UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE ELECTRONIC BOOKS ANTITRUST LITIGATION	No.	11-MD-02293 (DLC) ECF Case

This Document Relates to:

ALL ACTIONS

DEFENDANT APPLE INC.'S RESPONSE TO CLASS PLAINTIFFS' STATEMENT OF UNDISPUTED FACTS

Apple Inc. hereby responds to the proposed Statement of Undisputed Facts filed by Class Plaintiffs and incorporates by reference its Memorandum of Law In Support of Defendant Apple Inc.'s Opposition to Class Plaintiffs' Motion for Summary Judgment, including its legal argument as to the proper scope of the application of collateral estoppel to this action. Apple sets forth below its point by point response to the proposed undisputed facts. In addition, as to the proposed undisputed facts based on findings not properly given collateral estoppel effect, Apple further objects to the citation to the Court's order as hearsay and incorporates the evidence Apple presented at trial by reference in further response. Moreover, Apple objects pursuant to Federal Rule of Civil Procedure 56(d) to Plaintiffs' reliance on the Reply Declaration of Roger G. Noll. Apple had no opportunity to depose Dr. Noll with respect to the new opinions offered in his Reply Declaration, including his revised damages calculation. *See* Dkt. 502. Apple has therefore not had a full opportunity to develop and "present facts essential to justify its opposition" to Dr. Noll's new opinions. Fed. R. Civ. P. 56(d).

	Collateral Estoppel Findings	UNDISPUTED FACTS	Source Citation
1	*	"E-books are books that are sold to consumers in electronic form."	Order at 12
	Apple's Response	Evidentiary fact not necessary for the Judgment and therefore inappropriate for collateral estoppel. Apple will stipulate to the fact.	
2	*	"Trade [e-books] consist of general interest fiction and non-fiction [e-books]. They are to be distinguished from 'non-trade' books such as academic textbooks, reference materials, and other texts."	Order at 13 n.4
	Apple's Response	Evidentiary facts not necessary for the Judgment and therefore inappropriate for collateral estoppel. Apple will stipulate to the facts.	
3	*	"[T]he relevant market" is the market for "trade e-books in the United States."	Order at 142 n.60
	Apple's Response	Admitted.	
4	*	Macmillan, Penguin, Hachette, HarperCollins, and Simon & Schuster (the "Publisher Defendants") "publish both e-books and print books. The five Publisher Defendants and Random House represent the six largest publishers of 'trade' books in the United States."	Order at 13

	Apple's Response	Evidentiary findings not necessary for the Judgment, and therefore inappropriate for collateral estoppel. Apple will stipulate to the facts.	
5	*	"The Publisher Defendants sold over 48% of all e-books in the United States in the first quarter of 2010."	Order at 13
	Apple's Response	Evidentiary fact not necessary for the Judgment and therefore inappropriate for collateral estoppel. The asserted fact is also not supported by cited admissible evidence.	
6	*	"Defendant Apple engages in a number of businesses, but as relevant here it sells the iPad tablet device and distributes e-books through its iBookstore."	Order at 12
	Apple's Response	Evidentiary findings not necessary for the Judgment and therefore inappropriate for collateral estoppel. Apple will stipulate to the facts.	
7	*	"Amazon's Kindle was the first e-reader to gain widespread commercial acceptance. When the Kindle was launched in 2007, Amazon quickly became the market leader in the sale of e-books and e-book readers. Through 2009, Amazon dominated the e-book retail market, selling nearly 90% of all e-books."	Order at 13-14
	Apple's Response	Evidentiary findings not necessary for the Judgment and therefore inappropriate for collateral estoppel. Apple will stipulate to the facts.	

8		In July 2009, Barnes & Noble began selling e-books; in November 2009, it introduced the Nook, an e-reader device like the Kindle.	Order at 14; Ex. 17, ¶ 19 (Orszag Report)
	Apple's Response	Vague and ambiguous as to the date in November. Barnes & Noble began shipping the Nook on November 30, 2009.	*Barnes & Noble's Nook e-reader ships today amid heavy demand*, Examiner.com, Nov. 30, 2009, *available at* http://www.examiner.com/article/barnes-noble-s-nook-e-reader-ships-today-amid-heavy-demand (accessed Feb. 21, 2014).

9	*	"Prior to April 2010, the Publisher[] [Defendants] distributed print and [electronic] books through a wholesale pricing model, in which a content provider sets a list price (also known as a suggested retail price) and then sells books and e-books to a retailer — such as Amazon — for a wholesale price, which is often a percentage of the list price. The retailer then offers the book and e-book to consumers at whatever price it chooses."	Order at 14-15.
	Apple's Response	Evidentiary finding not necessary for the Judgment and therefore inappropriate for collateral estoppel. Apple will stipulate to the facts.	
10	*	"Amazon utilized a discount pricing strategy through which it charged $9.99 for certain New Release and bestselling e-books. Amazon was staunchly committed to its $9.99 price point and believed it would have long-term benefits for its consumers. In order to compete with Amazon, other e-book retailers also adopted a $9.99 or lower retail price for many e-book titles."	Order at 14
	Apple's Response	Evidentiary findings not necessary for the Judgment and therefore inappropriate for collateral estoppel. The asserted facts are also not supported by cited admissible evidence.	

11	*	"The Publisher[] [Defendants] were unhappy with Amazon's $9.99 price point and feared that it would have a number of pernicious effects on their profits. . . . The Publisher[] [Defendants] also feared Amazon's growing power in the book distribution business. . . . As a result, the Publisher Defendants determined that they needed to force Amazon to abandon its discount pricing model."	Order at 15-16
	Apple's Response	Evidentiary findings not necessary for the Judgment and therefore inappropriate for collateral estoppel. The asserted facts are also not supported by cited admissible evidence.	
12	*	"[The entire conspiracy] was shaped by the Publisher[] [Defendants'] desire to raise the price of e-books being sold through Amazon."	Order at 75
	Apple's Response	Evidentiary findings not necessary for the Judgment and therefore inappropriate for collateral estoppel. The asserted facts are also not supported by cited admissible evidence.	
13	*	The Publisher Defendants "were concerned that, should Amazon continue to dominate the sale of e-books to consumers, it would start to demand even lower wholesale prices for e-books . . . ."	Order at 75
	Apple's Response	Evidentiary findings not necessary for the Judgment and therefore inappropriate for collateral estoppel. The asserted facts are also not supported by cited admissible evidence.	

14	*	"Beginning in at least early 2009, the Publisher Defendants began testing different ways to address what Macmillan termed 'book devaluation to 9.99,' and to confront what [Simon & Schuster's Carolyn] Reidy described as the 'basic problem: how to get Amazon to change its pricing' and move off its $9.99 price point. They frequently coordinated their efforts to increase the pressure on Amazon and decrease the likelihood that Amazon would retaliate -- an outcome each Publisher Defendant feared if it acted alone."	Order at 17
	Apple's Response	Evidentiary findings not necessary for the Judgment and therefore inappropriate for collateral estoppel. The asserted facts are also not supported by cited admissible evidence.	
15	*	"The Publisher Defendants did not believe . . . that any one of them acting alone could convince Amazon to change its pricing policy."	Order at 18
	Apple's Response	Evidentiary findings not necessary for the Judgment and therefore inappropriate for collateral estoppel. The asserted facts are also not supported by cited admissible evidence.	
16	*	"In 2009, Apple was close to unveiling the iPad. . . . [Apple employees] began studying the e-book industry."	Order at 29

		Evidentiary findings not necessary for the Judgment and therefore inappropriate for collateral estoppel. The asserted facts are also not supported by cited admissible evidence.	
17	*	"At [Apple's] very first meetings [with the Publisher Defendants] in mid-December 2009, the Publisher[] [Defendants] conveyed to Apple their abhorrence of Amazon's pricing, and Apple assured the Publisher[] [Defendants] it was willing to work with them to raise those prices, suggesting prices such as $12.99 and $14.99."	Order at 9
	Apple's Response	Evidentiary findings not necessary for the Judgment and therefore inappropriate for collateral estoppel. The asserted facts are also not supported by cited admissible evidence.	
18	*	"From its very first meetings with the Publisher[] [Defendants], Apple appealed to their desire to raise prices and offered them a vision of how they could reach that objective."	Order at 159
	Apple's Response	Evidentiary findings not necessary for the Judgment and therefore inappropriate for collateral estoppel. The asserted facts are also not supported by cited admissible evidence.	

19	*	"Apple and the Publisher Defendants shared one overarching interest -- that there be no price competition at the retail level. Apple did not want to compete with Amazon (or any other e-book retailer) on price; and the Publisher Defendants wanted to end Amazon's $9.99 pricing and increase significantly the prevailing price point for e-books." *Id.*, at *10.	Order at 10
	Apple's Response	Evidentiary findings not necessary for the Judgment and therefore inappropriate for collateral estoppel. The asserted facts are also not supported by cited admissible evidence.	
20	*	"Apple played a central role in facilitating and executing [the] conspiracy. Without Apple's orchestration of this conspiracy, it would not have succeeded as it did in the Spring of 2010."	Order at 8-9
	Apple's Response	Evidentiary findings not necessary for the Judgment and therefore inappropriate for collateral estoppel. The asserted facts are also not supported by cited admissible evidence.	

21	*	Apple "provided the Publisher Defendants with the vision, the format, the timetable, and the coordination that they needed to raise e-book prices. Apple decided to offer the Publisher Defendants the opportunity to move from a wholesale model -- where a publisher receives its designated wholesale price for each e-book and the retailer sets the retail price -- to an agency model, where a publisher sets the retail price and the retailer sells the e-book as its agent."	Order at 11
	Apple's Response	Evidentiary findings not necessary for the Judgment and therefore inappropriate for collateral estoppel. The asserted facts are also not supported by cited admissible evidence. Apple stipulates that it offered to all publishers a written agreement offering to sell e-books as a publisher agent, where the publisher would set the price, subject to price caps and an MFN.	
22	*	"The agency agreements that Apple and the Publisher Defendants executed on the eve of the [iPad] Launch divided New Release e-books among price tiers. The top of each tier, or cap, was essentially the new price for New Release e-books. The caps included $12.99 and $14.99 for many books then being sold at $9.99 by Amazon."	Order at 11

	Apple's Response	Evidentiary findings not necessary for the Judgment and therefore inappropriate for collateral estoppel. The asserted facts are also not supported by cited admissible evidence.	
23	*	"[The agreements] carved out NYT Bestsellers for special treatment. When a NYT Bestseller was listed [in hardcover] for $30 or less, the iTunes price would be capped at $12.99; when it was listed above $30 and up to $35, the iTunes price would be no greater than $14.99."	Order at 70
	Apple's Response	Evidentiary findings not necessary for the Judgment and therefore inappropriate for collateral estoppel. The asserted facts are also not supported by cited admissible evidence. Apple will stipulate to these facts.	
24	*	"Apple well understood that the negotiations over the price 'caps' were actually negotiations over ultimate e-book prices."	Order at 71
	Apple's Response	Evidentiary findings not necessary for the Judgment and therefore inappropriate for collateral estoppel. The asserted facts are also not supported by cited admissible evidence.	

25	*	"The . . . pricing tiers were incorporated into Apple's final Agreements and were identical for each Publisher Defendant. Through Apple's adoption of price caps in Agreements, it took on the role of setting the prices for the Publisher Defendants' e-books and eventually for much of the e-book industry. . . . [T]he Publisher Defendants largely moved the prices of their e-books to the caps, raising them consistently higher than they had been albeit below the pries [sic] that they would have preferred."	Order at 74
	Apple's Response	Evidentiary findings not necessary for the Judgment and therefore inappropriate for collateral estoppel. The asserted facts are also not supported by cited admissible evidence.	
26	*	"To ensure that the iBookstore would be competitive at higher prices, Apple concluded that it needed to eliminate all retail price competition. Thus, the final component of its agency model required the Publisher[] [Defendants] to move all of their e-tailers to agency."	Order at 44-45
	Apple's Response	Evidentiary findings not necessary for the Judgment and therefore inappropriate for collateral estoppel. The asserted facts are also not supported by cited admissible evidence.	

27	*	This requirement "eliminated any risk that Apple would ever have to compete on price when selling e-books, while as a practical matter forcing the Publisher[] [Defendants] to adopt the agency model across the board."	Order at 55
	Apple's Response	Evidentiary findings not necessary for the Judgment and therefore inappropriate for collateral estoppel. The asserted facts are also not supported by cited admissible evidence.	
28	*	"By January 26, [2010], Apple had executed" agency agreements with the five Defendant Publishers.	Order at 75
	Apple's Response	Evidentiary fact not necessary for the Judgment, and therefore inappropriate for collateral estoppel. Apple will stipulate to the fact.	
29	*	"Thus, in less than two months, Apple had signed agency contracts with [the five Publisher Defendants] and those Publisher Defendants had agreed with each other and Apple to solve the 'Amazon issue' and eliminate retail price competition for e-books. The Publisher Defendants would move as one, first to force Amazon to relinquish control of pricing, and then, when the iBookstore went live, to raise the retail prices for e-book versions of New Releases and NYT Bestsellers to the caps set by Apple."	Order at 95-96

	Apple's Response	Evidentiary findings not necessary for the Judgment and therefore inappropriate for collateral estoppel. The asserted facts are also not supported by cited admissible evidence.	
30	*	The Publisher Defendants "put Amazon on notice that they were joining forces with Apple and would be altering their relationship with Amazon in order to take control of the retail price of e-books. It was clear to Amazon that it was facing a united front."	Order at 84
	Apple's Response	Evidentiary findings not necessary for the Judgment and therefore inappropriate for collateral estoppel. The asserted facts are also not supported by cited admissible evidence.	
31	*	"As [an Amazon executive] testified, "[i]f it had been only Macmillan demanding agency, we would not have negotiated an agency contract with them. But having heard the same demand for agency terms coming from all the publishers in such close proximity . . . we really had no choice but to negotiate the best agency contracts we could with these five publishers.' Unless it moved to an agency distribution model for e-books, Amazon customers would cease to have access to many of the most popular e-books, which would hurt Kindle customers and the attractiveness of the Kindle."	Order at 104

	Apple's Response	Evidentiary findings not necessary for the Judgment and therefore inappropriate for collateral estoppel. The asserted facts are also not supported by cited admissible evidence.	
32	*	"Apple . . . encouraged the Publisher Defendants to present Amazon with a blanket threat of windowing for a seven month period . . . . [I]t was that threat, delivered simultaneously by [the Publisher Defendants] that left [Amazon] with no alternative but to sign agency agreements with each of them."	Order at 166
	Apple's Response	Evidentiary findings not necessary for the Judgment and therefore inappropriate for collateral estoppel. The asserted facts are also not supported by cited admissible evidence.	
33	*	"Apple closely monitored the progress of the Publisher Defendants in their negotiations with Amazon. The Publisher Defendants told Apple when their agency agreements with Amazon had been signed, and Apple watched as they swiftly moved their prices for New Release e-books on Amazon to the top of Apple's tiers."	Order at 108
	Apple's Response	Evidentiary findings not necessary for the Judgment and therefore inappropriate for collateral estoppel. The asserted facts are also not supported by cited admissible evidence.	

34	*	"Through their conspiracy, [Apple and the Publisher Defendants] forced Amazon (and other resellers) to relinquish retail pricing authority and then they raised retail e-book prices. Those higher prices were not the result of regular market forces but of a scheme in which Apple was a full participant."	Order at 185
	Apple's Response	Evidentiary findings not necessary for the Judgment and therefore inappropriate for collateral estoppel. The asserted facts are also not supported by cited admissible evidence.	
35	*	"Without the collective action that Apple nurtured, it is unlikely any individual Publisher would have succeeded in unilaterally imposing an agency relationship on Amazon. Working together, and equipped with Apple's agency Agreements, Apple and the Publisher Defendants moved the largest publishers of trade e-books and their distributors from a wholesale to agency model, eliminated retail price competition, and raised e-book prices."	Order at 138
	Apple's Response	Evidentiary findings not necessary for the Judgment and therefore inappropriate for collateral estoppel. The asserted facts are also not supported by cited admissible evidence.	
36	*	"[T]he conspiracy succeeded. It not only succeeded, it did so in record-setting time and at the precise moment that Apple entered the e-book market."	Order at 168

	Apple's Response	Evidentiary findings not necessary for the Judgment and therefore inappropriate for collateral estoppel. The asserted facts are also not supported by cited admissible evidence.	
37		Three of the Publisher Defendants (Hachette, HarperCollins, and Macmillan) began selling e-books exclusively on the agency model between April 1 and April 3, 2010.	Noll Reply Report at 30-31; Ex. 20; Ex. 21
	Apple's Response	Undisputed. Reliance on the Noll Reply Report is improper pursuant to Fed. R. Civ. P. Rule 56(d), because Apple has not had an opportunity to depose Dr. Noll regarding the new opinions contained in that report. *See* Dkt. 502.	
38		Between April 1 and April 3, 2010, Simon & Schuster began selling e-books exclusively through the agency model at all of its resellers except Sony. With only two exceptions, Simon & Schuster did not sell any e-books through Sony between April 3 and April 18, because it had not yet reached an agency agreement with Sony. Beginning April 19, 2010, Simon & Schuster sold e-books at Sony exclusively on the agency model.	Noll Reply Report at 30-32; Ex. 22; Ex. 23.
	Apple's Response	Undisputed. Reliance on the Noll Reply Report is improper pursuant to Fed. R. Civ. P. Rule 56(d). *See* Apple's response to Proposed Undisputed Fact 37.	

39		Between April 1 and April 3, 2010, Penguin began selling e-books exclusively through the agency model at all of its resellers except Amazon. Penguin did not immediately reach an agency agreement with Amazon at that time. Amazon continued to sell Penguin e-books released before April 1, 2010 at prices set by Amazon, but Penguin refused to sell it any e-books released in April or May 2010 until Amazon switched to the agency model. Beginning May 28, 2010, Penguin sold e-books at Amazon exclusively on the agency model.	Noll Reply Report at 30, 32; Ex. 24; Ex. 25; Ex. 26
	Apple's Response	Undisputed. Reliance on the Noll Reply Report is improper pursuant to Fed. R. Civ. P. Rule 56(d). *See* Apple's response to Proposed Undisputed Fact 37.	
40	*	"When the iPad went on sale and the iBookstore went live in early April 2010 (or shortly thereafter, in the case of Penguin), each of the Publisher Defendants used their new pricing authority to raise the prices of their e-books overnight and substantially."	Order at 133
	Apple's Response	Evidentiary findings not necessary for the Judgment and therefore inappropriate for collateral estoppel. The asserted facts are also not supported by cited admissible evidence.	

41	*	"Just as Apple expected, after the iBookstore opened in April 2010, the price caps in the Agreements became the new retail prices for the Publisher Defendants' e-books. In the five months that followed, the Publisher Defendants collectively priced 85.7% of their New Release titles sold through Amazon and 92.1% of their New Release titles sold through Apple within 1% of the price caps. This was also true for 99.4% of the NYT Bestseller titles on Apple's iBookstore, and 96.8% of NYT Bestsellers sold through Amazon. The increases at Amazon within roughly two weeks of moving to agency amounted to an average per unit e-book retail price increase of 14.2% for their New Releases, 42.7% for their NYT Bestsellers, and 18.6% across all of the Publisher Defendants' e-books."	Order at 109-110
	Apple's Response	Evidentiary findings not necessary for the Judgment and therefore inappropriate for collateral estoppel. The asserted facts are also not supported by cited admissible evidence.	
42	*	"[T]he rise in trade e-book prices to or close to the price caps established in the Agreements was large and essentially simultaneous."	Order at 139
	Apple's Response	Evidentiary findings not necessary for the Judgment and therefore inappropriate for collateral estoppel. The asserted facts are also not supported by cited admissible evidence.	

43	*	"[Chart A], prepared by one of Apple's experts, illustrates this sudden and uniform price increase. While the average prices for Random House's e-books hovered steadily around $8, for four of the Publisher Defendants, the price increases occurred at the opening of the iBookstore; Penguin's price increases awaited the execution of its agency agreement with Amazon and followed within a few weeks. The bottom flat line represents the average prices of non-major publishers" who did not participate in the conspiracy.	Order at 110; see also Ex. 27
	Apple's Response	Evidentiary findings not necessary for the Judgment and therefore inappropriate for collateral estoppel. The characterization of the facts is also not supported by cited admissible evidence.	

44	*	"The Publisher Defendants raised more than the prices of just New Release e-books. The prices of some of their New Release hardcover books were also raised in order to move the e-book version into a correspondingly higher price tier. And, all of the Publisher Defendants raised the prices of their backlist e-books, which were not governed by the Agreements' price tier regimen. As [Apple] had anticipated, the Publisher Defendants did this in order to make up for some of the revenue lost from their sales of New Release e-books."	Order at 110-111
	Apple's Response	Evidentiary findings not necessary for the Judgment and therefore inappropriate for collateral estoppel. The asserted facts are also not supported by cited admissible evidence.	
45		"[P]rices not covered by pricing tiers in the agency agreements rose relatively more (from pre-agency to post-agency) compared to prices that were covered by price tiers."	Ex. 19, ¶ 49
	Apple's Response	Irrelevant and immaterial to summary judgment motion. Vague and ambiguous.	

46	*	"[Charts B and C], one prepared by the Plaintiffs' expert and another from an expert for Apple, respectively, compare the price increases for the Publisher Defendants' New Releases with the price increases for their backlist books. Despite drawing from different time periods, their conclusions are very similar. The Publisher Defendants used the change to an agency method for distributing their e-books as an opportunity to raise the prices for their e-books across the board."	Order at 111; Ex. 15; Ex. 28
	Apple's Response	Evidentiary findings not necessary for the Judgment and therefore inappropriate for collateral estoppel. The characterization of the facts is also not supported by cited admissible evidence.	
47	*	"Through the vehicle of the Apple agency agreements, the prices in the nascent e-book industry shifted upward, in some cases 50% or more for an individual title".	Order at 12
	Apple's Response	Evidentiary findings not necessary for the Judgment and therefore inappropriate for collateral estoppel. The asserted facts are also not supported by cited admissible evidence.	

48	*	"[T]he actions taken by Apple and the Publisher Defendants led to an increase in the price of e-books. After all, the Publisher Defendants accounted for roughly 50% of the trade e-book market in April 2010, and it is undisputed that they raised the prices for not only their New Release but also their backlist e-books substantially."	Order at 115
	Apple's Response	Evidentiary findings not necessary for the Judgment and therefore inappropriate for collateral estoppel. The asserted facts are also not supported by cited admissible evidence.	
49		Before the conspiracy, retail e-book prices had been declining. Average retail prices for Publisher Defendants' e-books fell from $8.83 in October 2009 to $8.28 in March 2010. In February 2010, the average retail price was $8.13, the lowest price since at least February 2008, the first month for which the parties have data. Average retail prices for e-books from all publishers fell from $8.26 to $7.66 over that time period. The $7.66 average price in March 2010 was the lowest since at least February 2008.	Demana Decl., Ex. B; Ex. 29
	Apple's Response	Irrelevant and immaterial to summary judgment motion. Vague and ambiguous. Admitted as to the data, but the characterization of the facts is inconsistent with the evidence and is disputed.	

50		In April 2010, when the iPad launched, the average retail price for Publisher Defendants' e-books rose from $8.28 to $9.38. This was higher than the average retail price had been for Publisher Defendants in any month in the past two years.	Demana Decl., Ex. B
	Apple's Response	Irrelevant and immaterial to the summary judgment motion. Vague and ambiguous.	
51		Between February 2008 and March 2010, average retail prices for Publisher Defendants' e-books ranged from $8.13 to $8.84. Between April 2010 and March 2012, the last month for which the parties have data, average retail prices for Publisher Defendants' e-books ranged from $9.38 to $10.25.	Demana Decl., Ex. B
	Apple's Response	Irrelevant and immaterial to the summary judgment motion. Vague and ambiguous.	
52		Before April 2010, average retail prices for Publisher Defendants' e-books were never more than $0.67 higher (7.9%) than average retail prices for all publishers' e-books. From April 2010 through March 2012, average retail prices for Publisher Defendants' e-books were always at least $1.21 higher (13%) than average retail prices for all publishers' e-books, and were as much as $2.91 higher (28.4%).	Demana Decl., Ex. B

	Apple's Response	Irrelevant and immaterial to the summary judgment motion. Vague and ambiguous.	
53		Between March and April 2010, the average retail price change of Random House e-books was 0.0%. In that same month, the average retail price change for other non-defendant publishers' e-books was -0.2%.	Noll Reply Report. at 22; Ex. 11 at Charts 13 and 15.
	Apple's Response	Irrelevant and immaterial to the summary judgment motion. Vague and ambiguous. Reliance on the Noll Reply Report is improper pursuant to Fed. R. Civ. P. Rule 56(d). *See* Apple's response to Proposed Undisputed Fact 37.	
54		In April and May 2010, between 96.8% and 98.3% of Penguin e-books that were sold at Amazon were priced higher at Apple and Barnes & Noble. On average, titles that were priced higher were $1.67 higher at Barnes & Noble than Amazon in April and $1.70 higher in May. On average, titles that were priced higher were $2.00 higher at the iBookstore than Amazon in both April and May.	Ex. 14, Table A-6; Noll Reply Report at 32 n.11.
	Apple's Response	Irrelevant and immaterial to summary judgment motion. Vague and ambiguous. Reliance on the Noll Reply Report is improper pursuant to Fed. R. Civ. P. Rule 56(d). *See* Apple's response to Proposed Undisputed Fact 37.	

55		The average retail price of the Publisher Defendants' e-books increased for the entire two-year period after the agency agreements went into effect because of Publisher Defendants' move to the agency model.	Ex. 16 at 2235:7-14
	Apple's Response	Irrelevant and immaterial to summary judgment motion. Vague and ambiguous and the conclusion is not supported by the cited evidence.	
56	*	"Viewed from any perspective, Apple's conduct led to higher consumer prices for e-books."	Order at 166
	Apple's Response	Evidentiary findings not necessary for the Judgment and therefore inappropriate for collateral estoppel. The asserted facts are also not supported by cited admissible evidence.	
57		The average agency effect was no less than 14.9 percent.	Ex. 1 at 2298:21-24; Ex. 14, ¶ 10; Ex. 15, ¶ 158; Ex. 17, ¶ 125 (Orszag Report); Ex. 18; Noll Reply Decl. at Ex. 2

	Apple's Response	Vague and ambiguous as to the meaning of "agency effect." Also, irrelevant and immaterial to summary judgment motion. The "average agency effect" does not take into account changes in e-book prices that would have occurred in the but-for world. Disputed by Dr. Kalt. Dr. Kalt opines that e-book prices increased as a result of lawful increased competition among e-readers which has not been accounted for, and further that agency marketing can result in a decline in some e-book prices.	Dkt. 538 [Kalt Sur-Reply Decl.] ¶¶ 88-89; Richman Decl. Ex. I [Kalt Decl.] at ¶¶ 88-89
58		The conspiracy caused overcharges to e-book consumers of $280,254,374.	Noll Reply Report at 17 & Ex. 2.
	Apple's Response	Disputed by Kalt, Orzag expert reports, as well as objections to Noll report and opinions expressed in motion to exclude his report, and issues raised in, inter alia, Professor Noll's deposition. Reliance on the Noll Reply Report is improper pursuant to Fed. R. Civ. P. Rule 56(d). *See* Apple's response to Proposed Undisputed Fact 37.	Dkt. 538 ¶¶ 88-89; Richman Decl., Ex. A [Corrected Orszag Decl.] ¶¶ 28-41
59	*	"[E]ach of the Publisher Defendants lost sales of e-books due to the price increases."	Order at 114
	Apple's Response	Evidentiary findings not necessary for the Judgment and therefore inappropriate for collateral estoppel. The asserted facts are also not supported by cited admissible evidence.	

60		The loss of sales that would have occurred in the but-for world is a "loss of consumer welfare."	Noll Decl. at 12-13.
	Apple's Response	Incomplete and misleading. Any loss of sales in the but-for world was offset by benefits to consumers resulting from the transition to agency. *E.g.*, Richman Decl., Ex. A, § VI-VII. And some portion of Apple's sales would have been lost in the but-for world. Dkt. 541, App'x D. Additionally, Dr. Noll's opinion as to price increases that supposedly caused lost sales is disputed in the Orzsag and Kalt expert reports, as well as in objections to Noll report and opinions expressed in the motion to exclude his report, and issues raised in, inter alia, Professor Noll's deposition.	Richman Decl. Ex. A §§ VI-VII; Dkt. 541 [Orszag Sur-Reply Decl.], App'x D; Dkt. 538 ¶¶ 87-89
61	*	"[T]he arrival of the iBookstore brought less price competition and higher prices."	Order at 183
	Apple's Response	Evidentiary findings not necessary for the Judgment and therefore inappropriate for collateral estoppel. The asserted facts are also not supported by cited admissible evidence.	
62	*	"[T]here is no basis to find based on the trial record that Apple ever had reason to fear that the Publisher[] [Defendants] would use their power over retail pricing to lower prices anywhere."	Order at 162 n.64.

	Apple's Response	Evidentiary findings not necessary for the Judgment and therefore inappropriate for collateral estoppel. The asserted facts are also not supported by cited admissible evidence.	
63	*	"[C]onsumers suffered in a variety of ways from this scheme to eliminate retail price competition and to raise e-book prices. Some consumers had to pay more for e-books; others bought a cheaper e-book rather than the one they preferred to purchase; and it can be assumed that still others deferred a purchase altogether rather than pay the higher price."	Order at 114
	Apple's Response	Evidentiary findings not necessary for the Judgment and therefore inappropriate for collateral estoppel. The asserted facts are also not supported by cited admissible evidence.	

64		The Publisher Defendants all continued selling e-books exclusively on the agency model until at least May 21, 2012.	Mem. in Supp. of Prelim. Approval of Settlements, App'x A-C § IV.B, *Texas v. Penguin Grp. (USA) Inc.*, No. 12-cv-6625, (S.D.N.Y. Sept. 13, 2012), ECF No. 11; *United States v. Apple, Inc.*, 889 F. Supp. 2d 623, 629 (S.D.N.Y. 2012)
	Apple's Response	Undisputed.	
65	*	One "strategy that Publisher Defendants adopted in 2009 to combat Amazon's $9.99 pricing was the delayed release or 'withholding' of the e-book versions of New Releases, a practice that was also called 'windowing.'"	Order at 22
	Apple's Response	Evidentiary findings not necessary for the Judgment and therefore inappropriate for collateral estoppel. The asserted facts are also not supported by cited admissible evidence.	

66	*	"In order for the tactic of windowing to succeed, the Publisher[] [Defendants] knew they needed to act together. That several Publisher[] [Defendants] synchronized the adoption and announcement of their windowing strategies was thus no mere coincidence."	Order at 23
	Apple's Response	Evidentiary findings not necessary for the Judgment and therefore inappropriate for collateral estoppel. The asserted facts are also not supported by cited admissible evidence.	
67	*	"[There is no reason to find that windowing would have become widespread, long-lasting, or effective. Indeed, the Publishers (as well as Apple) realized that the delayed release of e-books was a foolish and even dangerous idea."	Order at 164-165
	Apple's Response	Evidentiary findings not necessary for the Judgment and therefore inappropriate for collateral estoppel. The asserted facts are also not supported by cited admissible evidence.	
68	*	"[There was never any threat (before Apple encouraged one) to withhold all e-books. Many of the Publisher Defendants' most popular books were not, nor were they slated to be, windowed . . . ."	Order at 165
	Apple's Response	Evidentiary findings not necessary for the Judgment and therefore inappropriate for collateral estoppel. The asserted facts are also not supported by cited admissible evidence.	

69	*	"Without the collective action that Apple nurtured, it is unlikely any individual Publisher would have succeeded in unilaterally imposing an agency relationship on Amazon."	Order at 138
	Apple's Response	Evidentiary findings not necessary for the Judgment and therefore inappropriate for collateral estoppel. The asserted facts are also not supported by cited admissible evidence.	
70	*	"While conceding that the prices for the Publisher Defendants' e-books went up after Apple opened the iBookstore, Apple argued as [sic] trial that the opening of the iBookstore actually led to an overall decline in trade e-book prices during the two-year period that followed that event. Its evidence was not persuasive. . . . The analysis presented by the Plaintiffs' experts as well as common sense lead invariably to a finding that the actions taken by Apple and the Publisher Defendants led to an increase in the price of e-books."	Order at 114-115
	Apple's Response	Findings not necessary for the Judgment and therefore inappropriate for collateral estoppel. The findings are also not supported by cited admissible evidence.	
71	*	"Apple has not shown that the execution of the Agreements had any pro-competitive effects."	Order at 141

	Apple's Response	Finding not necessary for the Judgment, and decided under a different burden of proof, and therefore inappropriate for collateral estoppel. Disputed by Apple's evidence at trial in DOJ action and by Orszag Report.	Richman Decl., Ex. A §§ VI-VII
72	*	"The pro-competitive effects to which Apple has pointed, including its launch of the iBookstore, the technical novelties of the iPad, and the evolution of digital publishing more generally, are phenomena that are independent of the Agreements and therefore do not demonstrate any pro-competitive effects flowing from the Agreements."	Order at 141
	Apple's Response	Finding not necessary for the Judgment and decided under a different burden of proof and therefore inappropriate for collateral estoppel. Disputed by Apple's evidence at trial in DOJ action.	
73	*	"The iBookstore was not an essential feature of the iPad, and the iPad Launch would have occurred without any iBookstore."	Order at 182
	Apple's Response	Findings not necessary for the Judgment and therefore inappropriate for collateral estoppel. Undisputed that the iPad launch would have occurred without an iBookstore.	
74		E-books would have been available on the iPad whether or not Apple launched an iBookstore.	Ex. 30 at 60:21-65:14

	Apple's Response	Vague and ambiguous, speculative. Undisputed that Apple would have been willing to permit e-book apps to be offered on the iPad on a non-discriminatory basis, assuming appropriate agreements could have been reached, but disputed, based on the expert opinions of Kalt and Orszag, that the but-for world would have included all the e-books available as a result of the competition brought about by Apple's entry.	*E.g.*, Richman Decl., Ex. A ¶¶ 104-110; Richman Decl., Ex. I ¶¶ 97-99
75	*	"Apple violated Section 1 of the Sherman Act by conspiring with the Publisher Defendants to eliminate retail price competition and to raise e-book prices."	Order at 131
	Apple's Response	Apple incorporates by reference its response to Proposed Finding 76, *infra*, and otherwise objects to any additional finding beyond that in Proposed Finding 76 that "Apple participated in and facilitated a horizontal price-fixing conspiracy . . . a per se violation of the Sherman Act" as unnecessary to the Judgment.	
76	*	"Apple participated in and facilitated a horizontal price-fixing conspiracy . . . a per se violation of the Sherman Act."	Order at 140

	Apple's Response	Apple disagrees with the Court's finding and denies that it violated Section 1 of the Sherman Act. However, it is admitted that the Court's finding is applicable to this action under principles of collateral estoppel, subject to Apple's right to vacate the finding, and any related judgment, if the underlying judgment is reversed on appeal.	
77	*	"Plaintiffs have carried their burden to show a violation of Section 1 of the Sherman Act under [the rule of reason] test as well."	Order at 142
	Apple's Response	Finding not necessary for the Judgment and decided under a different burden of proof and therefore inappropriate for collateral estoppel. Disputed by evidence at trial in DOJ action.	
78	*	"Apple knowingly and intentionally participated in and facilitated a horizontal conspiracy to eliminate retail price competition and raise the retail prices of e-books. Apple made a conscious commitment to join a scheme with the Publisher Defendants to raise the prices of e-books."	Order at 151

	Apple's Response	Apple incorporates by reference its response to Proposed Finding 76, and otherwise objects to any additional finding beyond that in Proposed Finding 76 that "Apple participated in and facilitated a horizontal price-fixing conspiracy . . . a per se violation of the Sherman Act" as unnecessary to the Judgment. The additional findings are also not supported by cited admissible evidence.	
79	*	"Apple was a knowing and active member of that conspiracy. Apple not only willingly joined the conspiracy, but also forcefully facilitated it."	Order at 131
	Apple's Response	Apple incorporates by reference its response to Proposed Undisputed Fact 76, and otherwise objects to any additional finding beyond that in Proposed Finding 76 that "Apple participated in and facilitated a horizontal price-fixing conspiracy . . . a per se violation of the Sherman Act" as unnecessary to the Judgment. The additional findings are also not supported by cited admissible evidence.	

80	*	"Understanding that no one Publisher could risk acting alone in an attempt to take pricing power away from Amazon, Apple created a mechanism and environment that enabled [the Publisher Defendants] to work together in a matter of weeks to eliminate all retail price competition for their e-books. The evidence is overwhelming that Apple knew of the unlawful aims of the conspiracy and joined that conspiracy with the specific intent to help it succeed."	Order at 159-160
	Apple's Response	Apple incorporates by reference its response to Proposed Undisputed Fact 76 , and otherwise objects to any additional finding beyond that in Proposed Undisputed Fact 76 that "Apple participated in and facilitated a horizontal price-fixing conspiracy . . . a per se violation of the Sherman Act" as unnecessary to the Judgment. The additional findings are also not supported by cited admissible evidence.	
81	*	"Apple did not want to compete with Amazon on price and proposed to the Publisher[] [Defendants] a method through which both Apple and the Publisher[] [Defendants] could each achieve their goals. Apple was an essential member of the charged conspiracy and was fully complicit in the scheme to raise e-book prices even though the Publisher Defendants also had their own roles to play."	Order at 177

	Apple's Response	Apple incorporates by reference its response to Proposed Undisputed Fact 76, and otherwise objects to any additional finding beyond that in Proposed Undisputed Fact 76 that "Apple participated in and facilitated a horizontal price-fixing conspiracy . . . a per se violation of the Sherman Act" as unnecessary to the Judgment. The additional findings are also not supported by cited admissible evidence.	
82	*	"[T]he actions taken by Apple and the Publisher Defendants led to an increase in the price of e-books."	Order at 115
	Apple's Response	Finding not necessary for the Judgment and therefore inappropriate for collateral estoppel. Vague and ambiguous. Disputed by evidence at trial in DOJ action.	
83	*	"[T]he Agreements did not promote competition, but destroyed it. The Agreements compelled the Publisher Defendants to move Amazon and other retailers to an agency model for the distribution of e-books, removed the ability of retailers to set the prices of their e-books and compete with each other on price, relieved Apple of the need to compete on price, and allowed the Publisher Defendants to raise the prices for their e-books, which they promptly did on both New Releases and [NYT] Bestsellers as well as backlist titles."	Order at 141-142

	Apple's Response	Findings not necessary for the Judgment and therefore inappropriate for collateral estoppel. Disputed by evidence at trial in DOJ action.	
84		Smashwords offered a royalty rate of 85% to self-publishing e-book authors at least as early as 2009.	Noll Reply Report at 50 n.18; http://www.idealog.com/blog/ideas-triggered-by-amazon-buying-lexcycle/
	Apple's Response	Irrelevant and immaterial to the summary judgment motion. Unsupported by admissible evidence. Reliance on the Noll Reply Report is improper pursuant to Fed. R. Civ. P. Rule 56(d). *See* Apple's response to Proposed Undisputed Fact 37. Also incomplete and misleading. Smashwords, a publisher and distributor of self-published books, offered an 85% royalty only for books sold through its own website, which constituted less than 10% of its overall sales. Dkt. 541 ¶¶ 65-66.	Dkt. 541 ¶¶ 65-66

85		Lulu offered a royalty rate of 80% to self-publishing e-book authors at least as early as 2008.	Noll Reply Report at 50 n.18; http://lulupressce nter.com/uploads/ assets/Press_Kit_9 08.pdf
	Apple's Response	Irrelevant and immaterial to the summary judgment motion. Unsupported by admissible evidence. Reliance on the Noll Reply Report is improper pursuant to Fed. R. Civ. P. Rule 56(d). *See* Apple's response to Proposed Undisputed Fact 37.	Dkt. 541 ¶¶ 65-66
86		As of 2009, self-publishing authors could get an effective 42.5% royalty rate at Amazon.	https://web.archiv e.org/web/200912 13041703/http:// www.smashword s.com/distribution
	Apple's Response	Irrelevant and immaterial to the summary judgment motion. Unsupported by admissible evidence. Also incomplete and misleading. The royalty rate cited was available only when a self-published e-book was distributed through Smashwords to be sold at Amazon.	Richman Decl., Ex. H [Reply In Support of Motions to Exclude Orszag Opinions] at 16 n.74

87		Between January 2009 and January 2010, the share of Amazon books that were self-published approximately tripled.	Kalt Decl., Ex. 2; Ex. 13 at 109:14-110:22
	Apple's Response	Irrelevant and immaterial to the summary judgment motion. Incomplete and misleading. [redacted] Richman Decl., Ex. A, Fig. VII-1.	Richman Decl., Ex. A, Fig. VII-1.
88		Amazon was considering introducing a 70/30 split at least as early as December 10, 2009.	Noll Reply Report at 50; Ex. 31
	Apple's Response	Irrelevant and immaterial to the summary judgment motion. Unsupported by admissible evidence. Reliance on the Noll Reply Report is improper pursuant to Fed. R. Civ. P. Rule 56(d). *See* Apple's response to Proposed Undisputed Fact 37.	
89		As of December 10, 2009, Apple had not met with any publishers and was not considering an agency model for e-books.	Order at 33-36; Ex. 32, ¶¶ 71, 73; Ex. 33, ¶¶ 36, 38-39, 41, 43

	Apple's Response	Irrelevant and immaterial to the summary judgment motion. Vague and ambiguous. Admitted that prior to December 10, 2009, Apple was not contemplating an agency model for the sale of e-books.	
90		As of January 11, 2010, Amazon planned to announce new terms for self-published authors on January 20, 2010.	Noll Reply Report at 50; Ex. 28 to the Declaration of Steve W. Berman in Further Support of Class Certification and Daubert Motions, filed Under Seal, December 18, 2013
	Apple's Response	Irrelevant and immaterial to the summary judgment motion. Vague and ambiguous as to the "new terms," and not supported by admissible evidence. Reliance on the Noll Reply Report is improper pursuant to Fed. R. Civ. P. Rule 56(d). *See* Apple's response to Proposed Undisputed Fact 37.	
91		Amazon first learned that Apple and the Publisher Defendants were moving to an agency model on January 18, 2010.	Order at 76; Ex. 35 at 217:15-218:5

	Apple's Response	Irrelevant and immaterial to summary judgment motion. Not supported by cited admissible evidence and contradicted by the proposed finding (No. 28) that agreements were entered into after January 18, 20110.	
92		Apple did not announce any terms for self-publishing authors until May 2010, and did not release iBooks Author until January 2012.	Ex. 17, ¶ 96 (Orszag Report); Ex. 36 at 189:20-21; Ex. 37
	Apple's Response	Irrelevant and immaterial to summary judgment motion.	
93		In 2009, "more than one million free public-domain titles" were available from Sony, and more than "500,000 free public domain titles" were available from Barnes & Noble.	Ex. 17, ¶¶ 17, 19 (Orszag Report)
	Apple's Response	Irrelevant and immaterial to summary judgment motion. Not supported by cited admissible evidence.	
94		When Apple launched the iBookstore, it included 30,000 free public domain e-books from Project Gutenberg.	Ex. 38
	Apple's Response	Irrelevant and immaterial to summary judgment motion. Incomplete and misleading. Apple's iBookstore dramatically expanded the supply of free e-books and a large number of free titles available on Apple's iBookstore were not available on the Kindle Store. Richman Decl., Ex. A ¶¶ 106, 107.	Richman Decl., Ex. A ¶¶ 106, 107

95		When Apple launched the iBookstore, the most frequently downloaded e-books from the iBookstore were all public domain Project Gutenberg e-books.	Ex. 39 at APLEBOOK0044 1288
	Apple's Response	Irrelevant and immaterial to summary judgment motion. Vague and ambiguous as to time period.	
96		The Project Gutenberg e-books made available through the iBookstore were all available to consumers prior to April 2010.	http://www.gutenberg.org/ebooks/.
	Apple's Response	Irrelevant and immaterial to the summary judgment motion. Not supported by cited admissible evidence.	
97		Class Representatives Anthony Petru and Thomas Friedman purchased one or more e-books from the Defendant Publishers at supra-competitive prices caused by the conspiracy.	Kalt Sur-Reply Decl. Fig. 6
	Apple's Response	Unsupported by admissible evidence. Plaintiffs mischaracterize the cited declaration. Dr. Kalt's analysis addressed whether Noll's modeling is reliable and not does opine whether individual prices were "supra-competitive."	Dkt. 538 ¶ 33 and n.38.