

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

IN RE ELECTRONIC BOOKS ANTITRUST  
LITIGATION

No. 11-md-02293 (DLC)  
ECF Case

This Document Relates to:  
  
ALL ACTIONS

CLASS ACTION

**CLASS PLAINTIFFS' STATEMENT OF UNDISPUTED FACTS**

	<b>Collateral Estoppel Findings</b>	<b>UNDISPUTED FACTS</b>	<b>Source Citation</b>
1.	*	“E-books are books that are sold to consumers in electronic form.”	Order at 12. <sup>1</sup>
2.	*	“Trade [e-books] consist of general interest fiction and non-fiction [e-books]. They are to be distinguished from ‘non-trade’ books such as academic textbooks, reference materials, and other texts.”	Order at 13 n.4.
3.	*	“[T]he relevant market” is the market for “trade e-books in the United States.”	Order at 142 n.60.
4.	*	Macmillan, Penguin, Hachette, HarperCollins, and Simon & Schuster (the “Publisher Defendants”) “publish both e-books and print books. The five Publisher Defendants and Random House represent the six largest publishers of ‘trade’ books in the United States.”	Order at 13.
5.	*	“The Publisher Defendants sold over 48% of all e-books in the United States in the first quarter of 2010.”	Order at 13
6.	*	“Defendant Apple engages in a number of businesses, but as relevant here it sells the iPad tablet device and	Order at 12.

<sup>1</sup> All asterisks designate findings found in *United States v. Apple Inc.*, Nos. 12-cv-2826 & 12-cv-3394, 2013 U.S. Dist. LEXIS 96424, (S.D.N.Y. July 10, 2013) (hereinafter referred to as the “Order”), and suitable for collateral estoppel as discussed in Class Plaintiffs’ Motion for Summary Judgment. All page references to the Order are to Lexis pagination.

		distributes e-books through its iBookstore.”	
7.	*	“Amazon’s Kindle was the first e-reader to gain widespread commercial acceptance. When the Kindle was launched in 2007, Amazon quickly became the market leader in the sale of e-books and e-book readers. Through 2009, Amazon dominated the e-book retail market, selling nearly 90% of all e-books.”	Order at 13-14.
8.		In July 2009, Barnes & Noble began selling e-books; in November 2009, it introduced the Nook, an e-reader device like the Kindle.	Order at 14; Ex. 17 <sup>2</sup> , ¶ 19 (Orszag Report)
9.	*	“Prior to April 2010, the Publisher[] [Defendants] distributed print and [electronic] books through a wholesale pricing model, in which a content provider sets a list price (also known as a suggested retail price) and then sells books and e-books to a retailer – such as Amazon – for a wholesale price, which is often a percentage of the list price. The retailer then offers the book and e-book to consumers at whatever price it chooses.”	Order at 14-15.
10.	*	“Amazon utilized a discount pricing strategy through which it charged \$9.99 for certain New Release and	Order at 14

<sup>2</sup> All “Ex. \_\_” references hereto are to the Declaration of Steve W. Berman in Support of Class Plaintiffs’ Motion for Summary Judgment, and Statement of Undisputed Facts, unless otherwise noted.

		bestselling e-books. Amazon was staunchly committed to its \$9.99 price point and believed it would have long-term benefits for its consumers. In order to compete with Amazon, other e-book retailers also adopted a \$9.99 or lower retail price for many e-book titles.”	
11	*	“The Publisher[] [Defendants] were unhappy with Amazon’s \$9.99 price point and feared that it would have a number of pernicious effects on their profits. . . . The Publisher[] [Defendants] also feared Amazon’s growing power in the book distribution business. . . . As a result, the Publisher Defendants determined that they needed to force Amazon to abandon its discount pricing model.”	Order at 15-16
12	*	“[The entire conspiracy] was shaped by the Publisher[] [Defendants’] desire to raise the price of e-books being sold through Amazon.”	Order at 75
13	*	The Publisher Defendants “were concerned that, should Amazon continue to dominate the sale of e-books to consumers, it would start to demand even lower wholesale prices for e-books . . . .”	Order at 75
14	*	“Beginning in at least early 2009, the Publisher Defendants began testing different ways to address what Macmillan termed ‘book devaluation to 9.99,’ and to confront what [Simon & Schuster’s Carolyn] Reidy described as the	Order at 17

		<p>‘basic problem: how to get Amazon to change its pricing’ and move off its \$9.99 price point. They frequently coordinated their efforts to increase the pressure on Amazon and decrease the likelihood that Amazon would retaliate -- an outcome each Publisher Defendant feared if it acted alone.”</p>	
15	*	<p>“The Publisher Defendants did not believe . . . that any one of them acting alone could convince Amazon to change its pricing policy.”</p>	Order at 18
16	*	<p>“In 2009, Apple was close to unveiling the iPad. . . . [Apple employees] began studying the e-book industry.”</p>	Order at 29
17	*	<p>“At [Apple’s] very first meetings [with the Publisher Defendants] in mid-December 2009, the Publisher[] [Defendants] conveyed to Apple their abhorrence of Amazon’s pricing, and Apple assured the Publisher[] [Defendants] it was willing to work with them to raise those prices, suggesting prices such as \$12.99 and \$14.99.”</p>	Order at 9
18	*	<p>“From its very first meetings with the Publisher[] [Defendants], Apple appealed to their desire to raise prices and offered them a vision of how they could reach that objective.”</p>	Order at 159
19	*	<p>“Apple and the Publisher Defendants shared one overarching interest -- that there be no price competition at</p>	Order at 10

		the retail level. Apple did not want to compete with Amazon (or any other e-book retailer) on price; and the Publisher Defendants wanted to end Amazon’s \$9.99 pricing and increase significantly the prevailing price point for e-books.” Id., at *10.	
20	*	“Apple played a central role in facilitating and executing [the] conspiracy. Without Apple’s orchestration of this conspiracy, it would not have succeeded as it did in the Spring of 2010.”	Order at 8-9
21	*	Apple “provided the Publisher Defendants with the vision, the format, the timetable, and the coordination that they needed to raise e-book prices. Apple decided to offer the Publisher Defendants the opportunity to move from a wholesale model -- where a publisher receives its designated wholesale price for each e-book and the retailer sets the retail price -- to an agency model, where a publisher sets the retail price and the retailer sells the e-book as its agent.”	Order at 11
22	*	“The agency agreements that Apple and the Publisher Defendants executed on the eve of the [iPad] Launch divided New Release e-books among price tiers. The top of each tier, or cap, was essentially the new price for New Release e-books. The caps included \$12.99 and \$14.99 for	Order at 11

		many books then being sold at \$9.99 by Amazon.”	
23	*	“[The agreements] carved out NYT Bestsellers for special treatment. When a NYT Bestseller was listed [in hardcover] for \$30 or less, the iTunes price would be capped at \$12.99; when it was listed above \$30 and up to \$35, the iTunes price would be no greater than \$14.99.”	Order at 70
24	*	“Apple well understood that the negotiations over the price ‘caps’ were actually negotiations over ultimate e-book prices.”	Order at 71
25	*	“The . . . pricing tiers were incorporated into Apple’s final Agreements and were identical for each Publisher Defendant. Through Apple’s adoption of price caps in Agreements, it took on the role of setting the prices for the Publisher Defendants’ e-books and eventually for much of the e-book industry. . . . [T]he Publisher Defendants largely moved the prices of their e-books to the caps, raising them consistently higher than they had been albeit below the pries that they would have preferred.”	Order at 74
26	*	“To ensure that the iBookstore would be competitive at higher prices, Apple concluded that it needed to eliminate all retail price competition. Thus, the final component of its agency model required the Publisher[] [Defendants] to move all of their e-tailers to agency.”	Order at 44-45

27.	*	*This requirement “eliminated any risk that Apple would ever have to compete on price when selling e-books, while as a practical matter forcing the Publisher[] [Defendants] to adopt the agency model across the board.”	Order at 55
28.	*	“By January 26, [2010], Apple had executed” agency agreements with the five Defendant Publishers.	Order at 75
29.	*	“Thus, in less than two months, Apple had signed agency contracts with [the five Publisher Defendants] and those Publisher Defendants had agreed with each other and Apple to solve the ‘Amazon issue’ and eliminate retail price competition for e-books. The Publisher Defendants would move as one, first to force Amazon to relinquish control of pricing, and then, when the iBookstore went live, to raise the retail prices for e-book versions of New Releases and NYT Bestsellers to the caps set by Apple.”	Order at 95-96
30.	*	The Publisher Defendants “put Amazon on notice that they were joining forces with Apple and would be altering their relationship with Amazon in order to take control of the retail price of e-books. It was clear to Amazon that it was facing a united front.”	Order at 84
31.	*	“As [an Amazon executive] testified, ‘[i]f it had been only Macmillan demanding agency, we would not have negotiated an agency contract with them. But having heard	Order at 104

		the same demand for agency terms coming from all the publishers in such close proximity . . . we really had no choice but to negotiate the best agency contracts we could with these five publishers.’ Unless it moved to an agency distribution model for e-books, Amazon customers would cease to have access to many of the most popular e-books, which would hurt Kindle customers and the attractiveness of the Kindle.”	
32	*	“Apple . . . encouraged the Publisher Defendants to present Amazon with a blanket threat of windowing for a seven month period . . . . [I]t was that threat, delivered simultaneously by [the Publisher Defendants] that left [Amazon] with no alternative but to sign agency agreements with each of them.”	Order at 166
33	*	“Apple closely monitored the progress of the Publisher Defendants in their negotiations with Amazon. The Publisher Defendants told Apple when their agency agreements with Amazon had been signed, and Apple watched as they swiftly moved their prices for New Release e-books on Amazon to the top of Apple’s tiers.”	Order at 108
34	*	“Through their conspiracy, [Apple and the Publisher Defendants] forced Amazon (and other resellers) to relinquish retail pricing authority and then they raised retail	Order at 185

		e-book prices. Those higher prices were not the result of regular market forces but of a scheme in which Apple was a full participant.”	
35	*	“Without the collective action that Apple nurtured, it is unlikely any individual Publisher would have succeeded in unilaterally imposing an agency relationship on Amazon. Working together, and equipped with Apple’s agency Agreements, Apple and the Publisher Defendants moved the largest publishers of trade e-books and their distributors from a wholesale to agency model, eliminated retail price competition, and raised e-book prices.”	Order at 138
36	*	“[T]he conspiracy succeeded. It not only succeeded, it did so in record-setting time and at the precise moment that Apple entered the e-book market.”	Order at 168
37		Three of the Publisher Defendants (Hachette, HarperCollins, and Macmillan) began selling e-books exclusively on the agency model between April 1 and April 3, 2010.	Noll Reply Report <sup>3</sup> at 30-31; Ex. 20; Ex. 21
38		Between April 1 and April 3, 2010, Simon & Schuster began selling e-books exclusively through the agency model at all of its resellers except Sony. With only two	Noll Reply Report at 30-32; Ex. 22; Ex. 23.

<sup>3</sup> “Noll Reply Report” refers to the Reply Declaration of Roger G. Noll, filed Under Seal, Dec. 18, 2013.

		<p>exceptions, Simon &amp; Schuster did not sell any e-books through Sony between April 3 and April 18, because it had not yet reached an agency agreement with Sony. Beginning April 19, 2010, Simon &amp; Schuster sold e-books at Sony exclusively on the agency model.</p>	
39		<p>Between April 1 and April 3, 2010, Penguin began selling e-books exclusively through the agency model at all of its resellers except Amazon. Penguin did not immediately reach an agency agreement with Amazon at that time. Amazon continued to sell Penguin e-books released before April 1, 2010 at prices set by Amazon, but Penguin refused to sell it any e-books released in April or May 2010 until Amazon switched to the agency model. Beginning May 28, 2010, Penguin sold e-books at Amazon exclusively on the agency model.</p>	<p>Noll Reply Report at 30, 32; Ex. 24; Ex. 25; Ex. 26</p>
40	*	<p>“When the iPad went on sale and the iBookstore went live in early April 2010 (or shortly thereafter, in the case of Penguin), each of the Publisher Defendants used their new pricing authority to raise the prices of their e-books overnight and substantially.”</p>	<p>Order at 133</p>
41	*	<p>“Just as Apple expected, after the iBookstore opened in April 2010, the price caps in the Agreements became the new retail prices for the Publisher Defendants’ e-books. In</p>	<p>Order at 109-110</p>

		the five months that followed, the Publisher Defendants collectively priced 85.7% of their New Release titles sold through Amazon and 92.1% of their New Release titles sold through Apple within 1% of the price caps. This was also true for 99.4% of the NYT Bestseller titles on Apple’s iBookstore, and 96.8% of NYT Bestsellers sold through Amazon. The increases at Amazon within roughly two weeks of moving to agency amounted to an average per unit e-book retail price increase of 14.2% for their New Releases, 42.7% for their NYT Bestsellers, and 18.6% across all of the Publisher Defendants’ e-books.”	
42.	*	“[T]he rise in trade e-book prices to or close to the price caps established in the Agreements was large and essentially simultaneous.”	Order at 139
43.	*	“[Chart A], <sup>4</sup> prepared by one of Apple’s experts, illustrates this sudden and uniform price increase. While the average prices for Random House’s e-books hovered steadily around \$8, for four of the Publisher Defendants, the price increases occurred at the opening of the iBookstore; Penguin’s price increases awaited the execution of its	Order at 110; <i>see also</i> Ex. 27

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<sup>4</sup> Charts A, B, and C are attached in Appendix A and are taken from *Apple*, 2013 U.S. LEXIS 96424, at \*186.

		agency agreement with Amazon and followed within a few weeks. The bottom flat line represents the average prices of non-major publishers” who did not participate in the conspiracy.	
44	*	“The Publisher Defendants raised more than the prices of just New Release e-books. The prices of some of their New Release hardcover books were also raised in order to move the e-book version into a correspondingly higher price tier. And, all of the Publisher Defendants raised the prices of their backlist e-books, which were not governed by the Agreements’ price tier regimen. As [Apple] had anticipated, the Publisher Defendants did this in order to make up for some of the revenue lost from their sales of New Release e-books.”	Order at 110-111
45		“[P]rices not covered by pricing tiers in the agency agreements rose relatively more (from pre-agency to post-agency) compared to prices that were covered by price tiers.”	Ex. 19, ¶ 49
46	*	“[Charts B and C], one prepared by the Plaintiffs’ expert and another from an expert for Apple, respectively, compare the price increases for the Publisher Defendants’ New Releases with the price increases for their backlist books. Despite drawing from different time periods, their	Order at 111; Ex. 15; Ex. 28

		conclusions are very similar. The Publisher Defendants used the change to an agency method for distributing their e-books as an opportunity to raise the prices for their e-books across the board.”	
47.	*	“Through the vehicle of the Apple agency agreements, the prices in the nascent e-book industry shifted upward, in some cases 50% or more for an individual title”.	Order at 12
48.	*	“[T]he actions taken by Apple and the Publisher Defendants led to an increase in the price of e-books. After all, the Publisher Defendants accounted for roughly 50% of the trade e-book market in April 2010, and it is undisputed that they raised the prices for not only their New Release but also their backlist e-books substantially.”	Order at 115
49.		Before the conspiracy, retail e-book prices had been declining. Average retail prices for Publisher Defendants’ e-books fell from \$8.83 in October 2009 to \$8.28 in March 2010. In February 2010, the average retail price was \$8.13, the lowest price since at least February 2008, the first month for which the parties have data. Average retail prices for e-books from all publishers fell from \$8.26 to \$7.66 over that time period. The \$7.66 average price in	Demana Decl., <sup>5</sup> Ex. B; Ex. 29

<sup>5</sup> “Demana Decl.” refers to the Declaration of Christine Demana, filed Under Seal, Nov. 15, 2013.

		March 2010 was the lowest since at least February 2008.	
50		In April 2010, when the iPad launched, the average retail price for Publisher Defendants' e-books rose from \$8.28 to \$9.38. This was higher than the average retail price had been for Publisher Defendants in any month in the past two years.	Demana Decl., Ex. B
51		Between February 2008 and March 2010, average retail prices for Publisher Defendants' e-books ranged from \$8.13 to \$8.84. Between April 2010 and March 2012, the last month for which the parties have data, average retail prices for Publisher Defendants' e-books ranged from \$9.38 to \$10.25.	Demana Decl., Ex. B
52		Before April 2010, average retail prices for Publisher Defendants' e-books were never more than \$0.67 higher (7.9%) than average retail prices for all publishers' e-books. From April 2010 through March 2012, average retail prices for Publisher Defendants' e-books were always at least \$1.21 higher (13%) than average retail prices for all publishers' e-books, and were as much as \$2.91 higher (28.4%).	Demana Decl., Ex. B
53		Between March and April 2010, the average retail price change of Random House e-books was 0.0%. In that same month, the average retail price change for other non-	Noll Reply Report. at 22; Ex. 11 at Charts 13

		defendant publishers' e-books was -0.2%.	and 15 <sup>6</sup>
54.		In April and May 2010, between 96.8% and 98.3% of Penguin e-books that were sold at Amazon were priced higher at Apple and Barnes & Noble. On average, titles that were priced higher were \$1.67 higher at Barnes & Noble than Amazon in April and \$1.70 higher in May. On average, titles that were priced higher were \$2.00 higher at the iBookstore than Amazon in both April and May.	Ex. 14, Table A-6; Noll Reply Report at 32 n.11.
55.		The average retail price of the Publisher Defendants' e-books increased for the entire two-year period after the agency agreements went into effect because of Publisher Defendants' move to the agency model.	Ex. 16 at 2235:7-14
56.	*	"Viewed from any perspective, Apple's conduct led to higher consumer prices for e-books."	Order at 166
57.		The average agency effect was no less than 14.9 percent.	Ex. 1 at 2298:21-24; Ex. 14, ¶ 10; Ex. 15, ¶ 158; Ex. 17, ¶ 125 (Orszag Report); Ex. 18; Noll Reply Decl.

<sup>6</sup> Chart 13 is titled "Random House Distribution of Price Changes Pre-Agency to Post-Switch (% of Units in Post-Switch Week) All Titles, Weeks Ending March 20th and April 17th," and Chart 15 is titled "Distribution of Price Changes Pre-Agency to Post-Switch of Non-major Publishers (% of Units in Post-Switch Week) All Titles, Weeks Ending March 20th and April 17th."

			at Ex. 2
58		The conspiracy caused overcharges to e-book consumers of \$280,254,374.	Noll Reply Report at 17 & Ex. 2.
59	*	“[E]ach of the Publisher Defendants lost sales of e-books due to the price increases.”	Order at 114
60		The loss of sales that would have occurred in the but-for world is a “loss of consumer welfare.”	Noll Decl. <sup>7</sup> at 12-13.
61	*	“[T]he arrival of the iBookstore brought less price competition and higher prices.”	Order at 183
62	*	“[T]here is no basis to find based on the trial record that Apple ever had reason to fear that the Publisher[] [Defendants] would use their power over retail pricing to lower prices anywhere.”	Order at 162 n.64.
63	*	“[C]onsumers suffered in a variety of ways from this scheme to eliminate retail price competition and to raise e-book prices. Some consumers had to pay more for e-books; others bought a cheaper e-book rather than the one they preferred to purchase; and it can be assumed that still others deferred a purchase altogether rather than pay the higher price.”	Order at 114

<sup>7</sup> “Noll Decl.” refers to the Corrected Declaration of Roger Noll, Oct. 21, 2013, ECF No. 428.

64		The Publisher Defendants all continued selling e-books exclusively on the agency model until at least May 21, 2012.	Mem. in Supp. of Prelim. Approval of Settlements, App'x A-C § IV.B, <i>Texas v. Penguin Grp. (USA) Inc.</i> , No. 12-cv-6625, (S.D.N.Y. Sept. 13, 2012), ECF No. 11; <i>United States v. Apple, Inc.</i> , 889 F. Supp. 2d 623, 629 (S.D.N.Y. 2012).
65	*	One “strategy that Publisher Defendants adopted in 2009 to combat Amazon’s \$9.99 pricing was the delayed release or ‘withholding’ of the e-book versions of New Releases, a practice that was also called ‘windowing.’”	Order at 22
66	*	“In order for the tactic of windowing to succeed, the Publisher[] [Defendants] knew they needed to act together. That several Publisher[] [Defendants] synchronized the adoption and announcement of their windowing strategies	Order at 23

		was thus no mere coincidence.”	
67.	*	“[T]here is no reason to find that windowing would have become widespread, long-lasting, or effective. Indeed, the Publishers (as well as Apple) realized that the delayed release of e-books was a foolish and even dangerous idea.”	Order at 164-165
68.	*	“[T]here was never any threat (before Apple encouraged one) to withhold all e-books. Many of the Publisher Defendants’ most popular books were not, nor were they slated to be, windowed . . . .”	Order at 165
69.	*	“Without the collective action that Apple nurtured, it is unlikely any individual Publisher would have succeeded in unilaterally imposing an agency relationship on Amazon.”	Order at 138
70.	*	“While conceding that the prices for the Publisher Defendants’ e-books went up after Apple opened the iBookstore, Apple argued as trial that the opening of the iBookstore actually led to an overall decline in trade e-book prices during the two-year period that followed that event. Its evidence was not persuasive. . . . The analysis presented by the Plaintiffs’ experts as well as common sense lead invariably to a finding that the actions taken by Apple and the Publisher Defendants led to an increase in the price of e-books.”	Order at 114-115
71.	*	“Apple has not shown that the execution of the	Order at 141

		Agreements had any pro-competitive effects.”	
72.	*	“The pro-competitive effects to which Apple has pointed, including its launch of the iBookstore, the technical novelties of the iPad, and the evolution of digital publishing more generally, are phenomena that are independent of the Agreements and therefore do not demonstrate any pro-competitive effects flowing from the Agreements.”	Order at 141
73.	*	“The iBookstore was not an essential feature of the iPad, and the iPad Launch would have occurred without any iBookstore.”	Order at 182
74.		E-books would have been available on the iPad whether or not Apple launched an iBookstore.	Ex. 30 at 60:21-65:14
75.	*	“Apple violated Section 1 of the Sherman Act by conspiring with the Publisher Defendants to eliminate retail price competition and to raise e-book prices.”	Order at 131
76.	*	“Apple participated in and facilitated a horizontal price-fixing conspiracy . . . a per se violation of the Sherman Act.”	Order at 140
77.	*	“Plaintiffs have carried their burden to show a violation of Section 1 of the Sherman Act under [the rule of reason] test as well.”	Order at 142
78.	*	“Apple knowingly and intentionally participated in and	Order at 151

		facilitated a horizontal conspiracy to eliminate retail price competition and raise the retail prices of e-books. Apple made a conscious commitment to join a scheme with the Publisher Defendants to raise the prices of e-books.”	
79	*	“Apple was a knowing and active member of that conspiracy. Apple not only willingly joined the conspiracy, but also forcefully facilitated it.”	Order at 131
80	*	“Understanding that no one Publisher could risk acting alone in an attempt to take pricing power away from Amazon, Apple created a mechanism and environment that enabled [the Publisher Defendants] to work together in a matter of weeks to eliminate all retail price competition for their e-books. The evidence is overwhelming that Apple knew of the unlawful aims of the conspiracy and joined that conspiracy with the specific intent to help it succeed.”	Order at 159-160
81	*	“Apple did not want to compete with Amazon on price and proposed to the Publisher[] [Defendants] a method through which both Apple and the Publisher[] [Defendants] could each achieve their goals. Apple was an essential member of the charged conspiracy and was fully complicit in the scheme to raise e-book prices even though the Publisher Defendants also had their own roles to play.”	Order at 177
82	*	“[T]he actions taken by Apple and the Publisher	Order at 115

		Defendants led to an increase in the price of e-books.”	
83	*	<p>“[T]he Agreements did not promote competition, but destroyed it. The Agreements compelled the Publisher Defendants to move Amazon and other retailers to an agency model for the distribution of e-books, removed the ability of retailers to set the prices of their e-books and compete with each other on price, relieved Apple of the need to compete on price, and allowed the Publisher Defendants to raise the prices for their e-books, which they promptly did on both New Releases and [NYT] Bestsellers as well as backlist titles.”</p>	Order at 141-142
84		Smashwords offered a royalty rate of 85% to self-publishing e-book authors at least as early as 2009.	<p>Noll Reply Report at 50 n.18; <a href="http://www.idealog.com/blog/ideas-triggered-by-amazon-buying-lexcycle/">http://www.idealog.com/blog/ideas-triggered-by-amazon-buying-lexcycle/</a></p>
85		Lulu offered a royalty rate of 80% to self-publishing e-book authors at least as early as 2008.	<p>Noll Reply Report at 50 n.18; <a href="http://lulupresscenter.com/uploads/assets/Press_Kit_">http://lulupresscenter.com/uploads/assets/Press_Kit_</a></p>

			908.pdf
86		As of 2009, self-publishing authors could get an effective 42.5% royalty rate at Amazon.	<a href="https://web.archive.org/web/20091213041703/http://www.smashwords.com/distribution">https://web.archive.org/web/20091213041703/http://www.smashwords.com/distribution</a>
87		Between January 2009 and January 2010, the share of Amazon books that were self-published approximately tripled.	Kalt Decl., Ex. 2 <sup>8</sup> ; Ex. 13 at 109:14-110:22
88		Amazon was considering introducing a 70/30 split at least as early as December 10, 2009.	Noll Reply Report at 50; Ex. 31 .
89		As of December 10, 2009, Apple had not met with any publishers and was not considering an agency model for e-books.	Order at 33-36; Ex. 32 , ¶¶ 71, 73; Ex. 33, ¶¶ 36, 38-39, 41, 43
90		As of January 11, 2010, Amazon planned to announce new terms for self-published authors on January 20, 2010.	Noll Reply Report at 50; Ex. 28 to the Declaration of Steve W. Berman

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<sup>8</sup> “Kalt Decl.” refers to the Declaration of Joseph P. Kalt Ph.D. on Behalf of Apple Inc., filed Under Seal, Nov. 13, 2013.

			in Further Support of Class Certification and Daubert Motions, filed Under Seal, December 18, 2013
91		Amazon first learned that Apple and the Publisher Defendants were moving to an agency model on January 18, 2010.	Order at 76; Ex. 35 at 217:15-218:5
92		Apple did not announce any terms for self-publishing authors until May 2010, and did not release iBooks Author until January 2012.	Ex. 17, ¶ 96 (Orszag Report); Ex. 36 at 189:20-21; Ex. 37
93		In 2009, “more than one million free public-domain titles” were available from Sony, and more than “500,000 free public domain titles” were available from Barnes & Noble.	Ex. 17, ¶¶ 17, 19 (Orszag Report)
94		When Apple launched the iBookstore, it included 30,000 free public domain e-books from Project Gutenberg.	Ex. 38
95		When Apple launched the iBookstore, the most frequently downloaded e-books from the iBookstore were all public domain Project Gutenberg e-books.	Ex. 39 at APPLEBOOK0044 1288
96		The Project Gutenberg e-books made available through the	<a href="http://www.guten">http://www.guten</a>

		iBookstore were all available to consumers prior to April 2010.	berg.org/ebooks/.
97		Class Representatives Anthony Petru and Thomas Friedman purchased one or more e-books from the Defendant Publishers at supra-competitive prices caused by the conspiracy.	Kalt Sur-Reply Decl. <sup>9</sup> Fig. 6

DATED: January 31, 2014

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By       /s/ Steve W. Berman        
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<sup>9</sup> “Kalt Sur-Reply Decl.” refers to the Sur-Reply Declaration in Response to Reply Declaration of Roger G. Noll and in Support of Defendant Apple Inc.’s Memorandum of Law in Opposition to Class Plaintiffs’ Motion to Exclude Expert Opinions Offered by Dr. Joseph Kalt, filed Under Seal, Jan. 21, 2014.

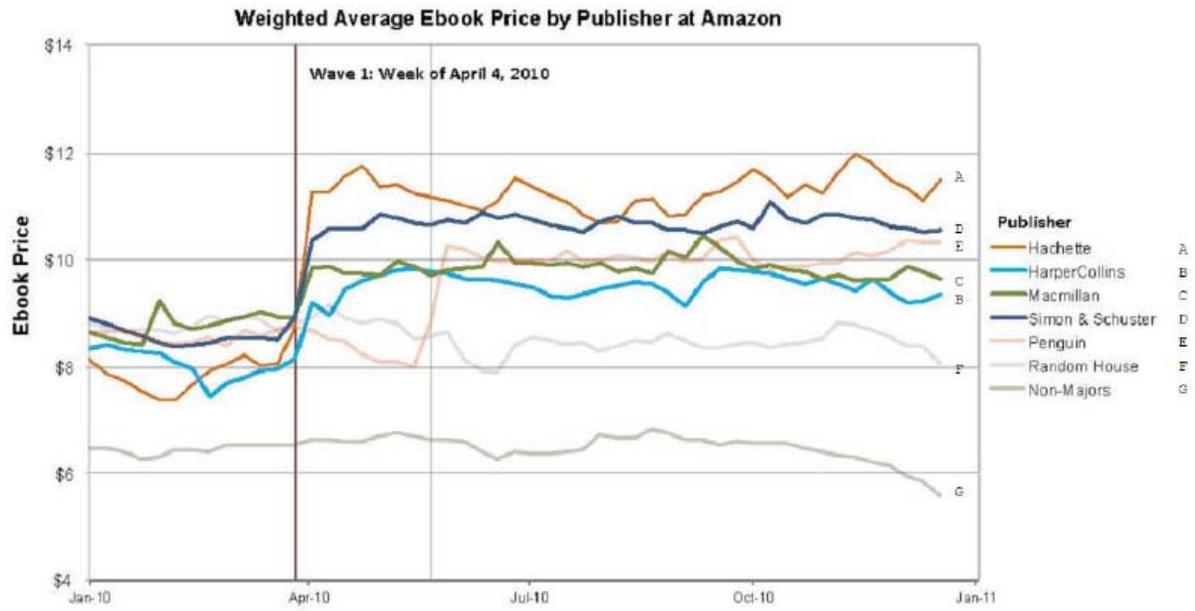
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# APPENDIX A

### CHART A



**CHART B**

E-Book Average Price Increases at Amazon by Publisher  
Defendants Following the Move to Agency

Amazon Weighted Average Price Increases

Publisher	All eBooks	New Releases	NYT Bestsellers	Backlist
Hachette	33.0%	14.1%	37.9%	37.5%
HarperCollins	13.6%	12.5%	44.0%	15.2%
Macmillan	11.6%	14.0%	-	11.2%
Penguin	18.3%	19.5%	43.6%	17.6%
Simon & Schuster	18.0%	15.1%	28.7%	19.8%
Defendant Publishers	18.6%	14.2%	42.7%	19.6%
Random House	0.01%	1.9%	0.2%	0.3%
Non-Majors	-0.2%	-0.9%	1.1%	0.1%

**CHART C**

Average E-book Prices of Backlist and New Release Titles  
in the Periods Before and After Agency

	Amazon	Barnes & Noble	Sony
<b>Backlist</b>			
Before Agency	\$7.16	\$6.84	\$8.07
After Agency	\$8.78	\$8.20	\$8.43
Percent Change	23%	20%	4%
<b>Hardcover New Release and NYT Bestsellers</b>			
Before Agency	\$10.37	\$9.99	\$11.31
After Agency	\$12.28	\$11.60	\$11.97
Percent Change	18%	16%	6%