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 Electronically Filed

MEMORANDUM OF LAW IN SUPPORT OF PUBLISHER DEFENDANTS' MOTION TO DISMISS THE CONSOLIDATED AMENDED CLASS ACTION COMPLAINT

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PRELIMINARY STATEMENT

This lawsuit arises from a change in the method of distribution of electronic books ("eBooks") that five of the major trade publishers adopted in connection with the announcement of the launch of Apple's iPad on January 27, 2010. The Publisher Defendants[1] switched from using the "wholesale" model they have used in connection with their sale of physical books (i.e., selling books to retailers at a wholesale price and allowing the retailers to resell the books to consumers at a retailer-set price) to an "agency" model in which the publishers sell eBooks directly to consumers at prices set by each publisher with the retailer acting only as an "agent" and earning a commission based on the sales price.

Plaintiffs allege that this change in distribution models—first, in vertical agreements between each Publisher Defendant and Defendant Apple, Inc. ("Apple"), and then in vertical agreements between each Publisher Defendant and Amazon—was the product of an unlawful horizontal conspiracy by the Publisher Defendants, facilitated by Apple, to artificially inflate retail prices for eBooks. Significantly, Plaintiffs do not attempt to support their claims with direct factual allegations of actual agreement between and among particular Publisher Defendants at specific times and places.

Despite its prolixity, Plaintiffs' Consolidated Amended Class Action Complaint ("Complaint" or "CAC") essentially alleges nothing more than parallel contracting behavior among the Publisher Defendants in simultaneously adopting the agency model. They add

[1] The Publisher Defendants are (i) Hachette Book Group, Inc. and Hachette Digital, Inc., (collectively, "Hachette"); (ii) HarperCollins Publishers, L.L.C. ("HarperCollins"); (iii) Holtzbrinck Publishers, LLC d/b/a Macmillan ("Macmillan"); (iv) Penguin Group (USA) Inc. ("Penguin"); and (v) Simon & Schuster, Inc. and Simon & Schuster Digital Sales, Inc. (collectively, "Simon & Schuster"). Plaintiffs have voluntarily dismissed Macmillan Publishers, Inc. and Hachette Livre USA. Plaintiffs only added Hachette Livre SA (France) to the CAC, filed in late January, and have not yet effected service of process.

conclusory allegations of "conspiracy," "agreement," and "coordination," as well as unsupported assertions that the Publisher Defendants would not have taken such actions independently in the absence of collusion. From these allegations, Plaintiffs attempt to create an inference of a horizontal conspiracy. Plaintiffs fail, though, to place their allegations of parallel conduct in a context plausibly suggesting conspiracy. This failure is fatal to their claims. The facts pled by Plaintiffs show that the alleged conduct is just as, or more, consistent with rational unilateral behavior by each Publisher Defendant than with any preceding agreement among them.

Although each Publisher Defendant would receive lower average net revenues per unit for eBooks sold under the proposed agency model (a fact that is inconsistent with an anticompetitive conspiracy), each Publisher Defendant had legitimate and independent business interests in agreeing to the terms of the agency agreement proposed by Apple. Each Publisher Defendant could reasonably anticipate that the decision would enable entry by an important new competitor with an established base of millions of customers and a proven track record in the e-retail space, which would in turn (i) expand demand for eBooks, thus increasing overall book sales and each publisher's total revenue; (ii) decrease reliance on Amazon, at the time a monopoly distributor, and protect against Amazon's monopsony; (iii) expand and diversify eBook distribution, providing readers broader access to new eBook titles and improving the eReading experience with market-wide innovations such as enhanced eBooks and a greater variety of eReaders; and (iv) provide support for important "brick-and-mortar" retailers that were suffering due to Amazon's below-cost predatory pricing. The fact that each Publisher Defendant independently recognized these benefits and executed separate agency contracts with Apple suggests at most a common response to a common stimulus, and is not indicative of an unlawful preceding agreement.

Nor is a plausible suggestion of conspiracy created by the timing or similar terms of the vertical agency agreements between each Publisher Defendant and Apple or between each Publisher Defendant and Amazon. The near-simultaneous negotiations and execution of separate agency agreements are more plausibly explained by the fact that the process was driven by Apple, which planned to enter and begin selling eBooks upon the launch of the iPad. Moreover, in addition to incorporating the same agency model previously (and very successfully) utilized by Apple in its App Store, Apple's "take it or leave it" proposals to the Publisher Defendants contained a number of other terms and conditions that led each Publisher Defendant to switch to the agency model with Amazon and other retailers as well. The Complaint itself thus provides obvious alternative explanations for the Publisher Defendants' purportedly parallel behavior that suggest lawful conduct rather than the unlawful conduct Plaintiffs ask the court to infer.

When stripped of conclusory labels and assertions of "conspiracy," Plaintiffs' allegations amount to nothing more than a series of (lawful) parallel vertical agreements between each Publisher Defendant and Apple and between each Publisher Defendant and Amazon, none of which is separately challenged by Plaintiffs. Accordingly, the Complaint should be dismissed because Plaintiffs' allegations fail to adequately raise a plausible inference of a horizontal agreement among the Publisher Defendants.

SUMMARY OF COMPLAINT

I. THE PRODUCTS, MARKETS, AND PARTIES

The Products. Plaintiffs allege a conspiracy involving eBooks, "an e-text that forms the digital media equivalent of a conventional print book." (CAC ¶ 199.) As distinguished from "physical books" (CAC ¶ 58), eBooks "are usually read on dedicated hardware devices known as eReaders" and are "sold directly through eReaders, as well as through the web." (CAC ¶ 61.)

Examples of eReaders or products with eReader functionality include the Kindle (Amazon), the Reader (Sony), the Nook (Barnes & Noble) and the iPad (Apple). (CAC ¶¶ 48, 62, 63, 67.)

The Complaint focuses on the manner in which eBooks are sold to consumers. For the period from approximately November 2007 until April 2010, Plaintiffs allege that eBooks were sold using the "wholesale model" or "retail model," which is the same model that has been used to sell physical books. (CAC ¶ 59.) Under this model, publishers sold titles to eBook retailers at a price determined by the publisher (the wholesale price), and the retailer set the price at which the eBook was resold to a consumer (the retail price). (CAC ¶ 59.) This model gave retailers "control over the final price ultimately charged to consumers." (CAC ¶ 125.) Beginning in April 2010, certain publishers began using the "agency model," which allowed each publisher to sell eBooks directly to consumers at a price set by the publisher with the retailer acting only as a sales agent and receiving a commission from the publisher based on the sales price. (CAC ¶ 124.) Under the agency model, the publisher "retain[s] all right, title and interest to all digital files and copies" until the eBook is sold to the consumer. (CAC ¶ 213.)

The Alleged Markets. Although the Complaint at times refers to "popular eBook titles" (CAC ¶ 64), "front list titles" (CAC ¶ 57), "newly released adult fiction and nonfiction" (CAC ¶ 131), and "bestselling eBooks" (CAC ¶ 201), at other points in the Complaint Plaintiffs attempt to allege a U.S.-wide relevant market consisting of all "eBooks." (CAC ¶¶ 199, 242-3.) In the same paragraph, though, Plaintiffs make explicit their contention that "it is not necessary to prove a relevant market." (CAC ¶ 242.) Plaintiffs further allege that "same-title eBooks are substitutes for each other" and that consumers often "forego the more expensive title and choose to purchase the less expensive, differently titled eBook." (CAC ¶ 172.) At the same time, however, Plaintiffs claim that eBooks are properly considered as part of a "more general book

market" (CAC ¶ 199) and that eBooks had a direct (and extremely detrimental) impact on physical book sales. (CAC ¶ 72.)

The Parties. The named Defendants are five trade publishers and Apple, a "leading manufacturer of mobile devices designed to distribute, store and display digital media." (CAC ¶¶ 48-53.) Excluded from this group is Random House, a "major U.S. publisher" that did not move to the agency model in April 2010 and one that saw "a 250% increase in eBook sales in the United States" over the 2010 calendar year. (CAC ¶¶ 151 n.23, 170.) Also excluded are other eReader manufacturers and eBook retailers, such as Amazon, Barnes & Noble, and Sony.

The Plaintiffs, purported to be both direct purchasers and indirect purchasers (CAC ¶¶ 205, 239), are those individuals who allegedly bought one or more eBooks—of any type, at any price, through any channel, and for use on any eReader—sold by a Publisher Defendant "after the adoption of the agency model by that publisher." (CAC ¶¶ 22-46, 228.)

II. THE ALLEGATIONS OF A "CONSPIRACY"

The conspiracy as alleged by Plaintiffs essentially involves the simultaneous adoption by five of the six largest publishing houses of a different model for the sale of eBooks than is used for the sale of physical books, realized through a series of bilateral vertical agreements between each Publisher Defendant and Apple and between each Publisher Defendant and Amazon. As Plaintiffs do not challenge the legality of each vertical agreement with Apple or Amazon (i.e., they do not argue that the agency model by itself is illegal), their claims depend on the existence of a preceding agreement among the publishers to (i) contract with Apple to move to the agency model; (ii) re-negotiate their existing contracts with Amazon to similarly move to the agency model; and (iii) implement a uniformly higher price point for eBooks.

A. Purported Wrongdoing

Windowing. Plaintiffs assert that the purported conspiracy to increase and stabilize eBook prices began in the fall of 2009. Plaintiffs' allegations are based on parallel actions by four of the Publisher Defendants (i.e., excluding Penguin), beginning in late 2009 with publisher announcements regarding "windowing"—the withholding of an eBook title for a period of time after the release of the same title in physical book form. (CAC ¶¶ 100, 108.)[2] Although admitting that this practice was first applied to eBooks in "the Summer and Fall of 2009" by Defendants Hachette and Simon & Schuster (CAC ¶ 100), Plaintiffs focus their attention on the early part of December. Immediately following complaints by Barnes & Noble (the publishers' most important brick-and-mortar retailer) (CAC ¶ 102) and various public reports regarding possible windowing by certain publishers,[3] HarperCollins and Macmillan informed Amazon of their decisions to begin windowing a select number of eBooks, while Hachette and Simon & Schuster informed Amazon of their decisions to increase the number of eBooks to be windowed. (CAC ¶¶ 102-108.) Plaintiffs concede—as they must—that Penguin never windowed eBooks, a

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[2] In addition to being a longstanding practice in the publishing industry (e.g., hardcover version before a paperback version), windowing is also a common distribution practice in many other industries, including the movie industry.

[3] The December 9, 2009 Wall Street Journal reported that "Simon & Schuster is delaying by four months the electronic-book editions of about 35 leading titles coming out early next year, taking a dramatic stand against the cut-rate $9.99 pricing of e-book best sellers. A second publisher, Lagardere SCA's Hachette Book Group, said it has similar plans in the works." Jeffrey A. Trachtenberg, *Two Major Publishers to Hold Back E-Books*, Wall St. J., Dec. 9, 2009. (CAC ¶ 105 n.9 (Request for Judicial Notice ("RJN") Ex. A).) All of the newspaper articles cited in this Motion are cited by Plaintiffs in the Consolidated Amended Complaint. In considering a motion to dismiss pursuant to Rule 12(b)(6), the Court may take judicial notice of the complete contents of any articles cited in the Complaint. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 568 n.13 (2007); *Halebian v. Berv*, 644 F.3d 122, 131 n.7 (2d Cir. 2011); *DiFolco v. MSNBC Cable L.L.C.*, 622 F.3d 104, 111 (2d Cir. 2010) (citing *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 153 (2d Cir. 2002)); *Sira v. Morton*, 380 F.3d 57, 67 (2d Cir. 2004). Accordingly, the Publisher Defendants are contemporaneously filing a request for judicial notice of the articles cited herein.

point that is inconsistent with the alleged conspiracy. Nor do Plaintiffs contend that any of the Publisher Defendants ever adopted windowing of eBooks as a general practice, assert that windowing led to higher eBook prices, or claim any damages based on the few instances in which certain Publisher Defendants experimented with windowing of eBooks.

Adoption and Implementation of the Agency Model. While willfully ignoring the common market forces that pushed the Publisher Defendants in these parallel directions, Plaintiffs contend that each Publisher Defendant (but not Random House) entered into a substantially similar bilateral agreement with Apple regarding eBooks on or about January 27, 2010, in the period leading up to the highly-anticipated announcement of Apple's revolutionary iPad tablet. (CAC ¶¶ 123, 126.) Each of these decisions is alleged to be the result of a preceding agreement among the Publisher Defendants; however, Plaintiffs do not allege any facts regarding the formation of that preceding agreement. The Apple contracts at issue each allegedly include a most favored nations ("MFN") clause that prohibits Publisher Defendants from selling their eBooks at a price below the one offered through the iBookstore, as well as purportedly an agreement to utilize the agency model for eBook sales through any online vendors of "meaningful size" (CAC ¶¶ 129, 130), although, as the Complaint concedes, even this is not uniform among the Publisher Defendants as at least one Publisher Defendant, Macmillan, negotiated the right to continue offering an alternative wholesale model that would permit Macmillan to delay the release of certain eBooks. (CAC ¶ 148.) Each Apple agreement also purportedly "specifies that the publisher will set prices for their eBooks that [are] offered through the iBookstore based on a formula tied to the list price of physical books." (CAC ¶ 127.) Plaintiffs allege that this "common formula" was intended to increase and standardize eBook prices to a range of $12.99 to $14.99. (CAC ¶ 128.)

During or immediately following the period in which they were publicly known to be negotiating with Apple in January 2010 (CAC ¶ 133), and pursuant to their contracts with Apple, four of the five Publisher Defendants (all but Penguin) purportedly brought this new model to Amazon and entered into negotiations concerning a switch to the agency model. (CAC ¶¶ 146-147.) This was allegedly accomplished not through joint meetings or an explicit agreement among those four Publisher Defendants, but through individual phone calls or in-person meetings with Amazon (none of which is alleged to have included more than one Publisher Defendant). (CAC ¶¶ 152, 164.) Penguin did not meet with Amazon until April 15, 2010. (CAC ¶ 164.)

Impact on Prices. The Complaint contains numerous allegations regarding the prices of eBooks both before and after the introduction of the iPad and the adoption of the agency model. Using unidentified, source-less "industry data," the Complaint alleges that the prices for "bestselling eBooks" and all eBooks rose in the period following the move to the agency model. (CAC ¶ 201.) Plaintiffs also cite the prices of certain current or former "bestselling eBooks" across retailers. (CAC ¶ 187.) However, the Complaint itself demonstrates that the prices charged by the Publisher Defendants for different titles were not in fact "standardize[d]," but instead varied from $9.99 (the pre-agency "pro-consumer" price that the agency model was purportedly implemented to abolish) to $14.99. (CAC ¶ 187.)

B. <u>The "Supporting" Allegations</u>

After pleading facts consistent with a number of unilateral rational business justifications for each of the decisions made by the Publisher Defendants and Apple, Plaintiffs leap to the unsupported conclusory allegation that only an overarching conspiracy can explain this particular sequence of events.

Dissatisfaction with Amazon. Plaintiffs allege that the publishers' initial motivation for the alleged conspiracy derived from a shared dislike of Amazon's "discounted pricing model." (CAC ¶ 65.) This dissatisfaction, of course, was far from secret, with certain of the Publisher Defendants publicly expressing "resent[ment over] how Amazon has aggressively discounted their books,"[4] and the press reporting that "for more than a year, publishers ha[d] been fretting about the price for digital books."[5] For example, Amazon's one-size-fits-all below-cost pricing treated eBooks, which are highly differentiated, as commodities. (CAC ¶ 2.) It was similarly well-known that Amazon's below-cost pricing "threatened to disrupt the . . . brick-and-mortar model," resulted in "stagnant physical book sales growth" (CAC ¶ 72), and led the CEO of the nation's largest brick-and-mortar retailer to "complain[]" to publishers about how eBooks were hurting his company's sales. (CAC ¶ 102.) Further, as Plaintiffs concede, Amazon had a ninety-percent market share in eBooks (CAC ¶ 68) and was actively seeking to acquire "buying power" (CAC ¶ 65) as part of a longer-term effort to "reduce the publishers' profits." (CAC ¶ 74.) Amazon's loss leading also resulted in "strong network effects" and raised "barriers to entry" for competition in the online sales of eBooks. (CAC ¶¶ 8, 112.)

Thus, there is nothing in these allegations that is inconsistent with each Publisher Defendant exercising its independent business judgment with respect to maximizing its overall book sales. Indeed, despite its sales growth during the additional year in which it remained with the wholesale model, even Random House, which is not alleged to be a party to any conspiracy,

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[4] Brad Stone & Motoko Rich, *Apple Courts Publishers, While Kindle Adds Apps*, N.Y. Times, Jan. 21, 2010. (CAC ¶ 75 n.6 (RJN Ex. C).)

[5] Motoko Rich & Brad Stone, *Publisher Wins Fight with Amazon over E-Books*, N.Y. Times, Feb. 1, 2010. (CAC ¶ 124 n.13 (RJN Ex. D.)

eventually came to the conclusion that a shift to the agency model with respect to sales of its eBooks was in its own independent business interests. (CAC ¶ 171.)

History of the Wholesale Model. Plaintiffs allege that since "all major publishing houses have used the same basic distribution model" for years, any move away from that model suggests coordination. (CAC ¶ 59.)[6] Not surprisingly, Plaintiffs selectively cite from the public record in an effort to bolster this claim, careful to omit any mention of the widespread belief that changes to the existing model were "logical and overdue," particularly given the "completely different nature of selling access to a digital file versus a physical object,"[7] and to hide from view the almost universal praise of the output-enhancing features of the agency model, which was predicted to "actually expand the network of retailers selling ebooks . . . [and] provide readers broad access to new titles in ebook form."[8]

Contracting with Apple. The Complaint attempts to portray the Publisher Defendants' decisions to contract with Apple as illogical, counter-intuitive and only explainable by conspiratorial motives. (CAC ¶ 142.) On the contrary, and as the facts alleged make clear, the Publisher Defendants simply seized the opportunity to develop a business relationship with Apple, a "powerful content distribution company" (CAC ¶ 112) and "dominant manufacturer of mobile devices" (CAC ¶ 114), with a proven track record in the e-retail space given its "virtual monopoly on the distribution of digital music." (CAC ¶ 115.) Joining with Apple gave the Publisher Defendants access to a "huge installed base" of consumers (CAC ¶ 115) in a "vast new

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[6] Because Plaintiffs suggest that this distribution model was utilized "for decades," it is clear that they are referring to the distribution of physical books.

[7] *Big Six Negotiate with Apple, Ready New Business Model for eBooks*, Publishersmarketplace.com (January 19, 2010). (CAC ¶ 12 n.2 (RJN Ex. B).)

[8] *Id.*

market,"[9] would hopefully serve as a "counterbalance" to Amazon,[10] and would open up the possibility of innovation in the form of product improvements such as "enhanced or extended ebooks."[11]

Simultaneous Acceptance. In the days and weeks leading to the "launch of the iPad" (CAC ¶¶ 123-4), numerous "press reports indicate[d] that each of the Publisher Defendants were negotiating with Apple simultaneously."[12] (CAC ¶ 133.) It was during these negotiations that "[Apple] proposed [to each of the Publisher Defendants and Random House] an arrangement under which publishers would get to set the prices of their books."[13] During the iPad launch announcement on January 27, 2010, Apple CEO Steve Jobs "indicated that Apple had agreements in place with five of the six largest publishing houses . . . to provide eBook content for the new device." (CAC ¶ 123.) The "coincident" timing of the move to the agency model is thus more rationally explained as the product of the fixed iPad launch date and Apple's clear role in driving the process. (CAC ¶¶ 124, 156.)

Similar Terms. Plaintiffs attempt to draw negative inferences from the "virtually identical" nature of the agreements signed by each Publisher Defendant with Apple. (CAC ¶

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[9] Jeffrey A. Trachtenberg & Geoffrey A. Fowler, *E-Book Pricing Put into Turmoil*, Wall St. J., Feb. 1, 2010. (CAC ¶ 128 n.16 (RJN Ex. E).)

[10] Paul Biba, *Why Smashwords Moved to "Agency Pricing" – Explained by Mark Coker*, Teleread.com (Dec. 2, 2010). (CAC ¶ 125 n.14 (RJN Ex. H).)

[11] *Big Six Negotiate with Apple, Ready New Business Model for eBooks*, Publishersmarketplace.com (January 19, 2010). (CAC ¶ 12 n.2 (RJN Ex. B).)

[12] *Id.* The New York Times, for example, reported that "[Apple] representatives are in New York for meetings this week" and was "negotiating with nearly all (and most likely all) of the six largest trade publishers." Brad Stone & Motoko Rich, *Apple Courts Publishers, While Kindle Adds Apps*, N.Y. Times, Jan. 21, 2010. (CAC ¶ 75 n.6 (RJN Ex. C).)

[13] Brad Stone & Motoko Rich, *Apple Courts Publishers, While Kindle Adds Apps*, N.Y. Times, Jan. 21, 2010. (CAC ¶ 75 n.6 (RJN Ex. C).)

133.) Yet they also allege that the model itself, including Apple's role going forward, was copied directly from the wildly successful structure Apple used in its App Store, which "offered seventy percent of royalties to software application publishers" (CAC ¶118), and simply reflected "[Apple's] decision to handle pricing for e-books in the same way it handles pricing for apps," rather than investing in some new or untested business plan.[14] Perhaps more importantly, with respect to the broader uniformity of "key terms" across the agreements, Plaintiffs plead, but proceed to ignore, the substantial evidence regarding Apple's role in pushing the model—Apple "first pitched the idea of selling e-books under the agency model to the book publishers,"[15] presenting each with the same "***take it or leave it***" offer.[16] Plaintiffs thus seek to draw sinister inferences from the alleged facts that Apple entered a new business field—digital bookselling—without creating five new and distinct arrangements under which to operate.

ARGUMENT

I. PLAINTIFFS FAIL TO ADEQUATELY ALLEGE AN ANTITRUST CONSPIRACY

The crux of Plaintiffs' Complaint is a purported horizontal conspiracy among the Publisher Defendants, facilitated by Apple, in violation of Section 1 of the Sherman Act and various state laws. As the Supreme Court instructed in its landmark *Bell Atlantic Corp. v. Twombly* decision—a case involving similar allegations of parallel conduct by competitors—to survive a motion to dismiss, a complaint alleging an antitrust conspiracy must contain either

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[14] John Timmer, *E-Book Prices to Rise as Amazon, Sony Adopts Agency Model*, Arstechnica.com (Apr. 2010). (CAC ¶ 151 n.22 (RJN Ex. F).)

[15] Motoko Rich & Brad Stone, *Publisher Wins Fight with Amazon over E-Books*, N.Y. Times, Feb. 1, 2010. (CAC ¶ 124 n.13 (RJN Ex. D).)

[16] Ken Auletta, *Publish or Perish: Can the iPad Topple the Kindle, and Save the Book Business?*, The New Yorker, Apr. 26, 2010 (emphasis added). (CAC ¶ 144 n.18 (RJN Ex. G).)

specific factual allegations of "actual agreement" among the defendants or "enough factual matter (taken as true) to suggest an agreement was made." *Twombly*, 550 U.S. at 556, 564. "'[T]he crucial question' is whether the challenged anticompetitive conduct 'stem[s] from independent decision or from an agreement . . . .'" *Id.* at 553 (citations omitted) (second alteration in original). Because "a formulaic recitation of the elements of a cause of action" is insufficient to state a claim, a plaintiff must do more than merely set forth labels and conclusions that an agreement was made. *Id.* at 555.

Thus, a plaintiff may plead a Section 1 conspiracy *directly*, by alleging facts that would be sufficient to establish an illegal agreement without requiring any inferences, or *indirectly*, by pleading facts that would support a reasonable inference of collusion. *Id.* at 556, 564. Factual allegations must not only be consistent with an inference of conspiracy but also must "render a § 1 conspiracy ***plausible***." *Id.* at 556 (emphasis added); *see also Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) ("Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of "entitlement to relief."'" (quoting *Twombly*, 550 U.S. at 557, 558)); *In re Elevator Antitrust Litig.*, 502 F.3d 47, 50 (2d Cir. 2007) (same). Allegations suggesting that a conspiracy is merely *possible* or *conceivable* are insufficient to permit "a potentially massive factual controversy to proceed." *Twombly*, 550 U.S. at 558; *Iqbal*, 129 S. Ct. at 1954 ("Because respondent's complaint is deficient under Rule 8, he is not entitled to discovery, cabined or otherwise."). For these reasons, a complaint must be dismissed when the court can infer "obvious alternative explanation[s]" that suggest lawful conduct rather than the unlawful conduct a plaintiff asks the court to infer. *Twombly*, 550 U.S. at 567; *Iqbal*, 129 S. Ct. at 1951-52.

Here, Plaintiffs offer no direct allegations of actual horizontal agreement among the Publisher Defendants and instead rely on allegations of parallel conduct among the Publisher Defendants and additional circumstantial facts (for the most part, strategically cherry-picked from media reports) in an attempt to create an inference of conspiracy. Because the Complaint fails to plead factual allegations plausibly suggesting that the Publisher Defendants unlawfully colluded with each other, it should be dismissed for failure to state a claim.

A. The Complaint Contains No Direct Allegations Of Explicit Agreement Among The Publisher Defendants

Plaintiffs have not pled any "independent allegation of actual agreement" among the Publisher Defendants. *See Twombly*, 550 U.S. at 564. While the Complaint is replete with conclusory allegations of "conspiracy," "agreement," and "coordination," such generic legal conclusions should be disregarded as irrelevant for purposes of this motion. *See Iqbal*, 129 S. Ct. at 1949-50. Stripped of these conclusory allegations, the Complaint contains no direct evidence of a preceding agreement among the Publisher Defendants to (i) contract with Apple under the agency model; (ii) renegotiate their contracts with Amazon to switch to the agency model; or (iii) implement increased (and uniform) prices for eBooks.

Indeed, Plaintiffs fail to allege any specific facts supporting an explicit agreement among the Publisher Defendants. Plaintiffs allege no detail on how the alleged conspiracy came about or was organized or enforced. Nor do Plaintiffs identify any informants or witnesses to, or participants in, any collusive agreement among the Publisher Defendants to switch to the agency model and/or raise prices for eBooks;[17] any documents indicating the existence of any specific

[17] While the Complaint includes a list of executives at each Publisher Defendant and Apple, accompanied by a conclusory statement that the executives were "individual participants in the coordinated activities and agreements to restrain competition" (CAC ¶ 98), Plaintiffs do not *(cont'd)*

collusive agreement; or a single detail of when or where the alleged agreement among the Publisher Defendants took place. Thus, the Complaint is devoid of any allegations that an actual agreement was reached by the Publisher Defendants at a particular place and time—i.e., "who, did what, to whom (or with whom), where, and when." *See Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1048 (9th Cir. 2008); *see also Twombly*, 550 U.S. at 565 n.10 (noting that plaintiffs had not pled the "specific time, place, or person" involved in any express agreement); *LaFlamme v. Societe Air France*, 702 F. Supp. 2d 136, 147-48 (E.D.N.Y. 2010) (same).

Plaintiffs' allegation that Arnaud Nourry, Chairman and CEO of Hachette Livre SA, and "other industry representatives" discussed "a price point for Amazon's eBooks that would be agreeable to the Agency 5" is no specific allegation of agreement at all. (CAC ¶ 101.) First, no actual agreement with any other publisher executive is alleged. Nor does the Complaint even identify the "other industry representatives" to whom this communication was purportedly made. The allegation does not specify the time and place where the discussions took place, indicate what prices were discussed, or offer any other details to support this vague assertion. Indeed, later in the same paragraph, Plaintiffs themselves suggest that the "other industry representatives" actually may have been *retailers* (i.e., Amazon's competitors), not other Publisher Defendants. (CAC ¶ 101.) In short, the vague allegations of paragraph 101 of the Complaint are wholly insufficient to support Plaintiffs' conspiracy claim. *See Anderson News, L.L.C. v. Am. Media, Inc.*, 732 F. Supp. 2d 389, 397 & n.9 (S.D.N.Y. 2010) (finding that

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attempt to connect these individuals to any specific agreements at specific times and places. Of course, merely identifying a list of individuals who are employed by the Defendants and attaching the conclusory label that they were participants in the alleged conspiracy is plainly insufficient to satisfy Plaintiffs' burden under *Twombly*. Without any underlying facts to support a plausible inference that these executives entered into any agreements with their counterparts at other publishers or otherwise participated in the purported conspiracy, this allegation adds nothing to the Complaint.

allegations of vague statements made by executives of Defendants, purported meetings at unspecified places and indeterminate dates, and general allegations of discussions among Defendants were insufficient to constitute direct evidence of conspiracy).[18]

Next, the Complaint's allegation that "Apple and the Agency 5" communicated and signaled to each other that they would agree to terms in the Apple contracts (CAC ¶ 101) is not only conclusory—without any specific factual support—but is also ambiguous as to which Defendant purportedly did (or said) what with whom. Moreover, Plaintiffs cleverly conflate both Apple and the Publisher Defendants in this allegation, leaving unclear whether the communications were undertaken horizontally among the Publisher Defendants or were just separate vertical discussions between Apple and each individual Publisher Defendant. Such conclusory and ambiguous assertions do not suffice as direct evidence of collusion among the Publisher Defendants.

Likewise, general assertions that (i) the Publisher Defendants and Apple coordinated their activities in order to raise prices for eBooks (CAC ¶121), (ii) Apple brokered a switch to the agency model (CAC ¶ 134), and (iii) the Publisher Defendants agreed to standardize increased eBook prices (CAC ¶ 134), do not constitute direct evidence of an actual agreement. Instead, the Complaint appears to assume those conclusions simply because each Publisher Defendant entered into an agency agreement with Apple. Again, these allegations are unsupported by any specific facts indicating who entered into the purported agreements among the Publisher

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[18] Note that the source for this information (and much of the evidence cited in the Complaint) is Amazon, whose market share was projected to decline significantly in light of the increased competition for eBooks since the adoption of the agency model. (*See* CAC ¶ 186 (stating that an analyst expects "Amazon's share of the eBooks market to fall from ninety percent to thirty-five percent over the next five years.").)

Defendants, where or when the agreements were made, the specific parameters of the coordination, or any such details. Like the mere labels used elsewhere in the Complaint, such conclusory allegations of agreement "'do[] not supply facts adequate to show illegality.'" *In re Elevator*, 502 F.3d at 51 (alteration in original) (quoting *Twombly*, 550 U.S. at 557).

Finally, the only allegations in the Complaint of any meetings between particular named individuals at specific times and places do *not* concern representatives of two or more Publisher Defendants, but rather involve alleged meetings between representatives of one Publisher Defendant and representatives of non-party Amazon, which is not an alleged co-conspirator. (CAC ¶¶ 152, 164.)[19] Obviously, meetings between individual suppliers and their distributor cannot form the basis for a claim of horizontal conspiracy between and among the Publisher Defendants.[20]

B. Plaintiffs' Allegations Of Parallel Conduct By The Publisher Defendants Do Not Give Rise To A Plausible Inference Of A Conspiracy

Lacking direct allegations of an explicit agreement, Plaintiffs fall back upon allegations of parallel conduct in an attempt to imply a horizontal conspiracy among the Publisher Defendants. As the Supreme Court in *Twombly* explained, "when allegations of parallel conduct are set out to make a § 1 claim, they must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent

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[19] In another allegation, Plaintiffs identify a meeting between a "Random House representative" and Steven Kessel of Amazon and bizarrely assert that this meeting was made to effectuate the alleged price-fix. Clearly a meeting between non-Defendants Random House and Amazon does not plausibly suggest a horizontal conspiracy among the Publisher Defendants.

[20] While not identifying individual meeting participants, Plaintiffs also allege a number of meetings between Apple and each Publisher Defendant. (CAC ¶ 133.) The Complaint, however, contains no plausible suggestion that these meetings were anything other than ordinary arms-length negotiations between Apple and each Publisher Defendant individually to enter into respective agency agreements for the distribution of eBooks.

action. . . . An allegation of parallel conduct is thus much like a naked assertion of conspiracy in a § 1 complaint: it gets the complaint close to stating a claim, but without some further factual enhancement it stops short of the line between possibility and plausibility of 'entitle[ment] to relief.'" *Twombly*, 550 U.S. at 557 (second alteration in original) (citation omitted). Therefore, a plaintiff must plead facts showing "'parallel behavior that would *probably not* result from chance, coincidence, independent responses to common stimuli, or mere interdependence unaided by an advance understanding among the parties.'" *Id.* at 556 n.4 (emphasis added) (quoting 6 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 1425, at 167 (2d ed. 2003)). "[W]ithout that further circumstance pointing toward a meeting of the minds, an account of a defendant's commercial efforts stays in neutral territory." *Id.* at 557. For these reasons, it is well-settled that parallel conduct alone is insufficient to state a claim for conspiracy. *Id.* at 556-57.

Here, Plaintiffs offer no more than allegations of parallel conduct, or in some instances even non-parallel conduct, that are wholly inadequate to permit a plausible inference of a conspiracy among the Publisher Defendants. Plaintiffs assert that the Publisher Defendants acted in parallel in (i) contracting with Apple, a new entrant and alternative to Amazon, for the distribution of eBooks under the agency model; (ii) renegotiating contracts with Amazon, a dominant retailer now faced with the first credible threat from a rival eBook distributor, to switch to the agency model; (iii) "windowing" eBooks so that they were released some period of time after the hardcover version; and (iv) increasing and standardizing eBooks prices. But the Complaint contains no allegations placing the purported parallel conduct in a context that gives rise to a plausible inference of conspiracy. Without such allegations, parallel conduct like that pled by Plaintiffs is "just as much in line with a wide swath of rational and competitive business

strategy unilaterally prompted by common perceptions of the market." *Twombly*, 550 U.S. at 545.

1. Agency Agreements with Apple

The primary focus of the Complaint is a purported agreement among the Publisher Defendants to switch to the agency model through contracts with Apple. Plaintiffs allege that each Publisher Defendant entered into a substantially similar agreement with Apple regarding eBooks on or about January 27, 2010, in the period leading up to the announcement of the launch of the iPad. (CAC ¶¶ 123, 126.) Plaintiffs contend that this parallel behavior evidences collusion among the Publisher Defendants.

The Second Circuit has followed the Supreme Court in acknowledging that assertions of parallel conduct that could "'just as well be independent action'" are insufficient to state a conspiracy claim. *Starr v. Sony BMG Music Entm't*, 592 F.3d 314, 323 (2d Cir. 2010) (quoting *Twombly*, 550 U.S. at 557); *see also In re Elevator*, 502 F.3d at 51. "Rather, to allow an inference of conspiracy to arise from allegedly parallel conduct, *Twombly* contemplates a 'factually suggestive' context involving some sort of anomalous behavior on the part of defendants." *LaFlamme*, 702 F. Supp. 2d at 151. Thus, when a complaint contains no more than allegations of conduct that is equally consistent with rational unilateral behavior, it must be dismissed.

Anderson News is instructive. There, the plaintiff, a magazine wholesaler, alleged that the defendant publishers, distributors, and wholesalers conspired to boycott the plaintiff and drive it out of business. *Anderson News*, 732 F. Supp. 2d at 391. In support of its claims, the plaintiff asserted that each defendant reacted similarly to a surcharge imposed by the plaintiff—essentially by cutting off the majority of the plaintiff's magazine supply. *Id.* at 394. The

plaintiff contended that the defendants "saw [the plaintiff's] proposed fee as nothing short of an opportunity to eliminate [the plaintiff] as a wholesaler." *Id.* The plaintiff alleged that the defendants' parallel conduct in simultaneously cutting off magazine supply in response to its surcharge was indicative of collusion because "unilateral action against [the plaintiff] would [have] be[en] contrary to any publisher's individual economic self-interest." *Id.* at 399.

The court dismissed the complaint, holding that even if the defendants had acted in parallel, their similar business decisions in response to the plaintiff's demands merely resulted in "unchoreographed behavior, a common response to a common stimulus." *Id.* at 398-99 (citing *Twombly*, 550 U.S. at 556 n.4). In reaching its decision, the court rejected the plaintiff's argument that the defendants would not have engaged in the alleged behavior unless they could be sure that their competitors were also going to behave in the same way. Relying on *In re Travel Agent Comm'n Antitrust Litig.*, 583 F.3d 896 (6th Cir. 2009), the court found that a "wait-and-see approach," whereby each defendant unilaterally stopped doing business with the plaintiff and "gambled" that its competitors would do the same, "was a reasonable alternative explanation for the parallel conduct." *Anderson News*, 732 F. Supp. 2d at 400.

Similarly, in *Wellnx Life Sciences Inc. v. Iovate Health Sciences Research, Inc.*, 516 F. Supp. 2d 270 (S.D.N.Y. 2007), the court found that in the face of knowledge that their competitors would be confronted with similar decisions, the defendants' parallel conduct was explained by independent rational business conduct in response to common perceptions of the market. The plaintiff, Wellnx, a manufacturer of dietary supplements, alleged that defendant publishers of bodybuilding magazines had conspired with each other and with a competing supplement manufacturer, Iovate, to boycott the plaintiff in the market for advertising space in bodybuilding publications. *Id.* at 283. According to the complaint, Iovate orchestrated a "hub

and spoke" conspiracy, causing each publisher defendant to cancel or reject advertisements from Wellnx. *Id.* at 281, 283. The court held that Wellnx failed to adequately plead a plausible horizontal conspiracy among the publishers:

> The inference that arises from plaintiff's allegations is that each publisher was presented with a choice between losing either Wellnx or Iovate as an advertising customer, or was offered a financial inducement to terminate its relationship with Wellnx. Each responded to this choice in an identical fashion, but the facts alleged do not imply that this was the result of an agreement among any of them. To the contrary, the amended complaint states that Iovate supplied each publisher with a "substantial profit motive" to agree to its terms. The fact that each publisher knew that its horizontal competitors were going to be presented with the same offer or threat, or that others had already capitulated to Iovate, or "believ[ed]" that other competitors would fall in line, does not suffice to "raise[] a suggestion of a preceding agreement."

Id. at 291 (alterations in original) (quoting *Twombly*, 550 U.S. at 557).[21]

As in *Anderson News* and *Wellnx Life Sciences*, Plaintiffs here contend that the Publisher Defendants' parallel conduct creates a plausible inference of conspiracy because, absent a prior agreement, unilaterally contracting with Apple and switching to the agency model at the cost of sacrificing revenue in the short run, and at the risk of losing Amazon as an eBooks distributor,

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[21] Other courts likewise have dismissed conspiracy claims where the plaintiffs pled conduct that could just as well be explained by rational unilateral responses to common market conditions. *See, e.g.*, *RxUSA Wholesale Inc. v. Alcon Labs.*, 391 F. App'x 59, 61 (2d Cir. 2010) ("As competitors of RxUSA in the wholesale pharmaceutical products market, each Authorized Wholesaler faced independent incentives not to sell to RxUSA."); *LaFlamme*, 702 F. Supp. 2d at 153-54 (rather than alleging "anomalous actions" for which there could be no "discernible reason" other than conspiracy, plaintiffs themselves identified "common external stimuli" that could explain defendants' conduct—e.g., parallel fuel surcharges were in face of increased fuel costs); *In re LTL Shipping Servs. Antitrust Litig.*, No. 1:08-MD-01895-WSD, 2009 WL 323219, at *16-18 (N.D. Ga. Jan. 28, 2009) (same); *In re Late Fee & Over-Limit Fee Litig.*, 528 F. Supp. 2d 953, 962-63 (N.D. Cal. 2007) ("[A]s in *Twombly*, the complaint itself provides an alternative explanation for the increases in late fees, namely that they were the result of a 'rational and competitive business strategy unilaterally prompted by common perceptions of the market.'" (quoting *Twombly*, 550 U.S. at 554)).

would be contrary to any Publisher Defendant's individual economic self-interest. (CAC ¶¶ 139, 142-43, 173.) Plaintiffs' conclusions, though, are "legal arguments, not facts." *See Anderson News*, 732 F. Supp. 2d at 399. Each Publisher Defendant had numerous rational independent business reasons for unilaterally taking the actions alleged by Plaintiffs. As the Complaint itself makes clear, each Publisher Defendant faced common market conditions and similar concerns about the growth and pricing policies of Amazon, and each had a strong independent economic incentive to support Apple's new entry as a competing eBook seller and to address some of those concerns. Just as in *Anderson News* and *In re Travel Agent*, in these circumstances, each Publisher Defendant conducted "a cost/benefit analysis of the financial impact" of contracting with Apple to facilitate downstream entry by a new competitor with a proven track record to compete with the dominant retailer (Amazon)—which entailed having to accept the terms that Apple decided upon as requirements for entering the eBook selling business—as opposed to maintaining the status quo, with Amazon as the unmatched monopsonist for wholesale purchases of eBooks.

That the Publisher Defendants reacted to the opportunity presented by Apple "by pursuing similar but predictable [actions] to protect their business interests" is not surprising. *See Anderson News*, 732 F. Supp. 2d at 399. The potential or perceived benefits of contracting with Apple were plenty, including:

- introduction of a viable competitor in eBooks distribution—a "counterbalance" to Amazon (*see supra* n.10)—to potentially undermine Amazon's strategy of pricing below cost in order to drive out large numbers of rival book retailers (including important "brick-and-mortar" bookstores) and establish a long-run monopoly in eBook retail sales (*see* CAC ¶¶ 65, 72-73);

- resisting Amazon's creation/maintenance of monopsony in the purchase of eBooks (*see* CAC ¶¶ 65, 68, 73);

- reducing reliance on a single retailer (*see* CAC ¶ 68);

- expanding and diversifying eBook distribution, and providing readers broad access to new titles in Ebook form (*see supra* n.9);
- increasing or preserving wholesale prices for physical books (*see* CAC ¶ 65);
- support for "brick-and-mortar" retailers that were (and are) central players in the development of consumer interest in new books and were subject to Amazon's below-cost pricing and destructive free-riding (*see* CAC ¶ 72);
- valuable partnerships with Apple, a "powerful content distribution company" ("the most powerful . . . other than Amazon"), an iconic brand, and a recognized leader in the manufacture of mobile devices, with a proven track record in the e-retail space (*see* CAC ¶¶ 112, 114);
- gaining access to Apple's "huge installed base" of millions of customers who were already buying other forms of digital media through Apple (*see* CAC ¶ 115);
- increasing overall book sales (*see* CAC ¶ 156 (Apple's launch of the iPad "was expected to prompt a surge in eBook purchasing")); and
- improvement of the eReading experience and market-wide innovation, including enhanced eBooks and greater selection of eReaders offering more features (*see supra* n.11).

In order to realize these benefits, each of the Publisher Defendants exercised its independent business judgment and accepted the terms of the agency model proposed by Apple, which used its previous digital commerce success, brand strength, and established practice of selling apps (including eBook apps) under agency terms, as well as the vulnerable position of the publishers that was by then well known (CAC ¶¶ 73-74; *supra* nn.4 & 14), to negotiate successfully with each publisher. (*See supra* n.16.) Because the allegations are consistent with each Publisher Defendant's own unilateral business judgment that taking smaller profits in the short run by switching to the agency model was the cost of doing business with Apple, the Complaint does not set forth sufficient factual allegations to support a plausible conspiracy.

Having concluded that its business interests favored supporting Apple's entry as a competing eBook seller, each Publisher Defendant entered into a separate vertical agency agreement with Apple, "betting that their competitors would follow suit." *See Anderson News*,

732 F. Supp. 2d at 400. Indeed, contrary to Plaintiffs' conclusory assertions, this was not an irrational gamble. Apple already had indicated that it was discussing agency agreements with other publishers (*see* CAC ¶ 133; *supra* n.13) and would not proceed with the iBookstore absent a critical mass of publishers agreeing to the proposed agency terms (CAC ¶ 120), leaving little possibility that a publisher would be alone in supporting the iBookstore. If an insufficient number of publishers had agreed to Apple's agency terms, Apple would not have launched its iBookstore, effectively providing any individual publisher with a *de facto* out clause.[22] Therefore, if their competitors did not conclude a deal with Apple, each Publisher Defendant could ultimately revert to the status quo—selling eBooks pursuant to the wholesale model and primarily through Amazon. *See Anderson News*, 732 F. Supp. 2d at 400. With this knowledge in hand, and recognizing that Apple's approach likely would have similar appeal to each of its competitors (all of whom faced similar economic circumstances and considerations), the Publisher Defendants had ample incentive to respond independently to the common economic stimulus created by the launch of the iPad and Apple's stated intentions to enter as a competing eBook seller. Because "[u]nilateral parallel conduct is completely plausible in this context," *id.* at 399, Plaintiffs' allegations do not give rise to an inference of conspiracy.[23]

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[22] Moreover, one would expect that any conspiracy among the publishers would have had to include Random House, the largest trade publisher. Its decision not to sign with Apple—and the tremendous sales growth that it experienced in part at the expense of the other publishers during the period it continued to eschew the agency model (CAC ¶ 170)—highlights the lack of plausibility of any inference of agreement among the Publisher Defendants.

[23] These facts distinguish this case from *Starr*, upon which Plaintiffs may rely in opposition to this motion. In *Starr*, the court held that illegal agreement could be inferred as the only plausible explanation for the defendants' adherence to prices and conditions of use that were so unpopular and unreasonable that one industry commentator noted that "nobody in their right mind" would want to pay the fees and adhere to the conditions in order to use the defendants' internet music services. 592 F.3d at 327. By contrast, as demonstrated above, the behavior

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Nor does the coincident timing of the Publisher Defendants' agency contracts with Apple suggest a preceding horizontal agreement. Instead, the near-simultaneous negotiations and execution of agency agreements are *more* plausibly explained by Apple's plans to enter and begin selling eBooks upon the launch of the iPad, which resulted in Apple approaching each Publisher Defendant at around the same time and with the same deadline for completion of a deal. Apple's negotiations with each Publisher Defendant began in January 2010. (CAC ¶¶ 12, 121; *supra* n.12.) Apple intended to complete agreements with eBook publishers by a specific date pegged to the announcement of the launch of the iPad (*see* CAC ¶¶ 123-24), thereby creating "a common economic stimulus [and] impelling an immediate market reaction" from the Publisher Defendants. *See Anderson News*, 732 F. Supp. 2d at 401; *see also id.* at 398 ("Defendants made a business decision—and one each of the Defendants had to, and did, make quickly because of [the plaintiff]'s demand."); *LaFlamme*, 702 F. Supp. 2d at 152 (independent decisions to impose parallel fuel surcharges instigated by rising jet fuel prices—an obvious potential stimulus and "discernible reason" aside from collusion for alleged conduct). Moreover, in light of press reports that Apple was negotiating with each of the "big six" publishers (as well as private statements from Apple to that effect), each Publisher Defendant knew or could have known about the negotiations of its competitors. (*See* CAC ¶ 133.) These "obvious alternative explanations" for the purported simultaneity of the Publisher Defendants' actions render these allegations insufficient to plausibly suggest conspiracy.

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alleged by Plaintiffs here would not plausibly contravene each Publisher Defendant's self-interest in the absence of collusion. Instead, the conduct pled in the Complaint is entirely consistent with independent, though parallel, action. *See id.* Moreover, the inference of conspiracy in *Starr* was based in part on the fact that defendants charged the same price for digital music as they did for physical CDs. *Id.* at 323. This case involves the opposite—the switch to the agency model constituted a move away from applying the same pricing model that governed physical books.

In sum, because the alleged parallel conduct with respect to contracting with Apple is consistent with independent and rational economic behavior, it provides no basis for a plausible inference of an agreement among the Publisher Defendants.[24]

2. Agency Agreements with Amazon

Plaintiffs allege that following execution of their agency agreements with Apple, "[e]ach of the publishers also simultaneously took steps that ensured the same business and price terms would be imposed on Amazon and each made clear that if Amazon declined to agree to those terms, they were each going to refuse to sell eBooks to Amazon until many months after they were made available to its competitor, Apple." (CAC ¶ 16.) Plaintiffs contend that this purported parallel behavior in renegotiating contracts with Amazon to switch to the agency model is additional evidence of a conspiracy among the Publisher Defendants. However, Plaintiffs again ignore Apple's role in proposing the agency model and other contractual terms to the Publisher Defendants—Apple "first pitched the idea of selling e-books under the agency model to the book publishers," presenting each with the same "take it or leave it" offer. (*See supra* n.16.) Indeed, the parameters of the agency model itself are identical to the wildly successful structure Apple used in its App Store, which "offered seventy percent of royalties to software application publishers" (CAC ¶118), and simply reflected "[Apple's] decision to handle

[24] Other additional circumstantial facts pled in the Complaint are insufficient to invest the purported parallel conduct with a plausible suggestion of a preceding agreement. For example, while Plaintiffs allege that Publisher Defendants were members of trade associations and attended trade association meetings (CAC ¶¶ 153-55, 181), "[a]ttendance at industry trade shows and events is presumed legitimate and is not a basis from which to infer a conspiracy, without more." *In re Graphics Processing Units Antitrust Litig.*, 527 F. Supp. 2d 1011, 1023 (N.D. Cal. 2007) ("*In re GPU*"); *see also Twombly*, 550 U.S. at 567 n.12. Moreover, alleged changes to the Online Information Exchange ("ONIX," a standard purportedly developed for dissemination of pricing and sales information) (CAC ¶ 176) are consistent with efforts by the publishing industry to accommodate a need for different reporting of eBook sales in light of the switch to the agency model, and thus do not plausibly support an inference of collusion.

pricing for e-books in the same way it handles pricing for apps." (*See supra* n.14.) As Plaintiffs concede, even Amazon had already begun utilizing the agency model with its own Kindle publishers, offering the same seventy percent-thirty percent split to authors who agreed to certain conditions. (CAC ¶ 118.)

The key terms of each Publisher Defendant's contract with Apple, which originated from Apple itself, allegedly include an MFN clause that, as MFN clauses do, allow Apple to match any lower prices if they were offered elsewhere (such as by Amazon), as well as a purported agreement (at least for some of the Publisher Defendants) to utilize the agency model for eBook sales through any online vendors of "meaningful size." (CAC ¶¶ 129, 130.) Whether or not the Apple contracts actually contain a provision requiring the Publisher Defendants to switch to the agency model with other major retailers—as Plaintiffs merely allege in conclusory fashion—each Publisher Defendant in any event had an independent incentive to move to agency with other retailers in light of the MFN clauses in the Apple agreements. Because Apple had the right to match any lower prices offered on the platforms of other eBook retailers—including the $9.99 price at which most eBooks were purportedly being sold by Amazon—it was in each Publisher Defendant's rational unilateral business interest to ensure it had control over the eBook pricing on those platforms. Accordingly, as the allegations in the Complaint itself make clear, once each Publisher Defendant had entered into an agency agreement with Apple, it was heavily incentivized to attempt to move to the agency model with Amazon and other large retailers as well if it wished to continue selling eBooks through Apple. The purported parallel conduct with respect to Amazon reflects nothing more than each Publisher Defendant responding to its own independent obligations under its vertical agreement with Apple, which Plaintiffs do not challenge as anticompetitive.

In light of the timing of their negotiations with Apple and execution of agency contracts, the Publisher Defendants' purportedly near-simultaneous presentations of the agency model to Amazon are likewise consistent with unilateral behavior. Once the Apple agreements were completed at around the same time in late January, each Publisher Defendant approached Amazon without delay because each faced the alleged April 1, 2010, common deadline for the switch to the agency model, when the iBookstore was scheduled to "go live." The alternative of not selling eBooks through Amazon makes clear that each Publisher's self-interest lay in securing an agreement with Amazon promptly.

Finally, Plaintiffs offer alleged quotes from Steve Jobs as evidence of the purported conspiracy among the Publisher Defendants and Apple. (*See* CAC ¶¶ 17-18, 134-35.) According to the Complaint, immediately after the announcement of the iPad launch, Jobs was quoted as stating that eBook prices on the iPad would "be the same" as prices offered for eBooks sold by Amazon and Barnes & Noble. (CAC ¶¶ 17, 134.) From this, Plaintiffs conclude that Publisher Defendants must have colluded with each other and Apple because "[a]bsent Apple's knowledge and participation in the unlawful conspiracy, Steve Jobs would not have been able to predict future eBook pricing with such startling accuracy." (CAC ¶ 135.) Of course, Jobs' purported statement suggests no such thing. In light of the nature and terms of the vertical agency contracts between Apple and each Publisher Defendant—and in particular the MFNs—Jobs' statements merely reflect his knowledge that particular eBooks could not be sold at lower prices on the platforms of eBook distributors that competed with Apple. That Jobs knew (and publicly acknowledged) that pricing of the same eBook titles would not vary across different retailers is thus neither surprising nor indicative of conspiracy.

3. "Windowing" of eBooks

Plaintiffs allege that "[b]ecause Amazon was unwilling to raise eBook prices to appease the Publisher Defendants," four of the Publisher Defendants (but not Penguin) initially devised a scheme to "window" eBooks. (CAC ¶¶ 7, 105-08.)[25] In support of this contention, Plaintiffs allege that within a two-week period in the fall of 2009, four of the five Publisher Defendants (excluding Penguin) "almost simultaneously" changed their business practices to begin delaying the release of new eBook titles until a certain amount of time after the release of the new physical book. (CAC ¶¶ 7, 99-109.) The Complaint, however, pleads nothing more than classic parallel conduct and "follow-the-leader" behavior that was in each of the four Publisher Defendant's unilateral interest. Of course, with regard to Penguin, it alleges nothing.

Plaintiffs have pled no additional facts sufficient to place the purported parallel conduct in a context suggesting preceding agreement. As discussed above, rather than suggesting conspiracy among the Publisher Defendants to window eBooks, Plaintiffs' allegation of discussions with "other industry representatives" regarding eBook pricing (CAC ¶ 101) indicates that it is more likely that these "other industry representatives" were retailers that were customers of the Publisher Defendants and competitors of Amazon. Indeed, the very next paragraph of the Complaint identifies Barnes & Noble as one of those retailers with which Hachette had been in discussions. (CAC ¶ 102.)

Moreover, Plaintiffs cannot maintain their conspiracy claims based on the unsupported hypothesis that no publisher would have engaged in windowing with respect to eBooks "without

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[25] Plaintiffs do not appear to make a separate liability or damages claim based on their allegations of "windowing" of eBooks, but instead offer windowing merely as evidence that the purported conspiracy to increase and stabilize eBook prices began in the fall of 2009. (*See* CAC ¶ 99 ("The Agency 5's *first stage* of coordinating their activities to raise and stabilize industry eBooks prices took shape in the fall of 2009.") (emphasis added).)

knowing that other major publishers would take the same action." (CAC ¶ 109.) First, the Complaint contains no allegations that any of the Publisher Defendants actually knew of the others' intentions to window eBooks before those decisions were made public. Further, even if Plaintiffs' conclusory assertion were true, the Publisher Defendants were put on notice by public information—specifically by highly publicized announcements of windowing of high-profile books in the summer and fall of 2009 (CAC ¶ 100) and including the Wall Street Journal articles referenced in the complaint (CAC ¶ 105)—that at least some of the other publishers had already taken or planned on taking "the same action." It would not be unusual or suggestive of conspiracy that other publishers would have studied the option and then followed suit after observing that some publishers had begun the practice of windowing. *See, e.g.*, *In re Travel Agent*, 583 F.3d at 910 ("'[A] firm . . . has reason to decide (individually) to copy an industry leader. . . . One does not need an agreement to bring about this kind of follow-the-leader effect in a concentrated industry.'" (quoting *Reserve Supply Corp. v. Owens-Corning Fiberglas Corp.*, 971 F.2d 37, 53 (7th Cir. 1992))). Nor is it surprising or suggestive of a conspiracy that publishers that had windowed a single title would decide to window a larger number of titles as a next step.

In addition, contrary to Plaintiffs' bald suggestion that absent agreement it would be against each Publisher Defendant's unilateral interest to window eBooks, any Publisher Defendant actually would have rational independent and competitive business reasons to delay the release of new eBook titles for a period of time after the release of the hardcover version. Windowing was a reasonable unilateral response by certain Publisher Defendants to the complaints of Barnes & Noble (and other brick-and-mortar and online retailers) regarding the potential harm of below-cost eBook pricing to the sales of hardcover books. (*See* CAC ¶¶ 101-

02.) Indeed, the Complaint alleges that Barnes & Noble met with multiple publishers around this time period and expressed this view (CAC ¶ 102). If so, it would not be surprising that four of the five Publisher Defendants responded in a similar (yet independent) fashion to a complaint by a shared important customer, and at around the same time—some for the first time and others as a next step—during the period shortly after Barnes & Noble's discussions with the major publishers. (CAC ¶ 102.) The fact that major publishers had windowed high-profile books before that period further reduces any claim of plausibility for an alleged conspiracy. Even absent complaints from retailers, it is a perfectly rational unilateral business strategy to attempt to balance eBook sales and physical book sales by delaying the release of eBooks to maintain sales of higher-priced physical books, particularly as hardcover books typically provide the largest profit to the publishers. (CAC ¶ 72.)[26]

Finally, while Plaintiffs conclusorily suggest that "business practice changed dramatically" when some of the Publisher Defendants opted to window eBooks (CAC ¶ 101; *see also* CAC ¶ 109 ("radical departure in business practice")), windowing already had been a long-

[26] Indeed, the Department of Justice Antitrust Division recently observed that windowing is a procompetitive practice frequently used by content producers as a means to protect and maximize the value of their content. *See* Competitive Impact Statement, U.S. et al. v. Comcast et al., No. 1:11-cv-0016 (D.D.C. Jan. 18, 2011) ("The video programming distribution industry frequently uses exclusive contract terms that can be procompetitive. For instance, … content producers often sequence the release of their content to various distribution platforms, a practice known as 'windowing.' These windows of exclusivity enable a content producer to maximize the revenues it earns on its content by separating customers based on their willingness to pay and effectively increasing the price charged to the customers that place a higher value on receiving content earlier. Exclusivity also encourages the various distributors…to promote the content during a distribution window by assuring the distributor that the content will not be available through other distribution channels at a lower price. This ability to price discriminate across types of customers and increase promotion of the content increases the profitability of producing quality programming and encourages the production of more high-quality programming than otherwise would be the case. Exclusivity also may help a new competitor gain entry to a market by encouraging users to try a service they would not otherwise consider.")

held practice in the publishing industry, with publishers having windowed paperback books vis-à-vis hardcover versions for decades. *U.S. Naval Inst. v. Charter Commc'ns, Inc.*, 875 F.2d 1044, 1045 (2d Cir. 1989) ("[S]tandard practice in the industry was to delay the paperback version until one year after the month of the hardcover publication."). Likewise, windowing behavior is very common in other media distribution businesses, such as the movie industry, where movies are released first in theaters, then some time later on home video/DVD/internet streaming sites (e.g., Netflix), then video-on-demand, then pay (i.e., cable/satellite) television, then ad-supported television. On the other hand, the "historical" eBook business practice from which some of the Publisher Defendants purportedly "radical[ly]" departed had only been in place for less than two years, and publishers had deviated from the practice even during that time period. (*See* CAC ¶ 100.)

Accordingly, without additional factual allegations suggesting otherwise, the alleged parallel windowing behavior by four of the five Publisher Defendants is consistent with each Defendant acting in its own independent business judgment. *See RxUSA Wholesale*, 391 F. App'x at 61; *LaFlamme*, 702 F. Supp. 2d at 152; *cf. In re Travel Agent*, 583 F.3d at 910 (dismissing conspiracy claim after finding that "each defendant's decision to match a new commission cut was arguably a reasoned, prudent business decision"). Because they stop short of the line between possibility and plausibility of an agreement, the windowing allegations do not give rise to an inference of horizontal conspiracy among the Publisher Defendants.

4. Pricing Allegations

Plaintiffs allege that the Publisher Defendants implemented and utilized windowing and agency agreements in a coordinated manner to increase and "standardize" prices for eBooks, and destroy price competition in the market for eBooks. (CAC ¶¶ 77, 127-131, 187.) Moreover, the

Complaint contains the conclusory allegation that the Publisher Defendants and Apple "agreed" to a common pricing formula intended to increase and stabilize eBook prices to a range of $12.99 to $14.99. (CAC ¶¶ 127-28.)[27] Plaintiffs provide no factual support, however, for a conclusion that the Publisher Defendants in any way agreed among themselves (i) not to compete with each other in the pricing of eBooks or (ii) to facilitate a restraint on price competition among eBook distributors.[28] Indeed, the Complaint itself contains evidence that eBook pricing among the Publisher Defendants was not uniform or standardized at all. Instead, pricing became *less* uniform after the switch to the agency model—whereas prior to the alleged conspiracy, most bestselling eBooks were priced by retailers at $9.99, regardless of title or publisher (*see* CAC ¶¶ 2, 13, 64, 67), after the purported commencement of the conspiracy, prices varied among different titles and publishers, fluctuating anywhere from $9.99 to $14.99 for bestsellers. (CAC ¶¶ 187 (demonstrating bestselling eBook prices of $9.99, $11.99, $12.99, and $14.99), 201.)[29]

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[27] Again, Plaintiffs ambiguously include both Apple and the Publisher Defendants in this allegation (*see* CAC ¶ 128), leaving unclear whether Plaintiffs are asserting that the purported pricing formula was agreed to horizontally among the Publisher Defendants or was just part of the separate (unchallenged) vertical contracts negotiated unilaterally between each individual Publisher Defendant and Apple.

[28] There is no factual support alleged for the implied claim that windowing itself could affect, increase, or standardize prices for eBooks rather than simply affect their availability.

[29] Pricing for non-bestsellers is even more varied, with countless titles available for prices below $9.99. This price variation is not surprising in light of the nature of the publishing industry. Unlike the commodity products that are at issue in the majority of price-fixing cases, books are not perfectly homogenous products. Indeed, even among "bestselling" books (which assumes a certain level of popularity) upon which Plaintiffs focus, the products are differentiated from one another by author, genre, time since original release, and so on. (*See, e.g.*, CAC ¶ 151 (alleging that in one instance, Amazon capitulated to terms imposed by Macmillan because "Macmillan has a monopoly over their own titles").) Such heterogeneity makes Plaintiffs' conspiracy claims much less plausible. *See, e.g.*, *Todd v. Exxon Corp.*, 275 F.3d 191, 209 (2d Cir. 2001) ("[I]t is less realistic for a cartel to establish and police a price conspiracy where it is difficult to compare the products being sold."); *FTC v. CCC Holdings, Inc.*, 605 F. Supp. 2d 26,

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Thus, from the allegations in the Complaint, the most one can infer is that retail price uniformity (largely dictated by Amazon) prevailed *prior to the alleged conspiracy*, but after the conspiracy purportedly began, the Publisher Defendants competed with each other on price.

Because Plaintiffs do not allege parallel pricing among the Publisher Defendants, the Complaint does not even begin to plausibly suggest a conspiracy to standardize prices across publishers. *See In re Late Fee*, 528 F. Supp. 2d at 961 (dismissing price-fixing allegations for failure to state claim where plaintiffs alleged merely that some defendants had late fee terms that were in part parallel). And even had Plaintiffs alleged consciously parallel pricing for eBooks, that alone would be insufficient to support an inference of conspiracy. *Twombly*, 550 U.S. at 556-57; *In re Elevator*, 502 F.3d at 51 ("[S]imilar pricing can suggest competition at least as plausibly as it can suggest anticompetitive conspiracy . . . ."); *In re GPU*, 527 F. Supp. 2d at 1022 (standing alone, parallel pricing is not sufficient to implicate price-fixing).

Likewise, Plaintiffs' allegation that the prices of a specific eBook title from a particular publisher are uniform across eBook distributors is insufficient to plausibly suggest collusion among the Publisher Defendants.[30] Other than conclusory allegations of conspiracy that should be disregarded on this motion, Plaintiffs plead only facts suggesting that each Publisher

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65 (D.D.C. 2009) ("Product heterogeneity . . . in some ways can reduce the likelihood of coordination . . . ."); *Hosp. Corp. of Am. v. FTC*, 807 F.2d 1381, 1390 (7th Cir. 1986) (**"**[C]ollusion is more difficult the more heterogeneous the output of the colluding firms . . . .").

[30] Vertical price restraints are widely acknowledged to promote competition between differentiated products by encouraging competing sellers to compete with one another in other ways—e.g., improved eReaders, lower eReader prices, increased sales channels, and other improvements. *See Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007). Thus, it is perhaps not surprising that Amazon, the largest seller of ebooks, appears to be the primary, if not sole, source of Plaintiffs allegations. (*See* CAC ¶ 103 (citing private email communications between a defendant publisher and Amazon), CAC ¶ 164 (identifying meetings between each publisher and Amazon).)

Defendant unilaterally entered into agreements with Apple that contained MFN clauses that purportedly had the effect of standardizing prices across Apple's competitors. (CAC ¶¶ 129-31.) That each Publisher Defendant accepted the MFN in order to persuade a desirable new distributor to enter the business of selling eBooks is not indicative of conspiracy. Given that Plaintiffs do not challenge the underlying legality of the agency model, these facts merely lead to the conclusion that when a publisher is selling eBooks directly to consumers, it charges the same price to all consumers regardless of what eReader device they own. The MFN clauses cited by Plaintiffs relate to the price at which each Publisher would sell *its own books* for reading on different eReader devices—it has nothing to do with prices charged by other Publishers for their books.[31]

Finally, the pricing allegations in the Complaint actually suggest that the alleged conspiracy is economically implausible. Plaintiffs concede that the Publisher Defendants' earned less revenue per unit and lower profit margins on eBooks under the agency model than they had under the wholesale model. (CAC ¶¶ 82-91.) Indeed, the Complaint spends a considerable amount of time detailing the detrimental impact that the switch would and did have on the Publisher Defendants, including "reduc[tion of] future growth rates and lower eBook revenue (and margins) per unit." (CAC ¶¶ 84, 90.)[32] In some cases, the prices at which the Publisher Defendants sold eBooks to consumers under the agency model were lower on an

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[31] In fact, any agent might require an MFN clause to ensure that the purchasers of its eReader device would not be subject to price discrimination. Plaintiffs have not alleged facts from which one could infer a conspiracy from each of the Publisher Defendants having agreed to a contractual provision with one or more agents that would prevent them from engaging in such pricing.

[32] The Complaint also states that Random House, the large publishing house that did not sign with Apple, saw a 250 percent increase in its eBook sales. (CAC ¶ 170.)

absolute basis than the wholesale prices at which they sold eBooks to retailers under the wholesale model. Considering that the Publisher Defendants only received seventy percent of the revenue from each eBook sale under the agency model, it becomes clear that the Publisher Defendants were receiving much less revenue per book under the agency model. While Plaintiffs speculate that the purported conspiracy had a long-run objective to protect profit margins on sales of hardcover books (CAC ¶ 72), they provide no additional support or explanation for an alleged horizontal agreement to make "*less money*" (CAC ¶¶ 82, 91 (emphasis added)), at least in the short term. Such a conspiracy is implausible. *See, e.g.*, *DM Research, Inc. v. College of Am. Pathologists*, 170 F.3d 53, 56 (1st Cir. 1999) (affirming dismissal where complaint alleged "highly implausible" conspiracy); *SCFC ILC, Inc. v. Visa U.S.A. Inc.*, 819 F. Supp. 956, 971 (D. Utah 1993) ("[T]he focus of the economic sense inquiry center[s] on whether the alleged restraint of trade was economically detrimental to the defendant. If the alleged restraint were significantly detrimental, the plaintiff's argument could be said to make no economic sense and dismissal could be appropriate."), *aff'd in part, rev'd in part*, 36 F.3d 958 (10th Cir. 1994); *cf. Anderson News*, 732 F. Supp. 2d at 397 (granting motion to dismiss where purported goal of conspiracy—to eliminate two of four largest wholesalers—was against defendants' economic self-interest and therefore "not plausible"). Moreover, even assuming each Publisher Defendant were willing to accept less money on sales of eBooks under the agency model in order to protect its overall sales of hardcover books, there is nothing in that allegation inconsistent with each Publisher Defendant's independent self interest.

C. Plaintiffs' Characterization Of The Alleged Conspiracy As A "Hub And Spoke" Conspiracy Does Not Save Their Complaint

Plaintiffs appear to suggest that the conspiracy alleged here may be characterized as a "hub and spoke" conspiracy in which Apple facilitated the purported horizontal coordination

among the Publisher Defendants. (*See* CAC ¶ 11 ("Working simultaneously with each of the Agency 5 to enter into 'agency' agreements, Defendant Apple was at the core of these coordinated activities, *acting as a hub* for Defendants' conspiracy") (emphasis added); CAC ¶ 122 ("Apple was a critical partner and conduit for the success of this conspiracy.").) Yet to plausibly allege a "hub-and-spoke" conspiracy of the type Plaintiffs appear to try to allege here, the Complaint must plead facts that could establish a horizontal agreement among the Publisher Defendants—the "wheel" or "rim"—and not just the vertical "spoke" agreements between individual Publishers and Apple. *See, e.g.*, *PSKS, Inc. v. Leegin Creative Leather Prods., Inc.*, 615 F.3d 412, 420 (5th Cir. 2010) (affirming dismissal of Section 1 claim because "there is no wheel and therefore no hub-and-spoke conspiracy"), *cert. denied*, 131 S. Ct. 1476 (2011); *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 327 (3d Cir. 2010) (same). Indeed, while the Publisher Defendants maintain that any purported conspiracy to change distribution methods from the wholesale to agency model should be analyzed under the rule of reason, even Plaintiffs must concede that there can be no *per se* claim of conspiracy without a horizontal agreement among the Publisher Defendants. *See Wellnx Life Sciences*, 516 F. Supp. 2d at 292 (holding that complaint alleging "hub and spoke" conspiracy failed to adequately plead existence of horizontal agreement necessary to state claim for *per se* violation); *cf. Pepsico Inc. v. Coca-Cola Co.*, 315 F.3d 101, 110 (2d Cir. 2002) (holding that absent evidence of horizontal agreement between distributors necessary to establish "hub and spoke" conspiracy, alleged conspiracy was vertical and properly analyzed under rule of reason). As discussed above, Plaintiffs have not adequately alleged a horizontal agreement among the Publisher Defendants and thus have failed to state a *per se* claim under section 1.

Even were Plaintiffs challenging the vertical agreements between Apple and each Publisher Defendant under the rule of reason (again, which they are not), their claim would fail for at least three reasons. First, as discussed above, Plaintiffs have not alleged a coherent market or any specific allegation of market power in a properly defined market. *See Kasada, Inc. v. Access Capital, Inc.*, No. 01 Civ. 8893, 2004 WL 2903776, at *8 (S.D.N.Y. Dec. 14, 2004) (dismissing section 1 claim because plaintiffs failed to allege facts demonstrating defendants possessed market power in a relevant market). In fact, the only party the Complaint specifically alleges has market power is Amazon, which held a 90% share of eBooks sales at the time of the alleged anticompetitive agreements. (CAC ¶ 14.) Second, Plaintiffs have failed to allege that any purported anticompetitive effects of Defendants' alleged conduct outweigh the procompetitive effects. *See Atlantic Richfield Co. v. USA Petroleum Co.,* 495 U.S. 328, 342 (1990) (rule of reason analysis seeks to determine if alleged restraint of trade unreasonable because its anticompetitive effects outweigh its procompetitive effects). Third, in a traditional "hub and spoke" conspiracy, a dominant hub uses its dominant position to orchestrate a group boycott of its competitors. *See, e.g.*, *Interstate Circuit, Inc. v. U.S.*, 306 U.S. 208 (1939); *Toys "R" Us, Inc. v. FTC*, 221 F.3d 928 (7th Cir. 2000). Plaintiffs have pled no such facts here, and in fact correctly allege that Apple actually was the opposite—a new entrant and not a dominant distributor of eBooks. Indeed, unlike prior "hub and spoke" conspiracy cases, Plaintiffs here have attempted to allege an agreement to sponsor entry *against* a dominant firm (Amazon)—i.e., to increase competition. This is implausible on its face.

Accordingly, whether characterized as a traditional horizontal conspiracy or a "hub and spoke" conspiracy, because Plaintiffs have not plausibly alleged an agreement among the Publisher Defendants, their claims fail as a matter of law.

II. BECAUSE PLAINTIFFS HAVE FAILED TO STATE A SECTION 1 CLAIM, THEIR UNJUST ENRICHMENT CLAIM ALSO SHOULD BE DISMISSED

Because the Complaint fails to state a claim under the Sherman Act, Plaintiffs' fourth cause of action seeking unjust enrichment should also be dismissed. A claim for unjust enrichment takes one of two forms: "parasitic" or "autonomous." *In re Digital Music Antitrust Litig.*, No. 06 MD 1780 (LAP), 2011 WL 2848195, at *14 (S.D.N.Y. July 18, 2011). Parasitic restitution enables a plaintiff to recover the defendant's unjust benefit resulting from "a predicate wrong, such as a tort, breach of contract or other wrongful conduct such as an antitrust violation." *In re Flonase Antitrust Litig.*, 692 F. Supp. 2d 524, 542 n.13 (E.D. Pa. 2010). As detailed above, Plaintiffs' allegations do not give rise to a plausible inference of a conspiracy and thus cannot support a claim for violation of the Sherman Act. To the extent that the claims of unjust enrichment depend on actions that are alleged to be illegal, and "because the allegations of illegality in the complaint fail, the unjust enrichment claim must also be dismissed." *Kramer v. Pollock-Krasner Found.*, 890 F. Supp. 250, 257 (S.D.N.Y. 1995) (dismissing unjust enrichment claims because the plaintiff failed to state a claim under the Sherman Act).

In some instances, unjust enrichment may provide an independent ground for restitution absent any such predicate wrong—this is known as "autonomous" restitution. *In re New Motor Vehicles Canadian Exp. Antitrust Litig.*, 350 F. Supp. 2d 160, 207-08 (D. Me. 2004). However, autonomous restitution is unavailable when parties to an agreement voluntarily negotiated and fully performed their bargain. *Id.* at 210. Relief may only be available when "the transaction is rescinded for fraud, mistake, duress, undue influence or illegality, or unless the other has failed to perform his part of the bargain." *Id.* (quoting Restatement (First) of Restitution § 107(1)). Here, Plaintiffs do not seek to rescind their transactions, nor do they claim that Defendants failed

to perform their part of the bargain—i.e., delivering eBooks for an agreed price. Therefore, to the extent Plaintiffs' claims are for autonomous unjust enrichment, they should be dismissed.

Plaintiffs also fail to identify the state laws under which they claim a right to restitution for unjust enrichment. This is an independent basis to dismiss this claim. *See In re Static Random Access Memory (SRAM) Antitrust Litig.*, No. M:07-cv-01819cw, 2008 WL 426522, at *12 (N.D. Cal. Feb. 14, 2008); *see also In re Ditropan XL Antitrust Litig.*, 529 F. Supp. 2d 1098, 1101 (N.D. Cal. 2007) (finding that "neither Defendants nor the Court can address whether the claim or claims have been adequately pled" without knowing the state unjust enrichment laws on which Plaintiffs' purport to rely).[33]

CONCLUSION

For the foregoing reasons, Defendants respectfully request that Plaintiffs' Consolidated Amended Class Action Complaint be dismissed.

[33] Plaintiffs' third cause of action for violation of state antitrust laws should be dismissed as well. First, that cause of action is not intended as a separate claim for relief but instead has been made by Plaintiffs in the alternative, in the event Plaintiffs are not deemed to be direct purchasers of eBooks. (CAC ¶¶ 239-40, 251-81.) For purposes of this motion, Defendants are assuming that Plaintiffs are direct purchasers. Moreover, the failure of Plaintiffs' Sherman Act allegations are fatal to their state antitrust law claims, to the extent that the state antitrust laws should be construed in light of federal precedent. *See Doron Precision Systems v. FAAC, Inc.*, 423 F. Supp. 2d 173, 192-93 (S.D.N.Y. 2006). Plaintiffs have not argued that any special state antitrust law policies or provisions require a different result. Because each state antitrust law requires some form of agreement, and Plaintiffs have not pled sufficient facts to give rise to a plausible inference of conspiracy, the state law claims should be dismissed.

Plaintiffs' second cause of action based on California's Cartwright Act is asserted only against Apple and thus requires no response from the Publisher Defendants. (CAC ¶¶ 248-50.)

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Respectfully submitted,

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