UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

IN RE ELECTRONIC BOOKS ANTITRUST LITIGATION	No. 11-md-02293 (DLC)
This Document Relates to: ALL ACTIONS	ECF Case

MEMORANDUM OF LAW IN SUPPORT OF CLASS PLAINTIFFS' MOTION FOR CLASS CERTIFICATION AND APPOINTMENT OF CLASS COUNSEL

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I. INTRODUCTION

This Court determined Apple orchestrated a conspiracy to "eliminate retail price competition in order to raise e-book prices."[1] Unsurprisingly, the conspiracy succeeded, enabling the Publisher Defendants to "use 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."[2] Indeed, Apple's visionary founder, Steve Jobs, admitted to the increase in future prices customers would pay for e-books in a world in which the Publisher Defendants controlled prices and Apple eradicated competition with a retail price "MFN." Recounting the agreement between Apple and the Publisher Defendants to his biographer the day after publicly announcing the iPad's launch, Mr. Jobs captured the essence of the conspiratorial scheme's intended effects. With Apple's "a[i]kido move," Defendants would eradicate the Amazon $9.99 price point that the Publisher Defendants disdained and raise consumer market prices by eliminating retail competition, Apple would receive a 30% commission on these higher prices, and "the customer [would] pay[] a little more" to finance Defendants' scheme.[3] This "little more" translates to ***307 million dollars*** illegally charged to consumers.[4]

It is truly remarkable that in a case where the parties have presented starkly competing narratives on nearly every major issue, when it came to whether the Defendant Publishers used the switch to the agency model to raise their e-book prices, each side read from the same page.

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[1] July 10 Order at 9. References to "July 10 Order" in this Memorandum are to this Court's July 10, 2013, Opinion and Order in *United States v. Apple*, No. 12-cv-2826 (S.D.N.Y.). All other reference to trial documents are to documents in the master docket for *In re Electronic Books Antitrust Litigation*, No. 11-md-2293 (S.D.N.Y.).

[2] *Id.* at 96.

[3] *Id.* at 103-104.

[4] *See* Declaration of Roger G. Noll ("Noll Decl.") at 6, concurrently filed herewith.

Apple's own expert at trial, Dr. Burtis, conceded (and in fact demonstrated) Apple's conspiracy resulted in "sudden and uniform" price increases.[5]

Nevertheless, consistent with Apple's unwillingness to recognize any finding of wrongdoing, Apple seeks to march Class Plaintiffs through their certification paces – even though this litigation is a text book case for certifying a class. Here: (1) the Court found Apple liable, and the Class may use the findings against Apple as common evidence under collateral estoppel principles; (2) Dr. Roger Noll, a highly respected economist, will offer his expert economic opinion (supported by econometric regression analysis) of antitrust impact and the amount of damages the conspiracy caused to millions of e-book purchasers; and (3) the Class – and States – will propose a common formula to determine, and then distribute, damages to injured consumers (which is far superior to individual actions being brought, or in reality no individual recovery at all).

Moreover, this case involves the digital distribution of content (e-books), centrally and electronically priced, according to the Publishers Defendant' master pricing policies. As such, the pricing and distribution of e-books readily lends itself to class treatment. Consumers did not individually negotiate e-book prices. And the record before the Court includes a plan of distribution implemented for the Publisher Defendant settlements which shows that the e-book retailers maintain uniquely detailed historical records of consumer purchase transactions. The retailers' electronic records are capable of showing how many and which e-books each Class member purchased.[6] Under these conditions, certifying a class under Federal Rule of Civil Procedure 23(b)(3) is the most effective, efficient, and appropriate way of finding liability

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[5] July 10 Order at 94-95.

[6] *See* Memorandum in Support of Plaintiffs' Motion for Preliminary Approval of Macmillan & Penguin Settlements & Proposed Consumer Notice & Distribution Plan, Exhibit G ("Consumer Distribution Plan"), ¶ B(7)-(8), June 21, 2013, ECF No. 360-7.

against Apple on behalf of the proposed Class, and then calculating Class members' damages and distributing their recovery.

Finally, it is not difficult to anticipate Apple will construct innovative arguments in an attempt to defeat class certification and avoid paying damages it owes consumers. But none of Apple's creativity, innovation, or "elegant solutions" can erase its fingerprint from this conspiracy's home-button or change a simple truth: Apple's conspiracy raised the Publisher Defendants' e-book prices and what remains is a formulaic calculation of the damage to consumers Apple caused.

II. STATEMENT OF FACTS

The Court is extraordinarily versed in the facts. Plaintiffs will therefore only highlight some of the salient findings Apple will be estopped from disputing under principles of either collateral estoppel or judicial estoppel.[7]

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."[8] And "[w]ithout Apple's orchestration of this conspiracy, it would not have succeeded as it did in the Spring of 2010."[9]

The entire conspiracy "was shaped by the Publishers' desire to raise the price of e-books being sold through Amazon."[10] Apple expected that "the price caps in the Agreements" that it negotiated with the Publisher Defendants would "bec[o]me the new retail prices for the Publisher

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[7] The parties have met and conferred in an attempt to agree on the application of collateral estoppel in light of *United States v. Apple*. These discussions were unsuccessful. *See* Letter of Steve W. Berman, Sept. 27, 2013, ECF No. 411.

[8] July 10 Order at 129.

[9] *Id.* at 9.

[10] *Id.* at 66.

Defendants' e-books," and "anticipated" that "all of the Publisher Defendants [would] raise[] the prices of their backlist e-books."[11] The Publisher Defendants did exactly that, "us[ing] the change to an agency method for distributing their e-books as an opportunity to raise the prices of their e-books across the board."[12] The actions taken by Apple and the Publisher Defendants undisputedly led to an increase not only in the price of new release e-books, but also their backlist books.[13]

III. PROPOSED CLASS AND CLASS COUNSEL

A. The Proposed Class

Plaintiffs seek certification of a proposed class of direct purchasers of the Publisher Defendants' e-books. The proposed Class is defined as:

> All persons in the Non-Litigating Jurisdictions who purchased e-books between April 1, 2010 and May 21, 2012, published by Hachette Book Group, Inc. ("Hachette"), HarperCollins Publishers L.L.C. ("HarperCollins"), Holtzbrinck Publishers, LLC d/b/a Macmillan ("Macmillan"), Penguin Group (USA) Inc. ("Penguin"), or Simon & Schuster, Inc. ("Simon & Schuster") directly from that publisher (including any of its imprints) after the adoption of the agency model by that publisher. The "Non-Litigating Jurisdictions" are American Samoa, California, Florida, Georgia, Guam, Hawaii, Kentucky, Maine, Minnesota, Mississippi, Montana, Nevada, New Hampshire, New Jersey, North Carolina, Northern Mariana Islands, Oklahoma, Oregon, Rhode Island, South Carolina, U.S. Virgin Islands, Washington, and Wyoming. Excluded from the Class are Defendants, their employees, co-conspirators, officers, directors, legal representatives, heirs, successors, and wholly or partly owned subsidiaries of affiliated companies, as well as the Honorable Denise L. Cote and persons described in 28 U.S.C. § 455(b)(4)-(5).

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[11] *Id.* at 94-96.

[12] *Id.* at 96.

[13] *Id.* at 99.

B. The Proposed Class Representatives

Anthony Petru (Oakland, California), Thomas Friedman (Boca Raton, Florida), and Shane S. Davis (Beaverton, Oregon),[14] each purchased at least one or more e-books directly from one or more of the Publisher Defendants during the class period and were injured as a result of Defendants' conduct.

C. The Proposed Class Counsel

Plaintiffs also request that the Court reaffirm its appointment of Hagens Berman Sobol Shapiro LLP ("Hagens Berman") and Cohen Milstein Sellers & Toll PLLC ("Cohen Milstein") as Class Counsel. The Court appointed Hagens Berman and Cohen Milstein Co-Lead Counsel on December 21, 2011 (ECF No. 23), and those firms have represented the Class Representatives and the putative Class in this matter since that time.

IV. ARGUMENT

A. Class Certification Standard

A court hearing a motion to certify a class must make a determination that each of the requirements of Rule 23 has been met.[15] Where, as here, Plaintiffs seek certification under Rule 23(b)(3), they must meet two sets of requirements.

First, they must satisfy Rule 23(a), which requires a showing that:

> (1) the class is so numerous that joinder of all members is impracticable;
>
> (2) there are questions of law or fact common to the class;
>
> (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

[14] Hereinafter the "Class Representatives."

[15] *See In re Initial Pub. Offering Secs. Litig.*, 471 F.3d 24, 40 (2d Cir. 2006), *clarified*, 483 F.3d 70 (2d Cir. 2007) ("*In re IPO*"). All internal citations and quotations omitted, and emphasis added, unless otherwise noted.

(4) the representative parties will fairly and adequately protect the interests of the class.

Second, they must satisfy Rule 23(b)(3), which requires the Court to find that "the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy."[16]

Plaintiffs need not make these showings "to a degree of absolute certainty. It is sufficient if each disputed requirement has been proven by a preponderance of evidence."[17] This determination may require the Court to make factual findings in order to resolve the issues with respect to a particular Rule 23 requirement.[18] However, factual disputes should only be resolved to the extent needed to determine whether a Rule 23 requirement has been satisfied.[19] Thus, simply because a defendant or its expert raises a merits issue on class certification does not make the issue relevant. "[A] district judge should not assess any aspect of the merits unrelated to a Rule 23 requirement."[20]

The Court must conduct a "rigorous analysis" of each of these requirements.[21] Nonetheless, "[t]he Second Circuit has emphasized that Rule 23 should be 'given liberal rather than restrictive construction,' and has shown a 'general preference' for granting rather than

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[16] Fed. R. Civ. P. 23(b)(3).

[17] *Messner v. Northshore Univ. Health System*, 669 F.3d 802, 811 (7th Cir. 2012).

[18] *See In re IPO*, 471 F.3d at 41.

[19] *See id.*

[20] *Id.*; *see Hnot v. Willis Group Holdings, Ltd.*, 241 F.R.D. 204, 209 (S.D.N.Y. 2007) ("*In re IPO* specifically cautions ***against*** deciding the merits at the certification stage, unless such a decision is coextensive with a Rule 23 determination.") (Emphasis in original.)

[21] *Wal-Mart Stores, Inc. v. Dukes*, _U.S._, 131 S. Ct. 2541, 2551 (2011).

denying class certification."[22] This broad construction has particular force in antitrust cases. "Because of the important role that class actions play in the private enforcement of antitrust actions, courts resolve doubts in favor of certifying the class."[23] "Courts have stressed that price-fixing cases are appropriate for class certification because a class-action lawsuit is the most fair and efficient means of enforcing the law where antitrust violations have been continuous, widespread, and detrimental to as yet unidentified consumers."[24] For these reasons, "courts have repeatedly found antitrust claims to be particularly well suited for class actions."[25]

B. This Case Satisfies the Requirements of Rule 23(a)

As explained above, Rule 23(a) contains four requirements: numerosity, commonality, typicality, and adequacy.[26] The proposed Class in this case satisfies all of these requirements.

1. The Class Meets the Numerosity Requirement

Rule 23(a)(1) requires that the class must be so numerous that joinder of all members would be "impracticable." "Numerosity is presumed when a class consists of forty members or

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[22] *Massey v. On-Site Manager, Inc.*, 285 F.R.D. 239, 244 (E.D.N.Y. 2012); *accord, e.g.*, *Marisol A. v. Giuliani*, 126 F.3d 372, 377 (2d Cir. 1997); *Butto v. Collecto Inc.*, 290 F.R.D. 372, 380 (E.D.N.Y. 2013) ("[C]ourts have implicitly harmonized the idea of a liberal approach and a rigorous analysis."); *All Star Carts & Vehicles, Inc. v. BFI Canada Income Fund*, 280 F.R.D. 78, 83-84 (E.D.N.Y. 2012) ("general preference" is "beyond peradventure").

[23] *In re Playmobil Antitrust Litig.*, 35 F. Supp. 2d 231, 239 (E.D.N.Y. 1998); *accord, e.g.*, *In re Static Random Access Memory (SRAM) Antitrust Litig.*, 264 F.R.D. 603, 608 (N.D. Cal. 2009); *In re Carbon Black Antitrust Litig.*, No. 03-cv-10191, 2005 WL 102966, at *9 (D. Mass. Jan. 18, 2005); *In re Vitamins Antitrust Litig*, 209 F.R.D. 251, 258 (D.D.C. 2002).

[24] *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 267 F.R.D. 583, 592 (N.D. Cal. 2010), *amended*, 2011 WL 3268649 (N.D. Cal. July 28, 2011); *see also, e.g.*, *In re Playmobil*, 35 F. Supp. 2d at 238 (objectives of providing generous recompense to those harmed and erecting deterrent to those contemplating future violations "cannot be fully realized if large numbers of potential claimants are not afforded an efficient and cost-effective method of vindicating their claims").

[25] *In re Lorazepam & Clorazepate Antitrust Litig.*, 202 F.R.D. 12, 21 (D.D.C. 2001).

[26] *Velez v. Novartis Pharms. Corp.*, 244 F.R.D. 243, 256 (S.D.N.Y. 2007).

more."[27] Here, as reflected in the transactional sales records produced by Apple, the Publisher Defendants, and other third party e-book retailers such as Amazon and Barnes & Noble, the proposed class consists of millions of individual consumer, making joinder of each class member is plainly impracticable.[28]

2. There Are Questions of Law and Fact Common to Class Members

Rule 23(a)(2) requires that there be "questions of law or fact common to the class." The class members' "claims must depend upon a common contention of such a nature that it is capable of classwide resolution – which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke."[29] Commonality is established if a classwide proceeding may "generate common ***answers*** apt to drive the resolution of the litigation."[30] The commonality requirement is a "low hurdle."[31] Commonality "does not mandate that all class members make identical claims and arguments, only that common issues of fact or law affect all class members."[32] Thus, "[a] court may find a common issue of law even though there exists some factual variation among class members' specific grievances."[33]

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[27] *Stinson v. City of New York*, 282 F.R.D. 360, 369 (S.D.N.Y. 2012); *see also Marisol A.*, 126 F.3d at 376.

[28] Dr. Noll has calculated damages for approximately 150 million transactions (Noll Decl. at 25 n.22), suggesting that the number of affected consumers is in the millions.

[29] *Dukes*, 131 S. Ct. at 2545.

[30] *Id.*at 2551 (emphasis in original).

[31] *Anwar v. Fairfield Greenwich Ltd.*, 289 F.R.D. 105, 111 (S.D.N.Y. 2013); *see also Davis v. Cent. Vt. Public Serv. Corp.*, No. 11-cv-181, 2012 WL 4471226, at *4 (D. Vt. Sept. 27, 2012) ("[Commonality] is not a demanding standard, as it is established so long as the plaintiffs can identify some unifying thread among the [class] members' claims.") (Second alteration in original.)

[32] *Stinson*, 282 F.R.D. at 369.

[33] *Id.*

Antitrust price-fixing cases inherently present common legal and factual questions that satisfy the requirement of Rule 23(a)(2). Numerous courts hold that allegations concerning the existence, scope, and efficacy of an alleged antitrust conspiracy present questions that satisfy the commonality requirement of Rule 23(a)(2).[34]

Here, there are unquestionably "common contention[s] . . . capable of classwide resolution," which can "resolve an issue that is central to the validity of each one of the claims in one stroke."[35] The applicability of collateral estoppel, which will structure any consumer litigation and which Apple has expressed an intent to contest vigorously, is a common question, and its resolution in one stroke will dramatically reduce the burden on the courts and e-book consumers in effecting compensation for Apple's antitrust violations. Even in the absence of collateral estoppel on particular facts, allegations of the existence of a price-fixing conspiracy are susceptible to common proof.[36] Similarly, the validity of Dr. Noll's damages calculation methodology and the application of his estimated but-for prices, discussed in section IV.C(2), *infra*, are entirely common questions. Thus, the commonality requirement is easily satisfied.

3. Plaintiffs' Claims Are Typical of the Claims of the Class

Rule 23(a)(3) requires that "the claims or defenses of the representative parties are typical of the claims or defenses of the class."[37] "The requirement of typicality is 'not demanding.'"[38]

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[34] *In re NASDAQ Market-Makers Antitrust Litig.*, 169 F.R.D. 493, 509 (S.D.N.Y. 1996) (collecting cases); *see also, e.g.*, *In re Vitamin C Antitrust Litig.*, 279 F.R.D. 90, 99, 109 (E.D.N.Y. 2012); *Daniel v. Am. Bd. of Emer. Med.*, 269 F. Supp. 2d 159, 189-90 (W.D.N.Y. 2003); *In re Playmobil*, 35 F. Supp. 2d at 240.

[35] *Dukes*, 131 S. Ct. at 2551.

[36] *See Cordes & Co. Fin. Servs., Inc. v. A.G. Edwards & Sons, Inc.*, 502 F.3d 91, 105 (2d Cir. 2007).

[37] Fed. R. Civ. P. 23(a)(3).

[38] *Tsereteli v. Residential Asset Securitization Trust 2006-A8*, 283 F.R.D. 199, 208 (S.D.N.Y. 2012).

By its terms, the rule only requires the named plaintiff's ***claims*** to be typical of the class. It "is satisfied when each class member's claim arises from the same course of events, and each class member makes similar legal arguments to prove the defendant's liability."[39] Typicality "does not require 'that the factual background of each named plaintiff's claim be identical to that of all class members.'"[40] "As long as plaintiffs assert, as they do here, that defendants committed the same wrongful acts in the same manner, against all members of the class, they establish [the] necessary typicality."[41]

"[C]laims in antitrust price-fixing cases generally satisfy Rule 23(a)(3)'s typicality requirement."[42] Typicality "in the antitrust context will be established by plaintiffs and all class members alleging the same antitrust violations by the defendants."[43]

Here, the proposed Class Representatives' claims are typical of the claims of the entire Class. Each proposed Class Representative purchased e-books from one or more of the Publisher Defendants; each claims that he or she was injured by paying unlawfully inflated and stabilized prices as a result of Defendants' anticompetitive scheme; each alleges a common course of unlawful conduct by Defendants directed against all Class members; and each asserts the same theory of antitrust liability. Nothing more is required by Rule 23(a)(3).

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[39] *Marisol A.*, 126 F.3d at 376; *accord, e.g.*, *In re Vitamin C*, 279 F.R.D. at 105.

[40] *In re J.P. Morgan Chase Cash Balance Litig.*, 242 F.R.D 265, 272-73 (S.D.N.Y. 2007); *see also, e.g.*, *In re Playmobil*, 35 F. Supp.2d at 242 ("Personal traits or variables . . . are irrelevant to the typicality criterion.").

[41] *Velez*, 244 F.R.D. at 268 (alteration in original).

[42] *In re Playmobil*, 35 F. Supp. 2d 231 at 241.

[43] *Id.*; *see also, e.g.*, *Freeland v. AT&T Corp.*, 238 F.R.D. 130, 141 (S.D.N.Y. 2006).

4. The Class Representatives Will Fairly and Adequately Protect the Interests of the Class

Rule 23(a)(4) requires that the "representative parties will fairly and adequately protect the interests of the class."[44] Courts generally consider two factors when analyzing the adequacy of the named plaintiffs: "(1) absence of conflict and (2) assurance of vigorous prosecution."[45] This inquiry focuses "on uncovering 'conflicts of interest between named parties and the class they seek to represent.'"[46] Certification will only be defeated by "fundamental" conflicts, and courts reject efforts to defeat certification "by raising the possibility of hypothetical conflicts or antagonisms among class member" that are not "apparent, imminent, and on an issue at the very heart of the suit."[47]

The proposed Class Representatives readily meet the requirements of Rule 23(a)(4). Their interests are not antagonistic to those of the unnamed class members; rather, they share the same interest in proving and recovering the damages caused by Defendants' conspiracy. Additionally, they have demonstrated that they can and will pursue the action vigorously, having reviewed pleadings, submitted declarations in opposition to Penguin's motion to compel arbitration, responded to Defendants' discovery requests, and made themselves available for deposition. In sum, the named Plaintiffs have demonstrated they can and will represent the Class fairly and adequately, thereby satisfying the last of the Rule 23(a) requirements.

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[44] Fed. R. Civ. P. 23(a)(4).

[45] *Robinson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147, 170 (2d Cir. 2001), *abrogated by United States. v. City of New York*, 717 F.3d 72 (2d Cir. 2013).

[46] *In re Flag Telecom Holdings, Ltd. Secs. Litig.*, 574 F.3d 29, 40-41 (2d Cir. 2009).

[47] *In re NASDAQ*, 169 F.R.D. at 513, 514.

C. The Requirements of Rule 23(b)(3) Are Satisfied Because the Court's Liability Findings Are Subject to Collateral Estoppel, Dr. Noll Will Testify to the Fact of Injury and Amount of Consumer Damages, and Certifying a Class Is Superior to Individual Consumer Litigation (or None at All)

In addition to meeting the requirements of Rule 23(a), the proposed class's claims meet the standards of Rule 23(b)(3). Rule 23(b)(3) requires the plaintiff to show "that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy."[48] Each of these requirements is satisfied here.

1. Common Questions Frequently Predominate in Antitrust Class Actions, and in Particular Here Because this Court Found Apple Conspired With the Publisher Defendants, Causing Consumers to Pay Supracompetitive E-Book Prices "Across the Board"

"Class-wide issues predominate if resolution of some of the legal or factual questions that qualify each class member's case as a genuine controversy can be achieved through generalized proof, and if these particular issues are more substantial than the issues subject only to individualized proof."[49] "The common questions need not be dispositive of the entire action. . . . Therefore, when one or more of the central issues in the action are common to the class and can be said to predominate, the [class] will be considered proper."[50] Unless "it is clear that individual issues will overwhelm the common questions," the predominance requirement is satisfied.[51] That "class plaintiffs' individualized damages will vary" is no bar to certification.[52]

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[48] Fed. R. Civ. P. 23(b)(3).

[49] *UFCW Local 1776 v. Eli Lilly & Co.*, 620 F.3d 121, 131 (2d Cir. 2010), *cert. denied*, *Sergeants Benevolent Ass'n Health & Welfare Fund v. Eli Lilly & Co.*, _U.S._, 131 S. Ct. 3062 (2011).

[50] 7A Charles Alan Wright, Arthur R. Miller & Mary. K. Kane, *Federal Practice & Procedure* § 1778 at 121-23 (3d ed. 2005).

[51] *In re Playmobil*, 35 F. Supp. 2d at 245.

[52] *Shahriar v. Smith & Wollensky Rest. Grp., Inc.*, 659 F.3d 234, 253 (2d Cir. 2011).

The Supreme Court and the Second Circuit have stated that this test is "readily met in certain cases alleging . . . violations of the antitrust laws."[53] As courts have consistently held, "common issues regarding the existence and scope of [an antitrust] conspiracy predominate over questions affecting only individual members."[54] "In cases such as this, courts have frequently held that the predominance requirement is satisfied because the existence and effect of the conspiracy are the prime issues in the case and are common across the class."[55]

Plaintiffs here must prove three things in order to prevail: "(1) a violation of antitrust law; (2) causal injury; and (3) damages."[56] On the first two prongs, this Court's trial rulings will be used against Apple as findings applicable to the entire Class. For example, Apple's violation of antitrust law – as well as the facts on which antitrust injury and causation are based – will readily be shown by collateral estoppel based on this Court's rulings in *United States v. Apple*.[57] This type of binding "common evidence" is a unique and powerful method to answer common questions, which is seldom in plaintiffs' hands in class actions.

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[53] *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625 (1997); *accord, e.g.*, *Cordes*, 502 F.3d at 108.

[54] *In re Foundry Resins Antitrust Litig.*, 242 F.R.D. 393, 408 (S.D. Ohio 2007); *see also, e.g.*, *In re Playmobil*, 35 F. Supp. 2d at 245 (collecting cases); *see generally In re Marsh & McLennan Cos., Inc. Sec. Litig.*, No. 04 Civ. 8144, 2009 U.S. Dist. LEXIS 120953, at *35 (S.D.N.Y. Dec. 23, 2009) ("Courts generally focus on the liability issue in deciding whether the predominance requirement is met, and if the liability issue is common to the class, common questions are held to predominate over individual questions.").

[55] *In re Vitamin C*, 279 F.R.D. at 109; *see also, e.g.*, *Sullivan v. DB Invs., Inc.*, 667 F.3d 273 (3d Cir. 2011) (en banc), *cert. denied*, *Murray v. Sullivan*, _U.S. _, 132 S. Ct. 1876 (2012). (predominance requirement satisfied by allegations of a price-fixing scheme and resultant inflated prices); *In re NASDAQ*, 169 F.R.D. at 518 (collecting cases).

[56] *Cordes*, 502 F.3d at 105.

[57] *See id.* (finding "no controversy" regarding whether "allegations of the existence of a price-fixing conspiracy [we]re susceptible to common proof").

2. Dr. Roger Noll Will Confirm that the Conspiracy Caused Class-Wide Antitrust Injury and Estimate the Amount of Damages to Class Members

Whether Apple's conduct caused class-wide injury is similarly susceptible to common proof. If plaintiffs offer a formula that "can be employed to make a valid comparison between the but-for fee and the actual fee paid" because of defendants' collusion, then "the injury-in-fact question is common to the class."[58] Here, a common formula can be applied to demonstrate Defendants' conspiracy raised the Publisher Defendants' e-book prices and estimate by how much.[59] Predominance exists when plaintiffs' methodology is capable of estimating damages without having to "focus largely on what ***particular*** plaintiffs would have paid in the but-for world."[60] Indeed, "[e]ven if the district court concludes that the issue of injury-in-fact presents individual questions . . . it does not necessarily follow that they predominate over common ones and that class action treatment is therefore unwarranted."[61] And, of course, whether any overcharges meet the legal definition of antitrust injury is a "legal question . . . common to the class."[62]

Dr. Noll has developed a commonly accepted methodology capable of estimating the damages the conspiracy caused to class members in the form of a multi-variable regression model.[63] Indeed, Dr. Noll implements this methodology and calculates damages.

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[58] *Id.* at 107.

[59] *Id.* at 107 n.11 & 108 n.14.

[60] *Id.* at 108.

[61] *Id.*

[62] *Id.* at 107; *see also, e.g.*, *In re Ethylene Propylene Diene Monomer (EPDM) Antitrust Litig.*, 256 F.R.D. 82, 88 (D. Conn. 2009).

[63] *In re Chocolate Confectionary Antitrust Litig.*, 289 F.R.D. 200, 211 n.14 (M.D. Pa. 2012) (finding that "[multiple regression analyses] have been accepted by many courts as reasonable and reliable methods of proving class-wide damages"); *EPDM Antitrust Litig.*, 256 F.R.D. at 88 (recognizing method common to the class to prove damages includes "using an econometric

In his report, Dr. Noll details a "before-after" methodology, a long-established econometric technique commonly accepted in antitrust cases.[64] Dr. Noll's analysis is based on e-book prices charged before the conspiracy took effect and during the conspiracy for more than 1.3 million e-book titles.[65] The econometric analyses establish a benchmark price for e-book titles that would have likely prevailed absent the conspiracy (the "but-for" prices) to compare to the prices that the Publisher Defendants set during the conspiracy. The difference between the benchmark price for each title is then compared to the actual price of the corresponding title during the conspiracy to calculate the damages for each sale.[66] Because e-books are differentiated products, Dr. Noll uses a "hedonic pricing model" to account for the effect of book attributes on price.

The data underlying these calculations constitute, as Apple's counsel suggested at trial, "the largest and most comprehensive database of transactional eBook sales" ever compiled.[67] This data includes both extensive pre-agency and post-agency prices of not only the Publisher Defendants' e-books, but those of Random House, independent publishers large and small, and

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regression model incorporating a variety of factors to demonstrate that a conspiracy variable was at work during the class period, raising prices above the 'but-for' level for all plaintiffs"); *Johnson Elec. N. Am. Inc. v. Mabuchi Motor Am. Corp.*, 103 F. Supp. 2d 268, 283 (S.D.N.Y. 2000) (same); *In re Indus. Silicon Antitrust Litig.*, No. 95-cv-2104, 1998 WL 1031507 (W.D. Pa. Oct. 13, 1998) (observing "that when used properly multiple regression analysis is one of the mainstream tools in economic study and it is an accepted method of determining damages in antitrust litigation").

[64] Noll Decl. at 16-18. *See also, e.g.*, *In re K-Dur Antitrust Litig.*, No. 01-cv-1652, 2008 WL 2699390, at *19 (D.N.J. Apr. 14, 2008) (observing that the "[d]efendants do not dispute that the 'before and after' methodology proposed by Dr. Leitzinger is 'judicially recognized and commonly accepted'"); *In re NASDAQ*, 169 F.R.D. at 521 (recognizing that "[m]ethodologies of this kind . . . have been cited with approval by numerous courts in granting class certification").

[65] Noll Decl. at 19.

[66] Noll Decl. at 23-24.

[67] Trial Tr. at 1571:4-5, June 12, 2013, *United States v. Apple*, No. 12-cv-2826 (S.D.N.Y.).

self-published authors. If this historic quantum of data is insufficient to allow a leading antitrust economist – reliably applying a commonly accepted methodology – to create a reasonable estimate of but-for prices, it is difficult to conceive of how such an elevated bar could be overcome on a common basis and a Rule 23(b)(3) class could be certified in any case.

The process of reasonably estimating and distributing damages here is far simpler than in many class action antitrust cases. In fact, courts frequently certify cases in which transactions involved "individual negotiations" and "varied purchase methods."[68] For example, the Seventh Circuit recently vacated an order denying class certification even though the relevant market was alleged to be "particularly complex," involving "third-party payors negotiat[ing] sophisticated contracts" for "complex bundles of many different services and products."[69] In the e-book market, by contrast, ***no*** negotiations occur; indeed, a central purpose of the conspiracy was to lodge sole pricing control with the Publisher Defendants and avoid price competition.

Translating Dr. Noll's estimated but-for prices into actual damages to individual Class members is a straightforward process of applying a common methodology. In the vast majority of consumer antitrust cases (including countless cases that have been certified), customer records are unavoidably incomplete, relying instead on the retention of receipts by thousands or millions of individual purchasers or the vagaries of physical record-keeping at myriad vendors. Here, by contrast, ***every*** purchase was necessarily completed online through a limited number of sales agents. Indeed, four retailers (Amazon, Barnes & Noble, Apple, and Sony) account for ***ninety-eight percent*** of the Publisher Defendants' e-book sales.[70] These retailers record the date, price,

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[68] *In re Vitamins*, 209 F.R.D. at 265-68.

[69] *Messner*, 669 F.3d at 816.

[70] *See* Noll Decl. at 28.

and title for nearly every single e-book sold by a Publisher Defendant to a consumer during the relevant time period.[71] Common questions clearly predominate here.

3. A Class Action Is Superior to Other Forms of Adjudication

The final requirement of Rule 23(b)(3) is a finding that "a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Factors relevant to this inquiry include:

> (A) the class members' interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action.[72]

Along with the predominance requirement, the superiority requirement ensures "that the class will be certified only when it would 'achieve economies of time, effort, and expense, and promote . . . uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results.'"[73]

Class adjudication is plainly superior to any other available method of adjudication. As a general matter, "[w]here proceeding individually would be prohibitive due to the minimal

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[71] *See* Consumer Distribution Plan, ¶ B(7)-(8), ECF No. 360-7. The transaction records also provide geographic information, such as zip codes, associated with each e-book purchase. For only approximately 6.7% of the total damages do these records have unidentified or unrecognized geographic fields, or information suggesting purchases by persons who had a foreign address and whose country of residence may also have been the United States. Noll Decl. at 28. If necessary, more detailed records than the transactional records in plaintiffs' possession could be used in the distribution process to identify the geographic location of these consumers' purchases.

[72] Rule 23(b)(3); *see also, e.g., In re Visa Check/Mastermoney Antitrust Litig.*, 280 F.3d 124, 133 (2d 2001), *overruled on other grounds*, *Brown v. Kelly*, 609 F.3d 467 (2d Cir. 2010).

[73] *Cordes*, 502 F.3d at 104 (alteration in original)

recovery, 'the class action device is frequently superior to individual actions.'"[74] This is manifestly the case here: given that the average overcharge was under $10, even the most voracious readers would have no possible economic incentive to incur the hefty costs of proving an antitrust suit. Filing fees alone would be enough to outweigh the potential recovery for the vast majority of potential litigants. In the Southern District of New York, for example, a litigant must pay $400 in fees simply to open a new action and file a complaint.[75] Nor could the application of collateral estoppel from *United States v. Apple* adequately minimize the cost of litigation, given that a copy of the 2607-page trial transcript costs more than $2300,[76] and an individual litigant would still need to retain expert economic assistance to calculate damages in the first instance.[77] Therefore, because it would be economically unreasonable for the class members to adjudicate their separate claims individually, the superiority of a class action is evident.

Furthermore, the factors identified in Rule 23(b)(3) all weigh in favor of certification. *First*, no class member has demonstrated any interest in litigating individually, nor does any class member have special circumstances or unique damages that provide him or her a greater or

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[74] *Engel v. Scully & Scully, Inc.*, 279 F.R.D. 117, 130 (S.D.N.Y. 2011); *see also Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809 (1985) ("Class actions . . . may permit the plaintiffs to pool claims which would be uneconomical to litigate individually."); *In re NASDAQ*, 169 F.R.D. at 527 (antitrust laws would be undermined if individuals abandoned valid but small claims because pursuing them would not be economical).

[75] *See* United States District Court Southern District of New York, *District Court Fee Schedule and Related Information*, available at http://www.nysd.uscourts.gov/fees (last visited October 10, 2013).

[76] S*ee* United States District Court Southern District of New York, *Court Reporting and Transcripts*, available at, http://www.nysd.uscourts.gov/court_reporting.php (last visited October 10, 2013).

[77] As this Court has previously recognized, "plaintiffs can expect at most a median recovery of $540 in treble damages, and face several hundred thousand dollars to millions of dollars in expert expenses alone." Opinion and Order, June 27, 2012, ECF No. 190.

idiosyncratic interest in controlling the litigation. *Second*, there is no other "litigation concerning the controversy already commenced" in which the proposed Class is represented. *Third*, judicial efficiency counsels strongly in favor of "concentrating the litigation of the claims in the particular forum," given the Court's thorough familiarity with the facts of the case.[78] *Fourth*, there is no reason to expect any "difficulties in the managing a class action;" quite the contrary, ***individual*** actions would have far greater difficulties, as described above.

At this stage, it would be enormously inefficient – for both the Court and the parties – to fracture this case into countless individual actions or, in reality, none at all. Accordingly, a class action is superior to other available methods of adjudication.

D. Proposed Class Counsel Will Fairly and Adequately Represent the Class

Finally, pursuant to Rule 23(g), a court that certifies a class must appoint class counsel, who must "fairly and adequately represent the interests of the class."[79] The court evaluates counsel according to (1) their work in identifying and investigating plaintiffs' claims, (2) their experience in similar litigation, (3) their knowledge of applicable law, and (4) the resources they will commit to representing the class, along with any "other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class."[80]

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[78] Class Plaintiffs intend to file, upon conclusion of pretrial proceedings, waivers of their right to remand their cases to their transferor jurisdictions pursuant to 28 U.S.C. § 1407(a). *See generally Armstrong v. LaSalle Bank Nat'l Ass'n*, 552 F.3d 613, 615-16 (7th Cir. 2009) (suits transferred pursuant to § 1407 must be remanded to transferor jurisdictions at conclusion of pretrial proceedings unless plaintiffs waive right to remand).

[79] Fed. R. Civ. P. 23(g)(1)(B).

[80] Fed. R. Civ. P. 23(g)(1)(A)-(B); *see, e.g.*, *Iglesias-Mendoza v. LaBelle Farm, Inc.*, 239 F.R.D. 363, 375 (S.D.N.Y. 2007).

The Court has already found Hagens Berman and Cohen Milstein to be suitable representatives of the Class on an interim basis[81] and the course of the litigation since their appointment has confirmed that they will fairly and adequately represent the Class. Both firms are composed of highly experienced counsel with decades of experience litigating antitrust class actions, as detailed in greater length in their motions for appointment as interim Class Counsel.[82] Since their appointment as interim Class Counsel, Hagens Berman and Cohen Milstein have opposed and defeated Defendants' motions to dismiss and to compel arbitration, negotiated an accelerated discovery schedule with the six Defendants and the state and federal governmental plaintiffs, taken or participated in dozens of fact and expert depositions, reviewed hundreds of thousands of documents, coordinated discovery from several third parties, and independently retained and worked with expert economists to identify, obtain, and then analyze the extensive transactional data produced in this case. Class Counsel developed cooperative working relationships with the principal attorneys litigating the case for the Department of Justice and the Litigating States, and are working closely with the Litigating States for the joint damages trial scheduled for May 2014. In short, there are no firms who are better suited to represent the proposed Class in the final stages of this matter.

Therefore, the proposed Class Counsel satisfy the Rule 23(g) factors and will fairly and adequately prosecute the interests of the Class.

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[81] Case Management Order, Dec. 21, 2011, ECF No. 23.

[82] *See* Application to Appoint Hagens Berman Interim Lead Counsel at 13-14, Dec. 19, 2011, ECF No. 19; Application of Cohen Milstein Sellers & Toll PLLC Seeking Appointment to Represent Consolidated Putative Class at 7-11, Dec. 19, 2011, ECF No. 11.

V. CONCLUSION

Plaintiffs respectfully request an Order pursuant to Federal Rule of Civil Procedure 23 certifying this suit as a class action, appointing the Class Representatives to represent the Class, and appointing Hagens Berman and Cohen Milstein as Class Counsel.

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CERTIFICATE OF SERVICE

I hereby certify that on October 11, 2013, I electronically filed the foregoing document using the CM/ECF system which will send notification of such filing to the e-mail addresses registered in the CM/ECF system, as denoted on the Electronic Mail Notice List, and I hereby certify that I have caused to be mailed a paper copy of the foregoing document via the United States Postal Service to the non-CM/ECF participants indicated on the Manual Notice List generated by the CM/ECF system.

/s/ Steve W. Berman
STEVE W. BERMAN