13-3741(L)

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United States Court of Appeals
for the Second Circuit

UNITED STATES OF AMERICA, STATE OF TEXAS, STATE OF CONNECTICUT, STATE OF ALABAMA, STATE OF ALASKA, STATE OF ARIZONA, STATE OF ARKANSAS, STATE OF COLORADO, STATE OF DELAWARE, STATE OF IDAHO, STATE OF ILLINOIS, STATE OF INDIANA, STATE OF IOWA, STATE OF KANSAS, STATE OF LOUISIANA,

(*Additional caption on inside cover*)

On Appeal from the United States District Court
for the Southern District of New York
No. 12-cv-2826 (DLC)

APPELLANT APPLE INC.'S REPLY BRIEF

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(*Caption continued*)

STATE OF MARYLAND, COMMONWEALTH OF MASSACHUSETTS, STATE OF MICHIGAN, STATE OF MISSOURI, STATE OF NEBRASKA STATE OF NEW MEXICO, STATE OF NEW YORK, STATE OF NORTH DAKOTA, STATE OF OHIO, COMMONWEALTH OF PENNSYLVANIA, STATE OF SOUTH DAKOTA, STATE OF TENNESSEE, STATE OF UTAH, STATE OF VERMONT, COMMONWEALTH OF VIRGINIA, STATE OF WEST VIRGINIA, STATE OF WISCONSIN, COMMONWEALTH OF PUERTO RICO, AND DISTRICT OF COLUMBIA,

Plaintiffs - Appellees,

v.

APPLE, INC., SIMON & SCHUSTER, INC., VERLAGSGRUPPE GEORG VON HOLTZBRINCK GMBH, HOLTZBRINCK PUBLISHERS, LLC, DBA MACMILLAN, SIMON & SCHUSTER DIGITAL SALES, INC.,

Defendants - Appellants,

HACHETTE BOOK GROUP, INC., HARPERCOLLINS PUBLISHERS L.L.C., THE PENGUIN GROUP, A DIVISION OF PEARSON PLC, PENGUIN GROUP (USA), INC.,

Defendants.

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INTRODUCTION

Plaintiffs' theory is fundamentally at odds with the most basic principles of antitrust law. Neither plaintiffs nor the district court cite a single case that supports antitrust liability under the circumstances presented here. Plaintiffs ask the Court to condemn the negotiation of admittedly lawful agency agreements that allowed Apple to enter a nascent market dominated by a single company, open the iBooks Store, and empower thousands of new retail price-setters, leading to intensified competition, exponential growth in output, and significantly lower average prices. Plaintiffs offer Delphic pronouncements about "a larger understanding" to which Apple was a party (RedBr.61), but they cannot even describe when the "understanding" was formed or what was agreed to, which is particularly devastating here given that the court explicitly did *not* find that "Apple itself desired higher e-book prices than those offered at Amazon" (A2151; A2285 n.68).

Apple's conduct cannot be deemed "price-fixing," whether "garden variety" or otherwise (RedBr.51), on any legal theory. Affirming the district court's ruling would "attach[] antitrust liability to conduct that in reality is the competitive activity the Sherman Act seeks to protect." *Int'l Distrib. Ctrs., Inc. v. Walsh Trucking Co.*, 812 F.2d 786, 795 n.8 (2d Cir. 1987). This Court should reverse.

STANDARD OF REVIEW

This Court reviews the existence of a cognizable antitrust conspiracy (a legal question) *de novo*. *Tokarz v. LOT Polish Airlines*, 258 F. App'x 377, 378 (2d Cir. 2007) (summary order). Whether the *per se* rule or rule of reason applies is also a legal question reviewed *de novo*. *Arizona v. Maricopa Cnty. Med. Soc'y*, 457 U.S. 332, 337 n.3 (1982). Plaintiffs incorrectly argue that "findings[] … of conspiracy and a defendant's participation therein" are reviewed for clear error (RedBr.42), but all they cite is *Krieger v. Gold Bond Building Products*, 863 F.2d 1091, 1098 (2d Cir. 1988), an irrelevant employment case involving no conspiracy allegations.

ARGUMENT

I. Application of the *Per Se* Rule Was Reversible Error

Plaintiffs begin their argument by labeling Apple's conduct a "horizontal price-fixing conspiracy" to invoke the *per se* rule and argue against what they characterize as an effort to justify price-fixing. RedBr.46. But plaintiffs attack a straw man: Apple does not seek to excuse price-fixing or any conspiracy among the publisher defendants (who settled without admitting liability and denied any conspiracy at trial). Nor does Apple seek to rewrite the *per se* rule. This appeal presents the question whether the *per se* rule properly applies to *Apple's* conduct under controlling law.

The district court acknowledged that Apple's negotiation strategy and its agreements were perfectly lawful (A2266; RedBr.48), and "did not rest its

conspiracy finding solely or even primarily on specific contract terms or supplier-distributor discussions" (RedBr.68). The court nonetheless found that Apple joined a price-fixing conspiracy in its initial individual meetings with each of the publishers in mid-December 2009. A2278.

In its opening brief, Apple demonstrated that this finding by the district court was reversible error (BlueBr.17-20), and plaintiffs now affirmatively abandon it (RedBr.39, 55). But their alternative theory does not even identify the practice they are asking this Court to condemn automatically under the *per se* rule. *Cf. E.I. du Pont de Nemours & Co. v. FTC*, 729 F.2d 128, 139 (2d Cir. 1984) (rejecting a similar approach as "fickle[] and uncertain[]"). In fact, plaintiffs characterize Apple's allegedly offending conduct at least nine different ways. *Compare*, *e.g.*, RedBr.46 ("Apple orchestrated th[e] horizontal conspiracy"), *with* 47 ("facilitate and implement"), 51 ("Apple … participated in a horizontal price-fixing conspiracy"), 63 ("Apple knowingly orchestrated and facilitated a horizontal price-fixing agreement"), 65 (Apple "masterminded and directed" the conspiracy) (internal quotation marks omitted), 67 (Apple "persuade[d] the Publisher-Defendants to join the conspiracy"), 70 (Apple's "MFN strengthened th[e publishers'] incentive" to move Amazon to agency), 74 (publishers agreed to move Amazon to agency and to raise prices, and "Apple joined in that agreement"), *and* 81 ("Apple knew the publishers would demand that Amazon move to agency").

They never define what these terms signify, what conduct they embrace, or why that conduct violates the Sherman Act. Indeed, plaintiffs use the terms interchangeably, while at the same time arguing that they trigger different legal standards. *See*, *e.g.*, RedBr.49-50 (arguing that "joining" a conspiracy triggers *per se* treatment whereas "facilitating" triggers the rule of reason).

This incoherent attack on supposed collusion that plaintiffs cannot even describe consistently, and where Apple's actual agency agreements are admittedly lawful, does not support a finding of conspiracy. *See infra* pp. 25-38; *see also BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 573 n.19 (1996) ("'To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort'") (quoting *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978)). And it certainly cannot trigger application of the *per se* rule, because any agreements involving Apple here were necessarily vertical (*Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 730 & n.4 (1988)), and vertical agreements (even on price) are not *per se* unlawful (*Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 886-89 (2007)). Apple's vertical conduct, which introduced the agency model and resulted in an array of pro-competitive effects, is of a kind never before condemned under the antitrust laws, and therefore cannot trigger the *per se* rule. *Id*. at 886-87.

A. The Rule of Reason Governs Apple's Vertical Agreements

The Supreme Court held in *Leegin* that "vertical price restraints are to be judged by the rule of reason." 551 U.S. at 882. Vertical agreements are treated differently from horizontal agreements under the antitrust laws, because, among other reasons, they can "stimulate interbrand competition" (*Leegin*, 551 U.S. at 890)—and nowhere more so than when they lead, as they did here, to entry through an innovative platform into a market dominated by a single retailer. Vertical arrangements "ha[ve] the potential to give consumers more options" among different brands offering different values at different prices, and "can increase interbrand competition by facilitating market entry for new firms and brands." *Id*. at 890-91.

The effects of Apple's entry into the market sustain *Leegin*'s premise that vertical restraints can stimulate competition. Apple's negotiation of agency agreements with the publishers made possible the iBooks Store, one of many features on the iPad, which the district court called "a revolutionary device that has encouraged innovation and competition." A2290. Apple's entry and introduction of the agency model injected into the market a huge number of new price-setters, all independent of the publisher defendants, and all in competition with them and with one another. A1897¶¶40-42; SEA45; A1752-53¶¶45-46; A1789-90¶¶106-108; A2115.2295:17-21. This growth in retail price-setters coincided with a

staggering growth in output. A1893-94¶¶29-32; SEA44; A1532-33¶22; A1533-34¶¶24-26. The retail market diversified (A1894¶31; A1902¶56), and overall prices in the market went down (A1885-86¶4; A1890-91¶18-20; A1901¶56; A1176).

Plaintiffs disregard these efficiencies simply by labeling Apple's conduct "price-fixing" (RedBr.46), but the Supreme Court has eschewed "easy labels" as a means of antitrust analysis. *Broad. Music, Inc. v. CBS, Inc.*, 441 U.S. 1, 8 (1979); *see also Major League Baseball Props., Inc. v. Salvino, Inc.*, 542 F.3d 290, 320 (2d Cir. 2008). A "'departure from the rule-of-reason standard must be based upon demonstrable economic effect rather than ... upon formalistic line drawing.'" *Leegin*, 551 U.S. at 887 (quoting *Cont'l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 58-59 (1977)); *see also Bus. Elecs.*, 485 U.S. at 728 (rejecting "[s]uch formalism").

In any event, the Supreme Court's mandate in *Leegin* is clear: "To the extent a vertical agreement setting minimum resale prices is entered upon to facilitate [a horizontal] cartel, it … would need to be held unlawful *under the rule of reason*." 551 U.S. at 893 (emphasis added). Similarly in *State Oil Co. v. Khan*, 522 U.S. 3 (1997), at a time when resale price maintenance was still *per se* unlawful, the Supreme Court held that the *per se* rule may not be used to "recognize[] and punish[]" vertical "maximum pricing," even if used to "mask"

unlawful "minimum pricing." *Id*. at 17. The Third Circuit thus held, following *Leegin*, that "[t]he rule-of-reason analysis applies even when … the plaintiff alleges that the purpose of the vertical agreement between a manufacturer and its dealers is to support illegal horizontal agreements between multiple dealers." *Toledo Mack Sales & Serv., Inc. v. Mack Trucks, Inc.*, 530 F.3d 204, 225 (3d Cir. 2008).

Plaintiffs claim that *Leegin* "mean[t] that a party who enters into a vertical agreement that facilitates a horizontal conspiracy, but does not join the horizontal conspiracy itself, would be subject to liability under the rule of reason." RedBr.49. Again, plaintiffs are simply manipulating labels without drawing any substantive distinctions between "facilitating" and "joining" or identifying how they believe Apple "joined" as opposed to merely "facilitated" a conspiracy. Plaintiffs' misguided interpretation of *Leegin* would undermine the Supreme Court's objective of purging "flawed antitrust doctrine that serves the interests of lawyers—by creating legal distinctions that operate as traps for the unwary." *Leegin*, 551 U.S. at 904.

Plaintiffs contend that *Toledo Mack* sheds "no light on the *per se* illegality of horizontal price-fixing agreements" (RedBr.51 n.12), but they are incorrect. There, a group of horizontally related truck dealers "entered into 'gentlemen's agreements' not to compete with each other on price," and the vertically related

manufacturer agreed to facilitate the conspiracy by "'deny[ing] sales assistance to any dealer' who violated the horizontal agreements." *Toledo Mack*, 530 F.3d at 210. The Third Circuit held that the horizontal conspiracy among the dealers could be *per se* illegal, but that the vertical agreement between the manufacturer and the dealers must be adjudicated under the rule of reason. *Id*. at 225.

As the Third Circuit recognized—but plaintiffs ignore—*Leegin overruled* prior case law to the contrary. *Toledo Mack*, 530 F.3d at 225 n.15; *see also Leegin*, 551 U.S. at 888 (rejecting treatment of "vertical agreements a manufacturer makes with its distributors as analogous to a horizontal combination among competing distributors"); *cf. Halliburton Co. v. Erica P. John Fund, Inc.*, No. 13-317, slip op. 11 (U.S. June 23, 2014) (*Khan* overruled prior precedent due to "fundamental shift in economic theory"); *Gatt Commc'ns, Inc. v PMC Assocs., L.L.C.*, 711 F.3d 68, 73 n.5, 77 (2d Cir. 2013). Thus, in *Toledo Mack*, the court declined to follow its own prior decision in *Rossi v. Standard Roofing, Inc.*, 156 F.3d 452 (3d Cir. 1998), which had applied the *per se* rule in a similar context. *Id*. at 456, 464. *Rossi* and the Seventh Circuit cases plaintiffs rely on—*Denny's Marina, Inc. v. Renfro Prods., Inc.*, 8 F.3d 1217 (7th Cir. 1993), and *Toys "R" Us, Inc. v. FTC*, 221 F.3d 928 (7th Cir. 2000) ("*TRU*")—*have all necessarily been overruled* by *Leegin* to the extent they apply the *per se* rule to vertical agreements. Indeed, *Leegin* specifically cited *TRU* as an example of a *vertical* arrangement with

anticompetitive effects, which must be analyzed under the rule of reason. 551 U.S. at 893-94.

Plaintiffs rely heavily on *TRU*, but it is the exact opposite of this case: TRU was a "giant in the toy retailing industry" that sought to maintain existing market power by *excluding entry* from rivals who pursued a new business model. *TRU*, 221 F.3d at 930; *see In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 332 (3d Cir. 2010). In addition, the Seventh Circuit considered *TRU* "a modern equivalent of the old *Interstate Circuit* decision" (221 F.3d. at 935), but as plaintiffs do not dispute, *Interstate Circuit* did not even apply the *per se* rule (BlueBr.49-50).

None of the other decisions plaintiffs cite applies the *per se* rule to a vertical actor. Plaintiffs claim that *Insurance Brokerage* applied the *per se* rule to a vertically situated insurance broker who "orchestrated [a] bid-rigging conspiracy with competing insurers" (RedBr.47), but the broker had settled and dismissed its appeal (*Ins. Brokerage*, 618 F.3d at 311 n.4). Indeed, the Third Circuit relied on *Toledo Mack* and *Leegin*, and recognized the "general rule that vertical restraints are reviewed under the full-scale rule of reason." *Id.* at 315, 318-19 n.15. The defendant in *United States v. MMR Corp. (LA)*, 907 F.2d 489 (5th Cir. 1990), was not in a vertical relationship with the alleged co-conspirators; it was one of many bidders involved in a bid-rigging conspiracy. *Id.* at 498. Likewise, the appealing defendants in *United States v. All Star Industries*, 962 F.2d 465, 467-68 (5th Cir.

1992), were horizontal competitors; the vertical players charged in the conspiracy either reached plea agreements or did not appeal from their convictions. *Id.* at 468.

There is simply no way of reconciling the district court's decision with either the Supreme Court's holdings in *Leegin* and *Khan* or the Third Circuit's holding in *Toledo Mack*. Plaintiffs have no competing authority.

B. Apple's Pro-Competitive Market Entry Through Lawful Agency Agreements Cannot Be Deemed *Per Se* Unlawful

Applying the *per se* rule here to conduct with indisputably pro-competitive effects, and which has never before been condemned under the antitrust laws, would directly conflict with the Supreme Court's guidance on the limited circumstances warranting *per se* liability.

1. Resort to the *per se* rule "is confined to restraints … 'that would always or almost always tend to restrict competition and decrease output.'" *Leegin*, 551 U.S. at 886 (quoting *Bus. Elecs.*, 485 U.S. at 723) (internal quotation marks omitted). The *per se* rule therefore cannot apply here, where plaintiffs concede that the negotiation tactics, agency agreements, price caps, and MFNs used to launch the iBooks Store are lawful; that their "proper use" should not be discouraged; and that the launch, which was an "expansion of the market," "increase[d] the number of options available to consumers for reading and buying ebooks." RedBr.48, 52.

Plaintiffs disregard these considerable benefits as "irrelevant" (RedBr.50), because having labeled Apple's conduct unlawful "horizontal price-fixing," they claim that Apple's conduct can have no cognizable pro-competitive effects. Such relabeling of Apple's conduct is improper, as described above. Apple is not a competitor of any publisher and therefore could not engage in "horizontal price-fixing." *Texaco Inc. v. Dagher*, 547 U.S. 1, 5 (2006) ("horizontal price-fixing agreements" are "agreements between two or more competitors").

As a result, plaintiffs' claims that Apple "fixed" or "raise[d]" prices" and took "control of retail pricing" cannot alone trigger the *per se* rule. RedBr.4, 38. These are simply pejorative labels that plaintiffs attach to Apple's indisputably lawful agency agreements, and they cannot support application of the *per se* rule. Allowing plaintiffs to carry the day on the basis of such *ipse dixit* would produce "the wrong result in the present case" and "introduce[] needless confusion into antitrust terminology." *Bus. Elecs.*, 485 U.S. at 729-30.

The only provision in the agency agreements that specifically addressed "price" was a schedule of price *caps*, which *limited* the publishers' ability to raise prices. The Supreme Court specifically held in *Khan* that price caps "should be evaluated under the rule of reason" (522 U.S. at 22), a decision plaintiffs ignore.

Agency agreements by definition transfer price competition from retailers to manufacturers (BlueBr.39-40), but this is not "price-fixing" (*Morrison v. Murray*

Biscuit Co., 797 F.2d 1430, 1437 (7th Cir. 1986)), and it does not "eliminate competition." Here, that transfer of pricing authority brought enormous pro-competitive benefits as it transformed the market from a single dominant price-setter (Amazon) to thousands of independent price-setters (publishers), only five of which were alleged to have conspired. Publishers continued to compete with each other and Amazon, which continued to act as a price-setting retailer.

The district court explicitly did not find that Apple desired higher prices. A2285 n.68; *see* A2093.2049:25-A2094.2050:8; A1869¶26. While Apple anticipated that the publishers would price some e-books at the price caps (A2071.1788:18-21), it expected them to "play around with the pricing and compete with each other" (A2071.1789:8-10). And they did—Macmillan, for example, priced nearly 25% of its new releases below the caps. A1610¶141 (Table 4).

The slight and short-lived increase in average market price after Apple's entry (RedBr.52) cannot condemn Apple's conduct. The Supreme Court has cautioned that "all vertical restraints … have the potential to allow dealers to increase 'prices' and can be characterized as intended to achieve just that." *Bus. Elecs.*, 485 U.S. at 728. But "prices can be increased in the course of promoting pro-competitive effects," and a singular focus on immediate effects can obscure the longer term impact of increased "competition, from which lower prices can later

result." *Leegin*, 551 U.S. at 895-96; *see also Brantley v. NBC Universal, Inc.*, 675 F.3d 1192, 1202 (9th Cir. 2012) ("higher consumer prices can result from pro-competitive conduct").

Plaintiffs ignore the actual market dynamics that resulted in dramatically increased competition and decreased overall prices. Before Apple's entry, e-book prices averaged over $8 (A2763; A1176), and were rising (A2016.1091:8-19; A2763; A1176; A2044.1513:2-13). Prices dropped significantly in December 2009 with the launch of the Barnes & Noble Nook (A1176; A2763), and even further in January 2010, the month Apple cemented its entry—well below $8 (A2763). "[U]nder basic economic principles, increased competition—as [Amazon] encountered in [2010] with the entrance of [Apple]—generally lowers price." *Somers v. Apple, Inc.*, 729 F.3d 953, 964 (9th Cir. 2013).

Apple's entry led to a fundamental shift from a market dominated by a single retail price-setter to a market with thousands of independent price-setters in competition with one another. A1897¶¶40-42; SEA45; A1752-53¶¶45-46; A1789-90¶¶106-108; A2115.2295:17-21. There is no dispute that the five publisher defendants and Random House set prices higher than Amazon had previously on many of their new releases. A1901¶55. This elevated average market price by seven cents over its 2009 high water mark (A2763; A1176), but average prices

then decreased below $8 by December 2010, and below $7 by the end of 2011 (A2763). Over this entire period, output grew at a galloping rate. A1893-94¶30.

This dramatically *increased* competition in the trade e-books market is precisely what the antitrust laws are designed to encourage. *Leegin*, 551 U.S. at 895-96. Resort to the *per se* rule "is confined to restraints … 'that would always or almost always tend to restrict competition and decrease output.'" *Id.* at 886 (quoting *Bus. Elecs.*, 485 U.S. at 723) (internal quotation marks omitted). It therefore has no applicability here.

Plaintiffs speculate that competition emerged after Apple's entry "simply because [Apple] contemporaneously engage[d] in *other* conduct that has pro-competitive effects" that were somehow "independent" of the agreements. RedBr.52-53. But that claim (also made by the district court) is premised on legal error. Having charged Apple with conspiring "to change the business model for the distribution of e-books" (A2264), the district court was not free to ignore the pro-competitive effects of Apple's market-wide entry through that business model (*In re Sulfuric Acid Antitrust Litig.*, 703 F.3d 1004, 1012 (7th Cir. 2012) ("The plaintiffs' claim that the price would have been even lower without the [challenged price-raising] agreements is doubtful, as we have said, because without the agreements the [defendants] might not have entered the U.S. market"); *see also infra* pp. 17-25).

2. Plaintiffs do not cite a *single case* in which a court has condemned remotely analogous conduct. This failure itself requires reversal.

The *per se* rule is appropriate only where, unlike here, "experience has convinced the judiciary that a particular type of business practice has no (or trivial) redeeming benefits ever." *Sulfuric Acid*, 703 F.3d at 1011-12; *see also Copy-Data Sys., Inc. v. Toshiba Am., Inc.*, 663 F.2d 405, 408-09 (2d Cir. 1981). To "subject a novel way of doing business (or an old way in a new and previously unexamined context ...) to *per se* treatment," like the district court did here, is "a bad idea" and reversible error. *Sulfuric Acid*, 703 F.3d at 1011.

The Supreme Court has "repeatedly emphasized the importance of *clear rules* in antitrust law." *Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc.*, 555 U.S. 438, 452 (2009) (emphasis added). As a result, an antitrust enforcer "owes a duty to define the conditions under which conduct claimed to facilitate price uniformity would be unfair so that businesses will have an inkling as to what they can lawfully do." *E.I. du Pont*, 729 F.2d at 139. Condemning the supposed "use" of admittedly lawful agreements to enter into an undefined conspiracy at an unspecified date violates due process as it does not inform "regulated parties … what is required of them so they may act accordingly," and it does not provide the "precision and guidance … necessary so that those enforcing the law do not act in an arbitrary or

discriminatory way." *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012).

In *E.I. du Pont*, the government sought to condemn "[c]ertain otherwise-legitimate practices … only when used cumulatively with other practices," but this Court rejected that approach as "fickle[] and uncertain[]." 729 F.2d at 139. Here, the district court condemned Apple under the *per se* rule while acknowledging that "entirely lawful contracts may include an MFN, price caps, or pricing tiers." A2266. As in *E.I. du Pont*, the court's ruling "creates doubt as to the types of otherwise legitimate conduct that are lawful and those that are not," and "represent[s] uncertain guesswork rather than [a] workable rule[] of law." 729 F.2d at 139.

* * *

Never before has a court found a company liable under the antitrust laws for entry into a market dominated by a single company, through admittedly vertical and lawful distribution agreements, to launch an enterprise that the court admitted benefitted consumers and competition, where the company did not desire higher prices and the agreements did not specify prices to be charged, and which resulted in more competition, lower market prices, and increased market output. Plaintiffs do not cite a single analogous case, and there is none. The district court's decision finding Apple *per se* liable under the antitrust laws was therefore reversible error.

II. The District Court's Rule-of-Reason Analysis Was Reversible Error

The district court found that "having the creativity and commitment of Apple invested in the enhancement of a product like the iBookstore is extremely beneficial to consumers and competition" (A2290 n.69), and plaintiffs acknowledge that "the launch of the iBookstore … increase[d] the number of options available to consumers for reading and buying ebooks" (RedBr.52). It is undisputed that the average market price for trade e-books went down and that output increased exponentially. A870-A871; A1176; A2763; A1885¶4; A1887¶8; A1890-91¶¶18-19; A1893-94¶¶29-30; A1894¶32; A1897¶42; A1532-33¶22; A1533-34¶¶24-26.

Yet plaintiffs, like the district court, maintain that all of this is irrelevant because (1) the iBooks Store's plainly pro-competitive effects were somehow "independent" of the iBooks Store agency agreements (RedBr.34-35, 53, 90-92) and (2) because prices for a segment of the relevant market increased (RedBr.84-87). In addition to proceeding from these legally erroneous premises, the district court relieved plaintiffs of their burden to show actual anticompetitive effects in the relevant market (BlueBr.54-59) and "*presumed*" Apple's conduct to violate the rule of reason (*In re Elec. Books Antitrust Litig.*, 859 F. Supp. 2d 671, 693 (S.D.N.Y. 2012)). Yet plaintiffs implausibly deem the court's rule-of-reason

analysis to be "careful and complete" as demanded by *Capital Imaging Associates, P.C. v. Mohawk Valley Medical Associates, Inc.*, 996 F.2d 537, 593 (2d Cir. 1993).

Plaintiffs are wrong as a matter of law on all counts.

1. Plaintiffs cite no authority for the proposition that the pro-competitive effects flowing from the iBooks Store are somehow "independent" of the agency agreements that allowed Apple to launch it and enter the market in the first place. They cite *Insurance Brokerage* in passing (RedBr.90), but that case did not undertake a rule-of-reason analysis. Given that the supposed conspiracy the district court found was to "change the business model" (A2264), it would be nonsensical to ignore the pro-competitive effects of that new business model (*see* A2148).

Far from being "independent" of the iBooks Store, the agency agreements were integral to its introduction and structure. Indeed, the purpose of the agreements was to launch the iBooks Store. A2165-67; A2172-73. In connection with the iBooks Store and its introduction of the agency model, thousands of publishers signed agency agreements with Apple (A1752-53¶45; A1789-90¶¶106-108), and the introduction of those new price-setters contributed to the exponential growth in output and the decrease in market price (A1890-91¶¶18-20; A1893-94¶¶29-31; A1896-97¶¶39-43; A1752-53¶¶45-46; A1789-90¶¶106-108;

A2115.2294-2296). It is hard to envision any closer linkage between an agreement and the effects flowing from it.

Moreover, contrary to plaintiffs' claim, the unrebutted testimony was that Apple could not have launched the iBooks Store absent the agency agreements, and the district court did not find otherwise. A2072.1800:8-1801:15; A2039.1481:2-8. Plaintiffs hypothesize that Apple could have entered the market on wholesale (RedBr.91), but the evidence was undisputed that Apple could not have done so without losing money (A1768-69¶41; A1742-43¶19), which it was unwilling to do (A1759¶13; A1742-43¶19; A2167). In addition, Apple did not believe the publishers would accept a wholesale model without "windowing" (temporarily withholding new releases). A2029.1247:12-A2030.1248:21; A2172. And Apple would never allow windowing (A2030.1248:18-21), because it "alienated customers and led to piracy" (A2168), "would interfere with the growth of the digital market[,] and was inconsistent with [Apple's] business goals and practices" (A2172). There is no evidence of a plausible alternative to agency agreements that would have allowed Apple to enter the market and thus bring about all the pro-competitive effects associated with that increased competition. Indeed, plaintiffs' theory at trial was that if Apple was unwilling to lose money on the iBooks Store, it should have "stay[ed] out of the market." A2131.2566:25-A2132.2567:6.

2. The district court also erred in limiting its rule-of-reason analysis to only a subset of the relevant market. Though acknowledging that "trade e-books" was the relevant market (A2255 n.60), the court limited its focus (with one telling exception) to the publisher defendants' prices and output (A2256)—thereby confining its analysis to a fraction (between 30% and 50%) of the relevant market (A1177).

The one exception to this blinkered view was the court's observation that Apple "did little to counter" the evidence of an "across-the-board price increase" by "Random House when it moved to agency." A2256. But this actually highlights the unfairly selective manner in which the court applied the rule of reason, attributing to Apple the decision of conceded non-conspirator Random House to raise prices higher than those of the publisher defendants (A2046.1522; A1176) but willfully ignoring the decisions of the independent publishers on agency with Apple—who accounted for between 30 and 60% of the relevant market (A1177)—to charge prices *below* those charged by the defendant publishers (A1176).

This was wrong because "the antitrust laws protect competition *as a whole*." *Geneva Pharm. Tech. Corp. v. Barr Labs., Inc.*, 386 F.3d 485, 507 (2d Cir. 2004) (emphasis added). Accordingly, courts must look at the actual effects of the

challenged conduct "on competition as a whole in the relevant market." *Capital Imaging*, 996 F.2d at 543; *see* BlueBr.54, 57 (collecting cases).

Plaintiffs claim that these courts were "simply caution[ing] that proof of a plaintiff's *own* injury, *standing alone*, does not establish the requisite harm to competition." RedBr.87 (emphases added). But while it is obviously true that a competitor may not satisfy its rule-of-reason burden by merely alleging harm to *itself*, that does not mean that considering only a circumscribed market segment of the plaintiffs' choosing is sufficient, particularly when all parties have accepted a definition of the relevant market (proposed by plaintiffs) encompassing a much broader array of reasonably interchangeable (substitute) e-books. A2053; A2114. The rule of reason "[i]nsist[s] on proof of harm to the *whole market*" (*Capital Imaging*, 996 F.2d at 543 (emphasis added))—not harm only to the plaintiff, and not harm only to a market subset. The Supreme Court, this Court, and several other Circuits have repeatedly recognized this. *See*, *e.g.*, *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 31 (1984); *K.M.B. Warehouse Distribs., Inc. v. KMB/CT, Inc.*, 61 F.3d 123, 127-28 (2d Cir. 1995); BlueBr.54 (citing cases). Plaintiffs do not cite a single case in which a court limited its rule-of-reason analysis to only a subset of the relevant market.

In the trade e-books market *as a whole*, it is undisputed that average prices decreased, overall output increased, more retailers began selling e-books, more e-

book titles became available, and more price-setters entered the market. BlueBr.8-10, 51-53, 56-58. While Apple's expert, Dr. Burtis, acknowledged that the overall average price of e-books went up (RedBr.87), she made clear—and plaintiffs' expert agreed (A2044-45)—that the increase was only for a very short period of time after the adoption of the agency agreements (A2106.2236:5-11; A2106.2237:1-2238:5). As output increased, average price declined. A1890-A1896¶¶18-38; A1901-02¶56. She explained why it was critical to look at a longer time frame to accurately capture all of the effects flowing from Apple's entry and the agency model. A1890¶17; *see also Leegin*, 551 U.S. at 895 ("the antitrust laws are designed primarily to protect interbrand competition, from which lower prices can later result"); Justin P. Johnson, *The Agency and Wholesale Models in Electronic Content Markets* 1 (March 15, 2013) (unpublished, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2126808) ("observation of [e-book] price increases following the adoption of the agency model is not sufficient to conclude that consumers have been injured"; "a complete assessment of consumer welfare must take a longer-term perspective" since "future prices are lower under the agency model" because "it ensures robust competition exists directly between suppliers").

Plaintiffs suggest that e-book prices from other publishers "remained flat" or "roughly unchanged." RedBr.40, 87. But this ignores the flood of new titles that

entered the market after Apple opened the iBooks Store, which indisputably caused an overall price decrease. The 70-30 revenue split Apple introduced, and which Amazon mimicked,[1] promoted entry and growth by independent and self-publishers. A1897¶¶40-43; SEA45. Plaintiffs point to no evidence disputing that "the average retail price of eBooks in the alleged relevant market was lower during the post-agency period than it was in the pre-agency period" (A1885¶4 (emphasis omitted)), whether examining prices one year after the switch to agency, the time period examined by their expert (A1891¶19), or during the more relevant two-year period (A1890-91¶18). Indeed, plaintiffs' own expert prepared a chart, reprinted in the district court's opinion, that depicts a decrease in the average price of e-books from nonparty publishers. A2230.

Plaintiffs concede that output "is a commonly used proxy for efficiency" (RedBr.89 n.13), but do no more than point to a reduction in sales growth for the *publisher defendants*' e-books (RedBr.84-85). Yet it is undisputed that the market *as a whole* grew rapidly after agency, and the relevant antitrust question is whether *market* output would have been even higher if Apple had not entered. *Brooke Grp.*

[1] Plaintiffs are incorrect in claiming that Amazon did not know about Apple's proposed 70-30 revenue split when it announced its new royalty rates. RedBr.90-91. In early December 2009, Amazon believed Apple was planning to offer publishers a 70% royalty while retaining a 30% commission. A309; A302. Amazon announced identical rates more than a month later. A534-A537.

Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 233 (1993) ("the record evidence does not permit a reasonable inference that output would have been greater without Brown & Williamson's entry into the generic segment"). Plaintiffs' own experts conceded they could show no statistically significant drop in the market trend of e-book growth (A2040.1488:8-14) or any reduction of market growth attributable to agency (A2047.1563:6-9).

Plaintiffs also do not dispute that Apple's entry brought an end to a market dominated by Amazon, which set virtually every retail price and "s[old] nearly 90% of all e-books." A2148. While plaintiffs declare that retailers "were … free to compete with each other on retail price" (RedBr.7), it is undisputed that Amazon was effectively the only retailer, and was driving Barnes & Noble out of the market (A1818¶¶15-17; A2100.2172:7-9; A2100.2174:5-A2101.2175:13; A2101.2178.18-A2102.2179:7; *see* BlueBr.52). After Apple's agency agreements took effect, Apple and Barnes & Noble together accounted for between 30% and 40% of e-book sales. SEA44. As the *amici* economists explain, Apple's entry "dramatically *increased* competition by diminishing Amazon's power as a retail monopolist." EconomistsBr.2, 19-20.

As this Court has recognized, where a market is dominated by a small number of sellers, "*entry* of a large firm as a new competitor *necessarily has significant pro-competitive effects*," including "'shak[ing] things up' or

engendering 'competitive motion.'" *BOC Int'l, Ltd. v. FTC*, 557 F.2d 24, 27 (2d Cir. 1977) (citations omitted) (emphasis added); *see also Sulfuric Acid*, 703 F.3d at 1012; *Somers*, 729 F.3d at 964. That is exactly what happened here.[2]

III. Apple Did Not Conspire to Fix Prices Under Any Cognizable Legal Theory

Plaintiffs must prove that Apple "had an *intent to adhere to an agreement* that was designed to achieve an unlawful objective." *Geneva Pharm. Tech.*, 386 F.3d at 507 (emphasis added). The "essence of any violation of § 1 is *the illegal agreement itself*—rather than the overt acts performed in furtherance of it." *Summit Health, Ltd. v. Pinhas*, 500 U.S. 322, 330 (1991) (emphasis added); *see also Venture Tech., Inc. v. Nat'l Fuel Gas Co.*, 685 F.2d 41, 47 (2d Cir. 1982) (antitrust plaintiff "must show more than the existence of a *climate* in which such a conspiracy *may* have been formed") (emphases added). As a result, in order to give rise to section 1 liability, "parallel conduct [must] flow[] from a *preceding agreement* rather than from [the defendant's] own business priorities." *Mayor &*

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[2] In the wake of the injunction restricting Apple's lawful activities, Amazon reportedly continues to exert market power over the publishers by refusing to sell books if they do not agree to its terms. *See*, *e.g.*, David Streitfeld & Melissa Eddy, *As Publishers Fight Amazon, Books Vanish*, N.Y. Times, May 24, 2014, at A1; Jeffrey A. Trachtenberg, *Amazon-Hachette Dispute Heats Up*, Wall St. J., May 23, 2014, http://online.wsj.com/news/articles/SB10001424052702303749904579580052135901452.

City Council of Balt. v. Citigroup, Inc., 709 F.3d 129, 138 (2d Cir. 2013) (emphasis added); *see also Oreck Corp. v. Whirlpool Corp.*, 639 F.2d 75, 79 (2d Cir. 1980).

Apple knew that the publishers were unhappy with Amazon and its $9.99 loss-leader prices. It knew that the publishers thought Amazon's prices were too low and threatened the publishing industry. It knew that the publishers wanted higher prices for new releases. And it knew that they tended to act in parallel fashion. It knew all of this from reports in the newspapers. Based on this knowledge, Apple offered the publishers a business model—agency—that it believed they would find more attractive than the wholesale model offered by Amazon and that was in Apple's own independent business interests irrespective of any conspiracy among or with the publishers and regardless of what arrangements the publishers reached with Amazon or other retailers. The terms of the agency agreements Apple entered into with the publishers are lawful. All of these facts are undisputed and compel reversal of the district court's conspiracy finding.

That Apple used the leverage created by market dynamics and the publishers' well-publicized antipathy toward Amazon to enter the market is quintessential competition, not conspiracy. Indeed, Barnes & Noble was independently pursuing the same strategy during the same period in order to remain in the market. A2168; A2271; A1725-26¶16; A1818¶15; A2099.2141:8-

2142:17. This "simply reflect[s] the working of a free market in which [Apple] ... acquired relevant information." *Acquaire v. Canada Dry Bottling Co. of N.Y.*, 24 F.3d 401, 411 (2d Cir. 1994) (citation and internal quotation marks omitted).

A. Apple Did Not Participate in Any Way in a Conspiracy with the Publishers

The district court determined that Apple formed agreements with the publishers constituting a price-fixing conspiracy in mid-December 2009. A2278. That finding necessarily tainted every inference drawn by the court about every subsequent event and infected every credibility determination. A2279 (deeming "not credible" Apple's and the publisher CEOs' denial of conspiracy at initial New York meetings). Apple demonstrated in its opening brief that the court's finding is unsustainable as a matter of law (BlueBr.16-46), and plaintiffs do not defend it.

Instead, plaintiffs run from the district court's finding, claiming that the "court did not suggest … that, as of that [mid-December] date, the Publisher Defendants had formed (or even conceived of) the specific price-fixing conspiracy … that was ultimately alleged and proved in this case." RedBr.55. But this completely misrepresents the district court's decision. The court acknowledged that "Apple's entry into the conspiracy *had to start somewhere*, and the evidence is that it started at those initial meetings in New York City with the Publishers," which occurred in mid-December 2009. A2278 (emphasis added); *see also* A2249; A2271. The subsequent negotiations with the publishers, the court found,

amounted simply to haggling over the "details of the conspiracy with the cartel members." A2273 (citation and internal quotation marks omitted).

The alternative theories plaintiffs present in their brief impermissibly seek to rewrite the factual basis for the judgment below and do so incoherently. They acknowledge that "[t]he district court did not rest its conspiracy finding solely or even primarily on specific contract terms or supplier-distributor discussions" (RedBr.68), but then describe Apple's supposed role in the conspiracy multiple different ways, oscillating between Apple "participat[ing] in," "join[ing]," "orchestrat[ing]," "facilitat[ing]," and "'mastermind[ing] and direct[ing]'" the conspiracy. RedBr.46, 51, 63, 65, 74 (citation omitted); *see supra* pp. 3-4. None of these theories has any basis in the record, and none points to any actual *agreement* as is necessary for a cognizable finding of a conspiracy. *United States v. Borelli*, 336 F.2d 376, 385 (2d Cir. 1964) ("If, in Judge Learned Hand's well-known phrase, in order for a man to be held for joining others in a conspiracy, he 'must in some sense promote their venture himself, make it his own,' ... it becomes essential to determine just what he is promoting and making 'his own'") (citation omitted).

While Apple on January 4, 2010, "*propos[ed]* a principal-agency model" and stated that one of the features of this relationship would be that "all resellers of new titles need to be in agency model" (A364 (emphasis added); *see* RedBr.68-

69), it almost immediately determined that such a provision was unworkable and unnecessary (A1775-76¶64; *see* BlueBr.6). Thus, without having any further discussions with any of the publishers (A2181-82), Apple chose not to include such a provision in the draft contracts it sent to the publishers, let alone the final agency contracts the publishers actually signed (A2183; A438-A453; A1980.352:12-13; A1995.503:23-A1996.504:1; A2010.983:13-20; A2018.1125:23-25; A2038.1454:14-16). Apple repeatedly told the publishers that they could keep other resellers on a wholesale model if they wished, and in fact Penguin did so for the first several months. BlueBr.45-46 (citing evidence); A2227.

Plaintiffs ignore all this undisputed evidence, but it destroys their claim that Apple never "retreated from the substance of th[e] demand" to move all resellers to agency. RedBr.69. A pre-contractual suggestion that is never agreed to and is rejected before the actual contracts are drafted and signed cannot possibly be the basis for finding an "agreement"—*i.e.*, a "meeting of the minds"—that amounts to a *per se* section 1 violation. *See Brookhaven Hous. Coal. v. Solomon*, 583 F.2d 584, 592 (2d Cir. 1978) ("deliberate excision" of a contract term "is inconsistent with a belief" that the parties agreed to that term).

Plaintiffs argue in the alternative that "[b]y accepting the MFN in [the agency] agreement, each Publisher-Defendant that signed it *effectively* committed

itself to move Amazon to agency as well." RedBr.76 (emphasis added). But the whole point of the MFN from Apple's independent business perspective was that it made Apple indifferent to the nature of Amazon's agreements with the publishers—if Amazon stayed on wholesale and sold books at $9.99, Apple could profitably sell those same books at those same prices. A2181; A1776¶65. The fact that Apple knew the publishers might try to use the new agency agreements with Apple as bargaining chips with Amazon, and that the publishers tended to act in parallel fashion, cannot convert the lawful agency agreements into an unlawful section 1 conspiracy. *See*, *e.g.*, *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 554 (2007) ("interdependent parallelism does not establish … conspiracy") (citation and internal quotation marks omitted); *Brooke Grp.*, 509 U.S. at 227 ("conscious parallelism," is "not in itself unlawful").

Nor does plaintiffs' MFN theory have any basis in economics, as Apple's expert, Dr. Benjamin Klein, testified at trial, and which plaintiffs do not attempt to rebut. BlueBr.43-45; *see also* EconomistsBr.16 ("it was Apple's entry, rather than the MFN provisions or price caps, that explained subsequent industry changes" such as Amazon's move to agency). Plaintiffs' only response is that Dr. Klein supposedly "failed to account for the preexisting powerful, albeit insufficient, *incentive* the Publisher-Defendants had to move retailers to agency," which "[t]he MFN *strengthened*." RedBr.69-70 (emphases added). Dr. Klein, however,

actually quantified the *additional* incentive attributable to the MFN, and concluded that it was miniscule (roughly 1% of a publisher's revenues). A1800¶22; *see also* EconomistsBr.16-17.

Moreover, no court has held that "strengthen[ing]" a party's existing incentives is equivalent to "forcing" a party to act, let alone that such increased incentives amount to "a conscious commitment to a common scheme" to restrain trade. *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 768 (1984). Such a theory hopelessly blurs the "the basic distinction between concerted and independent action." *Id*. at 761. This Court should reject it.

B. The District Court's Unhesitating Inference of a Conspiracy Was Legal Error

Plaintiffs do not seriously maintain that there is direct evidence of a conspiracy by Apple. RedBr.76 (claiming only that there is "direct evidence of the actual *communications* among the parties") (emphasis added). Plaintiffs did not present any evidence that "explicitly refer[s] to an understanding between the alleged conspirators." *Viazis v. Am. Ass'n of Orthodontists*, 314 F.3d 758, 762 (5th Cir. 2002) (citation and internal quotation marks omitted); *see also In re Baby Food Antitrust Litig.*, 166 F.3d 112, 118 (3d Cir. 1999) ("direct evidence in a Section 1 conspiracy must be evidence that is *explicit* and *requires no inferences* to establish the proposition or conclusion being asserted") (emphasis added). And the evidence from which conspiracy was *inferred* was fundamentally ambiguous, and

cannot meet the "stringent" standard of proof the Sherman Act imposes. *Leegin*, 551 U.S. at 903; *see Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Monsanto*, 465 U.S. at 768.

1. Apple demonstrated that all of its conduct was consistent with its independent business interests. BlueBr.31-34. Neither plaintiffs nor the district court dispute this. A2264; RedBr.69-73.

As a result, Apple's conduct was necessarily ambiguous evidence of a conspiracy, and the district court's conclusion that Apple's independent business interests did not "create[] any ambiguity in the evidentiary record that should require hesitation before finding Apple liable" (A2268) is gravely wrong as a matter of law (BlueBr.31-32; *H.L. Hayden Co. of N.Y. v. Siemens Med. Sys., Inc.*, 879 F.2d 1005, 1015-16 (2d Cir. 1989)). Plaintiffs do not even respond to this point.

And because *all* the evidence supposedly supporting a conspiracy was highly ambiguous (*see infra* pp. 34-38), plaintiffs failed as a matter of law to meet their burden of presenting evidence that "'tends to exclude the possibility of independent action'" (*H.L. Hayden*, 879 F.2d at 1014 (quoting *Monsanto*, 465 U.S. at 768); *see* BlueBr.29-30). This Court should therefore reverse because "taken as a whole, the evidence point[s] with at least as much force toward unilateral action by the defendants as toward conspiracy, and [the district court] would have to

engage in impermissible speculation to reach the latter conclusion." *H.L. Hayden*, 879 F.2d at 1014 (alterations and internal quotation marks omitted).

To deal with this problem, plaintiffs, like the district court, rely on *United States v. General Motors Corp.*, 384 U.S. 127, 142 (1966), in arguing that "in determining whether an unlawful conspiracy existed, it is of '*no consequence*' that each of the parties acted in its own 'lawful interest'" (RedBr.72 (emphasis added)). They too discount Apple's "lawful interest" by invoking the "totality of the evidence." RedBr.51, 72.

Plaintiffs and the district court are wrong as a matter of law: Review of "the totality of the evidence" must be accomplished "with *proper regard* for the *Matsushita* standards." *In re Publ'n Paper Antitrust Litig.*, 690 F.3d 51, 64 (2d Cir. 2012) (emphasis added). Conduct that is "consistent with the defendant's independent interest" cannot "by itself support a finding of antitrust liability." *Matsushita*, 475 U.S. at 587. As the Solicitor General told the Supreme Court in *Monsanto*, inferring a conspiracy "requires a showing that the conduct is not in the individual self-interest of the participants, acting independently, and is in their collective self-interest *only when they coordinate* their actions." Brief for the United States as Amicus Curiae in Support of Petitioner, *Monsanto*, 465 U.S. 752 (No. 82-914), 1983 U.S. S. Ct. Briefs LEXIS 375, at *19 (emphasis added); *see also* Brief for the United States as Amicus Curiae Supporting Petitioners,

Matsushita, 475 U.S. 574 (No. 83-2004), 1985 WL 669667, at *9 ("evidence of parallel conduct normally will be probative of an anticompetitive agreement only if it is shown to be inconsistent with the independent competitive interests of the defendants and therefore unlikely to occur in the absence of collusion").

The district court's reliance on *General Motors* was legal error, and disregards the legal standard the Supreme Court has followed since *Monsanto*.

2. As a result of the district court's error on the legal standard, it unhesitatingly inferred a conspiracy from highly ambiguous evidence (A2268), which does not as a matter of law "tend[] to exclude the possibility of independent action" by Apple and the publishers (*Monsanto*, 465 U.S. at 768; *see* BlueBr.38-46). There is no evidence in the record demonstrating Apple's knowledge of any of the phone calls or meetings among the publishers (RedBr.24-26; *see* BlueBr.18 & n.3) or a resulting publisher conspiracy to fix prices, much less that Apple joined any such conspiracy.[3]

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[3] Plaintiffs' brief is full of statements that cite nothing from the record and are not supported by any evidence. *See*, *e.g.*, RedBr.12 ("Apple quickly realized that agency could help it and the publishers eliminate retail price competition and raise ebook prices"), 13 ("On December 18, two days after the initial meetings, Cue set about organizing an industry-wide switch to agency as a way to raise ebook prices"), 16 ("For the publishers, accepting Apple's proposed MFN would make sense only if Amazon could be moved to an agency model as well"), 18 ("the Publisher-Defendants all understood that signing on with Apple meant moving all their retailers to agency"), 24 ("Apple also successfully encouraged the publishers to reassure one another").

Plaintiffs, having abandoned the agreement the district court actually found (in December 2009), seek to stitch together a conspiracy from snippets of emails, testimony, and provisions of indisputably lawful agreements they claim are "suggestive" of conspiracy. RedBr.67. But the evidence they rely on does not tend to exclude the possibility that Apple acted independently.

Indeed, the example plaintiffs trumpet as "particularly probative" evidence that is "clearly a plea for concerted action" is an email from Steve Jobs to James Murdoch (neither of whom testified at trial), in which they claim Mr. Jobs urged Murdoch to "[t]hrow in with apple and see if we can *all* make a go of this and create a real mainstream ebooks market at $12.99 and $14.99." RedBr.76 (citing A2215) (emphasis in RedBr.). But Mr. Jobs's use of the term "all" is not unambiguous evidence of a price-fixing conspiracy. Indeed, plaintiffs ignore that in the same email, Jobs said that "Amazon is selling these books at $9.99, and who knows, maybe they are right and we will fail even at $12.99." A591.

Plaintiffs also repeatedly cite Mr. Cue's testimony that he told various publishers they would not be alone in signing with Apple. RedBr.22, 39, 60, 64, 73; *see* A2068.1758:6-12. But Mr. Cue nowhere encouraged the publishers to jointly move Amazon to agency; rather, as he made clear from the outset, Mr. Cue was telling the publishers that Apple would not launch the iBooks Store unless it attracted a "critical mass" of publishers (A2251; A1785-86¶ 95; BlueBr.6-7),

which was indisputably in Apple's independent business interests (A2266; A1871-A1875¶¶30-42; A1785-A1786¶¶94-96). Plaintiffs point to no affirmative evidence supporting the court's conclusion that Macmillan's John Sargent told Mr. Cue that he was traveling to Seattle to demand that Amazon adopt an agency model. RedBr.80-81. There is none. BlueBr.37. And in any event, even if Apple *knew* that the publishers would seek agency with Amazon and other retailers, that is not evidence that Apple *conspired* with all the publishers to do so.

Moreover all of the communications plaintiffs point to (RedBr.64, 68, 69, 75, 76, 78-82) are discussions between a single supplier and its potential distributor. The contrast with *TRU* could not be more clear, where there was direct evidence "in the form of statements by the manufacturers' executives, that each manufacturer agreed to Toys 'R' Us's proposal on the explicit condition that its competitors do the same." *Ins. Brokerage*, 618 F.3d at 332. And as *Monsanto* makes clear, pricing discussions between suppliers and distributors are "legitimate," "natural," and "arise in the normal course of business and do not indicate illegal concerted action." 465 U.S. at 762-63 (citation and internal quotation marks omitted).

Plaintiffs argue that Apple and the publishers could never have signed the agency agreements absent collusion (RedBr.76), but that is clearly incorrect. As plaintiffs do not dispute, Apple was free to negotiate with individual publishers in

parallel, to offer them the same terms, to tell them that Apple would not launch the iBooks Store without a critical mass of publishers, and to apprise some publishers of the status of negotiations with other publishers. A2291 ("Plaintiffs have not argued and this Court has not found that" "agency agreements, pricing tiers with caps, MFN clauses, or simultaneous negotiations with suppliers" "were wrongful, either alone or in combination"). These lawful and effective negotiation tactics explain the resulting agency agreements every bit as much as does some undefined "larger understanding" (RedBr.61), and therefore no inference of a conspiracy is permissible as a matter of law. A1863-64¶12; *see Leegin*, 551 U.S. at 903; *Matsushita*, 475 U.S. at 587; *Monsanto*, 465 U.S. at 768; *Ins. Brokerage*, 618 F.3d at 329-31. This case thus "stands in stark contrast to the hub-and-spoke conspiracies found in *Interstate Circuit* and [*TRU*], in which each firm's motivation to enter into the vertical agreement was contingent on all of its competitors[] doing the same." *Ins. Brokerage*, 618 F.3d at 333 n.30.

Indeed, if it were true that vertical agreement for any publisher was "contingent on all of its competitors[] doing the same," agency would never have survived after Random House, by far the largest publisher, declined Apple's proposal in January 2010. A2216. And if "no Publisher Defendant would have signed the agency agreement with Apple absent an understanding that other publishers would do likewise" (RedBr.76), then it is equally true that Random

House, a conceded non-conspirator, would never have even considered adopting agency. Yet Random House engaged in "a great deal of internal discussion," thought that perhaps "three or four other publishers might accept the proposal," and ultimately adopted "a wait-and-see approach" while recognizing that "[s]aying no to Apple felt like a risk to our digital credibility." A1553-54¶15; A1554¶17. These were not the actions of a party facing an offer that no one but a conspirator could accept.

The launch of the iBooks Store by Apple, "one of America's most admired, dynamic, and successful technology companies" (A2160), was a tremendous opportunity for the publishers, and it was in their independent business interests absent any conspiracy. The iBooks Store significantly improved the publishers' independent bargaining power with Amazon, even if Amazon remained on the wholesale model and regardless of the actions of other publishers. A1805¶35. The agency agreements were a far more potent and much less risky weapon against Amazon than embarking on an illegal horizontal price-fixing conspiracy with competitors. Plaintiffs failed to identify evidence that addresses, let alone "tends to exclude," this possibility. Accordingly, their conspiracy theory fails as a matter of law.

IV. The District Court's Evidentiary Exclusion and Injunction Were Erroneous

The record evidence establishing the pro-competitive effects of Apple's entry would have been even more powerful had the district court not improperly excluded the portion of Dr. Burtis's testimony explaining that the agency agreements stimulated interbrand competition and caused e-book prices to ultimately decrease. *See* BlueBr.61. Plaintiffs' claims that Dr. Burtis did not "control for any changes in the rapidly evolving ebook market" (RedBr.88) and failed to "employ or disclose any methodology" (RedBr.94) are untrue. An economist does not require an econometric study to conclude that substantial entry drives competition. *BOC Int'l*, 557 F.2d at 27; *Sulfuric Acid*, 703 F.3d at 1012; *Somers*, 729 F.3d at 964. In supporting this basic economic tenet, Dr. Burtis analyzed the sales data (A1889¶13; A1889-A1890¶¶15-16), studied the contemporaneous business records (A2113.2287:7-2288:23), analyzed the state of price competition in the relevant market (A2114.2289:16-17; A2115.2294:22-2295:21), examined output and changes in output (A2114.2292:13-18), looked at the shares of different types of publishers (*id.*), and calculated pertinent statistics (A2113.2287:1-6). Dr. Burtis "undertook various analyses" to isolate the factors causing average prices in the relevant market to fall after the introduction of agency (A2115.2293:20-21; *see also* A2115.2293:8-2294:7), and plaintiffs fail to identify any specific shortcomings in her analysis. Her methodology had also been

previously disclosed. A2104.2214:14-19; A1890¶16; SEA46-71. It was therefore reversible error for the court to exclude this testimony.

Apple did not waive its challenge to the injunction's monitorship provision (BlueBr.63-64 & n.9); plaintiffs themselves conceded that "[a] separation of powers claim cannot be waived" (A2668 n.6 (citing *CFTC v. Schor*, 478 U.S. 833, 850-51 (1986))). The monitorship violates Rule 53 and the separation of powers, as the D.C. Circuit held in *Cobell v. Norton*, 334 F.3d 1128, 1142 (D.C. Cir. 2003), and as Apple argues on appeal from the monitorship's application and the court's failure to disqualify him (Dkt. 78 (No. 14-60)), which it incorporates by reference here.

CONCLUSION

The district court's judgment and injunction should be reversed.

Respectfully submitted this 15th day of July, 2014.

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CERTIFICATE OF COMPLIANCE

On June 20, 2014, Apple filed an unopposed motion for leave to file an oversize brief up to 9,000 words. That motion was granted on June 25, 2014. This brief contains 8,992 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). The brief complies with the typeface requirement of Fed. R. App. P. 32(a)(5) and the typestyle requirements of Fed. R. App. P. 32(a)(6), and is prepared in a proportionally spaced typeface (14-point Times New Roman).

/s/ Theodore J. Boutrous, Jr.