business, not a conspiracy. It negotiated business deals, not boycotts. It negotiated quickly because it had a real world deadline. Its contract terms were driven by valid business needs. It drew on no power in the market: the publishers negotiated fiercely against Apple. To infer a conspiracy from these circumstances, from the fact that Apple fought for and won similar deals from its suppliers—something that happens every day in a dynamic economy—would spite, not honor the teachings of *Interstate Circuit* and *TRU*.

Thus, plaintiffs do not and cannot rebut the undisputed evidence that every indicator of

market health—lower price, higher output, more selection, higher quality, and lower concentration—followed Apple's entry. AF ¶¶ 251–290; *see also* AF ¶ 295 (plaintiffs' experts Professors Gilbert and Ashenfelter "admit that they cannot dispute that average e-book prices for all trade e-books—plaintiffs' alleged relevant market—have fallen since Apple's entry .... No party disputes the rapid growth of output.") (citations omitted). Plaintiffs' outlandish suggestion that Apple "could have remained out of the market" and that "this would have been the wiser choice," P. Br. 40, highlights how misguided their case is against Apple.

ARGUMENT

I. Plaintiffs Have No Direct Evidence Of Apple's Participation In The Alleged Conspiracy

Plaintiffs casually label documents and communications as "direct evidence" of their alleged conspiracy without a single supporting citation. This is no surprise: the law makes clear that the evidence proffered by plaintiffs is anything but direct.

A. Plaintiffs Misconstrue What Constitutes Direct Evidence

In finding direct evidence of a conspiracy, the Second Circuit has required an explicit reference to the alleged unlawful agreement. *See*, *e.g.*, *Mayor & City Council of Balt., Md. v. Citigroup, Inc.*, 709 F.3d 129, 136 (2d Cir. 2013); *United States v. Taubman*, 297 F.3d 161, 165 (2d Cir. 2002) (per curiam). This is consistent with other circuits, which hold that direct evidence of a conspiracy is only that which contains an "*explicit* understanding between the [defendants]" to commit the alleged unlawful act (*Golden Bridge Tech., Inc. v. Motorola, Inc.*, 547 F.3d 266, 272 (5th Cir. 2008) (emphasis added)), and "requires no inferences to establish the proposition or conclusion being asserted," *In re Baby Food Antitrust Litig.*, 166 F.3d 112, 118 (3d Cir. 1999). Direct evidence of a conspiracy in a section 1 case is "evidence tantamount to an acknowledgment of guilt." *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 662

(7th Cir. 2002). "[*E*]*verything else*" is "circumstantial evidence." *Id.* (emphasis added).

B. None Of Plaintiffs' Proffered Proof Constitutes Direct Evidence

There is no direct evidence of Apple's participation in the alleged conspiracy. Rather, plaintiffs selectively and misleadingly quote from a handful of documents and ignore record evidence that directly refutes their story.

1. Penguin's February 2011 E-mail. The e-mail from Penguin's CEO David Shanks in 2011—more than a year after Penguin signed its agency agreement with Apple—is not direct evidence against Apple. Leaving aside that this e-mail is inadmissible hearsay as to Apple, it has no "explicit reference" to the alleged agreement to force Amazon to agency. Evidence is also not "direct" where it is attributable to only one of the alleged co-conspirators (Penguin), and does not evince that Apple *knew* it was being used as, let alone agreed to be, a "go between." *See Cnty. of Tuolumne v. Sonora Cmty. Hosp.*, 236 F.3d 1148, 1156 (9th Cir. 2001) (no direct evidence of conspiracy where "[t]here was no evidence that the other defendant[s] ... even knew about" an individual's threat that appeared only in a letter on his personal letterhead).

2. Mr. Saul's December 2009 E-mail. Mr. Saul's e-mail describes HC as "[i]nterested in [an] agency model to fix Amazon pricing (we said no)." PX-0036, at APLEBOOK-01601745. Plaintiffs deliberately omit the parenthetical both times they quote this e-mail. P. Br. 2, 26. Apple's mere understanding of HC's or any other publisher's dissatisfaction with Amazon's pricing, P. Br. 7, is not direct evidence of Apple's intent to move Amazon to agency. To the contrary, Eddy Cue testified: "[W]e made very clear that we did not care whether Amazon stayed on the wholesale model or moved to agency." Cue Decl. ¶ 67; *see also* Moerer Decl. ¶¶ 30–31; Saul Decl. ¶¶ 9, 13.

3. Mr. Cue's December 21, 2009 E-mail. Mr. Cue informed Steve Jobs that the publishers saw Apple's "position"—an agency model for selling e-books on Apple's own e-

bookstore—as a "plus" that "solves [the] Amazon issue." PX-0043. For the publishers, the ability to set their own prices on Apple's e-bookstore, within limits established by Apple, was indeed a "plus" that enabled them to solve that issue—but only as it pertained to e-book sales on Apple's store, and only up to the price caps Apple was contemplating.[4]

4. Mr. Jobs's January 24, 2010 E-mail. Plaintiffs selectively quote this e-mail, the very first sentence of which makes clear that Apple's price caps "set the upper limit for e-book retail pricing based on the hardcover price of each book" and that Apple did not believe it or the publishers could be "successful" beyond those proposed limits. DX-234, at APLEBOOK-000013995. Plaintiffs also omit Mr. Jobs's acknowledgement that Amazon's $9.99 price point may be the more appropriate, competitive price. *See* P. Br. 31–32.

5. Mr. Jobs's Statement to His Biographer. Plaintiffs place heavy reliance on a partial statement from Mr. Jobs's biography, wrongly suggesting that it shows Apple's agency agreements were designed to raise *industry* e-book prices. P. Br. 1. Tellingly, plaintiffs fail to quote the next sentence in Mr. Jobs's statement, which proves that he anticipated there could simultaneously be different, and *possibly lower*, prices across the e-book market: "But we also asked for a guarantee [in the MFN] that *if anybody else is selling the books cheaper than we are*, then we can sell them at a lower price too." PX-0514, at 503 (emphasis added).

II. Plaintiffs Misstate The Legal Standard For Proving A Conspiracy By Circumstantial Evidence

Plaintiffs ignore the most well-known Supreme Court cases on antitrust conspiracy from the last 30 years and instead piece together a legal standard from a footnote in a 1992 Third

[4] Nor does Mr. Cue's update show Apple committed to "solv[ing]" the publishers' issues with Amazon's pricing model through a conspiracy, as opposed to through lawful competition from Apple's entry. *See Superior Offshore Int'l, Inc. v. Bristow Grp., Inc.*, 490 F. App'x 492, 498 (3d Cir. 2012) ("general sense" or "subjective impression" of conversations "is not direct evidence of a conspiracy"). It simply reflects an ongoing internal discussion about how Apple could best enter the e-book business. *See* Cue Decl. ¶¶ 32–34, 37.

Circuit decision, a mischaracterized quotation from *General Motors*, and a misstatement of the law on which Apple does not rely. These mischaracterizations expose a fundamental weakness in their case: they cannot rebut Apple's evidence that it acted to set up its own e-bookstore.

A. Plaintiffs Ignore Controlling Supreme Court Precedent

Plaintiffs virtually ignore *Monsanto*—the lens through which this Court will view all of the evidence in the case—which holds that plaintiffs must present "evidence that tends to exclude the possibility that" the defendant acted independently. 465 U.S. at 764. Plaintiffs' mention of *Monsanto* is buried more than 30 pages into their brief. P. Br. 32. Yet the Supreme Court and the Second Circuit have consistently reaffirmed *Monsanto*'s continuing force. *See*, *e.g.*, *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 554 (2007); *In re Publication Paper*, 690 F.3d at 63. Just last year, the Second Circuit clarified in *Publication Paper* that it takes "strong" evidence to satisfy the "tends to exclude" standard where "plaintiff's theory of recovery is implausible." *Id*. "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.* (quotation marks omitted).

Here, plaintiffs erect a straw man legal standard, asserting that they need not prove "there is *no possibility* that Apple acted" to further its own interests. P. Br. 4–5, 31, 32. But Apple never argued as much.[5] Apple insists only that plaintiffs meet the "stringent standards in *Monsanto*" (*Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 903 (2007)): they must "tend[] to exclude"—that is, "tend to rule out"—the possibility that Apple acted

[5] Plaintiffs seize upon a single statement by Apple's counsel at a telephone conference with the Court. But counsel had articulated the correct legal standard just moments prior. Tr. of Tele. Conf., Mar. 13, 2013, at 11:6–9 ("*Monsanto* ... imposes on the government the affirmative burden to prove and present evidence that *tends to exclude* the possibility that Apple acted independently" (emphasis added)).

independently. *Twombly*, 550 U.S. at 554 (quotations omitted).[6]

B. Plaintiffs' Arguments About Evidence Against Vertical Defendants Are Obscure And Totally Contrary To Controlling Case Law

Plaintiffs offer a theory of proof for antitrust cases that is virtually unprecedented: that because Apple had a vertical relationship to the publishers, evidence that Apple acted in its independent economic interest "carries no weight." P. Br. 31; *see also id.* at 5, 27. For support, plaintiffs cite a single footnote from a 1992 Third Circuit decision. P. Br. 5, 32 (citing *Fineman v. Armstrong World Indus., Inc.*, 980 F.2d 171, 214 n.32 (3d Cir. 1992)).

Fineman's holding was simply that all co-conspirators in an antitrust case need not share the *same* anticompetitive motive. 980 F.2d at 214 & n.32. The court did not hold or even suggest that *Monsanto* is somehow inapplicable where "the alleged conspirator is in a vertical relationship with its co-conspirators." P. Br. 5; *cf. Fineman*, 980 F.2d at 214 (co-conspirator "acted against its economic interest"). Plaintiffs' characterization of *Fineman* is egregiously incorrect. No federal court of appeals has adopted plaintiffs' baseless interpretation of *Fineman*, nor has any judge of this District.

Plaintiffs' theory is also directly contrary to decades of binding precedent on vertical relationships. *Monsanto* itself involved a *vertical* defendant. *See* 465 U.S. at 757. And there, the Court specifically held that parties in a vertical relationship may have "independent," *i.e.*, non-conspiratorial, reasons to engage in "constant communication about prices and marketing strategy." *Id.* at 762, 763 ("it is of considerable importance that independent action by the manufacturer … be distinguished from price-fixing agreements"). The Second Circuit (and

[6] Of course, the legal standard *at trial* is much different from that which applied when the Court ruled on the defendants' motion to dismiss the class complaint. *See Starr v. Sony BMG Music Entm't*, 592 F.3d 314, 321 (2d Cir. 2010) (citing *Twombly*, 550 U.S. at 554, 546). At the pleading stage, plaintiffs were entitled to have the Court treat all of their allegations as true; now the record is complete and plaintiffs' "general allegations" must be tested against the evidence. *See Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 889 (1990).

courts around the country) also have routinely applied *Monsanto* in ruling for vertical defendants based on evidence of their independent business interests. *See*, *e.g.*, *AD/SAT v. Assoc. Press*, 181 F.3d 216, 235 (2d Cir. 1999) (rejecting conspiracy because vertical defendants' conduct "was as consistent with the defendants' legitimate business interests as with a conspiracy").

C. Plaintiffs Misrepresent The Supreme Court's Decision In *General Motors*

Plaintiffs rely on a distorted reading of *United States v. General Motors Corp.*, 384 U.S. 127 (1966) to argue that this Court should ignore Apple's unrebutted evidence that it acted in its own independent interest. *See* P. Br. 32. Plaintiffs' brief states (with additions bolded):

> Accordingly, the Supreme Court has held that it "is of no consequence, for purposes of determining whether there has been a combination or conspiracy under § 1 of the Sherman Act" whether **a vertical conspirator** "acted in its own lawful interest. Nor is it of consequence for this purpose whether the [**challenged conduct was**] economically desirable.

P. Br. 32. The actual quotation is:

> It is of no consequence, for purposes of determining whether there has been a combination or conspiracy under § 1 of the Sherman Act, that ***each party*** acted in its own lawful interest. Nor is it of consequence for this purpose whether the **"*location clause*" and *franchise system*** are lawful or economically desirable.

General Motors, 384 U.S. at 142 (emphasis added). Plaintiffs' rewriting—adding "a vertical conspirator" and replacing "'location clause' and franchise system" with "the challenged conduct"—fundamentally alters the Court's holding in two critical ways.

The Court's first sentence as written does not distinguish vertical defendants from horizontal ones, as the Court refers to *all* types of antitrust defendants. (Moreover, plaintiffs cannot argue that *General Motors* (a 1966 case) supplants *Monsanto* (a 1984 case).) Second, plaintiffs' bracketed change misstates the facts: The "location clause" and "franchise system" *were not* the challenged conduct in *General Motors*. 384 U.S. at 140. Rather, the Court found that GM had entered *separate*, illegal agreements with its dealers. *See id*. at 140–41; *Oreck*

Corp. v. Whirlpool Corp., 579 F.2d 126, 132 (2d Cir. 1978) (*General Motors* "focused on the *extra*-contractual and price-fixing aspects" of GM's activities, as distinguished from "the contractual nature of the dealings between Oreck and Whirlpool"). And having done so, GM could not hide behind lawful contracts. *General Motors*, 384 U.S. at 140.

Here, of course, Apple had a "contractual" relationship with the publishers (*Oreck*, 579 F.2d at 132)—the agency agreements with the MFN and the price caps *are* the challenged conduct. *General Motors* did not hold that evidence of the defendant's independent business interest in engaging in the challenged conduct is not important to the question whether that conduct supports an inference of a conspiracy. Rather, *General Motors* holds only that *if* the plaintiff can prove that a conspiracy existed, *then* the defendant may not avoid liability by arguing that it stood to benefit individually from the conspiracy. Neither the Supreme Court nor the Second Circuit has ever interpreted *General Motors* any other way.

III. Plaintiffs' Fragmented Circumstantial Evidence Does Not Support An Inference Of The Alleged Conspiracy Against Apple

Plaintiffs ask this Court to believe that Mr. Cue arrived in New York on December 15, 2009, met with the CEOs of the six largest book publishers for the *very first time* over two days, and promptly proposed an anticompetitive scheme to increase prices in a market he knew very little about. P. Br. 11–13. To get there, plaintiffs selectively stitch together fragments of circumstantial evidence from different time periods and gloss over the actual negotiations of the contract terms that plaintiffs place at the heart of the alleged conspiracy. Those negotiations—which occurred between January 11 and 26, 2010—are amply documented, and are the best evidence of Apple's lawful intent in entering into the agency agreements.[7]

[7] Plaintiffs spend nearly five pages of their trial brief detailing alleged communications between publishers in 2009, but these conversations had nothing to do with Apple. *See* P. Br. 7–11. Plaintiffs also cite evidence that

A. December 9, 2009 To January 4, 2010: Apple's Introductory And Exploratory Discussions With Publishers

Between December 9 and December 17, 2009, the parties reached no agreements or understandings. *E.g.*, Sargent Decl. ¶ 22; *see* Young Decl. ¶¶ 23, 25; Reidy Decl. ¶¶ 19–25. From December 18 through January 4, Apple continued discussions, but again reached no agreements or understandings. Cue Decl. ¶ 62; *e.g.*, Reidy Decl. ¶ 24. As discussed *supra*, at 6–7, Apple's mere knowledge of the publishers' public dissatisfaction with Amazon's below-cost pricing is not evidence that Apple proposed its agency terms to the publishers as a ringmaster to raise industry e-book prices. Apple was interested solely in setting up its own e-bookstore. *See* AF ¶ 99; Cue Decl. ¶¶ 57, 59, 66; Moerer Decl. ¶¶ 26, 28, 30; Saul Decl. ¶ 7.

For example, evidence that Apple told a publisher it was "not interested in a low price point for digital books," or that Apple "agreed to price caps higher than [it] had initially proposed," P. Br. 23, PX-510, only describes Apple's independent and permissible business judgments about *its own* bookstore pricing—and not conspiratorial conduct with regard to the larger e-book market. Similarly, the quote plucked from a December 22, 2009 e-mail from S&S CEO Carolyn Reidy proves nothing. *See* P. Br. 1–2 (citing PX-540). This e-mail was part of exploratory discussions *before* Mr. Cue and Apple determined that asking all of the publishers to move to agency with other retailers was the wrong strategy. Apple abandoned this idea in early January 2010. *See* Br. 10–11. Placed within this case's factual chronology, there is nothing probative about this e-mail. Nor does any evidence about Apple's learning process and related exploratory conversations before January 4, 2010 suggest, much less prove, Apple's participation

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suggests "there were approximately 100 calls between Publisher Defendant CEOs during the time the Apple Agency Agreements were being negotiated." P. Br. 25 n.112. Plaintiffs admit that Apple did not participate in any of these alleged discussions; nor do they even claim Apple's knowledge of these communications. And they could not. Apple had no knowledge of any intra-publisher communications at any time. Cue Decl. ¶ 98.

in the alleged conspiracy to fix prices for all e-books across the board.

B. January 4 To 11, 2010: Apple Formulates Its Agency Contract Terms

On January 4 and 5, 2010, Mr. Cue e-mailed Apple's initial proposal to the publishers. AF ¶ 95; Cue Decl. ¶ 63. It contained Mr. Jobs's and Mr. Cue's idea that, in order for Apple to offer the lowest prices on its e-bookstore, the publishers would need to use an agency model with their e-book retailers. AF ¶¶ 94–95; Cue Decl. ¶¶ 61–63. Shortly after Mr. Cue sent these e-mails, Apple determined that this concept was neither necessary nor feasible—and promptly abandoned it. The testimony of Mr. Cue, Mr. Moerer, Madeline McIntosh, and others, as well as the contemporaneous e-mails, explain how Apple came to understand, by no later than January 10, that requiring all resellers to move to agency would not address Apple's legitimate goal of competitive prices. AF ¶¶ 97–104. After January 4, Apple determined the MFN that it had drafted in late December (*see* Saul Decl. ¶ 7), would best enable Apple to compete with existing retailers regardless of whether they sold their e-books on a wholesale or agency model—the "elegant solution" that Mr. Saul explained.[8] Cue Decl. ¶¶ 64–66. There is no evidence that the MFN was designed for the purpose of "rais[ing] consumer prices market-wide." P. Br. 31. Plaintiffs ignore the evidence during this critical time period, which proves Apple's intent for the MFN was to *lower prices* on its own e-bookstore.

C. January 11 To 26, 2010: Apple and Publisher Negotiations

After Apple sent each publisher an initial draft agency agreement on January 11, 2010, it commenced intense negotiations with each publisher. *See* AF ¶ 96. The negotiations occurred over a fifteen-day period, as Apple faced a January 27 deadline imposed by the iPad launch

[8] In a particularly bold mischaracterization, plaintiffs contend that Mr. Saul's "elegant solution" comment refers to Apple's using the MFN to move all resellers to agency. P. Br. 3. The opposite is true, as Mr. Saul's actual trial testimony makes clear. *See* Saul Decl. ¶ 3 ("The sole objective of the MFN was to protect Apple's ability to be price competitive *on its own e-bookstore*") (emphasis added).

event. AF ¶ 108. Plaintiffs largely ignore these negotiations because they show an arms-length process in which each publisher opposed the MFN and price caps that plaintiffs say were the linchpins of the alleged conspiracy.[9]

Instead, plaintiffs pluck out a handful of communications during the negotiations as proof of Apple's purported facilitation of the conspiracy: Mr. Cue's e-mail to Mr. Jobs reporting that Penguin "wants an assurance that he is 1 of 4 before signing," Ms. Reidy's request for "an update on [Apple's] progress in herding us cats," Mr. Sargent's reference to Macmillan as "one voice among many," and Apple's January 4 initial outline of terms that refers to talks with "the other publishers." P. Br. 3, 19, 29–30 (citing PX-0028, PX-0782, PX-0076, PX-0041). These e-mails reveal nothing more than the publishers' awareness that Apple was negotiating with all of the major publishers to secure a sufficiently large catalog of e-books to launch its e-bookstore—an approach fully aligned with Apple's core business principles and legitimate interests. AF ¶¶ 18–22, 145–52.[10] In fact, Amazon communicated the very same type of information to the publishers during its agency negotiations. *See* DX-228 (Amazon receives a specific discount off digital list price from "other publishers" and requests that "Penguin match these terms").

1. The Sole Purpose Of The MFN Was To Allow Apple To Price Competitively On Its Own Bookstore

Plaintiffs' central allegation is that Apple designed the MFN as "the key commitment mechanism" to force publishers to move their other retailers to agency. Compl. ¶ 74. Because

[9] The publishers fought against Apple's proposed MFN for the entirety of the negotiations. Br. 12; AF ¶¶ 110, 115, 118 (Hachette), 123 (Macmillan), 127 (S&S), 138 (HC). For example, on January 21st—ten days after Apple sent its initial draft agreement—Hachette struck Apple's MFN in a redline of Apple's draft agreement. DX-213; AF ¶ 119. Hachette's CEO, David Young, said Hachette would have preferred to sign the agreement without any MFN at all. Young Decl. ¶ 30. On January 22, HC also rejected Apple's MFN outright. DX-223.

[10] Plaintiffs' reliance on Mr. Jobs's January 24 statement to Mr. Murdoch about "[a]ll the major publishers" as evidence of a conspiracy is also misguided. P. Br. 17–18 (citing PX-0032). By the end of January, the press was regularly documenting publishers' concerns with Amazon's below-cost pricing. Br. 8–9. There was nothing wrong with Mr. Jobs's repetition of what was public knowledge at the time.

the overwhelming evidence refutes that allegation (AF ¶¶ 97–105), plaintiffs now weakly assert that Apple merely "knew" that the MFN would "sharpen [the publishers'] incentives to follow through on raising prices across all retailers." P. Br. 13. Neither theory is supported.

First, Apple created the MFN—which was shared with the publishers for the first time in the January 11 draft agreements—to *lower the prices* of the most visible e-books *on Apple's own e-bookstore*. AF ¶ 99; Cue Decl. ¶ 66; Saul Decl. ¶ 7.[11] Plaintiffs posit—without any evidentiary basis—that the MFN was simply *a different way of achieving* Mr. Cue's initial idea that publishers should move all of their e-book retailers to an agency model.[12] P. Br. 3, 12. But the plain terms of the MFN say *nothing* about the prices charged by or business models used by *any other retailer*. AF ¶¶ 99–100; Cue Decl. ¶¶ 65–66; *see* P. Br. 12–13. The testimony of the Apple witnesses also disproves plaintiffs' unsupported characterization. They explain that Apple (1) was interested only in Apple's prices on its e-bookstore, (2) was indifferent about the pricing model publishers used with other retailers, and (3) did not propose the MFN to force other retailers to move to agency or influence how those retailers priced e-books. AF ¶¶ 99–101; Cue Decl. ¶ 66; Saul Decl. ¶ 7; *see also* Sargent Decl. ¶ 30; McIntosh Decl. ¶¶ 12–13. This testimony is amply corroborated by the documentary evidence:

- On January 10, the day before Apple circulated its draft contracts to each publisher, Mr. Cue made clear that Apple did not care which pricing model RH used with other retailers: "*What we care about is price* so the contract will say we get it at 30% less [which represents Apple's commission] *whatever the lowest retail price out in the market is (whether agency or wholesale)*." DX-140 (emphasis added); Cue Decl. ¶ 68; Moerer Decl. ¶¶ 27–28.

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[11] Apple's experts also explain that Apple had an "independent business justification for the MFN unrelated to the claimed publisher conspiracy." *See* Murphy Decl. ¶ 12. Plaintiffs' experts do not disagree. AF ¶ 291.

[12] Plaintiffs attempt to repurpose the MFN by relying on two e-mails. First is an after-the-fact e-mail between two Apple employees in Europe who had no involvement with Apple's U.S. e-book business or Apple's negotiations with publishers. *See* PX-0065. Second, the draft e-mail from Mr. Jobs to Mr. Cue on January 14, 2010 is also overblown. *See* PX-0055. There is no evidence that Mr. Cue received that draft e-mail or that Mr. Jobs communicated to any publisher that it should move to an agency model with Amazon or any other retailer.

- RH's internal e-mails confirm that Apple communicated this point to it directly. DX-169; McIntosh Decl. ¶¶ 12–13.
- Apple also conveyed the same message to Macmillan's president and CEO: "[Apple's MFN] says that for new releases in hardcover that you don't window, you would set a customer price in our deal that matches a lower retail price out there (if any), *which could be through a distributor under an agency deal or wholesale*." DX-198/DX-205 (emphasis added); Cue Decl. ¶ 69; Saul Decl. ¶ 13; Sargent Decl. ¶ 30.

Plaintiffs' narrative ignores all of this inconvenient evidence.

Second, Mr. Jobs's "prices will all be the same" comment to Walter Mossberg at Apple's January 2010 iPad launch event also negates any inference that the MFN was the vehicle through which Apple locked the publishers into a conspiracy to eliminate retail price competition. Rather, it reflects Mr. Jobs's own uncertainty about where other retailers—and market prices—were headed. *See* Br. 32.[13]

Given the substantial evidence that Apple's MFN never forced any publisher to take any action vis-a-vis any other retailer, plaintiffs now suggest that Apple "kn[ew]" that its MFN would "sharpen [publishers'] incentives" to allegedly raise prices by moving other retailers to agency. P. Br. 13. But whatever "sharpen[ing] their incentives" means or how it could be unlawful, Apple is not responsible for publishers' business decisions. For example, plaintiffs partially cite an e-mail from S&S CEO Carolyn Reidy, which stated that S&S "need[ed] to change [its] eBook selling terms with our other eRetailers." P. Br. 13 (citing PX-0341). But Ms. Reidy clearly testifies, "Apple's contract never required [S&S] to take any action with respect to

[13] Plaintiffs' selective citation to the record is rampant. Yet another example is plaintiffs' suggestion that Apple "appears to have enlisted" Macmillan to convince HC to agree to the MFN. P. Br. 13. Plaintiffs string together unrelated e-mails and phone calls to imply that, after HC sent a counterproposal to Apple's MFN on January 21, HC agreed to Apple's MFN as a result of a single phone call between Mr. Murray and Mr. Sargent that followed Mr. Cue's communication with each. P. Br. 13–14. In fact, the day after these calls, HC sent Apple *another counterproposal* in which it *completely rejected Apple's MFN*. DX-223; *see* Cue Decl. ¶ 88. HC's agreement to sign an agency deal reflected a "collective corporate determination that *signing an agency agreement with Apple for e-book sales was important as part of News Corp's overall content-based relationship with Apple*." Murray Decl. ¶ 26 (emphasis added); *see also* AF ¶¶ 141–43; DX-234; PX-0032; *cf.* Cue Decl. ¶¶ 88, 91.

other retailers." Reidy Decl. ¶ 33.

2. Apple Designed Its Price Caps To Ensure That E-Books On Its Store Cost Less Than Their Physical Counterparts

Plaintiffs contend that Apple's price caps operated as a disguised agreement among the publishers to set prices at the caps throughout the industry. P. Br. 3, 29. The evidence does not support this theory. Apple insisted on the price caps—over the publishers' fierce objections—to keep e-book prices on the iBookstore below the prevailing hardcover prices. *E.g.*, AF ¶¶ 92, 106–07, 118, 121, 125, 128.

Mr. Moerer's January 11 e-mail, which plaintiffs' cite, demonstrates this point. Mr. Moerer was not suggesting that each publisher planned to sign with Apple. In fact, at that point, the real negotiations were just getting underway. *See* AF ¶ 96; Cue Decl. ¶ 76; Moerer Decl. ¶ 34; Saul Decl. ¶ 10. Nor was he implying that all publishers' retail prices for *New York Times* bestsellers "would be the same." P. Br. 29 (citing PX-522). Rather, he used the January 1, 2010 *New York Times* bestseller lists and those price caps that might apply to illustrate to each publisher that those caps would in general keep e-book prices below the hardcover retail price for that publisher's books on the lists. *E.g.*, PX-522. This required use of the cap prices. Similarly, Apple's participation in a conspiracy cannot be inferred from the mere fact that the five publishers, as principals, decided to initially price a high percentage of their new releases and bestsellers at the caps following agency. P. Br. 20. Rather, the evidence establishes that the price caps worked as Apple intended—to keep e-book prices lower on Apple's iBookstore than those of physical books—not to cause publishers to set prices at any level either on Apple's iBookstore or elsewhere. *See* AF ¶¶ 273–77.

D. January 2010: Amazon's And Barnes & Noble's Parallel Agency Discussions With Publishers

Plaintiffs' effort to characterize the MFN as a "forcing mechanism" is based on another

fiction: that other retailers, including Amazon, were "forced" to agency in late January *after* the Apple agency agreements were signed. P. Br. 20–21 & n.98.

1. Barnes & Noble's And Amazon's Parallel Agency Negotiations

B&N had suggested agency to major publishers in early December 2009, before Apple. Br. 13; Horner Decl. ¶¶ 17–18. In mid-January 2010, while Apple and the publishers were negotiating, B&N again discussed moving to agency with the publishers. AF ¶¶ 225–28; Horner Decl. ¶¶ 20–23. On this record, plaintiffs' suggestion that B&N was happy and able to compete with Amazon's $9.99 pricing for certain e-books is misleading. P. Br. 7 (citing PX-0180, at BN0001895). Theresa Horner, B&N's Vice President of Digital Content, testifies that, "[w]ithout a new model, we were very concerned that B&N would be unable to sustain its eBook business." Horner Decl. ¶ 15.

Plaintiffs contend that Amazon was the victim of "simultaneous demands" by publishers to move to agency after the Apple agency agreements were signed in late January 2010. P. Br. 20. The real timeline of events shows that Amazon was also in parallel discussions with the publishers *in mid-January 2010* about a potential move to agency, at the same time Apple was negotiating its agency agreements with the publishers—but before a single one was signed.

- Amazon began using an agency-like revenue-sharing model for its Kindle Direct Publishing Platform in *late 2007*. P. Br. 13. In spring 2009, Amazon internally discussed a revenue sharing model as an option for the e-book market. *Id.*
- On January 9, 2010, RH approached Amazon to discuss the potential of an agency agreement. AF ¶ 172. This was before Apple had even sent its draft agreements.
- On January 18, the *Wall Street Journal* reported that publishers were exploring agency with Apple. *See* DX-184. Amazon promptly initiated parallel discussions with the publishers. *See* DX-188. On January 20, Amazon publicly announced its agency model for the Kindle Digital Text Platform Program, which featured price tiers and caps and a MFN. DX-189, at AMZN-MDL-0153987. On January 20, Amazon met individually with HC, Macmillan, S&S, and Hachette; several of the publishers indicated their strong interest in agency while Amazon expressed neutrality. *See*, *e.g.*, DX-197; DX-217; PX-0482, at AMZN-MDL-0161085-86.

- On January 22, at least two publishers signaled their desire to move to agency with Amazon. *See*, *e.g.*, DX-220; DX-233. HC told Amazon that it was "strongly considering moving to an agency model" for e-book sales and that "all books would be delayed 6 months for all retailers that are on our standard 'reseller' terms." DX-220. S&S also indicated that it was "preparing to change our terms" to agency as well. DX-233. Not a single publisher had signed its agency agreement with Apple at this point—and both HC and RH had strongly signaled that they were not interested in doing a deal on Apple's proposed terms. *See* Murray Decl. ¶ 21; McIntosh Decl. ¶ 15–16.

Thus, Amazon did not begin the process of negotiating agency agreements with Macmillan as a result of an "ultimatum," as plaintiffs proclaim. *See* P. Br. 14. And while Amazon later complained publicly, in an e-mail with Ms. McIntosh, it privately congratulated itself on its use of "Jedi Mind Tricks here in Seattle" to convince the publishers to adopt the same agency terms it thought none of the publishers would agree to just 9 months prior when Amazon internally discussed the possibility of moving off wholesale to a different model. DX-278; McIntosh Decl. ¶ 20.[14]

2. The Publishers' Approach To Other Retailers

Plaintiffs' effort to link Apple to the publishers' negotiations with Amazon also is based on pure speculation and belied by the record. Apple played no role in, and did not even know about, the publishers' parallel discussions with Amazon in January 2010.

Plaintiffs' speculate that "Mr. Cue *may* have forced" Macmillan to move Amazon to agency, theorizing that Mr. Sargent's decision to move to agency was prompted by a dinner between Mr. Cue and Mr. Sargent and their morning-after e-mail about the remaining "stumbling block" in their negotiations. *See* P. Br. 15 (emphasis added) (citing PX-482). This is directly contradicted by, among other things, Mr. Sargent's sworn testimony that Apple "made clear" to

[14] This evidence also belies Amazon's Russell Grandinetti's assertion that, by January 28, 2010, "'it had been made clear to us by S[&S], H[C], Macmillan, Hachette, and Penguin that they were all going to require us to move to agency . . . [m]uch as we disagreed with the publishers' decision . . . we really had no choice but to negotiate' agency terms." P. Br. 21 n.98 (emphasis added, all but last omission in original).

him on January 20 that it "no longer cared about our business relationships with other e-book retailers." Sargent Decl. ¶ 30.

Relying on a January 31, 2010 e-mail exchange, plaintiffs' speculation continues when they assert that Mr. Sargent "sought Mr. Cue's help in hammering out Macmillan's e-book terms with Amazon." P. Br. 21 (citing PX-0053). But the cited e-mail refers to a desired conversation between Mr. Sargent and Mr. Cue about their own agency terms. There is no evidence that these two men ever discussed the terms of Macmillan's agency deal with Amazon.[15]

IV. *Interstate Circuit* And *Toys "R" Us* Do Not Apply

Plaintiffs falsely accuse Apple of being the "ringmaster" at the center of a "hub and spoke" conspiracy analogous to those in *Interstate Circuit v. United States*, 306 U.S. 208 (1939), and *TRU*, 221 F.3d at 928.[16] P. Br. 4, 24. Plaintiffs erroneously contend that these cases permit this Court to circumvent the applicable standards in *Monsanto*. This is plainly false. *See*, *e.g.*, *TRU*, 221 F.3d at 934 (citing and relying on *Monsanto*'s standard). Rather, both cases were decided on proof of critical *facts not present* here. *See* Areeda, *supra*, at ¶ 1426 & n.47 (cautioning against applying *Interstate Circuit* and *TRU* "to an altogether different set of facts").

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[15] Nor does the statement Mr. Dohle attributes to Mr. Cue from December 2009—that "windowing could be used to establish a distributor model on print pub date for ebooks"—establish that Apple played any role in the publishers' windowing threats in January 2010. RH never threatened or announced plans to window its e-books, *see* McIntosh Decl. ¶ 5, and Mr. Cue told Mr. Dohle that Apple was "against windowing." *See* PX-0336. Mr. Cue has unambiguously testified that as of January 10, Apple did not care whether Apple stayed on a wholesale model or moved to agency with other publishers, and that Apple communicated this to publishers. Cue Decl. ¶ 67.

Plaintiffs also invoke RH to offer another piece of rank speculation: their claim that Apple "set about degrading competitive e-book apps . . . by forcing them to remove in-app links to their own e-book stores." P. Br. 44. Plaintiffs offer no evidence that Apple's prohibition of in-app outside purchase links was related in any way to RH joining the iBookstore. Indeed, Scott Forstall, the witness whom they only selectively quote, offered unrebutted testimony that Apple applied its in-app policies equitably, for legitimate business purposes, to all digital content types on the App Store. Forstall Depo. Tr. at 53:2-63:12.

[16] Importantly, the court in *TRU* acknowledged that "reasonable minds could differ on the facts" and that the evidence present in that case was essential to the finding of a conspiracy. 221 F.3d at 903, 935–36. The Second Circuit has made the same observation. *PepsiCo, Inc. v. Coca-Cola Co.*, 315 F.3d 101, 111 (2d Cir. 2002) ("[T]he court in [*TRU*] repeatedly pointed out that the evidence could be viewed either way," and *TRU* thus represents a "minimum evidentiary threshold" for a section 1 violation).

First, consistent with *Monsanto*, the court in both cases considered whether the defendants offered evidence of independent business justifications for their respective conduct and found that they did not. In *Interstate Circuit*, the Court expressly found that the inference of concerted action was entirely unrebutted. 306 U.S. at 223, 225; *see also In re Travel Agent Comm'n Antitrust Litig*, 583 F.3d 896, 906 (6th Cir. 2009) (noting that *Interstate Circuit* was decided in part on defendants' failure to provide an independent business justification); *Ambrook Enters. v. Time Inc.*, 612 F.2d 604, 614 (2d Cir. 1979) (Friendly, J.) (same). Likewise, the *TRU* defendant merely "hypothesiz[ed] independent motives." 221 F.3d at 935, 937; *see also id.* at 938 (rejecting Toys "R" Us's contention that "its policy was a legitimate business response to combat free riding"). Here, as discussed at length in its main brief, Apple's conduct is overwhelmingly justified by genuine, independent business interests. Br. 24–30.

Second, plaintiffs' "ringmaster" theory is unsupported by any evidence suggesting that Apple participated and exercised control in the manner of the "ringmaster" defendants in these two cases. In both *Interstate Circuit* and *TRU*, the "hub" or "ringmaster" of the conspiracy was the party that allegedly orchestrated, directed, and enforced the plan. *See TRU*, 221 F.3d at 933 (defendant "served as the central clearinghouse for complaints about breaches in the agreement"); *In re: Toys "R" Us*, 126 F.T.C. 415, 560 (1998); *Interstate Circuit*, 306 U.S. at 222; *see also Travel Agent Comm'n*, 583 F.3d at 906. For example, the ringmaster in *TRU* expressly "communicated the message 'I'll stop if they stop' from manufacturer to competing manufacturer." 221 F.3d at 932.

But here, the record lacks evidence that Apple sought to implement, orchestrate, or enforce the specific conspiracy alleged by the plaintiffs—a plan to coordinate the publishers to collectively force Amazon to agency and raise prices market-wide. *Cf. United States v. Green*,

592 F.3d 1057, 1072 (9th Cir. 2010) (describing the "ringmaster" as the party that "orchestrate[s]" and "dictate[s]" the conspiracy). Br. 20–21. Indeed, plaintiffs have no evidence that Apple had *any* knowledge of Amazon's agency discussions with the publishers.

Third, although this Court previously stated for pleading purposes that a "hub" does not need to "be a dominant purchaser or supplier," and that Apple could "plausibly" have been the "hub" under plaintiffs allegations (Mot. Dismiss Order 49–50), the evidence in this case extinguishes any possibility that Apple was such a "hub." Apple's relationships with the publishers are nothing like the vertical relationships at issue in *Interstate Circuit* and *TRU*. The vertical, "ringmaster" defendants in both *Interstate Circuit* and *TRU* held power over the alleged horizontal conspirators due to the nature of their pre-existing business relationships. *See Interstate Circuit*, 306 U.S. at 215 (ringmaster had "a complete monopoly of first-run theatres" in six Texas cites); *TRU*, 221 F.3d at 930 (ringmaster was "a giant in the toy retailing industry" and "a critical outlet for toy manufacturers"). These business relationships were critical to the horizontal conspirators, such that refusal to comply with the ringmasters' demands would likely have been devastating. *See Interstate Circuit*, 306 U.S. at 215 & n.2 (hub contributed more than 74 percent of all license fees paid to the horizontal conspirators); *TRU*, 221 F.3d at 930–31 (toy manufacturers "felt that [they] could not find other retailers to replace [Toys "R" Us]").

Apple, by contrast, had no such leverage over the publishers. The only "power" Apple could wield over the publishers was the attractiveness of a business opportunity—hardly the "make or break" scenarios found in *Interstate Circuit* and *TRU*. Far from capitulating to Apple's requested core business terms, the publishers fought Apple tooth and nail and negotiated intensely to the very end, and the largest, Random House, declined.

Finally, and critically, the conduct in *TRU* and *Interstate Circuit* was a raw exercise of

market power unaccompanied by any shred of procompetitive business activity. The Second Circuit has thus distinguished *TRU* and refused to find a conspiracy led by a "ringmaster" where the conduct at issue is "presumptively legal." *PepsiCo*, 315 F.3d at 110 (discussing the conduct in TRU as "clearly proscribed" trade restraints). Apple's conduct was to enter a new market and offer an alternative business model to the publishers. Forming new business relationships to expand the output of e-books is presumptively legal and characteristic of a typically procompetitive business arrangement. *See United States v. Gen. Elec. Co.*, 272 U.S. 476, 488 (1926) ("[G]enuine contracts of agency" are not "violations of the Antitrust Act" (*per se* or otherwise) as a "matter of principle").

V. The Rule Of Reason, Not The *Per Se* Rule Or Quick Look, Applies To This Case

As Apple has already explained, its conduct cannot be condemned as *per se* unlawful price fixing. Br. 35–37. *Per se* rules are limited to restraints that are "manifestly anticompetitive." *Leegin*, 551 U.S. at 886. Plaintiffs here contend that the key "restraint," the MFN, "sharpen[ed] incentives" (P. Br. 13) for publishers to seek to change their business model with Amazon, but these "incentives," when quantified—which plaintiffs' experts have tellingly refused to do—are trifling and inconsequential. Klein Decl. ¶¶ 5–6, 14–29. A restraint cannot be condemned as manifestly anticompetitive when on its face it can only lower prices, and its theoretical "anticompetitive" impact is trivial. *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 458–59 (1986) ("We've been slow ... to extend *per se* analysis to restraints imposed in the context of business relationships where the economic impact of certain practices is not immediately obvious"). This is consistent with the fact that, as plaintiffs recognize, Apple is positioned "at a different level of the market than Publisher Defendants." P. Br. 33. Vertical restraints are subject to review under the rule of reason. *See Leegin*, 551 U.S. at 907; *Khan*, 522 U.S. at 18. Characterizing a vertical restraint as "horizontal" because of the alleged involvement of

horizontal participants, P. Br. 33–35, does not change this.[17] *See*, *e.g., Khan*, 522 U.S. at 17; *Toledo Mack Sales & Serv., Inc. v. Mack Trucks, Inc.*, 530 F.3d 204, 225 (3d Cir. 2008) ("rule of reason analysis applies even when, as in this case, the plaintiff alleges that the purpose of the vertical agreement … is to support illegal horizontal agreements"); *Laumann v. Nat'l Hockey League*, 2012 WL 6043224, at *9 n. 123 (S.D.N.Y. Dec. 5, 2012) ("defendants' vertical agreements … are subject to rule of reason analysis").

Plaintiffs' attempts to meet their burden under the rule of reason are unsupported by both the law and the evidence. Plaintiffs admit that they bear the initial burden to demonstrate that Apple's entry and the agency model's operation "had an actual adverse effect on competition as a whole in the relevant market." P. Br. 35. Plaintiffs have failed to meet this burden.

Plaintiffs assert that an increase in e-book prices post-agency "is not seriously disputed." P. Br. 36. Apple *does* dispute this. Plaintiffs claim that agency "resulted in reduced output, or sales, of e-books." *Id*. It is not true. Not only did agency not "raise consumer prices market-wide," P. Br. 31, but the relevant market in the post-agency period enjoyed continued robust growth, more choice in titles, and greater quality and innovation. Br. 37–40. Apple's entry also eliminated the threat of windowing, which plaintiffs deem a "restriction on output to the detriment of consumers." States' SAC ¶ 56. This is not a picture of a market where "competition as a whole" has been adversely affected. *See*, *e.g.*, *Cont'l T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 45 (1977) ("Applying the rule of reason to the restrictions that were not imposed in conjunction with the sale of bicycles, the Court had little difficulty finding them

[17] Indeed, *Interstate Circuit*, a hub-and-spoke case that plaintiffs embrace, was not a *per se* case. *See* 306 U.S. at 230–32 (liability based on effects—"comparable with the effect of resale price maintenance agreements"—where the "benefit, at such a cost does not justify the restraint" as "[i]t does not appear that the competition at which [the restraints] were aimed was unfair or abnormal"); *see also Royal Drug Co. v. Group Life & Health Ins. Co.*, 737 F.2d 1433, 1437 (5th Cir. 1984) ("the Supreme Court's analysis [in *Interstate Circuit*] was predicated upon the rule of reason, analyzing the unreasonableness of the restraint in terms of the demonstrated effects on competition").

all reasonable in light of the competitive situation in 'the product market as a whole'").

Plaintiffs react to this overwhelming evidence of market health by urging that it should not be taken into account. Thus, they seek to exclude the testimony of Dr. Burtis. They wrongly attribute the benefits to the iPad itself, and attempt to recast the substantial innovations and improvements to the e-reading experience as relevant only to a separate market of *e-reading* devices. P. Br. 38. But improvements to the e-reading experience unquestionably increase the quality of *e-books*. Further, by attempting to siphon off undeniable benefits to a separate market, plaintiffs yet again contradict the Supreme Court's controlling precedent, which has made clear that procompetitive justifications include the "encourage[ment] of retailer services that would not be provided even absent free riding." *Leegin*, 551 U.S. at 891–92.

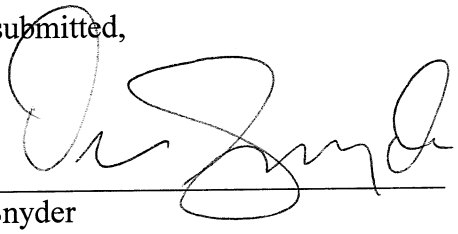
Finally, plaintiffs' breathtaking (and unsupported) assertion that the only way Apple could avoid violating Section 1 would be to ape Amazon's below-cost pricing approach, or "remain[] out of the market and ... leav[e] it to Amazon and other retailers to innovate," captures the absurdity of plaintiffs' approach. P. Br. 40. *No* precept or principle of antitrust law shackles Apple (or any other entrant) to enter a market solely in the manner of another competitor. *Cf. Leegin*, 551 U.S. at 891; *United States v. Microsoft Corp.*, 253 F.3d 34, 94 (D.C. Cir. 2001) ("efficiencies are common in technologically dynamic markets where product development is especially unlikely to follow an easily foreseen linear pattern"). The manifestly procompetitive effects of Apple's entry and the agency model leave no doubt that any alleged restraint by Apple in this case was reasonable.

CONCLUSION

For the foregoing reasons, this Court should order judgment for Apple.

Dated: May 3, 2013
New York, New York

Respectfully submitted,

By: 

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