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	CLASS ACTION

REPLY MEMORANDUM OF LAW IN SUPPORT OF
CLASS PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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I. INTRODUCTION

Apple wants a do-over of almost every fact and argument decided against it in the liability trial. According to Apple, the entire three-week bench trial – the trial that it previously said would allow the Court and the parties to "resolve the other matters without the need for a second trial" due to "collateral estoppel"[1] – produced a single, sanitized preclusive finding: "Apple participated in and facilitated a horizontal price-fixing conspiracy . . . a *per se* violation of the Sherman Act."[2] Apple "objects to any additional finding beyond that."[3] Apple's view, however, ignores one crucial thing: zero precedent supports Apple's extreme restriction of the doctrine of collateral estoppel.[4]

The rest of Apple's opposition mainly rehashes its arguments against class certification and in connection with the *Daubert* motions. None of Apple's arguments rebut Class Plaintiffs' previous dismantling of Apple's expert opinions. Thus, without offering admissible or material evidence in opposition, Apple fails to show triable issues of material fact exist to defeat Class Plaintiffs' evidence of impact and damages.

Apple also makes two cursory arguments worth little attention. Its one-way intervention argument is premature; the Court may rule on summary judgment after the opt-out period closes. And its argument that the Court must recuse itself because it acknowledged the fact that the conspiracy harmed consumers and increased prices by hundreds of millions of dollars is without authority. Respectfully, the Court should grant Class Plaintiffs' motion for summary judgment,

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[1] Declaration of Steve W. Berman in Support of Class Plaintiffs' Motion for Summary Judgment and Statement of Undisputed Facts ("Berman Opening Decl."), Ex. 2 at 60:2-4, Feb. 28, 2014, ECF No. 562.

[2] Defendant Apple Inc.'s Response to Class Plaintiffs' Statement of Undisputed Facts ("Apple SUF Resp."), ¶¶ 75-76 & 78-81, March 5, 2014, ECF No. 566.

[3] *Id.*, ¶¶ 75, 78-81.

[4] *See, e.g.*, *In re Dobbs*, 227 Fed. Appx. 63, 64 (2d Cir. 2007) (rejecting argument that collateral estoppel is limited to only the legal conclusion by the first court, observing the Second Circuit "has long recognized the preclusive effect of prior factual findings.").

or, alternatively, enter an order under Federal Rules of Civil Procedure 16(c) or 56(g).

II. COLLATERAL ESTOPPEL IS APPROPRIATE TO PRECLUDE APPLE FROM A DO OVER

A. Apple's Extreme Formulation of the "Necessary to the Judgment" Requirement Is Unprecedented

Apple's assertion as to the limited scope of collateral estoppel is based on either misrepresenting or misapplying (or both) the cases on which it relies.

Apple concedes the first three prongs of the four-prong collateral estoppel test and the fairness test of *Parklane Hosiery* are satisfied.[5] It contests only the requirement that "resolution of the issue was necessary to support a valid and final judgment on the merits."[6] Apple asserts that "the vast majority" of the 66 findings Class Plaintiffs rely on were unnecessary,[7] and that only one finding was necessary.[8] Apple's view is that the only thing "necessary" to the Court's prior finding was its ultimate conclusion, with none of the supporting facts, evidence, or findings having any preclusive weight. Even the description of the conspiracy Apple entered would be open for re-interpretation.[9] This is contrary to all precedent, including the authority Apple cites.

Apple does not dispute Class Plaintiffs' recitation of black-letter law as to the scope of collateral estoppel, deigning only to dismiss "Plaintiffs' cherry-picked treatise citations" in an unreasoned footnote.[10] And Apple fails to explain or acknowledge Second Circuit cases

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[5] *See* Defendant Apple Inc.'s Memorandum of Law in Opposition to Class Plaintiffs' Motion for Summary Judgment ("Apple SJ Opp.") at 6-13, March 5, 2014, ECF No. 565; *see generally Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 331 (1979); *Bear, Stearns & Co. v. 1109580 Ontario, Inc.*, 409 F.3d 87, 91 (2d Cir. 2005); Memorandum of Law in Support of Class Plaintiffs' Motion for Summary Judgment ("Class SJ Mem.") at 8-10, Feb. 3, 2014, ECF No. 527.

[6] *Bear, Stearns*, 409 F.3d at 91.

[7] Apple SJ Opp. at 6.

[8] Apple SUF Resp., ¶¶ 75-76 & 78-81.

[9] *See e.g., id*., ¶ 24 (opposing the finding that "Apple well understood that the negotiations over the price 'caps' were actually negotiations over ultimate e-book prices"); ¶ 78 (opposing the finding that "Apple made a conscious commitment to join a scheme with the Publisher Defendants to raise the prices of e-books").

[10] Apple SJ Opp. at 9 n.5.

following these legal principles.[11] Instead, Apple travels to the Fourth Circuit's opinion in *In re Microsoft Corp. Antitrust Litigation*, which concluded that "necessary" means, as Apple puts it, "logically required," "essential," or "indispensable."[12] But the *Microsoft* dissent noted that neither the Second Circuit nor the Supreme Court follow this reasoning.[13]

In the Second Circuit, "the word 'necessary' is not always used in its most rigid sense," and does not always "mean 'absolutely needed' or 'inescapable.'"[14] The Second Circuit has not adopted the *Microsoft* standard; nor does it appear ***any*** Article III Court outside the Fourth Circuit has followed it. And even Apple's effort to hold onto the Fourth Circuit as a life raft is misleading – *Microsoft* has not been applied as Apple suggests here.

The Fourth Circuit in *Microsoft* rejected the lower court's formulation that all relevant facts "supportive of" the ruling are subject to collateral estoppel. In doing so, the *Microsoft* decision focused on explaining a framework to delineate that not all "relevant" facts should be given preclusive effect.[15] But the court expressly stated that "the basis for a judgment" – not solely the judgment itself – could not be relitigated.[16] Stuck with this language, Apple chooses to present the *Microsoft* holding in a falsely restrictive light to claim the Court should give no estoppel effect to the central facts on which the Court relied to reach its judgment. Troublingly, Apple fails to tell this Court that on remand from the Fourth Circuit, the district court gave

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[11] *See* Class SJ Mem. at 8-9 & nn.34-39.

[12] *In re Microsoft Corp. Antitrust Litig.*, 355 F.3d 322, 27 (4th Cir. 2004); Apple SJ Opp. at 7.

[13] *See Microsoft*, 355 F.3d at 329-31 (Gregory, J., dissenting).

[14] *F.T.C. v. Rockefeller*, 591 F.2d 182, 188 (2d Cir. 1979); *see also McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 414 (1819) ("The word 'necessary' . . . admits of all degrees of comparison. . . ."). In addition, the Second Circuit disagrees with the Fourth Circuit's rule, reaffirmed in *Microsoft*, that "if a judgment in the prior case is supported by either of two findings, neither finding can be found essential to the judgment." *Microsoft*, 355 F.3d at 328; *see Gelb v. Royal Globe Ins. Co.*, 798 F.2d 38, 45 (2d Cir. 1986).

[15] *Microsoft*, 355 F.3d. at 327.

[16] *Id.* at 325, 327.

collateral estoppel effect to ***52 findings***.[17] Indeed, the court in another *Microsoft* follow-on case precluded relitigation of ***146 findings***, reading nearly 150 pages of findings to the jury before trial.[18]

Apple's other cases serve it no better. *Jack Faucett Associates, Inc. v. American Telephone and Telegraph Company* did not address the "necessary" requirement at all; it reversed on *Parklane Hosiery* fairness grounds, in light of conflicting prior rulings and the denial of a full and fair opportunity to litigate in the earlier case.[19] Similarly, *Discover Financial Services v. Visa U.S.A. Inc.* denied the plaintiffs' full request, not because any of the requested findings were unnecessary, instead because presentation of additional facts to the jury "in a vacuum and without context would be unfair to Defendants."[20] The court's decision in *Discover* turned on case-specific fairness considerations, not because the facts subject to collateral estoppel were "unnecessary to the judgment." Importantly, nowhere has Apple objected to the admissibility of Plaintiffs' undisputed facts by claiming "contextual fairness," for example under Federal Rules of Evidence 403.[21] Indeed, Apple's foreknowledge that the facts decided in the first phase of trial would be used in the anticipated damages trial strongly militates in Plaintiffs'

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[17] *See* Declaration of Steve W. Berman in Further Support of Class Plaintiffs' Motion for Summary Judgment ("Berman Reply Decl.") (concurrently filed herewith), Ex. 40 (Oct. 4, 2011 Memo to Counsel from The Honorable J. Frederick Motz Re: *Microsoft Corp. Antitrust Litig.*, MDL No. 1332, and *Novell, Inc. v. Microsoft Corp.*, No. 04-cv-1045 (D. Utah), ECF No. 163). Although the case had been remanded to the District of Utah, it remained before the same District of Maryland judge, who applied Fourth Circuit collateral estoppel law. *See, e.g.*, *id*., Ex. 41. (Dec. 3, 2008 Memo to Counsel from The Honorable J. Frederick Motz Re: *Microsoft Corp. Antitrust Litig.*, MDL No. 1332, and *Novell, Inc. v. Microsoft Corp.*, No. 05-cv-1087 (D. Md.), ECF No. 76) (applying "critical and essential" standard); *see also id.* ("Microsoft must assume that it will not be permitted to relitigate any issues that were material in the D.C. litigation and that are material in this case.").

[18] *Comes v. Microsoft Corp.*, No. CL82311, 2006 WL 4674041 (Iowa Dist. June 5, 2006); *see also* Berman Reply Decl., Ex. 42 at 2418:10-2540:18 (Nov. 30, 2006 Trial Tr. in *Comes*); *Id*., Ex. 43 at 2569:3-2595:19 (Dec. 1, 2006 Trial Tr. in *Comes*).

[19] *Jack Faucett Assocs., Inc. v. Am. Tel. & Tel. Co.*, 744 F.2d 118, 126-32 (D.C. Cir. 1984). *Jack Faucett* is discussed further *infra*.

[20] *Discover Fin. Servs. v. Visa U.S.A. Inc.*, 598 F. Supp. 2d 394, 401 (S.D.N.Y. 2008).

[21] *See, e.g.*, *Halebian v. Berv*, 869 F. Supp. 2d 420, 443 n.24 (S.D.N.Y. 2012), *aff'd*, No. 12-3360, 2013 WL 5977962 (2d Cir. Nov. 12, 2013) (noting the burden on party opposing summary judgment to make particularized evidentiary objections pursuant to Fed. R. Civ. P. 56(c)(2)).

favor. Apple cannot conceivably argue undue surprise or it lacked incentive to litigate the evidentiary facts in the first trial. This is a distinctive contextual aspect to this litigation.

The final case Apple relies on, *Howard Hess Dental Labs. Inc. v. Dentsply International, Inc.*, supports Plaintiffs, not Apple. There, the Third Circuit explained that the prior government case "require[d]" a finding that the conduct at issue injured "Dentsply's competitors."[22] But the government case did not determine there was anticompetitive injury to "upstream purchasers" – the plaintiffs seeking collateral estoppel in the second action.[23] Fidelity to *Dentsply's* reasoning supports applying collateral estoppel to the findings here that Class Plaintiffs have identified. The Third Circuit's reasoning suggests it would have estopped the defendant from relitigating the anticompetitive injury to its competitors, because the government's action focused on the restraint's effect on competitors, when determining the unreasonableness of the alleged restraint.[24] Here, the government's case focused on the anticompetitive harm to e-book consumers in the form of supra-competitive e-book retail prices caused by Apple's conspiracy. Consumer injury, in the form of artificially raised e-book prices, reduced output, and restricted choice was a centerpiece of the government trial. Remarkably, Apple glides by the fact that the *Dentsply* cases impeach Apple's "one finding only" position: indeed, one of the *Dentsply* cases gave preclusive effect to 27 findings.[25]

At bottom, Apple makes the unprincipled claim that every single factual finding Class Plaintiffs have identified was merely a "detour" from the Court's finding of a Sherman Act violation.[26] Apple is asserting the Court could have simply issued a one-sentence opinion

[22] *Howard Hess Dental Labs. Inc. v. Dentsply Int'l, Inc.*, 602 F.3d 237, 248 (3d Cir. 2010).
[23] *Id.*
[24] *See* Class SJ Mem. at 19 & n.93.
[25] *Univac Dental Co. v. Dentsply Int'l, Inc.*, 702 F. Supp. 2d 465, 474, 494-97 (M.D. Pa. 2010).
[26] Apple SJ Opp. at 8 (emphasis omitted).

reading, "Apple participated in and facilitated a horizontal price-fixing conspiracy . . . a *per se* violation of the Sherman Act."[27] And yet, just four days after presenting its position to this Court, Apple attacked this Court's rule of reason analysis in the Second Circuit on the grounds that it "does not amount to the 'careful and complete analysis of the competitive effects of the challenged restraint' that is ***required by law***."[28]

In short, there is simply no precedent to support Apple's claim that factual findings required to build the analytical bridge to this Court's ultimate destination were "unnecessary."

B. Apple's Burden-Shifting and Alternative Grounds Arguments Are Wrong

First, Apple claims it is allowed to repackage disproven arguments because the burden supposedly shifted between trials. Second, it claims collateral estoppel should be denied because the Second Circuit could theoretically reverse or ignore the Court's rule of reason analysis. Both arguments are wrong.

Apple's first contention, based on *Cobb v. Pozzi*, was thoroughly rebutted in the reply brief to Plaintiffs' motions to exclude Mr. Orszag's opinions.[29] *Cobb* denies preclusive effect only when the burden of persuasion changes from one case to another case.[30] Here, the burden of persuasion for liability and damages has at all times resided with the plaintiffs. Apple only

[27] Apple SUF Resp., ¶¶ 75-76, 78-81.

[28] Appellant Apple Inc.'s Opening Brief at 54, *United States v. Apple Inc.*, No. 13-3741 (2nd Cir.), Feb. 25, 2014, ECF No. 157 (quoting *Capital Imaging Assocs., P.C. v. Mohawk Valley Med. Assocs., Inc.*, 996 F.2d 537, 543 (2d Cir. 1993)) (emphasis added); *see also, e.g., id.* at 44 (observing that "competent evidence is necessary to allow a reasonable inference that [the challenged conduct] poses an authentic threat to competition") (quoting *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 232 (1993)) (Apple's emphasis omitted; alteration by Apple).

[29] *See* Joint Reply Memorandum of Law in Support of State Plaintiffs' and Class Plaintiffs' Motions to Exclude the Expert Opinions Offered by Apple's Expert Jonathan Orszag ("Pls.' Orszag *Daubert* Reply") at 6-7, filed Under Seal, Feb. 4, 2014.

[30] *See id.*; *Cobb v. Pozzi*, 363 F.3d 89, 113 (2d Cir. 2004).

bore the burden of ***production*** as to anticompetitive effects.[31] Apple does not refute – or even acknowledge – this point. And Apple's claim that the supposed *Cobb* problem applies to "many" of Plaintiffs' proposed findings[32] is belied by its response to Class Plaintiffs' Statement of Undisputed Facts. Apple opposes just three findings because they were "decided under a different burden of proof."[33] Thus, even if Apple's legal proposition were correct (which it is not), the other 63 proposed findings are left untouched.

Apple also contends the Court's rule of reason analysis was "not necessary to its judgment."[34] But even Apple concedes that "alternate [sic] findings may be deemed 'necessary' to a judgment."[35] Apple argues that the rule of reason analysis is not a "true" alternative finding because the Court prefaced it with the phrase "[i]f it were necessary to analyze th[e] evidence under the rule of reason, however, the Plaintiffs would also prevail."[36] But there is no such thing as an "untrue" alternative holding, and a Court's recognition that its holdings are independently sufficient does not render either one immaterial. Apple is simply rejecting the settled law of *Gelb*, which Apple, itself, cites. Similarly, Apple's argument that collateral estoppel cannot be given effect until the Second Circuit rules has been squarely rejected. "The fact that [Apple] has appealed the Court's ruling is irrelevant since the pendency of an appeal does not preclude the

[31] Pls.' Orszag *Daubert* Reply at 6-7; *see also, e.g.*, *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 507 (1993); *Chicago Bridge & Iron Co. N.V. v. F.T.C.*, 534 F.3d 410, 424 (5th Cir. 2008); *United States v. Visa U.S.A., Inc.*, 344 F.3d 229, 238 (2d Cir. 2003); Fed. R. Evid. 301.

[32] Apple SJ Opp. at 12.

[33] Apple SUF Resp., ¶¶ 71-72, 77.

[34] Apple SJ Opp. at 11.

[35] *Id.* at 12 n.8 (citing *Gelb*, 798 F.2d at 45); *see also, e.g.*, *Purdy v. Zeldes*, 337 F.3d 253, 258 n.6 (2d Cir. 2003) ("In this Circuit, each of two alternative, independent grounds for a prior holding is given effect for collateral estoppel purposes.").

[36] Apple SJ Opp. at 11, 12 n.8 (quoting *United States v. Apple Inc.*, 952 F. Supp. 2d 638, 694 (S.D.N.Y. 2013)) (Apple's emphasis omitted).

application of collateral estoppel."[37] Apple's apparent hope that the Second Circuit might affirm only the *per se* ruling (and ignore the rule of reason analysis) is no reason for delay.

Moreover, Plaintiffs have pointed out that the conspiracy's success in raising prices was a critical determination, undergirding the Court's rule of reason analysis and also its conclusion that there was a conspiracy to raise prices.[38] Thus, like its *Cobb* argument, Apple's *Gelb* argument could at most affect three findings: paragraphs 71-72 and 77. Because all of the supposed procompetitive effects Apple's experts have proposed are unreliable and irrelevant, in addition to being precluded,[39] Apple's arguments on these points are empty shells.

II. THERE IS NO GENUINE ISSUE OF MATERIAL FACT REGARDING WHETHER E-BOOK CONSUMERS SUFFERED ANTITRUST INJURY

Apple theorizes that a jury could find some small, unidentified segment of e-book consumers were not injured by the price-fixing conspiracy. But summary judgment is a test of proof – not theory.

As countless courts have held both before and after *Wal-Mart* and *Comcast*, "the law does not support [Apple's] argument that plaintiffs' claim fails if they do not show injuries and damages suffered by each and every class member."[40] Apple's argument to the contrary "rest[s] entirely on a selective quotation from [*Wal-Mart*] and must be rejected."[41] Apple further raises

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[37] *Flair Broad. Corp. v. Powers*, No. 89-cv2528, 1998 WL 247521, at *4 n.7 (S.D.N.Y. May 15, 1998), *clarified on denial of reconsideration*, 1999 WL 6363 (Jan. 7, 1999); *see also, e.g., United States v. Int'l Bhd. of Teamsters*, 905 F.2d 610, 621 (2d Cir. 1990) ("[T]he pendency of a[n] . . . appeal generally 'does not deprive a judgment of its preclusive effect.'"); *Murphy v. Int'l Bus. Mach. Corp.*, 810 F. Supp. 93, 94 n.1 (S.D.N.Y. 1992) ("An appeal is pending in those cases, however, that is 'irrelevant to a determination of whether a judgment is final' for purposes of preclusion.") (internal citation omitted).

[38] Class SJ Mem. at 16-17 & n. 82.

[39] *See generally* briefs in support of Class Plaintiffs' and State Plaintiffs' *Daubert* motions.

[40] *In re Urethane Antitrust Litig.*, No. 04-md-1616, 2013 WL 2097346, at *5-*6 (D. Kan. May 15, 2013); *see generally* Class Plaintiffs' Reply in Support of Motion for Class Certification ("Class Cert. Reply") at 4-5 nn.19-24, 8-9 & nn.39-40, Feb. 24, 2014, ECF No. 554.

[41] *In re Deepwater Horizon*, 739 F.3d 790, 810 (5th Cir. 2014).

the specter of "actual recovery by uninjured plaintiffs,"[42] but Dr. Noll has provided a methodology that estimates overcharges for every single purchase in the class period and can separate the 99.7% of purchases that occurred at supra-competitive prices from the 0.3% that did not. Thus, Dr. Noll's methodology calculates damages for only those consumers who paid an overcharge.

Class Plaintiffs have provided copious evidence that the conspiracy caused widespread injury to the class. This includes: (a) all e-books at issue were in the same product market;[43] (b) the conspiracy's central purpose was to raise prices;[44] (c) the Court found "across the board" price increases and "an industry-wide shift in price upward;"[45] (d) the fidelity of Dr. Noll's variables to actual pricing policies;[46] (e) the uniformity of Dr. Noll's findings of overcharge throughout Publisher Defendants' catalogs;[47] (f) Dr. Gilbert's findings of an upshift in distribution;[48] and (g) the presumption that "an illegal price-fixing scheme . . . impacts upon all purchasers of a price-fixed product in a conspiratorially affected market."[49] In combination, this

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[42] Apple SJ Opp. at 14 (emphasis omitted).

[43] *See* Reply Memorandum of Law in Support of Class Plaintiffs' Motion to Exclude the Expert Opinions Offered by Apple's Expert Joseph Kalt ("Class Kalt *Daubert* Reply") at 2-3, filed Under Seal, Feb. 4, 2014; Apple SUF Resp., ¶ 3 (admitting the relevant market).

[44] *See, e.g.*, *Apple*, 952 F. Supp. 2d at 670; Class Plaintiffs' Statement of Undisputed Facts ("SUF"), ¶¶ 12, 78, Jan. 31, 2014, ECF No. 521-1.

[45] *Apple*, 952 F. Supp. 2d at 683, 701; SUF, ¶¶ 46-47.

[46] *See, e.g.*, Class Plaintiffs' Memorandum of Law in Opposition to Defendant Apple's Motion to Exclude Opinions Offered by Dr. Roger Noll in Support of Motion for Class Certification ("Class Noll *Daubert* Opp.") at 15, Feb. 24, 2014, ECF No. 556; Berman Reply Decl., Ex. 44 at 59:9-63:15 (Nov. 1, 2013 Dep. Tr. of Roger Noll).

[47] *See* Reply Declaration of Roger G. Noll at 39, Feb. 24, 2014, ECF No. 555.

[48] *See id*. at 21-22; Declaration of Jeffrey B. Dubner in Further Support of Class Plaintiffs' Motions to Exclude the Expert Opinions Offered by Apple's Experts, Ex. A at 105-52; Ex. B, ¶¶ 154-58 & Figs. 5-6, filed Under Seal, Feb. 4, 2014.

[49] *In re Alcoholic Beverages Litig.*, 95 F.R.D. 321, 327 (E.D.N.Y. 1982) (internal quotation and citation omitted); *see generally* Class SJ Mem. at 14-16. Apple's argument that the Third Circuit has "rejected" or "disavowed" the *Bogosian* presumption (Apple SJ Opp. at 15, 23), is false. The very case that Apple cites permitted the lower court to "consider whether the reasoning in *Bogosian* is compatible with the record of this case." *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 326 (3d Cir. 2008). The Third Circuit's actual rule is the presumption may apply where plaintiffs provide more than "a bare allegation of a price-fixing conspiracy, in the absence of supporting evidence and analysis." *Id.*

is more than enough evidence to "entitle [Class Plaintiffs] to a directed verdict if not controverted at trial."[50] In turn, Apple must "submit affirmative evidence that raises a genuine issue of material fact for trial."[51]

Apple also wrongly relies upon *In re Industrial Diamonds Antitrust Litigation* for the proposition that antitrust impact cannot be shown "where, as here, a multitude of 'variables enter into setting prices in their industries.'"[52] This turns the holding of *Industrial Diamonds* on its head. The court actually said antitrust defendants "are free to argue, as many of them do, that their cases are exceptional because too many variables enter into setting prices."[53] But the court then held common proof of impact existed, despite defendant's contentions about "the wide variety of products sold by defendants" and "the large number of transactions during the class period."[54] "[C]ontentions of infinite diversity of product, marketing practices, and pricing have been made in numerous cases and rejected."[55] Notably, *Industrial Diamonds* distinguished between list prices and negotiated prices, finding common impact adequately shown in the former but not the latter;[56] here it is undisputed that consumer bought e-books at listed – not negotiated – prices.

Apple's expert has only strengthened the Class Plaintiffs' evidence (instead of rebutting it) by conceding the very type of upward shift in e-book prices that Plaintiffs assert.[57] Apple makes the unsupported claim that the e-book market does not have the type of price structure that

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[50] *Sorano v. Taggart*, 642 F. Supp. 2d 45, 50 (S.D.N.Y. 2009); *see also, e.g.*, *In re Bressman*, 327 F.3d 229, 237-38 (3d Cir. 2003) (explaining standard for granting summary judgment to party with the burden of proof).

[51] *Sorano*, 642 F. Supp. 2d at 50.

[52] Apple SJ Opp. at 15 (quoting *In re Indus. Diamonds Antitrust Litig.*, 167 F.R.D. 374, 382 (S.D.N.Y. 1996)).

[53] *Indus. Diamonds*, 167 F.R.D. at 382.

[54] *Id*. at 383.

[55] *In re Rubber Chems. Antitrust Litig.*, 232 F.R.D. 346, 352 (N.D. Cal. 2005).

[56] 167 F.R.D. at 382.

[57] Class SJ Mem. at 20; Apple SJ Opp. at 26 (conceding that Dr. Kalt "[a]cknowledg[ed] shifts in price distributions after the switch to agency").

courts have repeatedly held to show impact, because "[d]ifferent titles' prices occur at the upper end of the range at different times, with the same true for the lower end of the range."[58] But this statement does not undermine the existence of a price structure. Prices do not need to be frozen in a consistent ranking for injury to be shown; rather, as this Court has previously explained, "'it would be clear that all members of the class suffered some damage' '[i]f the price structure in the industry is such that . . . prices at the wholesale fluctuated within a range which, though different in different regions, was higher in all regions than the range which would have existed in all regions under competitive conditions.'"[59] This is what Class Plaintiffs' have shown, and Dr. Kalt ratifies. Apple claims also that injury cannot be shown because Plaintiffs must "present evidence showing that there were not offsetting benefits to any member of the class."[60] Apple's proposed "procompetitive offsets" are irrelevant as a matter of law, based on expert opinions that cannot survive rigorous analysis, and estopped by the findings of the liability case.[61] In short, Apple has not satisfied its burden to produce admissible evidence of any plausible, cognizable offsets.

Apple also claims that "Plaintiffs have not identified a single antitrust case in which classwide injury to consumer was established by collateral estoppel."[62] First, this is false. Plaintiffs cited just such a case in their opening brief.[63] And in a comparable case outside the

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[58] Apple SJ Opp. at 26.

[59] *Freeland v. AT&T Corp.*, 238 F.R.D. 130, 151 (quoting *Bogosian v. Gulf Air Corp.*, 561 F.2d 434, 455 (3rd Cir. 19770)); *see also, e.g., In re Domestic Air Transp. Antitrust Litig.*, 137 F.R.D. 677, 690 (N.D. Ga. 1991).

[60] Apple SJ Opp. at 16.

[61] *See generally* briefs in support of Class Plaintiffs' and State Plaintiffs' *Daubert* motions.

[62] Apple SJ Opp. at 16.

[63] *See Jack Faucett Assocs., Inc. v. Am. Tel. & Tel. Co.*, 566 F. Supp. 296, 301 (D.D.C. 1983), *rev'd on other grounds*, 744 F.2d 118 (D.C. Cir. 1984). While the D.C. Circuit vacated the finding that the defendants' conduct "proximately caused injury and damage to the class plaintiffs herein" (*id.* at 124), it did so not because the district court erred in concluding that collateral estoppel could show classwide injury but solely "because the [prior] trial court erroneously excluded crucial evidence and because [the prior court's] analysis is inconsistent with [a different court's] analysis of the same issue" (*id.* at 133).

antitrust context in the Southern District of New York, a court found that findings from a governmental action could be used to establish the elements of reliance and loss causation for a class of shareholders.[64] Second, it is unsurprisingly rare for a case featuring such overwhelming, preclusive evidence of consumer injury to proceed to trial. In any event, Class Plaintiffs do not rely solely on collateral estoppel. Rather, when considered together, this Court's factual findings and Dr. Noll's opinions are such that no reasonable jury could find Class Plaintiffs have failed to establish classwide injury by a preponderance of the evidence.

III. SUMMARY JUDGMENT OR PARTIAL SUMMARY JUDGMENT IS APPROPRIATE AS TO DAMAGES

Apple largely rehashes the dispute over the admissibility of the experts' opinions. Class Plaintiffs recognize (and fully embrace) that this portion of their motion will be dictated by the Court's *Daubert* rulings.

Apple contends that juries need not accept a witness's testimony even if the witness is unimpeached.[65] As a general statement, this is true – but hardly informative. This general proposition must be viewed in context and is particularly "directed at cases where credibility is at issue."[66] It does not mean, however, summary judgment cannot be granted when the record of admissible evidence is such that the non-movant's affirmative evidence demonstrates no genuine dispute of material fact exists. Such is the record here. Every expert who has opined on how much the conspiracy caused the Publisher Defendants' e-book prices to increase has landed within a few percentage points of Dr. Noll's 18.1% damages figure, including Apple's own experts – Mr. Orszag and Dr. Burtis.

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[64] *In re Ivan F. Boesky Secs. Litig.*, 848 F. Supp. 1119, 1124-26 (S.D.N.Y. 1994); *cf.* Apple SJ Opp. at 14; Defendant Apple Inc.'s Memorandum of Law in Opposition to Plaintiffs' Motion for Class Certification at 21, 23, Nov. 15, 2013, ECF No. 443 (all relying on *McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 231-32 (2d Cir. 2008), a case about classwide proof of reliance and loss causation).

[65] Apple SJ Opp. at 19.

[66] *Quintana-Ruiz v. Hyundai Motor Corp.*, 303 F.3d 62, 75 n.11 (1st Cir. 2002) (describing Second Circuit law).

Apple tries to run from Mr. Orszag's and Dr. Burtis's damning admissions. But Apple cannot deny that Mr. Orszag's 14.9% estimate is the result of all of the methodological changes he opines are necessary to Dr. Noll's model. Setting aside Mr. Orszag's counter-factual but-for world, and the procompetitive benefits this Court has rejected (as these opinions should clearly be excluded), Mr. Orszag estimates that e-book prices were 14.9% above what they would have been if Amazon's pre-conspiracy e-book pricing strategy had continued. Thus, Mr. Orszag's opinion (at best) is only admissible insofar as it "corrects" Dr. Noll's model to arrive at Orszag's 14.9% estimate. Similarly, Apple itself, elicited sworn testimony from Dr. Burtis that the Publisher Defendants' e-book prices were "about 17 percent" higher in the six months post-conspiracy than pre-conspiracy.[67]

Given Apple's admissions, it cannot claim there is a material issue of credibility relating to Dr. Noll's testimony sufficient so that a reasonable jury could find for Apple. Thus, there is no genuine dispute of material fact as to damages, or, at a minimum, as to the range of damages between 14.9% and 18.1%.

Next, Apple is incorrect that "Plaintiffs must prove actual, individual damages, rather than averages or estimates."[68] Once again, *Wal-Mart* and *Comcast* "did not bar the use of averages or aggregate damages measurements in class certification."[69] Rather, Plaintiffs must calculate damages in a way that "roughly reflect[s] the aggregate amount owed to class members"[70] and measures damages "on a classwide basis."[71] As explained previously, Dr. Noll's methods do exactly that and may be used to calculate damages for each individual e-book

[67] Berman Opening Decl., Ex. 1 at 2298:21-24.

[68] Apple SJ Opp. at 20.

[69] *In re Nexium (Esomeprazole) Antitrust Litig.*, 296 F.R.D. 47, 58 (D. Mass. 2013); *see generally* Class Cert. Reply at 4-5 nn.19-24, 8-9 & nn.39-40.

[70] *Seijas v. Rep. of Arg.*, 606 F.3d 53, 58-59 (2d Cir. 2010); *see generally* Class Cert Reply at 7-10.

[71] *Comcast v. Behrend*, _U.S. _, 133 S. Ct. 1426, 1433 (2013).

sold in the distribution phase, if the Court deems it necessary.[72] Apple's due process interests extend no further, because "a defendant has no interest in how the class members apportion and distribute a damage fund among themselves."[73]

Finally, it must be underscored that Apple's "individual" versus "average" damages argument is a pure red herring. Apple and its experts know very well that regression models, which are widely accepted as a method to demonstrate antitrust impact and measure damages, produce estimated co-efficients (which are converted to overcharge percentages) from the process of averaging multiple data points (transactions). Thus, by definition, one cannot compare any single consumer's actual price paid to a specific individual transaction price that same consumer would have paid in the constructed but-for world; instead estimated average overcharge percentages are applied to actual prices. Even Dr. Burtis admits this fundamental econometric point.[74]

IV. MOVING FOR SUMMARY JUDGMENT BEFORE CLASS CERTIFICATION IS GRANTED DOES NOT CREATE A ONE-WAY INTERVENTION PROBLEM

The one-way intervention doctrine limits courts from deciding cases on the merits before absent class members have had notice and the opportunity to opt out. This is only an issue when a court grants summary judgment before the opt-out period closes.[75] "[T]here is no reason why

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[72] *See generally* Corrected Declaration of Roger G. Noll at 27, Oct. 21, 2013, ECF No. 428; Class Noll *Daubert* Opp. at 25.

[73] *Allapatah Servs., Inc. v. Exxon Corp.*, 333 F.3d 1248, 1258 (11th Cir. 2003), *aff'd*, 545 U.S. 546 (2005) ; *see also, e.g.*, 3 Newberg on Class Actions § 10:17 (4th ed. 2002) ("When aggregate damages for the class are awarded, the litigation is ended from the defendant's standpoint except for payment of the judgment or appeal therefrom.").

[74] Michelle Burtis, *Correlation and Regression Analysis in Antitrust Class Certification*, 77 Antitrust L. J. 518 (Issue No. 2) (2011) ("a regression model that contains a variable (or variables) that measured the effect of the alleged conspiracy could be used to establish 'average' amounts of damage across groups of transactions (or groups of proposed class members)"); *id.* at 519 ("it is infeasible for a regression model that does not directly estimate the impact of the alleged conspiracy but rather estimates 'but for' prices to have coefficient estimates that are specific to particular transactions, or specific to particular putative class members").

[75] *See, e.g., London v. Wal-Mart Stores, Inc.*, 340 F.3d 1246, 1252 (11th Cir. 2003) ("'One-way intervention' occurs when the potential members of a class action are allowed to 'await . . . final judgment on the merits in order to determine whether participation [in the class] would be favorable to their interests.'") (internal citation omitted;

the motion cannot be fully briefed and ready for decision as soon as the opt-out received period expires."[76] This efficiently advances the litigation without giving absent class members any unfair insight into the Court's decision. Apple's one-way intervention argument is therefore premature and unnecessary.

Apple does not argue that a Rule 16(c) or 56(g) order clarifying the issues remaining for trial would pose a one-way intervention problem.[77] However, at least one court has held that a grant of partial summary judgment reaching the merits of the case can produce one-way intervention.[78] Thus deferring a ruling on any merits issues (beyond what is necessary to resolve the pending class certification and *Daubert* motions), including partial summary judgment motions, until the close of any opt-out period, will remove this from Apple's appeal plate.[79]

V. CONCLUSION

The Court should grant Class Plaintiffs' motion for summary judgment, or, in the alternative, enter an appropriate order under Rule 16(c) and/or 56(g).

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alterations in the original); *Becherer v. Merrill Lynch, Pierce, Fenner, & Smith, Inc.*, 193 F.3d 415, 430 (6th Cir. 1999) ("Once this opt-out date has passed, absent members are bound by the judgment.").

[76] *Jermyn v. Best Buy Stores, L.P.*, No. 08-cv-214, 2011 WL 280798, at *1 (S.D.N.Y. Jan. 18, 2011); *see also, e.g. Gonzales v. Arrow Fin. Servs. LLC*, 489 F. Supp. 2d 1140, 1156-57 (S.D. Cal. 2007), *aff'd*, 660 F.3d 1055 (9th Cir. 2011) (rejecting one-way intervention argument where summary judgment motion was filed before opt-out deadline and decided after).

[77] *Cf. Philip Morris Inc. v. Nat'l Asbestos Workers Med. Fund*, 214 F.3d 132, 135 (2d Cir. 2000) ("[W]e do not foreclose the possibility of a post-trial class certification in another case. . . ."); *Postow v. OBA Fed. Sav. & Loan Ass'n*, 627 F.2d 1370, 1383 (D.C. Cir. 1980) ("[T]here may be equitable reasons for allowing post-judgment certification in some cases.").

[78] *See Gomez v. Rossi Concrete Inc.*, No. 08-cv-1442, 2011 WL 666888, at *1 (S.D. Cal. Feb. 17, 2011).

[79] We hesitate to dignify Apple's recusal argument with response, even in a footnote. "[O]pinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible." *Liteky v. United States*, 510 U.S. 540, 555 (1994); *accord, e.g., S.E.C. v. Razmilovic*, 738 F.3d 14, 29 (2d Cir. 2013).

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CERTIFICATE OF SERVICE

I hereby certify that on March 7, 2014, I electronically filed the foregoing document using the CM/ECF system which will send notification of such filing to the e-mail addresses registered in the CM/ECF system, as denoted on the Electronic Mail Notice List, and I hereby certify that I have caused to be mailed a paper copy of the foregoing document via the United States Postal Service to the non-CM/ECF participants indicated on the Manual Notice List generated by the CM/ECF system.

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