UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE ELECTRONIC BOOKS ANTITRUST LITIGATION	:	11-MD-02293 (DLC)

This Document Relates to:

ALL ACTIONS	:	

DEFENDANT APPLE INC.'S MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

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PRELIMINARY STATEMENT

Plaintiffs seek to represent a class of tens of millions of individuals scattered across 23 States and U.S. territories who purchased e-books between April 1, 2010 and May 21, 2012 from five of the largest publishers in the United States (the "Publisher Defendants"). But Plaintiffs' proposed class is fatally defective, most notably because they cannot establish injury or allocate damages for each class member through common proof and a manageable process. As the Supreme Court and D.C. Circuit recently made clear, those are mandatory prerequisites for class certification that Plaintiffs cannot meet. *See Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013); *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244 (D.C. Cir. 2013).

The purported class members bought many millions of e-books across a vast constellation of titles from multiple publishers. Each of the millions of e-books has its own unique history. After the Publisher Defendants' shifted from a wholesale model of e-book-selling to an agency model in early 2010, the price of many e-books fell. The prices for some other e-book titles rose, while others stayed flat, and still others fluctuated over time, even during the same day. Like the e-books themselves, each of the many millions of e-book purchases has its own distinctive story that must be considered separately. Proof of injury and damages in this case would require a transaction-by-transaction investigation for each purchaser, running afoul of Rule 23's strict commonality, predominance, superiority, and manageability requirements.

Plaintiffs simplistically allege that every e-book purchaser was harmed because of the shift to the agency model. As discussed below and in economist Dr. Joseph Kalt's declaration, however, the purchase data unquestionably refute that false baseline assumption. Indeed, many e-book purchasers affirmatively *benefitted* from the Publisher Defendants' shift to the agency model because, for example, they paid *less* than they otherwise would have if the retailer had set the price or they had access to e-books that otherwise would have been unavailable.

Plaintiffs rely on an improper Trial-by-Formula method for determining injury and damages that ignores the significant differences among the millions of putative class members. The Supreme Court has decisively rejected such methods, which use "average[s] . . . to arrive at the entire class recovery—without further individualized proceedings." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2561 (2011). Plaintiffs are impermissibly treating the class "as a large, unified group that suffered a uniform, collective injury"—a "fictional composite" that masks "the disparate individuals behind the composite creation." *Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 345 (4th Cir. 1998).

Plaintiffs attempt to mask their improper Trial-by-Formula approach by having their economist expert, Dr. Roger Noll, suggest in his report that he has devised a methodology that determines individual harm to each proposed class member by comparing each class member's actual e-book purchases against but-for prices. Noll Decl. 6. Yet, Dr. Noll admitted at his deposition that he did nothing of the sort. *See* Declaration of Christine Demana ("Demana Decl."), Ex. A ("Noll Dep.") 156:22-23 ("I have not analyzed the individual transactions data."). Rather, Dr. Noll conceded that that he actually used four-week *averaged* and *aggregated* e-book prices for *categories* of e-books to determine injury and damages, not actual e-book prices that any particular customer paid or would have paid in the but-for world. *Id.*, 176:19-20, 179:19-20 ("I was not intending to produce individual damage estimates . . . . [W]e've only done it for the averages over the four-week period."). Dr. Noll has also hardwired into his formula a demonstrably false assumption of common impact. Boiled down, Plaintiffs are impermissibly relying on an expert who is *assuming* what needs to be *proven*, and improperly using aggregated and averaged data that cannot demonstrate harm or damages for any particular class member.

Dr. Noll's approach is similar to the unfounded expert testimony that caused the Supreme Court and D.C. Circuit to reject class certification in *Comcast*, 133 S. Ct. 1426 and *In re Rail Freight*, 725 F.3d 244—recent pivotal antitrust cases that Plaintiffs ignore. Instead, relying on outdated "principles" of class-action law, Plaintiffs argue that class certification should be the default position, especially in antitrust cases. Plaintiffs are wrong; there is no special watered-down Rule 23 for antitrust cases. Plaintiffs bear the burden to demonstrate affirmatively that their proposed class meets each of Rule 23's strict requirements. *Dukes*, 131 S. Ct. at 2551-52. The *Dukes*, *Comcast*, and *In re Rail Freight* decisions, as well as others, shatter any illusion that class certification should be presumed. Rather, they mandate denial of class certification here.

FACTUAL BACKGROUND

Plaintiffs Anthony Petru, Thomas Friedman, and Shane Davis seek to represent tens of millions of purchasers from 23 States and territories who bought e-books from the Publisher Defendants from April 1, 2010 through May 21, 2012. They assert that they paid higher prices for e-books as a result of an alleged conspiracy between Apple and the Publisher Defendants. Dkt. 432, Plaintiffs' First Amended Consolidated Class Action Complaint ("CAC") ¶¶ 185-87.

Plaintiffs hope to bootstrap this Court's opinion in *United States v. Apple* into class certification through the doctrine of issue preclusion. Mem. at 13. But the Court's opinion does not even mention Rule 23's requirements—let alone find that each class member's injury and damages could be established through common proof as required by Rule 23. *See Blades v. Monsanto Co.*, 400 F.3d 562, 571-72 (8th Cir. 2005) ("proof of conspiracy is not proof of

common injury"). Of course, the parties did not present evidence on that issue given the limited scope of the trial, and therefore the Court had no reason to make such a finding.[1]

In fact, many consumers benefitted from Apple's entry into the e-books market and the introduction of the agency model. Apple introduced new competition to Amazon, the undisputed dominant force in the market, which sold "nearly 90% of all e-books." Op. 14. At the time of Apple's entry into the market in 2010, Amazon unilaterally set the market price of nearly every e-book. Kalt Decl. ¶ 43(a). Indeed, by October 2009, the average market price for e-books was more than $8.00 and had never been higher. Demana Decl., Ex. B (DX-719).

Apple's agency agreements gave publishers the ability to determine retail prices of their e-books, subject to price caps. Op. 121-22. Further, as this Court found, the Apple agency model prompted Amazon to increase the self-publisher royalty from 35% to 70%, leading self-published e-book output to grow substantially, *see* Op. 69, benefitting many consumers who purchased e-books that otherwise would not have been available, *see* Demana Decl., Ex. C ("Petru Dep.") 146:7-147:5 (acknowledging he values self-published e-books).

With the increase in e-book output and the publishers' ability to set prices, the average e-book price across all publishers *fell* after the transition to the agency model. Kalt Decl. ¶ 81, n.97. Indeed, many e-books became available *free*—a significant benefit to class members—because of the shift to the agency method and the introduction of the iBookstore, whereas Amazon's pricing model discouraged free e-books. Orszag Decl. ¶¶ 96, 104-110; s*ee also* Demana Decl., Ex. D ("Friedman Dep.") 102:21-103:6 (testifying he greatly values free books);

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[1] This Court's Order noted that "*[s]ome* consumers had to pay more for e-books . . . ." Op. 98 (emphasis added). However, this Court did not hold, and Plaintiffs cannot demonstrate, that *all* putative class members paid more for e-books because of the switch to agency.

Petru Dep. 147:23-148:3 (same). Further, the prices of the majority of titles sold by the Publisher Defendants either stayed the same or decreased immediately after the shift to the agency model. Kalt Decl. ¶ 81. Many e-book prices also fluctuated over time. *See, e.g.*, *id.* ¶¶ 68-74. Thus, each of the *150 million* e-book purchases that took place during the putative class period has its own unique history and must be evaluated separately. Even Plaintiffs have admitted that "each book is different. You've got to look at each book to figure out the circumstances surrounding it in order to figure out if you were harmed by that book purchase." Demana Decl., Ex. E ("Davis Dep.") 48:20-25. As addressed below, the important differences among the many millions of e-book purchases are fatal to class certification in this case.

ARGUMENT

I. PLAINTIFFS IGNORE THEIR SUBSTANTIAL BURDEN AT THE CLASS CERTIFICATION STAGE.

Plaintiffs bear the burden to "affirmatively demonstrate" compliance with Rule 23's requirements. *Dukes*, 131 S. Ct. at 2551-52. Rule 23(a) requires Plaintiffs to demonstrate numerosity, commonality, typicality, and adequacy of representation. Additionally, Rule 23(b)(3) requires Plaintiffs to demonstrate that "questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." *Id.* at 2558; Fed. R. Civ. P. 23(b)(3). Rule 23's requirements are "stringent" and "exclude most claims." *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2310 (2013).

Plaintiffs paint a misleading portrait of the Rule 23 standard. Citing outdated cases, Plaintiffs argue that the Court should show a "general preference" for granting class certification, Mem. 6, and suggest that there is a presumption that class certification is proper in antitrust

cases. *Id.* at 7. They also argue that this Court should avoid addressing any merits issues. *Id*. at 6-7. Plaintiffs are flat wrong on all these points.

First, there is no general preference for class certification. "[A] district judge may certify a class only after making determinations that each of the Rule 23 requirements has been met," *In re Initial Pub. Offerings Sec. Litig.*, 471 F.3d 24, 41 (2d Cir. 2006) ("*In re IPO*"), and "[c]lass certification is far from automatic," *In re Rail Freight*, 725 F.3d at 249. A case may proceed as a class action "only if the trial court is satisfied, after a rigorous analysis, that [Rule 23's] prerequisites . . . have been satisfied." *Comcast*, 133 S. Ct. at 1432 (internal quotation marks omitted). This rigorous analysis is critical to protecting a defendant's right to defend itself under the applicable substantive law. *Dukes*, 131 S. Ct. at 2561 (citing 28 U.S.C. § 2072(b)).

Second, there is no presumption of class certification in antitrust cases. "Rule 23 provides a one-size-fits-all formula for deciding the class-action question." *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 399 (2010). As the federal circuit courts have explained, courts "should not suppress 'doubt' as to whether a Rule 23 requirement is met—no matter the area of substantive law." *In re Hydrogen Peroxide Antitrust Litig*., 552 F.3d 305, 321-22 (3d Cir. 2008); *see also Robinson v. Tex. Auto. Dealers Ass'n*, 387 F.3d 416, 420-21 (5th Cir. 2004). Antitrust cases, in particular, often seek enormous damages awards; it is therefore of paramount importance for the Court to ensure that Rule 23's requirements are analyzed rigorously. *See In re Hydrogen Peroxide*, 552 F.3d at 310 (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007)); *see also* Paul A. Johnson, *The Economics of Common Impact In Antitrust Class Certification*, 77 Antitrust Law Journal No. 2, 533, 533 (2011) ("Recent U.S. courts of appeal decisions have implemented a fundamental paradigm shift in the standards applied to the analysis of class certification in antitrust litigation. These decisions reject

explicitly the past status quo whereby courts could presume that class certification is appropriate in antitrust matters . . . .").

Plaintiffs do not even attempt to distinguish *Comcast* or *In re Rail Freight* in their brief—indeed, they completely ignore them. These recent seminal antitrust cases firmly establish that class certification is inappropriate where, as here, a plaintiff cannot demonstrate through a sound expert methodology that each of the class members was injured and cannot provide a sensible process for determining their individual damages. As the Supreme Court explained in *Comcast*, the Court must determine in an antitrust class action "whether the methodology" set forth in the expert's report utilizes "just and reasonable inference[s]" and avoids "speculative" conclusions. *Comcast*, 133 S. Ct. at 1433. Otherwise, "*any* method of measure [would be] acceptable so long as it can be applied classwide, no matter how arbitrary the measurements may be," "reduc[ing] Rule 23(b)(3)'s predominance requirement to a nullity." *Id.* In *In re Rail Freight*, the D.C. Circuit applied *Comcast*, holding that it is essential that plaintiffs "show that they can prove, through common evidence, that all class members were in fact injured by the alleged conspiracy" and noting that "[i]t is now clear . . . that Rule 23 not only authorizes a hard look at the soundness of statistical models that purport to show predominance—the rule commands it." *In re Rail Freight*, 725 F.3d at 252, 255.

Third, Plaintiffs' argument that this Court should not probe into the merits of this case as part of its Rule 23 analysis flies in the face of Supreme Court precedent. *See* Mem. 6-7. The class certification analysis will frequently "overlap with the merits of the plaintiff's underlying claim" because a "'class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action.'" *Dukes*, 133 S. Ct. at 2551-52 (quoting *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 160 (1982)). The court's

obligation to resolve factual disputes "is not lessened by overlap between a Rule 23 requirement and a merits issue," *In re IPO*, 471 F.3d at 41, for "[i]t is now indisputably the role of the district court to scrutinize the evidence before granting certification, even when doing so 'requires inquiry into the merits of the claim.'" *In re Rail Freight*, 725 F.3d at 253 (quoting *Comcast*, 133 S. Ct. at 1433)).

This Court must "resolve[] factual disputes relevant to each Rule 23 requirement," including any challenges to an expert's opinions, before determining whether to certify a class. *In re IPO*, 471 F.3d at 41; *see also Dukes*, 131 S. Ct. at 2553-54 & n.8 (noting that the expert's conclusions "elicited criticism" from scholars and disregarding his testimony); *In re Hydrogen Peroxide*, 552 F.3d at 320. "A district judge is to assess all of the relevant evidence admitted at the class certification stage and determine whether each Rule 23 requirement has been met," *In re IPO*, 471 F.3d at 42, using the rules governing expert evidence where necessary, *see, e.g.*, *Freeland v. AT&T Corp.*, 238 F.R.D. 130, 145-153 (S.D.N.Y. 2006) (Cote, J.) (applying the Federal Rules of Evidence and *Daubert* in denying certification in antitrust action where the plaintiff expert's regression analysis failed to account for crucial variables). The Second Circuit has "disavow[ed] the suggestion . . . that an expert's testimony may establish a component of a Rule 23 requirement simply by being not fatally flawed." *In re IPO*, 471 F.3d at 42. Plaintiffs have failed to meet their burden under these Rule 23 standards.

II. PLAINTIFFS' PROPOSED CLASS IS NOT ASCERTAINABLE

Plaintiffs have failed to meet their burden to provide evidence demonstrating that the putative class members are readily ascertainable. *See Spagnola v. Chubb Corp.*, 264 F.R.D. 76, 97 (S.D.N.Y. 2010) ("Class membership must be readily identifiable such that a court can determine who is in the class and bound by its ruling without having to engage in numerous fact-intensive inquiries"). Plaintiffs define the class as customers in 23 States and territories who

purchased e-books from the Defendant Publishers between April 1, 2010 and May 21, 2012. CAC ¶ 212. The ascertainability requirement, however, mandates that Plaintiffs make a specific showing *now* that it will be administratively feasible to identify class members. *Carrera v. Bayer Corp.*, 727 F.3d 300, 307-08 (3d Cir. 2013) (at class certification, "the plaintiff must demonstrate [that] his purported method for ascertaining class members is reliable and administratively feasible"); *Weiner v. Snapple Beverage Corp.*, No. 07 Civ. 8742, 2010 WL 3119452, at *13 (S.D.N.Y. Aug. 5, 2010) (Cote, J.) ("Plaintiffs have failed to show how the potentially millions of putative class members could be ascertained using objective criteria that are administratively feasible"); *see also Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 593 (3d Cir. 2012); *Intercontinental Hotels Corp. v. Girards & Girards, P.C.*, No. 05-02-01604-CV, 2004 Tex. App. LEXIS 2178, at *5 (Tex. App. Mar. 2, 2004). Plaintiffs have failed to meet their burden.

With respect to the three named plaintiffs, the only transaction records produced were a few pages of Shane Davis's BooksOnBoard and Barnes & Noble purchase records, which do not provide unique customer identifier numbers. Demana Decl., Ex. F (CLSPF-SD00001-45). Further, the BooksOnBoard records do not have Shane Davis's name on them, and the Barnes & Noble records do not identify the publisher of the e-books, making it necessary to check title-by-title for each of the millions of e-books purchased from Barnes & Noble whether a particular book is covered under the proposed class definition. Davis Dep. 112:1-9. Further, Messrs. Petru and Friedman, who produced no records, testified that they were unable to identify their e-book purchases, except perhaps by examining their Amazon accounts. Petru Dep. 119:9-22; Friedman Dep. 53:19-54:22; 56:24-57:17. But, again, neither of them produced their Amazon transaction histories (or any other records of e-book purchases), making it impossible to test whether they

are even members of the purported class, let alone whether their unproduced records would provide an administratively feasible way to demonstrate class membership. Although Plaintiffs' counsel produced a spreadsheet that purports to show their e-book purchases (Demana Decl., Ex. G (CLSPLF0000005)), none of the class representatives could verify the spreadsheet's accuracy—they could not recall even seeing it before. Friedman Dep. 90:6-16, 91:9-23; Petru Dep. 120:9-123:16; Davis Dep. 86:8-16, 97:10-15. And even more damning, Mr. Davis testified that the chart is inaccurate and does *not* reflect his purchase history. Davis Dep. 108:23-109:15.[2] When asked how he would prove he was a member of the class, Mr. Friedman testified that people would need to take his "word" for it. Friedman Dep. 81:21-83:5; 84:9-10. That is not the sort of class that satisfies Apple's due process rights to challenge class members' claims. *Carrera*, 727 F.3d at 307-08.

While Plaintiffs purport to have a list of e-book transactions taking place during the class period, they have not produced evidence identifying a list of customers who purchased those e-books or demonstrated the ability to match each transaction to any individual customer in an administratively feasible way. Plaintiffs cannot meet their burden to demonstrate an ascertainable class through unsupported promises that third-party retailer records might later be used to determine class membership when those records have not been produced in this case. *Carrera*, 727 F.3d at 308-09 (holding plaintiff failed to meet burden to demonstrate ascertainability through retailer records when such records were not provided to the court). In fact, Apple previously sought individual purchaser data from retailers' transactions, but Plaintiffs

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[2] Further, the chart is inadmissible hearsay and therefore cannot support class certification. *Lujan v. Cabana Mgmt., Inc.*, 284 F.R.D. 50, 64 (E.D.N.Y. 2012) (evidence in support of class certification under Rule 23 must be "admissible"—that is, "based on personal knowledge and either non-hearsay or information subject to hearsay exceptions").

adamantly opposed that discovery and the Court agreed with Plaintiffs' position. Demana Decl. ¶ 2. Without that missing information, Plaintiffs cannot meet their burden to show that class members can be identified in an administratively feasible way.

Nor can Plaintiffs simply rely on purported class members self-identifying at some later stage when Apple will not have the ability to challenge their assertion. Plaintiffs were required to provide evidence *with their class certification motion* that the class is ascertainable. *Carrera*, 727 F.3d at 307-08. Moreover, Apple has a right to a jury trial and a "due process right to challenge the proof used to demonstrate class membership," *id*. at 307, and therefore delaying this fundamental issue to some post-trial process is impermissible. Plaintiffs' failure to provide evidence that the class is readily ascertainable in an administratively feasible manner makes class certification improper.

III. PLAINTIFFS CANNOT DEMONSTRATE COMMONALITY OR PREDOMINANCE OF COMMON ISSUES.

A class may not be certified unless "there are questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). "Commonality requires the plaintiff to demonstrate that the class members 'have suffered the same injury.'" *Dukes*, 131 S. Ct. at 2551 (quoting *Falcon*, 457 U.S. at 157). "What matters to class certification . . . is not the raising of common 'questions'—even in droves—but, rather the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers." *Id.* (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 132 (2009)).

Plaintiffs must also prove that "questions of law or fact common to class members predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3). The predominance criterion is "even more demanding" than establishing commonality under

Rule 23(a). *Comcast*, 133 S. Ct. at 1432 (citing *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623-24 (1997)); *In re IPO*, 471 F.3d at 33 n.4. "Rule 23(b)(3) [is] an adventuresome innovation . . . designed for situations in which class-action treatment is not as clearly called for." *Comcast*, 133 S. Ct. at 1432 (internal quotation marks omitted) (citing *Dukes*, 131 S. Ct. at 2558; *Amchem*, 521 U.S. at 614-15). The court must "take a 'close look' at whether common questions predominate over individual ones." *Id.* (quoting *Amchem*, 521 U.S. at 615).

Plaintiffs place great emphasis on this Court's previous order finding that Apple violated Section 1 of the Sherman Act. Apparently, they would like the Court to certify a class through issue preclusion. But Plaintiffs overplay their hand—the mere fact of a Section 1 violation is insufficient to meet Rule 23's strict requirements. *See Moore v. Painewebber, Inc.*, 306 F.3d 1247, 1255 (2d Cir. 2002); *see also In re Rail Freight*, 725 F.3d at 252 (plaintiffs must demonstrate "more than common evidence the defendants colluded to raise . . . rates"); *Blades*, 400 F.3d at 570 (affirming denial of class certification where district court had concluded that "plaintiffs [erred by] presum[ing] classwide impact without any consideration of whether the markets or the alleged conspiracy at issue . . . actually operated in such a manner so as to justify that presumption") (internal quotation marks omitted).

Instead, class certification in this case turns on, among other things, whether Plaintiffs can establish through common proof, not only injury to competition in the market generally, but also *injury to each individual plaintiff and his or her damages*. *See* 15 U.S.C. §§ 1, 15; *Cordes & Co. Fin. Servs., Inc. v. A.G. Edwards & Sons, Inc.*, 502 F.3d 91, 105 (2d Cir. 2007) (antitrust plaintiffs must demonstrate "(1) a violation of antitrust law; (2) injury and causation; and (3) damages."); *In re Rail Freight*, 725 F.3d at 244 (plaintiffs must "show that they can prove, through common evidence, that *all* class members were *in fact* injured by the alleged

conspiracy" (emphasis added)); *see also Blue Tree Hotels Inv., Ltd. v. Starwood Hotels & Resorts*, 369 F.3d 212, 220 (2d Cir. 2004); *In re Hydrogen Peroxide*, 552 F.3d at 311 ("every class member must prove at least some antitrust impact [individual injury] resulting from the alleged violation"); *In re New Motor Vehicles Canadian Export Antitrust Litig.*, 522 F.3d 6, 28 (1st Cir. 2008); *Bell Atl. Corp v. AT&T Corp.*, 339 F.3d 294, 302 (5th Cir. 2003) ("[W]here fact of damage cannot be established for every class member through proof common to the class, the need to establish antitrust liability for individual class members defeats Rule 23(b)(3) predominance."). Notably, the Court's previous opinion did not decide that fundamental issue,[3] and, as addressed below, Plaintiffs have failed to meet their burden here.

A. The Dissimilarities Among The Putative Class Members Prevent Plaintiffs From Demonstrating Antitrust Injury And Damages On A Classwide Basis.

The putative class includes millions of consumers who purchased many different e-book titles from many different publishers at many different times through many different retailers at many different prices set by many different parties that fluctuated in many different ways after the adoption of the agency agreements. As in *Comcast*, the "permutations . . . are nearly endless." 133 S. Ct. at 1434-35. The prices of many e-books, including many from the Publisher Defendants, dropped immediately after the switch to agency. *See, e.g.,* Kalt Decl. ¶¶ 80-81; *see also* Petru Dep. 43:15-44:7 (not all e-book prices increased). For example, the

[3] The Court opinion expressly acknowledged that there was no "'need to study the reasonableness of [Apple's conduct] in light of the real market forces at work.'" Op. 106-07 (quoting *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 886 (2007)). Nor can this Court's alternative "rule of reason" findings support application of issue preclusion. Again, the Court's analysis did not find that *each* class member was harmed and that such harm could be demonstrated through common proof, the relevant questions here, so there could be no issue preclusion. *See Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 326 n.5 (1979) (preclusion obviates litigation only of issues actually litigated and necessary to the outcome of the first action). Apple further refers this Court to the letter it filed on September 27, 2013, which deals with this issue in greater detail. *See* Dkt. 409.

average weekly sales price of the e-book "Hound Dog," published by Simon & Schuster, fell from $14.99 to $11.99 directly after agency for several weeks and then down to $9.99, which is the price that plaintiff Thomas Friedman allegedly paid for it in April 2011. Kalt Decl. ¶ 80(f). This is not an isolated example—over 50% of the Publisher Defendants' e-book titles' prices decreased or stayed the same after the switch to agency. *Id*., ¶ 81. Combine that with the fact that approximately 60% of customers purchasing e-books on the iBookstore only download one or two e-books, *id*., Fig. 8, and it is clear that injury, if any, turns on the identity of the titles that a particular class member purchased and the timing of those purchases.

Although the price of some e-books increased immediately after the shift to agency, many of those prices fell shortly thereafter to pre-agency levels or even lower. For example, on September 26, 2011, Thomas Friedman allegedly purchased "The Strain" published by HarperCollins. Friedman Dep. 107:7-19. The average Amazon weekly price was $9.99 for that title before the switch to agency. Kalt Decl. ¶ 80(f). The price then went up to $11.99 immediately after the move to agency, but by the time that Mr. Friedman allegedly bought the e-book in September 2011, he paid just $1.99 for it. *Id*. Mr. Friedman testified that one would have to "speculate" to conclude that he was harmed by that e-book purchase. Friedman Dep. 107:7-108:20. Indeed, Mr. Friedman candidly admitted that it would be speculative to try to determine the but-for price for *any* of the e-books that he purchased. *Id.* at 108:21:109:2. Multiplying that speculative endeavor by millions of customers who bought many millions of e-books at various times during a two-year span would create an avalanche of individualized issues that would overtake any common issues.

These examples are not mere outliers. It is undisputed that the average e-book price across all publishers *fell* after the transition from wholesale to agency for many of the publishers'

e-book titles, benefiting many putative class members. Kalt Decl. ¶ 81, n.97. Indeed, the prices of many titles fell, or remained the same, following the switch to agency, and continued to remain at or below their pre-agency prices throughout the proposed class period. *Id.*, ¶¶ 80-81, 90.[4] For still other titles, the price fluctuated significantly on a day-to-day basis. *See e.g., id.*, ¶ 59. In short, lumping all e-books and purchases into one mammoth class and assuming that all purchasers were harmed is inappropriate because each e-book transaction has its own unique history. *Id.*, ¶¶ 73-74; *see also* Davis Dep. 48:20-25 (agreeing that "[y]ou've got to look at each book to figure out the circumstances surrounding it in order to figure out if you were harmed by that book purchase").

Moreover, among putative class members who purchased some e-books at higher prices during the proposed class period, many *also* purchased other e-books at prices that were *lower* as a result of Apple's entry into the market. Kalt Decl. ¶¶ 88-90. Indeed, many additional e-books became available *free* after Apple's entry into the market. Orszag Decl. ¶¶ 96, 104-110. Importantly, under Amazon's business terms, it was difficult for self-published authors to give away free books because Amazon set a price-floor. *Id.* at n. 166. It is only when Apple entered the market and started allowing self-publishers and authors to offer free e-books that Amazon lowered some of its prices to $0 to respond to the competitive threat from Apple's iBookstore. *Id*. at 104-110. Plaintiffs agree that they received a significant benefit from these free e-books. Friedman Dep. 102:21-103:6; Petru Dep. 147:23-148:3.

The law requires unequivocally that these benefits be taken into account in this case.

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[4] Plaintiffs bear the burden of proof to demonstrate that each one of these price decreases would have occurred in the but-for world with one dominant retailer, but they have presented no evidence in that regard (their expert is silent on this issue), let alone proposed a way to determine this issue without the need to examine each book purchase separately.

"Conduct in violation of the antitrust laws may . . . increase competition," *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 343-44 (1990), and in such cases a plaintiff's injury and damages, if any, are determined by offsetting the resulting gains and anticompetitive losses. *See, e.g.*, *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481, 503-04 (affirming offset) (1968); *L.A. Mem. Coliseum Comm'n v. Nat'l Football League*, 791 F.2d 1356, 1367 (9th Cir. 1986) ("The relevant inquiry is 'what plaintiff's situation would have been in the absence of the defendant's violation.'") (quoting *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 566 (1981)). As explained in *Comcast*, an antitrust plaintiff must "translat[e] . . . the legal theory of the harmful event into an analysis of the economic impact of that event." 133 S. Ct. at 1435. Ignoring the offset requirement would improperly "permit damages to those who actually benefitted from alleged [violations]," and "provide a windfall to those claimants." *Apex Oil Co. v. DiMauro*, 744 F. Supp. 53, 56 (S.D.N.Y. 1990); *see also Freeland*, 238 F.R.D. at 150 (Cote, J.) (a consumer whose antitrust injuries are offset "has suffered no economic harm as a result of the [antitrust violation]; any damages awarded to such a plaintiff are pure windfall"); *Minpeco, S.A. v. Conticommodity Servs., Inc.*, 676 F. Supp. 486, 488-89 (S.D.N.Y. 1987).

Thus, *all* of a putative class member's e-book downloads must be considered, with gains offset against anticompetitive losses, to determine whether, on balance, a class member suffered any antitrust impact and, if so, the amount of his net injury. *See Minpeco*, 676 F. Supp. at 488-89; *see also L.A. Mem. Coliseum Comm'n*, 791 F.2d at 1367; Noll Dep. 208:23-209:10 (acknowledging that he would "have to attempt to include [any pro-competitive benefits] in the model of damages"). The problem, however, is that there would be no manageable way to conduct such an individualized inquiry for each of the millions of class members. *In re Rail Freight*, 725 F.3d at 252-53 ("Common questions of fact cannot predominate where there exists

no reliable means of proving classwide injury in fact."); *In re New Motor Vehicles Canadian Export*, 522 F.3d at 28 (plaintiffs must have "some means of determining that each member of the class was in fact injured"); *Bell Atl. Corp.*, 339 F.3d at 302 ("where fact of damage cannot be established for every class member through proof common to the class, the need to establish antitrust liability for individual class members defeats Rule 23(b)(3) predominance").

The putative class also includes many consumers who received other off-setting benefits because of Apple's agency agreements. For example, more than 130 million (paid and free) e-books have been downloaded on the iBookstore. Kalt Decl. ¶ 94. A substantial number of putative class members who downloaded such e-books likely would not have done so but-for the launching of the iBookstore. *Id* ¶¶94-95.[5] The shift to agency also eliminated the practice of "windowing" e-books—an intentional delay of a new e-book release after the hard cover release that had occurred starting in Fall 2009—allowing putative class members to purchase e-books (that otherwise would not have been available) instead of more expensive physical books. *See* Orszag Decl. ¶ 70 & n. 36. These significant benefits, which would vary from purchaser to purchaser, would need to be analyzed on an individualized basis.

Put simply, Plaintiffs cannot satisfy the predominance test because they have "not proposed a suitable methodology for establishing the critical elements of causation and injury on a class-wide basis." *Weiner*, 2010 WL 3119452, at *6 (Cote, J.); *see also In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, No. 09-1967 CW, 2013 WL 5979327, at *8-10 (N.D. Cal. Nov. 8, 2013) (denying class certification where Dr. Noll's methodology failed to account

[5] Dr. Noll testified that he did not analyze whether Apple would have launched the iBookstore under a different business model because the Court already "rejected" that argument. *See* Noll Dep. 97:9-21. In fact, the Court's Order did not make any such finding, and Dr. Noll has no basis for his assumption.

for the fact that some putative members suffered no injury and may have even benefited from the challenged restraints on trade and where no feasible method existed for determining that issue through common proof).

B. Plaintiffs' Expert Report Is Fatally Flawed And Demonstrates That Damages Cannot Be Calculated On A Classwide Basis.

The Supreme Court explained in *Comcast* that "[t]he first step in a damages study is the translation of the legal theory of the harmful event into an analysis of the economic impact of that event," and Plaintiffs' expert's methodology must utilize "just and reasonable inference[s]" and avoid "speculative" conclusions. *Comcast*, 133 S. Ct. at 1433, 1435. Dr. Noll's methodology here does not come close to meeting *Comcast*'s standard. *Id*. at 1432-33.[6]

1. Plaintiffs' Expert Report Impermissibly Utilizes A "Trial-By-Formula" Approach.

Dr. Noll has devised a "*formula* to determine, and then distribute, damages" to the individual class members. Mem. 2 (emphasis added); *see also* Noll Dep. 156:17-157:3 (acknowledging that he "ha[s]n't run regressions on individual transactions data"). The Supreme Court, however, has expressly rejected a "Trial by Formula" approach to class litigation that masks individualized issues by estimating aggregate damages and disregarding what actually happened to any individual class member. *Dukes*, 131 S. Ct. at 2561; *see also Jacob v. Duane Reade, Inc.*, No. 11 Civ. 160, 2013 WL 4028147, at *10 (S.D.N.Y. Aug. 8, 2013) ("due process implications for defendants . . . render the so-called 'trial by formula' approach . . . inappropriate where individualized issues of proof overwhelm damages calculations"). Just as in *Dukes*, Dr. Noll's "formula" impermissibly relies on averages that obscure market realities and the

[6] Apple has also filed a *Daubert* motion to exclude Dr. Noll's opinions, which this Court should consider simultaneously with this motion.

important differences between class members. *See In re Rail Freight*, 725 F.3d at 255 ("It is now clear . . . that Rule 23 not only authorizes a hard look at the soundness of statistical models that purport to show predominance—the rule commands it."); *Comcast*, 133 S. Ct. at 1432-33. And it prevents Apple from defending against each individual's claim, even though the Supreme Court has made clear that "a class cannot be certified on the premise that [the defendant] will not be entitled to litigate its statutory defenses to individual claims." *Dukes*, 131 S. Ct. at 2561.[7]

Further, Dr. Noll's model does not rely on the *actual* prices that consumers paid for e-books in order to calculate their damages. To the contrary, Plaintiffs' model is nothing more than a "fictional composite" of averaged and aggregated e-book prices that masks "the disparate individuals behind the composite creation." *Broussard*, 155 F.3d at 345. First, Dr. Noll averages all transaction prices for a given e-book sold by a given retailer in a four-week period into a single four-week average price. Noll Decl. 19. This four-week averaging masks significant daily fluctuations in the prices of e-books. *See* Kalt Decl. ¶¶ 59, 68-74 (showing individual title prices fluctuating and churning significantly from day-to-day). Next, Dr. Noll takes e-book titles' averaged prices and aggregates the prices into broad categories. Noll Decl. 20. He begins by dividing the prices into two groups based on whether the title was on the New York Times bestsellers list. *Id*. Within each of those two groups, he then splits the prices into several other general categories based on the title's general characteristics, such as hardcover fiction, hardcover nonfiction, hardcover advice/miscellaneous, paperback trade fiction, paperback mass-market fiction, and paperback nonfiction. *Id*. Dr. Noll misleadingly refers to

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[7] Although *Dukes* involved class certification under Rule 23(b)(2), the Court prohibited the "novel project" of "Trial by Formula" because "the Rules Enabling Act forbids interpreting Rule 23 to 'abridge, enlarge or modify any substantive right.'" 131 S. Ct. at 2561. The Rules Enabling Act applies equally to Rule 23(b)(3) class actions.

these averaged and aggregated computations as "actual" prices, Noll Decl. 24, even though they are really a fictional construct—they are not the actual prices consumers paid for particular e-books.

Second, Dr. Noll compares the so-called "actual" prices to the prices he predicts would have resulted "but for" Apple's entry into the market, in order to estimate an average percentage price increase. *Id.* Again, he focuses not on genuine transaction prices, but instead on *four-week average* prices for *categories* of books. Noll Decl. 19-20. Notably, Dr. Noll contends his methodology is "consistent with the structure of Amazon's pricing formula" or algorithm (Noll Decl. 22, 20, 10 n.3), which set the vast majority of e-book prices before agency, despite having "no clue what's inside the Amazon pricing algorithm . . . ."[8] Noll Dep. 67:22-68:4.

Finally, Dr. Noll estimated the overcharge for each transaction by applying the average percentage overcharge to all the e-book transactions falling in a given category—misleadingly making it *look* like actual damages are being calculated transaction-by-transaction, when he actually does nothing of the sort. *See* Kalt Decl. ¶ 117-120. Instead, he has merely averaged and aggregated e-book price data across broad categories of e-books, assuming that the adoption of agency similarly impacted all titles in these categories—hardly a "just and reasonable inference." *Comcast*, 133 S. Ct. at 1433; *see also* Kalt Decl. ¶¶ 111-117.

Worse still, Dr. Noll's methodology is designed to find harm where none may exist. If the average percentage overcharge for a certain category of e-books is positive, his formula assumes that a consumer who purchased e-books falling within that category suffered damages,

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[8] Apple (but not Plaintiffs) sought discovery of the Amazon pricing algorithm, which the Court rejected. Demana Decl. ¶ 4. Any uncertainty due to lack of information should not prejudice Apple's rights.

regardless of whether the titles' prices were actually impacted. *See, e.g.,* Kalt Decl. ¶¶ 78, 114; Fig. 22. By utilizing this approach, Plaintiffs' expert has effectively *assumed* antitrust injury for nearly all class members—the very thing his model was supposed to *prove*. Indeed, using this rigged methodology, Dr. Noll arrives at the unsupportable conclusion that prices increased for 99.5% of the Publisher Defendants' e-book sales. Noll Decl. 6-7.

Dr. Noll's damages formula is nothing more than an improper "fluid recovery" mechanism, estimating (incorrectly) the overall damages to the class as a whole (using averages that ignore class members' actual facts) and then awaiting the processing of individual claims—an approach that "mask[s] the prevalence of individual issues." *McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 232 (2d Cir. 2008), *abrogated on other grounds by Bridge v. Phoenix & Indem. Co.*, 553 U.S. 639 (2008). "When fluid recovery is used to permit the mass aggregation of claims, the right of defendants to challenge the allegations of individual plaintiffs is lost, resulting in a due process violation," *id.*, and a violation of the Rules Enabling Act. 28 U.S.C. § 2072(b); *Dukes*, 131 S. Ct. at 2561.

2. Plaintiffs' Expert Report Ignores The Realities Of The E-Books Market In Constructing A "But-For" World.

Dr. Noll's damages model fails to construct a realistic "but-for" world—*i.e.*, one that accounts for key factors that would have affected the e-books market even in the absence of the alleged conspiracy. Plaintiffs must compare "profits, prices, and values as affected by the conspiracy, with what they would have been in its absence under freely competitive conditions." *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 264 (1946); *see also New York v. Hendrickson Bros., Inc.*, 840 F.2d 1065, 1077 (2d Cir. 1988) ("Where the antitrust violation is a price-fixing conspiracy, the measure of damages to one of the coconspirators' customers is the difference between the prices actually paid and the prices that would have been paid absent the

conspiracy."); *L.A. Mem. Coliseum Comm'n*, 791 F.2d at 1367; *In re NCAA*, 2013 WL 5979327, at *8-9 (finding Dr. Noll's but-for analysis lacking and denying certification of damages class).

Dr. Noll does not describe the "but-for" world in which he calculates "competitive benchmark prices." Noll Decl. 6. He also fails to account for key factors that would have increased e-book prices in the absence of a conspiracy. For example, Dr. Noll assumes, with no analysis at all, that Amazon's pre-agency pricing strategy would have continued, Noll Decl. 10, n.3, even though he admits "I have no idea what [Amazon] would have adopted in the but-for world . . . .", Noll Dep. 58:13-14. He ignores that Amazon's pricing strategy was already evolving in the pre-agency period, and would have been expected to continue to do so. *See, e.g.*, Orszag Decl. ¶¶ 68-70.

Dr. Noll particularly fails to account for the fact that the launch of the iPad, which was independent of agency, would have affected Amazon's e-book pricing in the but-for world. Orszag Decl. ¶¶ 59-75. Amazon's low e-book prices drove demand for its Kindles. *Id*. at ¶¶ 52-53. Amazon was able to recapture the money it lost on its pre-agency below-cost sales of e-books through sales of its more profitable Kindles. *Id*. ¶¶ 50-53. That strategy changed after the iPad launch, which caused Amazon to significantly cut its Kindle prices. *Id*. ¶¶ 54-58. Making up for this loss of revenue through Kindle sales would require Amazon to raise the price of e-books even in the but-for world. *Id*. ¶¶ 59-75; *see also* Noll Dep. 42:15-43:11 (acknowledging link between e-reader and e-book prices). Plaintiffs' damages model also ignores evidence that Barnes & Noble would have exited the e-books market in the "but-for" world, Noll Dep. 82:2-83:2, as its business model of matching Amazon's e-book prices was also not sustainable. Orszag Decl. ¶¶ 117-123. Failure to account for these market realities renders Dr. Noll's model inherently unreliable.

IV. PLAINTIFFS CANNOT SATISFY THE OTHER REQUIREMENTS FOR CLASS CERTIFICATION.

A. Plaintiffs Cannot Demonstrate That Their Proposed Class Action Is A Superior Method Of Adjudication.

Plaintiffs must demonstrate "that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). A class action in this case is not superior to other methods because it would violate Apple's due process rights. "Due process requires that there be an opportunity to present *every* available defense.'" *Lindsey v. Normet*, 405 U.S. 56, 67 (1972) (quoting *Am. Sur. Co. v. Baldwin*, 287 U.S. 156, 168 (1932) (emphasis added)); *see also McLaughlin*, 522 F.3d at 232 (eliminating "the right of defendants to challenge the allegations of individual plaintiffs . . . result[s] in a due process violation"); *Newton v. Merrill Lynch, Pierce, Fenner & Smith*, 259 F.3d 154, 191-92 (3d Cir. 2001). Any shortcut that would bypass individualized impact and damages determinations, such as the model proposed by Plaintiffs, would violate Apple's due process rights. The Due Process Clause ensures defendants an opportunity to challenge plaintiffs' allegations, and Rule 23 cannot be used to trample that right. *See Dukes*, 131 S. Ct. at 2561 (citing 28 U.S.C. § 2072(b)).

B. Plaintiffs' Proposed Class Action Is Not Manageable And Plaintiffs Have Not Presented A Workable Trial Plan.

Plaintiffs must also establish that classwide adjudication is manageable, *see In re Visa Check Mastermoney Antitrust Litig.*, 280 F.3d 124, 141 (2d Cir. 2001) ("manageability of a proposed class action is always a matter of justifiable and serious concern") (internal quotation marks omitted), *overruled on other grounds by In re IPO*, 471 F.3d at 40, and present a workable trial plan before the court rules on class certification, *Benner v. Becton Dickinson & Co.*, 214 F.R.D. 157, 174 (S.D.N.Y. 2003) (denying class certification where plaintiffs proposed inadequate trial plan). A trial plan under Rule 23(c)(1)(B) must contain sufficient detail for the

district court to determine "what elements plaintiffs would have to prove under [each] theory to reach a finding of liability and relief, and then assess whether this proof can be made within the parameters of Rule 23." *Hohider v. United Parcel Serv.*, 574 F.3d 169, 197 (3d Cir. 2009).

Tellingly, Plaintiffs do not even offer a trial plan in their class certification motion. They have avoided providing any specifics of how this case could be tried because attempting to do so would reveal that many millions of individualized determinations related to injury-in-fact and damages would be necessary, rendering class litigation unmanageable. First, a jury would need to determine which e-books were purchased by each of the millions of class members (from records that the parties do not have), when those purchases were made, and the price of those e-books. This, in and of itself, would be a highly individualized, unmanageable process. Second, a jury would need to examine for each book purchase whether the prices paid by a particular class member were higher than they would have been absent Apple's conduct, which would vary from purchase to purchase. Third, the jury would need to determine whether that particular class member received any off-setting benefits resulting from Apple's entry into the market. It would then need to engage in a similar painstaking process for each of the millions of class members. And Apple is entitled to present individualized defenses and an individualized assessment of damages for each of them. See *Dukes*, 131 S. Ct. at 2561; *Lindsey*, 405 U.S. at 67. Thus, millions of mini-trials would render the case unmanageable.

C. Plaintiffs Are Not Adequate Class Representatives.

Rule 23(a)(4) requires that the class representatives "fairly and adequately protect the interests of the class." A class representative may not have a conflict of interest with the class they seek to represent. *Amchem*, 521 U.S. at 625, 626 n. 20. Although Plaintiffs allege continuing harm resulting from Apple's conduct, they now seek damages only through May 21, 2012. Demana Decl. ¶ 3. By not seeking damages after May 21, 2012, they are waiving the

rights of absent class members to seek such damages, making them inadequate class representatives. *See In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig.*, 209 F.R.D. 323, 339-340 (S.D.N.Y. 2002) (noting that res judicata prevents claim-splitting in class action cases); *Feinstein v. Firestone Tire & Rubber Co.*, 535 F. Supp. 595, 606-07 (S.D.N.Y. 1982) (denying certification due to inadequate representation where plaintiffs sought only certain categories of damages in an effort to improve the possibility of establishing Rule 23's requirements); *Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 1345, 1349 (2013) (acknowledging that named representative might be found inadequate where he places an artificial limit on the class's recovery). Worse yet, it appears that *Plaintiffs' lawyers unilaterally decided* to cut off class members' claims after May 2012. Mr. Petru, for example, testified that he did not think the class period should be limited to May 2012 if the alleged harm continued beyond that date. Petru Dep. 56:22-57:9. The conflict created by Plaintiffs' waiver of damages after May 21, 2012 renders them inadequate class representatives.

CONCLUSION

For all of the reasons set forth in this Opposition, this case cannot proceed as a class action and this Court should deny Plaintiffs' motion for class certification.

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