No. 13-3857

In the United States Court of Appeals for the Second Circuit

STATE OF TEXAS ET AL.,
Appellees-Respondents,

v.

PENGUIN GROUP (USA) INC., ET AL.,
Appellants.

On Appeal from the United States District Court
For the Southern District of New York
No. 12-03394(DLC)

RESPONSE OF THE APPELLEE STATES TO REQUEST FOR ADMINISTRATIVE STAY

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INTRODUCTION

The alleged "emergency" for which Apple demands an administrative stay is the impending issuance of a third notice to the E-book consumers whose interests are at stake in this litigation. Of course, that's not an "emergency," and it is not the real reason Apple filed its eleventh-hour request for "emergency" relief. What Apple really wants is to delay its damages trial at all costs, and it knows that if it can bait this Court into granting *any* sort of stay — even a short administrative stay — Apple can blow up the trial date that marks the culmination of years' worth of district-court litigation. This Court should not countenance such gamesmanship. Apple's motion should be denied for all of the reasons given by the district court in its well-reasoned decision (attached as Ex. A), in addition to those highlighted below.

First, Apple's alleged "emergency" is entirely one of Apple's own making. Eighteen months ago, Apple urged the district court to delay class certification in the related class action (and hence the notice to E-book consumers) until after the company was held liable for violating the antitrust laws. *See* Ex. A at 4 (in October 2012, the district court

"inquired why Apple wished to delay class certification motion practice until after the liability trial," and "Apple stated that 'we think it makes sense to have class certification handled after the liability trial.'" (alterations omitted)). Having gotten the timeline it wanted from the district court, Apple cannot turn around and complain about the consequence of its choice.

Second, notwithstanding the hyperbole in the administrative stay request, all that is at stake is whether Apple will be irreparably harmed by notifying the Nation's E-book consumers that Apple has been held liable for violating the antitrust laws — an undisputedly true fact that every major newspaper in America has reported for almost a year. Moreover, as the district court pointed out, consumers previously received two official notices about this litigation. *See* Ex. A at 5–9. Those previous notices say in material part the same thing that the present one does: The States have sued Apple for violating the antitrust laws and raising E-book prices, and Apple denies the States' allegations. *See*, *e.g.*, Ex. B at 1 (The States "claim that there was a conspiracy involving five U.S. publishers and Apple to fix and raise retail prices of E-books. The lawyers for Eligible Consumers will have

to prove their claims in Court against Apple. Apple denies the claims and the requested damages."). It is surpassing strange for Apple to claim that it will be irreparably harmed by a third notice that is materially indistinguishable from the ones that the consumers previously received and that does nothing more than recount facts that every American can read in already-public judicial opinions. *Compare*, *e.g.*, *In re Electronic Books Antitrust Litig.*, 2014 WL 1282293, at *1, *10 (S.D.N.Y. Mar. 28, 2014) (noting that Apple "was found to have colluded with five major publishers to fix e-book prices, violating Section 1 of the Sherman Antitrust Act," and that the estimated damages are "just over $280 million"), *with* Ex. B at 4, 6 (notifying consumers of those exact same facts).

Third, Apple knew almost ten months ago that it would need a stay pending appeal to prevent consumers from receiving a third notice about this case. In fact, on August 2, 2013, Apple asked the district court for a stay of this summer's damages trial pending appeal of the district court's liability findings. *See* Ex. C. And in that eight-and-a-half-month-old motion, Apple specifically recognized that, absent a stay, "the state attorneys general must provide notice" to E-book consumers

and an opportunity to opt-out of the States' *parens patriae* suits under the Clayton Act. *Id*. at 10 (citing 15 U.S.C. § 15c(b)(1)–(2)). One week later, on August 9, 2013, the district court denied Apple's stay application in an on-the-record oral ruling. *See* Ex. D. Yet Apple waited *eight-and-a-half months* to renew its stay request in this Court. It is an odd "emergency" that takes eight-and-a-half months to recognize.

Fourth, there is nothing "highly controversial" about the district court's liability decision in this case. Steve Jobs himself admitted that the whole point of Apple's plan to shift the E-book market to an "agency model" was to force consumers to pay more for the same books. In Jobs' words: "So we told the publishers, 'We'll go to the agency model, where you set the price, and we get our 30%, and ***yes, the customer pays a little more, but that's what you want anyway***.'" Ex. E at 503 (emphasis added). That price increase is the opposite of "extremely beneficial to consumers and competition." Apple Stay Mot. at 3.

ARGUMENT

I. APPLE'S ALLEGED INJURY, WHICH IS NOT IRREPARABLE, IS FAR OUTWEIGHED BY THE INJURY FACED BY MILLIONS OF CONSUMERS IF THE DAMAGES TRIAL IS DELAYED.

Apple falsely portrays its administrative stay request as a modest one because, as the district court noted, even a *single day's* stay likely would postpone the joint trial on damages. *See* Ex. A at 32 ("[I]n order to meet current deadlines, including the joint damages trial to begin in the Class and States' Actions on July 14, the machinery of notice must be set in motion no later than [Monday,] April 28."). An administrative stay delaying the trial date would injure millions of consumers nationwide and "would impose substantial burdens . . . on the [trial] Court." *Id.*

Apple faces no irreparable injury, by contrast. E-book consumers already have received two notices that are materially indistinguishable from the forthcoming notice that stirred Apple's unpunctual demand for emergency relief. *See* Ex. A at 5–9, 13–14 ("Apple ignores the fact that this will be the third notice to class members advising them of the pendency of this lawsuit. Apple argues that class notice 'is a bell that cannot be unrung,' but this bell has already been rung — twice.").

Even if consumers ignored those prior notices, they likely would have read or heard about the antitrust judgment, which was reported in every newspaper from Bangor to Seattle. *See, e.g.*, Nate Raymond, *Apple Played A Central Role In Conspiracy On E-Book Prices, Judge Finds*, BANGOR DAILY NEWS (July 11, 2013); Deepti Hajela, *Apple Files Appeal In E-Book Antitrust Case*, SEATTLE TIMES (Feb. 26, 2014).

In any event, even if a third notice would injure Apple (which it would not), it is an injury that is inevitable. Although customers in some States are represented by private counsel pursuing a class action, 33 States and Territories sued Apple as *parens patriae* on behalf of their citizens. The Clayton Act demands that notice be sent to eligible consumers in these 33 States and Territories even if Apple successfully decertifies the class on appeal. 15 U.S.C. § 15c(b)(1)–(2).

Apple argues that courts will delay class notification to protect a defendant's brand from unnecessary reputational harm. Apple Stay Mot. at 18. But the Eleventh Circuit case that Apple cites issued a writ of mandamus to a district court that authorized a *pre-certification* mass mailing to the "*public at large*," charging a major motel chain with race discrimination. *Jackson v. Motel 6 Multipurpose Inc.*, 130 F.3d 999,

1004 (11th Cir. 1997) (emphasis added); *see also Simpkins v. Pulte Home Corp.*, 2008 WL 3927275, at *8 (M.D. Fla. 2008) (declining to extend *Jackson* for notice to an opt-in class). Here the notice will be sent only to consumers who purchased E-books from conspiring publishers, who already have been twice notified of the lawsuit, and then only after class certification, bench trial, and judgment of liability in federal district court.

II. APPLE IS UNLIKELY TO SUCCEED ON THE MERITS OF ITS APPEAL FROM THE LIABILITY RULING.

Apple will not succeed on the merits of its liability appeal.* The district court found that Apple conspired with five of the six largest American publishers to raise the price of E-books in violation of section 1 of the Sherman Act, 15 U.S.C. § 1, and various state laws. *United States v. Apple Inc.*, 952 F. Supp. 2d 638, 645 (S.D.N.Y. 2013). The evidence at trial showed that Apple wanted to enter the E-book market, which was dominated by Amazon, but it did not want to compete

* Apple's motion for an emergency stay is primarily focused on its purported likelihood of success on its petition under Fed. R. Civ. P. 23(f) to appeal the district court's ruling certifying a class in the related class action. The States, of course, are not subject to Rule 23. *See Illinois v. Abbott & Assocs.*, 460 U.S. 557, 573 n.29 (1990). As the district court noted in its opinion, the States' litigation — and the required dissemination of notice — will proceed regardless of this Court's ruling on Apple's Rule 23(f) petition. *See* Ex. A at 16–17. Thus, Apple's Rule 23(f) petition cannot justify any stay of the States' action or notification thereof to consumers.

against Amazon's low prices, which were famously set at $9.99 for certain new releases and bestsellers. Publishers also resented Amazon's low price because they feared it would cement $9.99 in customers' minds as the perceived value of all books, including hardcover print books that were traditionally sold for significantly more.

The trial court's judgment is supported by email and video evidence documenting the agreement between Apple and the publishers to raise prices, some examples of which are illustrative. As Steve Jobs explained over email to James Murdoch (CEO of NewsCorp, the parent company of HarperCollins), Murdoch could either "[t]hrow in with Apple and see if we can all make a go of this to create a real mainstream ebooks market at $12.99 and $14.99" or "[k]eep going with Amazon at $9.99." *Apple*, 952 F. Supp. at 677. As part of the scheme, the publishers agreed to a new pricing model and to force Amazon to adopt it by threatening to withhold popular book titles. *See, e.g.*, *id.* at 660 (statement from Random House CEO that Apple counseled him to withhold books from Amazon). In Steve Jobs's own words: "So we told the publishers, 'We'll go to the agency model . . . and yes the customer

pays a little more, but that's what you want anyway.' So [the publishers] went to Amazon and said, 'You're going to sign an agency contract or we're not going to give you the books.'" *Id.* at 687.

On January 27, 2010, Apple publicly unveiled the iPad, which featured an iBookstore with content from Apple's co-conspirators. At the event, Steve Jobs stood on stage and ushered in a new era of higher prices by purchasing for $14.99 Senator Edward Kennedy's autobiography, *True Compass*, which was selling at the time for $9.99 on Amazon. A reporter from the Wall Street Journal asked Mr. Jobs, on video camera, why in the world anyone would pay $14.99 for a book that Amazon was selling for $9.99. Mr. Jobs replied, "that won't be the case." The confused reporter pressed further, asking whether that meant that "you won't be $14.99 or they won't be $9.99?" Mr. Jobs responded with a knowing smile: "the prices will be the same." *Id.* at 678–79. The very next day, Macmillan's CEO was in Seattle and became the first publisher to give Amazon the ultimatum that it adopt the new pricing agreement or face a boycott from five of its largest suppliers. *See id.* at 679–80.

Two months later, the new pricing agreement took effect when the iBookstore became publicly accessible. Almost overnight, the prices of the vast majority of newly released and bestselling E-books jumped from $9.99 to $12.99 or $14.99. Prices of backlist titles increased dramatically as well. *Id.* at 682–84.

As set out in detail in the district court's comprehensive opinion, Apple's conduct constituted a *per se* violation of the antitrust laws under well-settled precedent. *See id.* at 688-94 (citing, *inter alia*, *Monsanto v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 761 (1984); *Interstate Circuit v. United States*, 306 U.S. 208, 222 (1939); *Toys "R" Us, Inc. v. FTC*, 221 F.3d 928, 935 (7th Cir. 2000)). Because Apple's conduct eliminated retail price competition, raised consumer prices, and had no countervailing procompetitive effects, it was illegal even under a rule of reason analysis. *See Apple*, 952 F. Supp. 2d at 694.

III. APPLE'S DELAY IN SEEKING AN EMERGENCY STAY FORECLOSES EQUITABLE RELIEF.

Apple has known for almost 10 months that a third notice would issue if it failed to obtain a stay pending appeal. *See* Ex. C at 10. But Apple elected to call haste and confusion into service, filing its untimely submission three business days before the Monday, April 28, deadline.

It is apparent that Apple views delinquency as an optimal litigation strategy, but equity does not reward brinksmanship, and busy trial courts should not have their trial dates blown up on such a short fuse.

CONCLUSION

The Court should deny Apple's request for an administrative stay.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I, Eric Lipman, hereby certify that on April 25, 2014, I electronically filed the foregoing Response of the Appellee States to Apple's Request for Administrative Stay with the Clerk of the Court of the United States Court of Appeals for the Second Circuit by using the CM/ECF System. I also sent three copies to the Clerk of the Court by Federal Express.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

April 25, 2014

s/ Eric Lipman
Eric Lipman

Exhibits

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE: ELECTRONIC BOOKS ANTITRUST LITIGATION		11 MD 2293 (DLC) Related to all matters
THE STATE OF TEXAS, et al., Plaintiffs, -v- PENGUIN GROUP (USA) INC., et al., Defendants.		12 Civ. 3394 (DLC) <u>OPINION & ORDER</u>

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DENISE COTE, District Judge:

After a bench trial in two closely related cases brought by the United States Department of Justice and thirty-three states

and U.S. territories,[1] defendant Apple Inc. ("Apple") was found to have colluded with five major publishers (the "Publisher Defendants") to fix e-book prices in violation of Section 1 of the Sherman Antitrust Act ("Sherman Act"), 15 U.S.C. § 1. On March 28, 2014, a class was certified in the related class action (the "Class Action"). In re: Electronic Books Antitrust Litig., 11 MD 2293 (DLC), 2014 WL 1282293 (S.D.N.Y. Mar. 28, 2014) (the "Class Certification Opinion"). A joint damages trial in the States' Action and Class Action is scheduled to begin on July 14, 2014.

On April 4, Apple moved to stay the Class and States' Actions pending Apple's submission and the Court of Appeals's review of a petition for interlocutory appeal of the Class Certification Decision (the "Rule 23(f) Petition"). Although the lion's share of its briefing is devoted to argument in favor of a stay during review of its Rule 23(f) Petition, Apple also suggests, in places, that these actions should be stayed pending Apple's merits appeal of the liability decision.[2] The parties agreed on an expedited schedule for briefing this motion for a stay, and the motion was fully submitted on April 15. By Order

[1] United States v. Apple Inc., 12 Civ. 2826 (S.D.N.Y.) ("DOJ Action"); State of Texas v. Penguin Grp. (USA) Inc., 12 Civ. 3394 (S.D.N.Y.) ("States' Action").

[2] Apple also requested an administrative stay pending issuance of a decision on its stay motion. That request is denied as moot.

of April 23, Apple's stay motion was denied for reasons to be set forth in a later Opinion. This Opinion gives the reasons for that denial.

BACKGROUND

The relevant procedural history is set out below. Although familiarity with the Class Certification Opinion is assumed, a brief description of the Class Action's expert's damages model is also set forth.

I. The Late Date of Class Certification, and Delay of the Damages Trial

Well before the June 2013 liability trial, at a lengthy conference held on October 26, 2012 addressed to pre-trial scheduling and discovery matters in the DOJ, States' and Class Actions, the Court inquired why Apple wished to delay class certification motion practice until after the liability trial. Apple stated that "the class certification process, we believe, can really be handled in a reasonable time" and "[we] think it makes sense to have it handled after" the liability trial. Apple represented that "not having the class go forward and opt out [at that time], certainly in no way will harm the class." Accordingly, the Court agreed to postpone class certification until after the liability trial.

Class plaintiffs moved for class certification on October 11, 2013. In support of that motion, class plaintiffs submitted

the expert report of Dr. Roger Noll ("Noll"), who reported the results of a sophisticated damages model built from a multivariate regression analysis of more than 149 million e-book sales. Noll's initial model explained 90% of the variance in prices among e-book titles. The parties' briefing on the class certification motion was fully submitted on January 21, 2014 following a sur-reply from Apple. Motions to exclude Apple's experts, who offered opinions in opposition to class certification, were fully submitted on February 4. On March 28, class certification was granted. To allow for a 45-day notice period and to accommodate certain pre-trial filings, the Court delayed the damages trial from May 2014 to July 14, 2014.

II. Two Prior Notices

Prior to the June 2013 liability trial in the DOJ Action and States' Action, each of the five Publisher Defendants settled with the DOJ, the States, and class plaintiffs. In connection with those settlements, two notices were sent to affected e-book purchasers -- including all class members in the Class Action -- advising them of the pendency of these actions and noting the allegations against the Publisher Defendants and Apple.

On September 13, 2012, the Court preliminary approved a $69 million settlement between all states and U.S. territories (sans Minnesota) and three of the Publisher Defendants: Hachette Book

Group, Inc. ("Hachette"), HarperCollins Publishers, LLC ("HarperCollins"), and Simon & Schuster, Inc. and Simon & Schuster Digital Sales, Inc. ("Simon & Schuster"). The Court also approved the first plan to notify affected e-book customers. Pursuant to that notice plan, e-retailers ("e-tailers") Amazon, Barnes & Noble, Apple, Kobo, Sony, and Google each identified customers who purchased one or more of the Publisher Defendants' e-books between April 1, 2010 and May 21, 2012 (the "class period"). Each e-tailer then sent by e-mail a one-page notice to affected customers. This first e-mail notice advised that those settlements "resolve an antitrust lawsuit about the price of electronic books," while "[a] separate lawsuit against two other publishers and Apple, Inc. continues and is set for trial in 2013."

In addition, the Claims Administrator set up a dedicated website at www.EbooksAGSettlements.com with further information about the litigation, including a more detailed notice. Kinsella Media, LLC, an advertising and legal notification firm, arranged for supplemental notice to be made through internet banner advertising, with banners that appeared on websites including Facebook's; sponsored links on the most popular U.S. search engines; mobile device advertising; advertising in newspapers in U.S. territories and possessions; press releases distributed via a national newswire and through promoted

stories; outreach to more than 300 blogs covering book-related topics; and posts to relevant Twitter accounts. Rust Consulting, Inc. ("Rust") also sent postcard notices to Apple and Sony customers whose e-mail notices were returned as undeliverable.

On July 12, 2013, the Court approved a second plan to notify consumers of $95 million settlements with Publisher Defendants Holtzbrinck Publishers, LLC d/b/a Macmillan ("Macmillan") and Penguin Group (USA) Inc. ("Penguin"), as well as Minnesota's settlement with all five of the Publisher Defendants. Notice of the former settlement went to customers in the States who purchased the Publisher Defendants' e-books during the class period, as well as to putative class members in the Class Action who purchased such e-books; notice of the latter went to Minnesota customers who purchased the Publisher Defendants' e-books during the class period.

The second notice plan largely mirrored the first. Much like the first, the second e-mail notice advised that the settlements resolved claims against these Publisher Defendants "in antitrust lawsuits about the price of electronic books," while "[t]he antitrust lawsuit against Apple, Inc. continues."

On March 28, 2014, a class was certified in the Class Action. Rule 23 requires individual notice to all class members who can be identified through reasonable effort, advising them,

among other things, of their right to opt-out of the litigation. Fed. R. Civ. P. 23(c)(2)(B). Similarly, the Clayton Antitrust Act ("Clayton Act") requires that the States, which have brought this action parens patriae on behalf of their residents, publish notice and permit residents to opt-out. 15 U.S.C. § 15c(b). Having been asked by the Court to prepare notice submissions in the event class certification was granted, plaintiffs moved for approval of a notice plan the same day.

The proposed notice plan is much like the prior plans. A short, half-page notice is to be sent by e-mail to class members and to customers in the States who purchased the Publisher Defendants' e-books during the class period, from their e-tailer, or from Rust on behalf of Apple or Sony (the "E-Mail Notice"). The E-mail Notice advises that the States' and Class Actions "claim that there was a conspiracy involving five U.S. publishers and Apple to fix and raise retail prices of E-books," that plaintiffs "will have to prove their claims in Court," and that "Apples denies the claims and the requested damages." Rust is to send the same notice by postcard to class members for whom no correct e-mail address was found in the two prior rounds of notice. An eight-page, detailed notice (the "Detailed Notice") is available on a dedicated case website, and will be mailed to anyone who requests it by calling a toll-free number, writing to

an Apple E-Books Antitrust Litigation Post Office Box, or writing or e-mailing class counsel.

Plaintiffs and Apple met and conferred regarding notice, and largely agreed upon the notices to be sent. The parties submitted minor disputes regarding the notices' language to the Court, which were addressed during a telephone conference on March 31. After a second round of discussions, the parties submitted a revised notice on April 1. The Court approved the form of notice by Order of April 1, and approved the notice plan as a whole by Order of April 2. The automated process for disseminating notice may not be halted after April 28.

III. The Instant Motion Practice

As noted above, class certification was granted on March 28 in the Class Action. On April 4, Apple brought the instant motion for a stay of the Class and States' Actions[3] pending Apple's submission and the Court of Appeals's review of Apple's Rule 23(f) Petition, as well as for a stay pending Apple's appeal from the Opinion finding Apple liable. Apple also moved for an administrative stay pending this Court's decision on its

[3] Although Apple's notice of motion and opening brief indicates that Apple requests a stay of both actions, Apple's initial brief makes few references to the States' Action. In a footnote in its reply, Apple briefly argues that a stay of the Class Action favors a stay in the States' Action (if the Court denies Apple's suggestion of remand), "to avoid piecemeal litigation." Just as Apple has failed to satisfy the standard for a stay of the Class Action, it has failed with respect to the States' Action, as well.

stay motion. The parties agreed upon a briefing schedule for the stay motion, which was fully submitted on April 15. On April 11, Apple filed its Rule 23(f) Petition.

By letter of April 22, Apple requested a ruling on its stay motion by close of business the following day, or, in the alternative, a grant of Apple's request for an administrative stay. By letters of April 22 and 23, class plaintiffs and the States, respectively, opposed any such stay. Class plaintiffs opined that any stay, including an administrative stay, of these proceedings will "almost assuredly delay the July 14 trial"; the States concurred that, in the event any stay were granted, "the feasibility of a July 14 trial is significantly decreased." By Order of April 23, the Court denied Apple's stay motion and its request for an administrative stay, with reasons to follow in this Opinion.

DISCUSSION

The standard for evaluating a stay application is well established:

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

S.E.C. v. Citigroup Global Markets Inc., 673 F.3d 158, 162 (2d Cir. 2012) (per curiam) (citation omitted). These factors

operate as a "sliding scale" where "[t]he necessary 'level' or 'degree' of possibility of success will vary according to the court's assessment of the other stay factors . . . [and] [t]he probability of success that must be demonstrated is inversely proportional to the amount of irreparable injury plaintiff will suffer absent the stay." Thapa v. Gonzales, 460 F.3d 323, 334 (2d Cir. 2006) (citation omitted). A stay is an "intrusion into the ordinary processes of administration and judicial review, and accordingly is not a matter of right." Nken v. Holder, 556 U.S. 418, 427 (2009) (citation omitted); see also Maldonado-Padilla v. Holder, 651 F.3d 325, 327-28 (2d Cir. 2011) (quoting Nken, 556 U.S. at 427).

I. Apple's Request for a Stay Pending Review of its Rule 23(f) Petition

Here, for the reasons set forth below, Apple has made no persuasive showing of harm, Apple's challenge to the class certification decision is unlikely to succeed, and any stay would injure plaintiffs and the public interest. Accordingly, Apple's request for a stay pending review of Apple's Rule 23(f) Petition was denied by Order of April 23.

A. Irreparable Injury

To demonstrate ongoing "irreparable harm" such that a stay is proper, a party must show that it will suffer injury which "cannot be remedied" absent a stay. Grand River Enter. Six

Nations, Ltd. v. Pryor, 481 F.3d 60, 66 (2d Cir. 2007) (per curiam) (citation omitted). The party seeking the stay has the burden of showing "injury that is not remote or speculative but actual and imminent, and for which a monetary award cannot be adequate compensation." Dexter 345 Inc. v. Cuomo, 663 F.3d 59, 63 (2d Cir. 2011) (citation omitted). Apple has not met this burden.

Apple chiefly argues that class notice will harm Apple's reputation, but also briefly refers to harm due to the cost of a corrected class notice, confusion engendered by a corrected notice, and invasion of class members' privacy.[4] These arguments are addressed in turn.

1. Harm to Apple's Reputation

Apple contends that class notice "risks damaging the goodwill and reputation that Apple has spent many years creating." Apple has not, however, pointed to any particular harm here that distinguishes this notice from the many other notices of pendency of a class action that are routinely issued without interlocutory appellate review of the certification decision. Moreover, the timing of this notice is largely due to

[4] Apple also argues that failure to stay these actions pending the merits appeal will harm Apple insofar as Apple will continue to pay counsel to litigate these actions. As discussed below, Apple's motion to stay pending the merits appeal is construed as an untimely motion for reconsideration of this Court's decision of August 9, 2013 and denied.

Apple's request to postpone class certification until after the liability trial. As significantly, Apple ignores the fact that this will be the third notice to class members advising them of the pendency of this lawsuit. Apple argues that class notice "is a bell that cannot be unrung," but this bell has already been rung -- twice.

The present E-mail Notice states that "[t]he lawsuits claim that there was a conspiracy involving five U.S. publishers and Apple to fix and raise retail prices of E-books," notes that the Publisher Defendants have settled, and states that plaintiffs "will have to prove their claims in Court against Apple" as "Apple denies the claims and the requested damages." In September 2012, the first e-mail notice was sent to the very same class members advising that certain Publisher Defendants had "resolve[d] an antitrust lawsuit about the price of electronic books" while "[a] separate lawsuit against two other publishers and Apple, Inc. continues and is set for trial in 2013." Less than nine months ago, a second e-mail notice was sent advising of further settlements with Publisher Defendants "in antitrust lawsuits about the price of electronic books," although "[t]he antitrust lawsuit against Apple, Inc. continues." Apple has not established that it will suffer any harm from a third notice advising class members of the pendency of these actions.

Instead, Apple argues that this notice is different because it is "the first class notice to consumers stating that Apple violated the law in connection with its entry into the e-books market." In fact, the E-mail Notice to be sent to class members says nothing about the Court's finding last July that Apple violated the antitrust laws. The liability finding is mentioned only in the Detailed Notice, which is to be provided only to class members who expressly request it.

In the Detailed Notice, in the sixth of eleven bullet points, following a bullet point stating that "Apples denies the claims and the alleged damages," the Detailed Notice advises:

> A trial in the AG Lawsuit against Apple was conducted in June 2013, and the Court found Apple liable for violating the antitrust laws. Damages were not determined in this first trial. Apple is appealing the Court's finding of liability, and also denies the alleged damages.

This reports only the bare fact that Apple was found liable, and advises that Apple is appealing that finding. This was widely reported news just nine months ago, and has continued to make news as the litigation develops. And it bears emphasis that this Detailed Notice will only be sent to class members who expressly request it. Apple has offered little reason to believe that making available a notice that includes a single sentence referencing this finding of liability will harm Apple.

Apple's only response is that "there is a significant difference between a newspaper article, reporting on the Court's prior findings of conspiracy, and an official class notice sent directly to Apple's consumers . . . bearing the imprimatur of a federal court." Again, it is the Detailed Notice, not the E-mail Notice, that references the liability finding, and the Detailed Notice is sent only to class members who request it. In any case, any interested class member has already been notified of this litigation, twice, and may well already know about the liability finding; if not, an interested class member could find the same information in a manner of minutes on the internet, not to mention a link to the liability opinion.

Notably, while Apple now argues that this language will cause it irreparable harm, Apple did not object to this language earlier this month when the parties proposed notice to the Court. Although Apple objected to a bullet point just below this one, which the Court struck in its Order of April 1, it raised no concerns about this reference to the liability finding. This quiescence does not accord with Apple's charge, weeks later, that this language will "undoubtedly and irreparably harm Apple's business."

Apple also suggests that it will be harmed because the Detailed Notice "explains that plaintiffs are seeking '$280 million' in damages attributable to Apple's conduct." Again,

Apple did not object to the statement in the proposed Detailed Notice that "[t]he two lawsuits are seeking $280 million combined." Apple suggested that the sentence following this one be stricken, and proposed adding a sentence just before this one ("The Plaintiffs allege violations of Section 1 of the Sherman Act, 15 U.S.C. § 1."), but raised no issue as to the "$280 million." And the two prior detailed notices already noted that damages estimates in claims against the Publisher Defendants totaled more than $200 million.

Although Apple contends that "many courts have found that potential injury to a defendant's reputation warrants curtailing or delaying class notice," Apple cites but a single case, in which "both parties agree[d] that some form of stay [wa]s appropriate." Altamura v. L'Oreal, USA, Inc., CV 11-5465 (CAS), 2013 WL 4537175, at *2 (C.D. Cal. Aug. 26, 2013).[5] And Apple does not dispute that, regardless of the success of its Rule 23(f) Petition, these notices will nonetheless be sent to affected customers in the thirty-three plaintiff states and

[5] The other two cases Apple cites on this point do not concern motions for stay pending a Rule 23(f) petition. See Register.com, Inc. v. Verio, Inc., 356 F.3d 393, 404 (2d Cir. 2004) (finding no abuse of discretion in issuing Lanham Act injunction on grounds that harm to reputation would be irreparable); Jackson v. Motel 6 Multipurpose, Inc., 130 F.3d 999, 1002-03 (11th Cir. 1997) (granting writ of mandamus in race discrimination case where district court permitted plaintiffs to send mass mailings to putative class members before class certification soliciting information about discrimination by defendant).

territories in the States' Action pursuant to the Clayton Act. For these reasons, Apple has failed to establish that it will suffer irreparable harm to its reputation absent a stay.

2. Cost of Corrected Notice and Possibility for Confusion

Apple also argues that, in the event the Court of Appeals reverses class certification, the parties would be burdened with the need to issue a corrective notice, which may confuse class members.[6] Because, as described below, Apple has failed to establish that its Rule 23(f) Petition is likely to win review by the Court of Appeals, let alone lead to decertification of the class, these costs are but a remote possibility.

3. Class Members' Privacy

Apple also argues that "the process of identifying class members and disseminating class notices inevitably burdens customers and infringes on their privacy interests." Yet class members are not being "identif[ied]" -- the e-tailers have already compiled lists of affected consumers, and already sent them at least two e-mail notices, in addition to subsequent e-mails advising that the Publisher Defendants' settlements were approved and that class members' accounts have been credited. And unless the class is decertified, notice must be given.

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[6] Apple suggests that it would have to "deal with more inquiries and questions from many confused customers," but the notice instructs that questions be directed to a dedicated administrator or class counsel.

Again, as described below, Apple has not established that there is a "substantial possibility" of decertification. Accordingly, Apple has failed to show that it will suffer irreparable harm absent a stay.

B. Likelihood of Success on the Merits

The next factor, a strong showing of a likelihood of success on the merits, requires "more than a mere possibility of relief." Nken, 556 U.S. at 434 (citation omitted). To demonstrate a "strong showing that it is likely to succeed on the merits," Apple has the burden of demonstrating "a substantial possibility, although less than a likelihood, of success" on appeal. Mohammed v. Reno, 309 F.3d 95, 101 (2d Cir. 2002) (citation omitted). Here, success on appeal requires both that Apple's Rule 23(f) Petition for interlocutory appeal is granted and that, upon review, the Court of Appeals decertifies the class. Apple has not established a substantial possibility of either.

1. Apple's Petition for Interlocutory Appeal

Pursuant to Rule 23(f), Fed. R. Civ. P., "[a] court of appeals may permit an appeal from an order granting or denying class-action certification" upon a timely petition. The Second Circuit will only grant leave to appeal where a petitioner demonstrates either "(1) that the certification order will effectively terminate the litigation and there has been a

substantial showing that the district court's decision is questionable, or (2) that the certification order implicates a legal question about which there is a compelling need for immediate resolution." Hevesi v. Citigroup Inc., 366 F.3d 70, 76 (2d Cir. 2004) (quoting Sumitomo Copper Litig. v. Credit Lyonnais Rouse, Ltd., 262 F.3d 134, 139 (2d Cir. 2001)).

The first category of cases comprises "the so-called 'death knell' cases" where class certification "forces the defendants to settle." Sumitomo, 262 F.3d at 138. The second category are cases in which certification "implicates an unresolved legal issue"; "the more fundamental the [legal] question and the greater the likelihood that it will escape effective disposition at the end of the case," the more likely the Court of Appeals is to permit an interlocutory appeal. Id. (citation omitted). The Court of Appeals has emphasized that "the standards of Rule 23(f) will rarely be met." Id. at 140.

Apple does not even address the Rule 23(f) standard in its initial memorandum in support of its motion. In response to plaintiffs' opposition memoranda, Apple quotes the standard in its reply, but simply states, without argument, that "both grounds for review . . . are satisfied here." This conclusory statement does not satisfy Apple's burden of establishing a substantial possibility of success on appeal.

Even if Apple had engaged with the Rule 23(f) standard, Apple's Petition does not appear to meet either ground for interlocutory appeal. Here, the class certification order cannot "effectively terminate the litigation," as the States' Action -- which accounts for $155 million of the $280 million of alleged damages -- will proceed to trial regardless of class certification. Nor does class certification threaten "ruinous liability" for Apple, as the $106 million[7] in damages alleged by the class, even trebled, will not seriously threaten a company recently reported by Moody's Investors Service to have more than $150 billion cash-on-hand. Cf. Chamberlan v. Ford Motor Co., 402 F.3d 952, 960 (9th Cir. 2005) (noting, in "death knell" analysis, that "the potential recovery here may be unpleasant to a behemoth company, but it is hardly terminal" to defendant Ford Motor Co.) (citation omitted); Waste Mgmt. Holdings, Inc. v. Mowbray, 208 F.3d 288, 294 (1st Cir. 2000) ("[W]hat might be 'ruinous' [liability] to a company of modest size might be merely unpleasant to a behemoth.").

And there is no reason to believe that the certification order presents "a legal question about which there is a compelling need for immediate resolution." Hevesi, 366 F.3d at 76 (citation omitted). The Class Certification Opinion is based

[7] The remaining damages are alleged to come from individuals in the armed forces and those with unidentified residences.

on well settled law applied to a conspiracy to set national e-book prices that, according to plaintiffs' expert's rigorous multivariate regression analysis, inflated e-book prices for 99.8% of sales of the Publisher Defendants' e-book during the class period. See Class Certification Opinion, at *11-25. Thus, Apple has failed to show a substantial possibility that its Petition will be granted.

2. Likelihood of Decertification

Apple has also failed to establish a substantial possibility that the Court of Appeals will decertify the class. Apple raises four arguments in support of decertification: (a) the class certified "contain[s] members who have suffered no harm" and therefore lack standing; (b) Noll's model cannot establish class-wide harm, because it is based on "average" overcharges and ignores offsets; (c) the Court erred in "resolv[ing] key merits questions" in its certification order, and consequently "abdicat[ed] its duty to 'rigorously analyze' plaintiffs' proof"; and (d) Noll's model does not match plaintiffs' theory of liability. These arguments are addressed in turn.

a) Article III Standing

First, Apple argues that the Court impermissibly accepted the possibility that the class might include persons who have not suffered injury from Apple's conduct. Citing to Denney v.

Deutsche Bank AG, 443 F.3d 253, 263-64 (2d Cir. 2006), Apple contends that, "[t]o the contrary, the Second Circuit has expressly held that bringing a suit as a class action does not relax the standing requirement, and that 'no class may be certified that contains members lacking Article III standing.'" Apple misreads Denney, which fully supports certification here, mistakenly conflating standing with persuasive proof of injury.[8]

[8] It is instructive to consider Denney's statement in context, particularly the cases cited in support:

> At the same time, no class may be certified that contains members lacking Article III standing. See Adashunas v. Negley, 626 F.2d 600, 604 (7th Cir. 1980) (affirming the denial of a plaintiff class because the definition of the class was "so amorphous and diverse" that it was not "reasonably clear that the proposed class members have all suffered a constitutional or statutory violation warranting some relief"); see also Ortiz v. Fibreboard Corp., 527 U.S. 815, 831 (1999) (noting petitioners' argument that "exposure-only" class members lack an injury-in-fact and acknowledging need for Article III standing but turning to class certification issues first); Id. at 884 (Breyer, J., dissenting) (referring to the "standing-related requirement that each class member have a good-faith basis under state law for claiming damages for some form of injury-in-fact"); Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F. Supp. 2d 289, 334 (S.D.N.Y. 2003) (noting that "each member of the class must have standing with respect to injuries suffered as a result of defendants' actions"); 7 AA Charles Alan Wright, Arthur R. Miller, Mary Kay Kane, Fed. Prac. & Proc. Civ. § 1785.1 (2005) ("[T]o avoid a dismissal based on a lack of standing, the court must be able to find that both the class and the representatives have suffered some injury requiring court intervention."). The class must

While Article III requires an "injury in fact," Denney itself teaches that, ordinarily, "[f]or purposes of determining standing, we must accept as true all material allegations of the complaint." Id. at 263. Where standing is challenged at the later stages of litigation, it must be "supported . . . with the manner and degree of evidence required at the successive stages of the litigation." Lewis v. Casey, 518 U.S. 343, 358 (1996) (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992)). Here, prior to trial, as a motion for summary judgment is pending, class members need do no more than establish a genuine issue of material fact exists as to the alleged injury. Id.

The class, by definition, is composed solely of consumers who purchased an e-book from a Publisher Defendant during the period of time in which those Publisher Defendants were engaged in a conspiracy with Apple to fix e-book prices. There can be no serious argument that those consumers lack Article III standing to bring a Sherman Act claim for price fixing.

Class plaintiffs have put forward evidence that in 99.8% of purchases of the Publisher Defendants' e-books during the class period, the purchaser suffered an overcharge as a result of

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> therefore be defined in such a way that anyone within it would have standing.

Denney, 443 F.3d at 264.

Apple's conduct. This adequately supports each class member's standing to litigate his or her claims. Cf. Denney, 443 F.3d at 263 ("We do not require that each member of a class submit evidence of personal standing.").

Apple also argues that class certification has "depriv[ed] Apple of its right to make . . . individualized challenges" to claims of overcharge with respect to particular e-books. This is not so. Apple has the list of the Publisher Defendants' e-books sold to class members during the class period. Apple is free to make as many "individualized challenges" to alleged overcharges for as many titles as it would like, should it have evidence to offer that does not run afoul of the Federal Rules of Evidence.

b) Challenges to Noll's Model

Apple next charges that class certification was inappropriate because "Noll's damages model is not capable of showing 'class-wide anticompetitive harm.'" For the reasons set out in the Class Certification Opinion, as well as the reasons below, Apple's arguments are not persuasive.

Apple principally argues that Noll's model "does not even attempt to demonstrate injury for each class member," as it "calculates an average overcharge for e-books within each category [Noll] created." This is not the case. In fact, there is no reason to believe that Noll's damages model would have

been any different had he been asked to calculate the overcharge for a single plaintiff who purchased a half-dozen e-books. That is, the fact that Noll's model calculates the same relative overcharge for each of the e-books in a given category is not an artifact of an attempt to measure class-wide damages; one would expect the same thing to be true if Noll were only interested in that single plaintiff's half-dozen titles.

Indeed, this would be a feature of any well-constructed multivariate regression analysis. Noll's 502 categories are as fine-grained a comparison as Noll can make between the Publisher Defendants' e-books and "competitive benchmark" e-books. Noll's multivariate regression analysis uses every major quantifiable factor that might influence e-book pricing to ensure that it compares apples to apples. After accounting for all of these factors, Noll has no other way to distinguish the effect of the conspiracy on one e-book in a given category from the effect on another that falls in that same category. Where all other variables are equal, Noll's model calculates that the relative effect of collusion will be the same. Thus, Noll is not impermissibly "averaging" overcharge calculations across many e-books -- Noll's method for calculating any overcharge simply depends on the objective variables that might influence pricing; when, for two e-books, those factors are identical, the relative overcharge will be the same. See Class Certification Opinion,

at *30-31. It is noteworthy that neither Apple nor either of its experts identified a quantifiable variable that Noll failed to include in his regression analysis. For this reason, as well, Apple's contention that the application of Noll's model will result in a "windfall" for purchasers of e-books who "suffered no harm" misses the mark. Damages will only be awarded where individual transaction records identify the purchaser as someone who bought an e-book for which there was an overcharge.

Apple also points to evidence that 17% of the Publisher Defendants' e-book prices fell after the adoption of agency agreements as evidence that many class members were not injured. Notably, Apple omits the fact that 60% of other publishers' e-books prices fell over the same period -- more than three and a half times as many. And because an e-book's price would be expected to fall for a number of independent reasons, like the release of a paperback edition, the fact that a given e-book's price fell does not prove that the price was not inflated (i.e., that the price would not have fallen more, absent Apple's conduct). See id. at *15. Apple appears to assume that any drop in the price of the Publisher Defendants' e-books during this time period was caused by Apple's conduct, but offers no evidence or analysis to support this inference.

Apple next contends that the Court erred in rejecting Apple's proposed damages offsets because "unavoidable 'speculation' about the but-for world, and the resulting uncertainty about any individual injury, renders certification inappropriate." This is a non sequitur. In the absence of evidence, Apple is no more able to speculate about injury to one plaintiff as to another, and thus any defense Apple may wish to make on the basis of such speculation would be applicable class-wide. Indeed, the appropriateness of offsets to any damages calculation is itself a class-wide issue.

It bears noting that in this application for a stay Apple has, for the first time, proposed a new offset to damages: it contends that undercharges enjoyed on one Publisher Defendant's e-book should be offset against overcharges suffered on another. Whether or not this offset is appropriate, it could easily be calculated on a class-wide basis and so does not inject individual issues into the trial. Noll's model, however, found no overcharges in just 0.2% of transactions.

Apple's final argument, regarding a "trial-by-formula," is rejected for the reasons set out in the Class Certification Opinion. See id. at *22. In brief, the Supreme Court has never suggested that widely used tools of economic analysis like regression models should be banned from trials because they rely on a "formula." The Supreme Court's reference to a "Trial by

Formula" in Wal-Mart Stores, Inc. v. Dukes was to a plan to try a sample set of class members' claims of sex discrimination and then multiply the average backpay award to determine the class-wide recovery without further individualized proceedings. 131 S. Ct. 2541, 2561 (2011). Under this procedure, liability for all but the sample set would never have been tried. Id. Here, class plaintiffs simply seek to apply an expert economist's measure of damages to each class member's individual transaction records. Apart from the word "formula," this method bears no relationship to the "Trial by Formula" prohibited in Dukes.

c) Resolving Key Merits Issues

Apple next argues that a class should be decertified because this Court abdicated its duty to rigorously analyze plaintiffs' proof and resolved key merits questions. Apple's chief argument on this score is that, in the first paragraph of the Class Certification Opinion, the Court made the following statement: "This is a paradigmatic antitrust class action. Virtually all class members paid inflated prices for e-books as a result of a centralized price-fixing conspiracy, and they have proffered a sophisticated damages model to reliably determine damages." Class Certification Opinion, at *1. Apple misreads the second sentence to ultimately resolve the question of damages against Apple as to "[v]irtually all class members."

As the context, as well as the remainder of the Opinion, makes clear, the Court made no such ultimate determination. Rather, the Court found that class plaintiffs had produced sufficient evidence -- for purposes of class certification -- that, according to Noll's rigorous damages model, class members suffered an overcharge in 99.8% of their purchases of the Publisher Defendants' e-books during the class period as a result of the centralized price-fixing conspiracy alleged by class plaintiffs. Given this fact-pattern, which was adequately established for purposes of class certification, the Court observed that this is a paradigmatic class action. This was not, as Apple charges, an attempt to "short-circuit a jury trial by resolving merits questions unrelated to certification." Whether particular class members were, in fact, injured by Apple's conduct remains a question for the jury.[9]

Similarly, Apple complains that the Court has "accepted" Noll's model. The Court was required to rule on the class plaintiffs' motion for class certification and Apple's motion to strike Noll's expert report. To that extent, the Court has

[9] Apple, of course, did not contest at the June 2013 liability trial and does not dispute now that the Publisher Defendants increased the prices of their e-books following Apple's entry into the e-book market. Apple's experts graphically displayed that sudden and dramatic price rise at trial and Apple's opening brief on this motion acknowledges that that sharp price rise prompted the Governments' investigations of Apple and the Publisher Defendants.

determined that Noll's model is sufficiently reliable to be admissible and to support a finding of predominance. It will be for the jury to accept or reject it as persuasive at trial.

Apple also contends, erroneously, that the Court "adopted a presumption in favor of class certification in antitrust cases." Apple's only basis for this argument is the Court's quotation from the Supreme Court's decision in Amchem Products, Inc. v. Windsor, 521 U.S. 591 (1997), noting that predominance is readily shown "in certain cases alleging . . . violations of the antitrust laws." Class Certification Opinion, at *13 (quoting Amchem, 521 U.S. at 625). To recognize that certain antitrust cases are prime candidates for class certification because class-wide issues so clearly predominate is not to indulge a presumption in favor of class certification in antitrust cases. The Court's Opinion recognized that the burden to show predominance rested on the plaintiffs, and required them to shoulder that burden. Id. at *11, 20, 22-23.

Apple's remaining arguments are rejected for the reasons given in the Class Certification Opinion. In particular, Apple's charge that Noll's model should be excluded because it can explain only 5% of the variation in the prices of a given e-book is misleading. Noll's model is built to estimate the effects of collusion on e-book prices; to do so, it effectively compares prices of e-books potentially affected by collusion to

prices of unaffected e-books. Thus, the relevant question is whether the model can reliably explain the differences between collusive e-book prices and competitive prices; the model's incidental ability (or inability) to explain changes in a given e-book's price is largely irrelevant. See Class Certification Opinion, at *28. Noll's model is able to explain 90% of the variance in prices among e-book titles.[10] Id. at *10.

d) Noll's Damages Model Matched Plaintiffs' Theory of Liability.

Relying on a portion of an expert report that was stricken as untimely, Apple argues that very few e-books would have been sold at $9.99 according to Noll's model. As noted in the Class Certification Opinion, it does not appear, on its face, that Apple's expert's study made any attempt to isolate the extent to which the predicted prices of New Releases and NYT Bestsellers -- the e-books Amazon sold at $9.99 prior to the shift to agency -- fall close to $9.99. Id. at *30 n.37. In any case, because this analysis has been stricken, Apple cannot rely on it in opposition to class certification. For all of the reasons set out above, Apple's Rule 23(f) Petition is unlikely to succeed.

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[10] For the first time, Apple complains that Noll did not disclose the adjusted R^2 of his revised model. Notably, Apple does not dispute that, as the Court observed in the Class Certification Opinion, Apple's experts re-ran Noll's later regression and should have been able to compute the adjusted R^2 of that model. See id. at *10 n.21. Apple does not suggest that the adjusted R^2 of the later model is less than 90%.

C. Injury to Plaintiffs and the Public Interest

By letter of April 22, 2014, Apple advised the Court that, in order to meet current deadlines, including the joint damages trial to begin in the Class and States' Actions on July 14, the machinery of notice must be set in motion no later than April 28. A stay pending the Second Circuit's review of Apple's Petition would delay not only adjudication of damages in the Class Action, but would also delay adjudication in the States' Action -- if a joint trial were maintained -- or require the States to move forward with a damages trial without the Class, despite the fact that damages trials in the States' and Class Actions should be nearly identical. This would impose substantial burdens on States, class plaintiffs, and on the Court.

Delaying the trial would also delay any recovery due plaintiffs, should they prevail. Apple argues that class members have already been partially compensated by the Publisher Defendants' settlements, but class members have a strong interest in being fully compensated for any losses they have suffered. Likewise, the public interest favors a speedy trial and resolution of this matter.

Apple also argues that a stay is in class members' interests because a corrective notice would cause confusion. As Apple's 23(f) Petition is unlikely to be granted, the chance of

such confusion is minimal. Accordingly, injury to plaintiffs, as well as the public interest, militates against a stay. Because Apple has not established that it will suffer irreparable harm without a stay, because it is unlikely to succeed on the merits, and because plaintiffs' interest and the public interest counsel against a stay, Apple's request for a stay pending the Second Circuit's review of Apple's Rule 23(f) Petition is denied.

Apple leans heavily on language taken from the Manual for Complex Litigation, urging that "the district court should ordinarily stay the dissemination of class notice to avoid the confusion and the substantial expense of renotification that may result from appellate reversal or modification." Manual for Complex Litigation (4th) § 21.28. But the Manual's sole support for this proposition is a single cite to Ramirez v. DeCoster, 203 F.R.D. 30 (D. Me. 2001), an aberrational case in which -- unbeknownst to the court -- the parties entered a settlement agreement as to all claims just before the court entered a ruling denying class certification on a number of claims. The court then considered certification of a settlement class, affirmatively "urg[ing] the Court of Appeals to accept an appeal under Rule 23(f)," making repeated references to possible reversal by the Court of Appeals and even considering, at length, the ramifications of such a reversal. Id. at 40. In

that context, the court entered a stay to be triggered by filing of a Rule 23(f) petition. The unusual circumstances in Ramirez find no parallel here.

Moreover, earlier in the same paragraph quoted by Apple, the Manual for Complex Litigation notes that "[i]nterlocutory appeals can disrupt and delay the litigation without necessarily changing the outcome of what are often familiar and almost routine issues" and states that "[g]ranting a stay depends . . . on a demonstration that the probability of error in the class certification decision is high enough that the costs of pressing ahead in the district court exceed the cost of waiting." Apple points to no authority suggesting that a court is empowered to enter a stay where the four-factor standard is not met. Because it is not met here, Apple's stay must be denied.

II. Apple's Request for a Stay Pending the Merits Appeal

Apple principally argues for a stay pending the Court of Appeals's review of Apple's Rule 23(f) Petition for interlocutory appeal of the grant of class certification. But, Apple also makes occasional references to its pending merits appeal of this Court's judgment on liability in the DOJ Action and the States' Action and suggests that a stay should be granted pending that appeal. This Court already denied Apple's request for a stay pending the merits appeal at a conference with the parties on August 9, 2013 for the reasons stated on the

record. Apple elected not to move for reconsideration of that decision, not to request a stay of all proceedings from the Court of Appeals, and not to move for an expedited appeal from the trial decision or the injunction entered against Apple. In its briefing on the present motion, Apple largely ignores the August request for a stay pending the merits appeal -- Apple does not even address whether it is likely to succeed on the merits of that appeal -- but occasionally adverts to it in an attempt to bolster its arguments for a stay pending review of its Rule 23(f) Petition.

To the extent Apple now moves the Court for a stay pending the merits appeal, that portion of its motion is construed as a motion for reconsideration. The motion is untimely and without merit. "A motion for reconsideration should be granted only when the defendant identifies an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice." Kolel Beth Yechiel Mechil of Tartikov, Inc. v. YLL Irrevocable Trust, 729 F.3d 99, 104 (2d Cir. 2013) (citation omitted). Apple has not attempted to make such a showing. Accordingly, Apple's motion for reconsideration of this Court's August 9, 2013 denial of its request for a stay pending the merits appeal is denied as well. Even if this were Apple's first motion for stay pending the merits appeal, Apple's motion would be denied on several

grounds -- not least of which is that Apple does not even attempt to show a likelihood of success on the merits in its briefing in support of this motion.

CONCLUSION

For the reasons stated above, Apple's April 4 motion for stay pending appeal, and its request for an administrative stay pending decision on that motion, were denied by Order of April 23.

SO ORDERED:

Dated: New York, New York
April 24, 2014

Denise Cote

DENISE COTE
United States District Judge

B

Legal Notice

If You Purchased an E-book You Could Be Included in a Lawsuit

Para una notificación en Español, llamar o visitar nuestro website.

Records indicate that you could be affected by two lawsuits against Apple Inc. ("Apple") about the price of electronic books ("E-books"). The Court ordered this notice and decided that these cases should proceed on behalf of two groups of people that could include you. The case is scheduled to go to trial to determine if Apple must pay any money.

What is this case about? The Attorneys General of 33 jurisdictions filed a lawsuit and private attorneys filed a class action in the remaining 19 states and other four U.S. territories ("Private Lawsuit"). The lawsuits claim that there was a conspiracy involving five U.S. publishers and Apple to fix and raise retail prices of E-books. The five Publishers (Hachette Book Group, Inc., HarperCollins Publishers L.L.C., Holtzbrinck Publishers, LLC d/b/a Macmillan, Penguin Group (USA) Inc., and Simon & Schuster, Inc.) have already agreed to settle in related lawsuits ("Settling Publishers"). The lawyers for Eligible Consumers will have to prove their claims in Court against Apple. Apple denies the claims and the requested damages.

Are you included? Generally, you are included as an Eligible Consumer in one or both of the lawsuits if you purchased an E-book from April 1, 2010 through May 21, 2012 published by the Settling Publishers.

Who represents Eligible Consumers? The Court has appointed two law firms to represent members of the Private Lawsuit ("Class Counsel"). As an Eligible Consumer, your interests are being represented by either your Attorney General or by Class Counsel. You don't have to pay Class Counsel or the Attorneys General to participate. Instead, they will ask the Court to award fees and costs, to be paid separately by Apple or out of a fund created for Eligible Consumers, if one becomes available. You may hire your own lawyer to appear in Court for you, but if you do, you have to pay that lawyer.

What are your options? To participate in the lawsuits, you do not have to do anything and you will be bound by the Court's judgment. If benefits are obtained, you will be notified about how to make an individual claim for money or benefits. If you do not want to participate in this lawsuit against Apple or want to keep your rights to sue Apple on your own over the claims in these lawsuits, you need to exclude yourself. If you exclude yourself, you cannot get money or benefits, if any are awarded, from these lawsuits. Your Exclusion Form must be submitted online or postmarked by **June 16, 2014**. (See Apple Lawsuits link on the E-book Lawsuits website.)

Where to get more information? This notice is only a summary. For more information visit the Apple Lawsuits link or call the toll-free number. Please do not contact Apple or the Court.

For more information: 1-866-686-9333 www.EbookLawsuits.com (Select "Apple Lawsuits" Link)

Court-Ordered Legal Notice
Apple E-Books Antitrust Litigation
P.O. Box 1852
Faribault MN 55021-7100

Important Notice About Apple E-Book Lawsuits

Notice ID Number <<XXXXXX>>

- <<SEQ>>

<<NAME1>>
<<NAME2>>
<<NAME3>>
<<ADDRESS1>>
<<ADDRESS2>>
<<CITY>> <<STATE>> <<ZIP>>
<<COUNTRY>>

Notice ID Number: <<XXXXXXXX>>

Legal Notice

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Generally, you are included as an Eligible Consumer in one or both of the lawsuits if you purchased an E-book from April 1, 2010 through May 21, 2012 published by the Settling Publishers.

Who represents Eligible Consumers?

The Court has appointed two law firms to represent members of the Private Lawsuit ("Class Counsel"). As an Eligible Consumer, your interests are being represented by either your Attorney General or by Class Counsel. You don't have to pay Class Counsel or the Attorneys General to participate. Instead, they will ask the Court to award fees and costs, to be paid separately by Apple or out of a fund created for Eligible Consumers, if one becomes available. You may hire your own lawyer to appear in Court for you, but if you do, you have to pay that lawyer.

What are your options?

To participate in the lawsuits, you do not have to do anything and you will be bound by the Court's judgment. If benefits are obtained, you will be notified about how to make an individual claim for money or benefits. If you do not want to participate in this lawsuit against Apple or want to keep your rights to sue Apple on your own over the claims in these lawsuits, you need to exclude yourself. If you exclude yourself, you cannot get money or benefits, if any are awarded, from these lawsuits. Your Exclusion Form must be submitted online or postmarked by **June 16, 2014.** (See Apple Lawsuits link on the E-book Lawsuits website.)

Where to get more information?

This notice is only a summary. For more information visit the Apple Lawsuits link or call the toll-free number. Please do not contact Apple or the Court.

For more information:
Call 1-866-686-9333 or Visit www.EbookLawsuits.com (Select "Apple Lawsuits" Link)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

A FEDERAL COURT AUTHORIZED THIS NOTICE. THIS IS NOT A SOLICITATION FROM A LAWYER.

If You Bought an E-book

You Could Be Included in a Lawsuit

- You could be affected by two lawsuits against Apple Inc. ("Apple") about the price of electronic books ("E-books").
- The lawsuits claim there was a conspiracy involving five top U.S. publishers and Apple to fix and raise retail prices of E-books.
- The five publishers ("Settling Publishers." *See* Question 2) settled these claims before trial, resulting in $166 million in payments being made available to consumers. You may have already received your payments from these settlements. This notice does not affect the previous settlements and applies only to the current claims for damages against Apple. Any damages that may be awarded against Apple will be in addition to the settlement amounts you may have already received.
- Apple denies the claims and the alleged damages.
- The Attorneys General of 33 jurisdictions filed one lawsuit ("AG Lawsuit") and private attorneys filed a separate lawsuit on behalf of consumers in 19 other states and four other U.S. territories ("Private Lawsuit"). The lawsuits both relate to the same claims.
- A trial in the AG Lawsuit against Apple was conducted in June 2013, and the Court found Apple liable for violating the antitrust laws. Damages were not determined in this first trial. Apple is appealing the Court's finding of liability, and also denies the alleged damages.
- A second trial against Apple is scheduled for July 14, 2014. The Attorneys General and Class Counsel believe that the main issue to be decided at trial is the amount of money Apple must pay to consumers. Apple does not agree.
- If you purchased one or more E-books from April 1, 2010 through May 21, 2012 that were published by any of the Settling Publishers, you may be included in these lawsuits.
- Depending upon where you lived when you purchased the affected E-books you may be a part of one or both of the lawsuits. (*See* Questions 7 and 8 for listing of the states in each lawsuit.)
- Your legal rights are affected whether you act or don't act. Read this notice carefully. Many frequently asked questions are answered below. Still have questions? Get more information at www.EbookLawsuits.com, by calling toll free at 1-866-686-9333, or writing to Apple E-Books Antitrust Litigation, P.O. Box 1851, Faribault, MN, 55021-1899.
- Hablas espanol? Para una notificación en Español, llamar o visitar nuestro website: www.EbookLawsuits.com

YOUR LEGAL RIGHTS AND OPTIONS IN THESE LAWSUITS	
EXCLUDE YOURSELF **BY JUNE 16, 2014**	**Get out of one or both of the lawsuits. Get no benefits. Keep your rights.** If you exclude yourself from a lawsuit, and money or benefits later become available from the lawsuit, you won't be eligible to share in those benefits. But you keep any rights to sue Apple on your own based on the same legal claims.
DO NOTHING	**Stay in one or both of the lawsuits. Await the outcome. Possibly share in benefits, if any become available. Give up certain rights.** By doing nothing, you keep the possibility of recovering money or other benefits that may result from a trial or settlement. But you give up any rights to ever sue Apple on your own based on the same legal claims.

- These rights and options are explained in this notice. **If you wish to be excluded from these lawsuits, you must act by June 16, 2014.**
- **This notice is separate from and does not alter any previous notices you may have already received regarding the settlements with the Settling Publishers.**

WHAT THIS NOTICE CONTAINS

BASIC INFORMATION

1. Why did I receive this notice?

If you received a notice in the mail or by email, you purchased at least one qualifying E-book and could be affected by the Private Lawsuit, the AG Lawsuit, or both. Your purchases are based on the records of the retailer(s) through which you bought your E-book(s). You have legal rights and options to consider and act upon. This notice explains all of these things.

2. What are these lawsuits about?

Judge Denise Cote, of the United States District Court for the Southern District of New York, is currently overseeing these cases. The cases are known as *In re Electronic Books Antitrust Litigation*, No. 11-md-02293 and *The State of Texas, et al. v. Penguin Group (USA) Inc., et al.*, No. 12-Civ.-03394. The people who sued are called the Plaintiffs. Apple and the Settling Publishers are the Defendants.

These lawsuits have been brought on behalf of consumers ("Eligible Consumers") who purchased one or more E-books published by the Settling Publishers from April 1, 2010 through May 21, 2012. The lawsuits claim that: 1) there was a conspiracy involving Apple and the Settling Publishers to fix and raise the retail prices of E-books and 2) this conspiracy led to a price increase for E-books published by the Settling Publishers. The two lawsuits are seeking $280 million combined. Any award by the jury would then be tripled under applicable law and reduced by the amount of the previous settlements.

The Settling Publishers include the following companies:

- Hachette Book Group, Inc.,
- HarperCollins Publishers L.L.C.,
- Holtzbrinck Publishers, LLC d/b/a Macmillan,
- Penguin Group (USA) Inc., and
- Simon & Schuster, Inc.

Apple is the only remaining Defendant.

Apple denies all the claims in these lawsuits.

3. Who brought these lawsuits?

The AG Lawsuit is brought by the Attorneys General of 33 jurisdictions listed below (*see* Question 7) against the Defendants on behalf of the Eligible Consumers who lived in their jurisdictions at the time of their E-book purchases from April 1, 2010 through May 21, 2012 ("AG Lawsuit").

Residents of 19 other states and four other U.S. territories are part of the Private Lawsuit (*see* Question 8). The Private Lawsuit is a class action against the Defendants. In a class action, one or more people called class representatives sue on behalf of people who have similar claims. The class representatives are Anthony Petru, Thomas Friedman, and Shane S. Davis.

The Private Lawsuit has been "certified," which means that the court has determined that it meets the requirements for class actions.

WHO IS INCLUDED IN THE LAWSUITS?

4. What E-book purchases are included in these lawsuits?

E-books published by the Settling Publishers (including their imprints) that were purchased from April 1, 2010 through May 21, 2012 are included in these lawsuits.

5. What is an E-book?

In these lawsuits, an E-book is an electronically formatted book read on a computer, a handheld device (including an e-reader or tablet), or other electronic device capable of visually displaying books. In these lawsuits, an audio book is not an E-book.

6. What is an imprint?

The Settling Publishers have imprints or divisions within their companies that publish E-books included in the lawsuits. For example, Simon & Schuster has the imprint Wall Street Journal Books. For a full list of all Settling Publishers and their imprints, and instructions on how to determine which E-books you have purchased and which company published a particular E-book, please select the "Apple Lawsuits" link at www.EbookLawsuits.com.

7. Who is an Eligible Consumer in the AG Lawsuit?

You are included in the AG Lawsuit if, at the time of your eligible E-book purchases, you lived in any of the following jurisdictions:

- District of Columbia
- Puerto Rico
- Alabama
- Alaska
- Arizona
- Arkansas
- Colorado
- Connecticut
- Delaware
- Idaho
- Illinois
- Indiana
- Iowa
- Kansas
- Louisiana
- Maryland
- Massachusetts
- Michigan
- Missouri
- Nebraska
- New Mexico
- New York
- North Dakota
- Ohio
- Pennsylvania
- South Dakota
- Tennessee
- Texas
- Utah
- Vermont
- Virginia
- West Virginia
- Wisconsin

It is possible to be an Eligible Consumer in both the AG Lawsuit and the Private Lawsuit if you moved residences.

8. Who is an Eligible Consumer in the Private Lawsuit?

You are included in the Private Lawsuit if, at the time of your eligible E-book purchases, you lived in the following jurisdictions:

- American Samoa
- California
- Florida
- Georgia
- Guam
- Hawaii
- Kentucky
- Maine
- Minnesota
- Mississippi
- Montana
- Nevada
- New Hampshire
- New Jersey
- North Carolina
- Northern Mariana Islands
- Oklahoma
- Oregon
- Rhode Island
- South Carolina
- U.S. Virgin Islands
- Washington
- Wyoming

It is possible to be an Eligible Consumer in both the AG Lawsuit and the Private Lawsuit if you moved residences.

9. Who is excluded from recovering damages from these lawsuits?

The lawsuits exclude Apple and the Settling Publishers, their employees, alleged co-conspirators, officers, directors, legal representatives, heirs, successors, and wholly or partly owned subsidiaries or affiliated companies, as well as the Honorable Denise Cote.

People who obtained rental E-books, free E-books, and E-books received as gifts only are not included. (Only E-book purchasers are included in the lawsuits. If you purchased an E-book with a gift card, you are a purchaser.)

Business, governments, libraries, non-profits, and other entities are also excluded from the lawsuits.

YOUR RIGHTS AND OPTIONS

10. What is the effect of being an Eligible Consumer?

Eligible Consumers have a choice to participate in the lawsuits or to exclude themselves. Either choice will have consequences, which you should understand before making your decision.

People who are Eligible Consumers in either the AG Lawsuit or the Private Lawsuit who do not exclude themselves will be bound by the Court's decisions and may remain eligible to participate in any benefits that may be obtained for Eligible Consumers as a result of this litigation.

If you wish to remain an Eligible Consumer, you do not need to do anything at this time. If you remain an Eligible Consumer in either of the lawsuits, you will be bound by any judgment in those lawsuits, whether it is favorable or unfavorable. If any benefits are awarded, you may be entitled to share in the proceeds, minus whatever costs, expenses, and attorney's fees the Court may approve. If Apple wins, you may not pursue a lawsuit on your own about any of the issues decided in these lawsuits.

If you choose not to participate in the lawsuits, you must exclude yourself. If you exclude yourself:

- You will not receive any benefit that may result from the lawsuits, and you will not be bound by any court orders in the lawsuits.
- You may choose to sue Apple on your own or you may choose to do nothing.

See Question 14 for additional information.

11. Who represents Eligible Consumers?

The Court appointed the firms of Hagens Berman Sobol Shapiro LLP and Cohen Milstein Sellers & Toll PLLC to represent members of the Private Lawsuit ("Class Counsel"). As an Eligible Consumer, your interests are being represented by either your jurisdiction's Attorney General or by Class Counsel. You will not be charged for these lawyers. If you want to be represented by another lawyer, you may hire one to appear in Court for you at your own expense.

12. How will the lawyers be paid?

You do not have to pay Class Counsel or the Attorneys General. Class Counsel and the Attorneys General will ask for an award of fees and costs from the Court, to be paid separately by Apple or out of the recoveries made, if any.

13. What happens if I do nothing?

If you do nothing you will automatically remain part of one or both of the lawsuits. You will be legally bound by all Court orders (including any judgments entered or any future settlement), which means you won't be able to sue, or continue to sue, Apple based on the same legal claims.

14. What if I don't want to be part of the lawsuits?

If you choose not to participate in the lawsuits, you must exclude yourself. If you exclude yourself, you may choose to take no further action regarding the issues in these lawsuits, or you may file an individual claim against Apple in a separate proceeding, but you will not receive any benefit that may result from the lawsuits. You will not be bound by any Court orders and you keep your right to sue Apple on your own regarding the issues in this case.

If you are an Eligible Consumer, but you want to exclude yourself from these lawsuits, you must follow each of these steps:

A. Download and complete the Exclusion Form available at the "Apple Lawsuits" link on the website www.EbookLawsuits.com or by calling 1-866-686-9333.

B. By no later than **June 16, 2014,** submit the completed Exclusion Form online at www.EbookLawsuits.com or by mailing it by First Class U.S. Mail, postage paid, to the following address:

Apple E-Books Exclusions
PO Box 1851
Faribault, MN 55021-1899

A TRIAL

15. When and where will the trial take place?

If the case is not dismissed or settled, Plaintiffs will have to prove their claims and damages at a trial that will take place at the United States District Court, 500 Pearl Street, New York, NY 10007-1312. The trial is currently scheduled to take place on July 14, 2014. The trial date and time will be posted on the "Apple Lawsuits" link at www.EbookLawsuits.com. During the trial, a jury will hear evidence, so that a decision can be reached about whether the Plaintiffs or Apple are right about the claims in the lawsuit.

GETTING MORE INFORMATION

16. How do I get more information?

If you have any questions concerning the matters contained in this notice, you can get more information on the "Apple Lawsuits" link at www.EbookLawsuits.com, by calling toll free at 1-866-686-9333, or writing to Apple E-Books Antitrust Litigation, P.O. Box 1851, Faribault, MN, 55021-1899.

You may also contact Class Counsel using the following contact information:

Jeff D. Friedman
Shana E. Scarlett
ebooks@hbsslaw.com
Hagens Berman Sobol Shapiro LLP
715 Hearst Avenue, Suite 202
Berkeley, CA 94710

Additional information about these lawsuits may also be obtained from the website of Class Counsel at www.hbsslaw.com.

If you think you may be an Eligible Consumer and did not receive a notice by email or mail, please visit the website to determine your eligibility.

Please do not contact the Court for information about these lawsuits.

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DOCUMENT
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8/8/13

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

v.

APPLE INC.,

Defendant.

12 Civ. 2826 (DLC)

DRF 8/8/13

THE STATE OF TEXAS,
THE STATE OF CONNECTICUT, *et al.*,

Plaintiffs,

v.

PENGUIN GROUP (USA) INC., *et al.*,

Defendants.

12 Civ. 3394 (DLC)

DEFENDANT APPLE INC.'S SCHEDULING PROPOSAL

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PRELIMINARY STATEMENT

Pursuant to this Court's July 10 Order, Apple hereby files this "proposal[] as to the completion of discovery and a schedule for any trial on damages." ECF No. 327 at 1.

Apple proposes that this Court stay all further proceedings pending Apple's appeal of the final judgment and any injunction entered by the Court. A stay is particularly appropriate given the procedural posture of this case and all the standards for issuing a stay are satisfied.

This Court's July 10 decision finding a violation of Section 1 of the Sherman Act raises substantial and important issues concerning how the antitrust laws, as interpreted by Supreme Court decisions thirty or more years old, apply to efforts of companies to enter new markets in the rapidly changing, always evolving technology sector. Apple plans to appeal this Court's final judgment and respectfully submits that it has a strong chance of prevailing in the Second Circuit and the Supreme Court. And the issues on appeal are potentially dispositive of the plaintiff States' action, as well as the related putative class proceedings: If Apple succeeds on appeal in challenging this Court's ruling that Apple joined and facilitated a price-fixing conspiracy among the publisher defendants and thereby violated Section 1, these related actions will fail as a matter of law as well.

Moreover, absent a stay, the parties and the Court will devote enormous time and effort to conducting further fact and expert discovery, motions practice, and a potential jury trial. Notwithstanding 15 U.S.C. §§ 15c-15e, the Court would have to determine whether there is a fair and efficient way to adjudicate the States' damages claims regarding alleged injuries to millions of consumers in a way that will protect Apple's right to defend itself under the antitrust laws and Due Process Clause. *See, e.g.*, *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013) (overturning class certification in antitrust case because the evidence fell "far short of establishing that

damages are capable of measurement on a classwide basis"). Nor does the granting of a stay pose any countervailing risks of injury to the parties or the public interest. Indeed, the States and the Settlement Class informed the Court earlier today that they would like to move forward with finalizing and distributing the $166 million in proceeds from their settlements with the defendant publishers, which amounts to over 76% of the damages that plaintiffs allege resulted from the alleged antitrust violation, and the publisher defendant consent decrees already provide protection against future violations. At the same time, the public will benefit greatly from the savings in judicial resources that will accrue by avoiding another costly round of hard-fought litigation that will all have been for nothing if Apple prevails on appeal. *Cf. Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 352 (4th Cir. 1998) (overturning a $390 million class action jury verdict as a matter of law).

In short, a stay pending Apple's appeal from the final judgment in the DOJ case will serve the interests of all parties and the Court. But in the event the Court declines to stay phase two of the plaintiff States' case and the class action, Apple proposes a schedule—set out below and attached as Exhibit A—that would allow for a single October 2014 jury trial on remaining issues of liability and damages in both cases. Apple has met and conferred with counsel for plaintiff States and the putative class twice on the schedule and procedure, and the parties have different views on the schedule. Apple's proposal for proceedings, if its stay request is ultimately denied, is set forth in Section II below. The parties anticipate further discussions in advance of the August 9, 2013 hearing to attempt to address the differences, and will report to the Court on any progress made.

DISCUSSION

I. The Court Should Stay Phase Two of the States' Trial and the Class Proceedings

This Court should exercise its "judicial discretion" to stay both phase two of the States' trial as well as the class proceedings. *Wells Fargo Bank, N.A. v. ESM Fund I, LP*, No. 10-cv-7332, 2012 WL 3023985, at *1 (S.D.N.Y. July 24, 2012) ("A determination to stay enforcement of a judgment pending appeal is an exercise of judicial discretion"); *see, e.g.*, *In re World Trade Ctr. Disaster Site Litig.*, No. 06-5324-cv, 2007 U.S. App. LEXIS 8728 (2d Cir. Mar. 9, 2007) (granting motion for a stay of trial as well as pre-trial proceedings pending appeal); *Estate of Heiser v. Deutsche Bank Trust Co. Americas*, No. 11-cv-1608, 2012 WL 2865485 (S.D.N.Y. July 10, 2012) (granting stay pending resolution of two consolidated appeals that presented questions of law substantially related to the case); *Plummer v. Quinn*, No. 07-cv-6154, 2008 WL 383507 (S.D.N.Y. Feb. 12, 2008) (granting stay pending defendant's appeal); *United States v. Visa U.S.A., Inc.*, No. 98-cv-7076, Dkt. No. 247 (S.D.N.Y. Feb. 7, 2002) (granting stay of all provisions of the final judgment pending final resolution of defendant's appeal).

As the Supreme Court has recognized, a district court has "broad discretion to stay proceedings as an incident to its power to control its own docket." *Clinton v. Jones*, 520 U.S. 681, 706-07 (1997) (citing *Landis v. N. American Co.*, 299 U.S. 248, 254 (1936)). Indeed, the Court has explained that "especially in cases of extraordinary public moment," as in this case, a plaintiff "may be required to submit to delay not immoderate in extent and not oppressive in its consequences if the public welfare or convenience will thereby be promoted." *Landis*, 299 U.S. at 256.

As shown below, Apple has met all of the standards necessary for stay: Apple has a substantial possibility of success on appeal, it will suffer irreparable harm absent a stay, and there are no countervailing hardships that would be created by a stay. *See Hilton v. Braunskill*,

481 U.S. 770, 776 (1987). In fact, all parties, the Court and the public will benefit from a stay while the important issues at the center of these cases are reviewed on appeal.

In determining whether to grant a stay, "the court may . . . consider the prospects of success on appeal, a consideration that is to be assessed *with liberality*." *Estate of Heiser*, 2012 WL 2865485, at *3 (emphasis added). Demonstrating "a substantial possibility" is therefore not a heavy burden—it is "*less than a likelihood*, of success on appeal." *Id.* (emphasis added) (internal quotation marks omitted).

Although plaintiffs repeatedly characterized this as a "garden variety" price-fixing case, it is no such thing. Rather, plaintiffs' theories of antitrust liability against Apple are novel—in particular where the key element of agreement is premised on the "practical effect" of a contract—and controversial. Apple has strong arguments for appeal from this Court's July 10 ruling, which has generated significant debate and discussion about the meaning and scope of the antitrust laws in this context.[1]

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[1] *See, e.g.*, L. Gordon Crovitz, *A Judge Convicts Apple of Competition*, Wall St. J., July 22, 2013, at A15 (describing "several grounds to appeal" the ruling that, if not overturned, "will undermine competition, harm consumers and deter new products"); Editorial, *The E-Book Price Fixing Conspiracy*, N.Y. Times, July 13, 2013, at A18 (Apple's agency agreements with the publishers "brought much-needed competition to the e-book marketplace . . . that is healthier for the publishers and for consumers, too"); Editorial, *Guilty of Competition*, Wall St. J., July 11, 2013, at A14 ("we trust the Second Circuit or even the Supreme Court will squelch this threat to competition and efficient markets"); Mark Seavy & Kate Tummarello, *Apple Guilty of E-Book Pricing Conspiracy – Observers Debate Likelihood of Appeal*, Consumer Electronics Daily, July 11, 2013 (explaining how "[a]nalysts were divided over Apple's chances for reversing Cote's decision"); Scott Martin, *Judge: Apple Conspired To Raise E-Book Prices*, USA Today, July 10, 2013, *at* http://www.usatoday.com/story/tech/2013/07/10/apple-ebooks-case/2504901/ (illustrating that "[l]egal experts remain[] mixed on whether Apple's actions were defensible or ran afoul of antitrust concerns"); Daniel Fisher, *Apple Learns the Hazards of Innovation with E-Book Antitrust Ruling*, Forbes, July 10, 2013, at http://www.forbes.com/sites/danielfisher/2013/07/10/apple-learns-the-hazards-of-innovation-with-e-book-antitrust-ruling/ (quoting one antitrust professor as saying "'[w]hen firms come up with new pricing schemes

Apple has at the very least a substantial possibility of success on the important issues it will raise on appeal, including the proper legal standards to apply. Those issues include how controlling Supreme Court authority applies in these circumstances, whether the "per se" rule of antitrust liability applies here, whether Apple can prevail under the rule of reason, and whether evidence was improperly admitted, excluded, or disregarded. Apple has repeatedly briefed and argued these issues to this Court. While this Court has disagreed with Apple's views on these important issues, the issues easily provide "substantial" grounds for appeal that are "more than just colorable." *Estate of Heiser*, 2012 WL 2865485, at *6.

The other relevant considerations also counsel in favor of a stay of the second phase of trial in the States' action: (1) whether the applicant will suffer irreparable harm without a stay; (2) whether a stay will substantially injure the other parties interested in the proceeding; and (3) the public interest. *Hilton*, 481 U.S. at 776; *Plummer*, 2008 WL 383507, at *1. Without a stay, Apple will be irreparably harmed if it prevails on appeal because it will have been forced to spend millions of dollars—that it could not recover—to litigate all remaining issues during the pendency of the appeal. "Normally the mere payment of money is not considered irreparable, but that is because money can usually be recovered from the person to whom it is paid. If expenditures cannot be recouped, the resulting loss may be irreparable." *Philip Morris USA, Inc. v. Scott*, 131 S. Ct. 1, 4 (2010) (Scalia, J. in chambers) (internal citations omitted); *see also*

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that force other companies to adopt new schemes, that's a good thing. . . . This will be appealed, I assure you. And I am not certain it will stand.'"); Roger Parloff, *US v. Apple Could Go to the Supreme Court*, CNNMoney, June 5, 2013, at http://tech.fortune.cnn.com/2013/06/05/us-v-apple-could-go-to-the-supreme-court/ ("it's hard not to already hear Justice Antonin Scalia's taunting voice at an oral argument, caustically demanding: 'Mr. Buterman, can you name another case in which we have held that a company violates the antitrust laws by "sharpening the incentives" of a contractual partner to act in certain ways?'").

Brenntag Int'l Chems., Inc. v. Bank of India, 175 F.3d 245, 249 (2d Cir. 1999) (in preliminary injunction context, irreparable harm exists where "there is a substantial chance that upon final resolution of the action the parties cannot be returned to the positions they previously occupied").

In particular, the required inquiry before any class could be certified is "rigorous" (*Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011)), and the undertaking required in order to prepare class-certification briefing for the Court's decision is enormous. It is also critical—as the Court is required by both Rule 23 and due process to engage in this inquiry in order to determine whether the proposed class would allow for fair and efficient adjudication of the plaintiffs' damages claims in a way that will protect Apple's right to defend itself under the antitrust laws and Due Process Clause. *Cf. Wal-Mart Stores, Inc.*, 131 S. Ct. at 2561 (unanimously banning "Trial by Formula" in class actions and requiring a process that ensures a defendant will be able to "litigate its statutory defenses to individual claims"); *McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 232 (2d Cir. 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."), *abrogated on other grounds by Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S 639 (2008). As the Supreme Court held recently in *Comcast Corp. v. Behrend*, 133 S. Ct. at 1435, plaintiffs must "bridge the differences between supra-competitive prices in general and supra-competitive prices attributable to the [defendant's wrongful conduct]." And the *Comcast* plaintiffs failed to do so—"the model failed to measure damages resulting from the particular antitrust injury on which petitioners' liability in this action is premised." *Id.* at 1433.

Indeed, the "stringent requirements for certification . . . exclude *most* claims." *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2307 (2013) (emphasis added); *see, e.g.*, *Wal-Mart Stores, Inc.*, 131 S. Ct. at 2551 ("it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question," and it must engage in this "rigorous analysis" even if it "entail[s] some overlap with the merits") (internal quotation marks omitted); *In re Initial Pub. Offerings Sec. Litig.*, 471 F.3d 24, 41 (2d Cir. 2006) (plaintiffs must offer "enough *evidence*" to prove that each Rule 23 requirement has been met) (emphasis added).

In short, the class-certification proceedings will be costly, time-consuming and will absorb a tremendous amount of the parties' and the Court's resources. Apple will suffer irreparable injury if it expends these resources and then prevails in an appeal that defeats the claims of the States and the putative class.

At the same time, the States and putative class plaintiffs will not be substantially injured during the appeal; in the meantime, consumers represented by the States (and class) will receive the $166 million settlement with the defendant publishers *amounting to over 76% of alleged damages on plaintiff States' calculation*. No. 12-cv-03394, ECF No. 242 at 2 (S.D.N.Y. July 23, 2013). Further, the major six publishers are operating under consent decrees with all retailers, including Apple. Thus, while the public has an interest in enforcing antitrust laws, that interest will be respected during the appeal by way of the consent decrees that have already been entered regarding this very case.

Moreover, the public has an interest in a stay because it would promote judicial economy and efficiency. *See Estate of Heiser*, 2012 WL 2865485, at *3. *All* parties risk wasting enormous amounts of time and resources preparing for the second phase of trial when the determination in the first trial will be under appellate review as the proceedings progress. The

class plaintiffs intend to pursue collateral estoppel based on findings in the DOJ and States' trial. While Apple disagrees that the Court's findings may be used as collateral estoppel to establish liability in the class action, the fact that plaintiffs intend to make this argument while the liability finding is on appeal is itself sufficient to warrant a stay of those proceedings. *See Marshel v. AFW Fabric Corp.*, 552 F.2d 471, 472 (2d Cir. 1977) (per curiam) (staying damages proceedings where the "question of liability for damages will, in all likelihood, turn upon the decision" in a "closely related case"); *Krantz & Berman, LLP v. Dalal*, No. 09-cv-9339, 2011 WL 2923938, at *2 (S.D.N.Y. July 20, 2011) (granting stay where decision on appeal might eliminate the need to litigate one of plaintiff's claims); *In re Literary Works in Elec. Databases Copyright Litig.*, No. 00-cv-6049, 2001 WL 204212, at *2 (S.D.N.Y. Mar. 1, 2001) ("A court may properly [stay proceedings] when a higher court is close to settling an important issue of law bearing on the action"). Accordingly, a stay will benefit all concerned by avoiding a waste of resources if the Court's decision is reversed.

II. If a Stay Is Denied, Proceedings Should Be Properly and Efficiently Sequenced.

If the second phase of the States' case and the class action are not stayed pending appeal, Apple proposes phasing the remaining proceedings to allow for a single October 2014 jury trial.[2] Specifically, and as explained more fully below, the schedule should allow time for class certification proceedings, and fact and expert discovery related to liability and damages issues. In addition, Apple anticipates that summary judgment proceedings will potentially be required after the close of merits discovery to address the scope of injury and damage claims to be presented at trial. Class plaintiffs have also raised the possibility of addressing collateral

[2] Although the class plaintiffs have proposed waiving their right to a jury trial, all parties agree that phase two trial proceedings will be before a jury.

estoppel questions via a motion for summary adjudication. Below, Apple has outlined its views on the order and elements of the pre-trial proceedings.

A. Class Certification.[3]

Apple will oppose a motion to certify the putative class. Class certification discovery, briefing and a hearing will be required. Apple proposes that proceedings related to class certification commence shortly and be phased as follows: (1) class plaintiffs file their motion for class certification and accompanying papers, including any expert reports and disclosures relating to class certification; (2) Apple takes discovery related to the class certification proceedings, including depositions of the proposed class representatives and any expert witnesses and, as necessary, third-party discovery; (3) Apple files a brief in opposition to class certification and any expert reports and disclosures on class certification; (4) class plaintiffs depose any experts proffered by Apple relating to class certification; (5) putative class plaintiffs file their reply brief in support of their motion; and (6) court holds a hearing on class certification, which may include live testimony, as well as *Daubert* motions and a corresponding hearing. *See Comcast*, 133 S. Ct. at 1433 (to prevail on a motion for class certification, plaintiffs must prove that "damages are capable of measurement on a classwide basis"); *Wal-Mart Stores, Inc.*, 131 S. Ct. at 2553-54 ("The District Court concluded that *Daubert* did not apply to expert testimony at the certification stage of class-action proceedings. We doubt that is so . . . .") (internal citations omitted); *see also Comcast*, 133 S. Ct. at 1432 (party "must not only be prepared to prove [the requirements of Rule 23(a)]," but "must also satisfy through evidentiary proof at least one of the provisions of Rule 23(b)"); *Wal-Mart Stores, Inc.*, 131 S. Ct. at 2551

[3] Counsel for the class has indicated that it is pursuing a case on behalf of e-book purchasers residing in 20 states and territories.

("Rule 23 does not set forth a mere pleading standard. A party seeking class certification must affirmatively demonstrate his compliance with [Rule 23]."); *In re Initial Pub. Offerings Sec. Litig.*, 471 F.3d at 41 ("[T]he district judge must receive enough evidence, by affidavits, documents, or testimony, to be satisfied that each Rule 23 requirement has been met."). Apple believes that the class certification process can be completed by mid-to-late January 2014.[4]

B. Notice and Opt-Out Procedures.

If the Court were to grant class certification in whole or part, it would need to approve and allow time for notice and opt-out procedures for the class action. Unless the Court determines additional notice is necessary to guarantee due process, the state attorneys general must provide notice by publication. 15 U.S.C. § 15c(b)(1). Any person on whose behalf a *parens patriae* case is brought may opt-out by filing notice of such election within the time specified in the published notice. *Id.* § 15c(b)(2). Plaintiffs have indicated that they want the class certification and expert damages reports to be combined to achieve an April 7, 2014 trial date. Apple believes that, given the parties did not engage in comprehensive fact discovery relating to causation and damages, or any expert discovery on these issues, and such discovery is required, coupling expert discovery on both issues together will in the end serve to delay this action, especially given the need for notice and opt-outs.

C. Fact and Expert Discovery Regarding Liability and Damages.

The parties will need to conduct and conclude fact and expert discovery on the merits issues relevant to the trial on the States' and (if certified) the class's claims. Apple is in the process of retaining its damages experts and will be developing its fact discovery plan. This

[4] This proposed schedule assumes that the class reply would not present new evidence or arguments requiring further discovery and/or briefing.

discovery will need to be incorporated into the expert damages reports and discovery. Apple believes that the discovery proceedings, including expert discovery, can be completed by May 30, 2014.

D. Summary Judgment Proceedings.

Apple anticipates that summary judgment proceedings will potentially be required—and should be scheduled—at the close of merits discovery to address the scope of injury and damages claims to be presented at trial. Class plaintiffs have also raised the possibility of addressing collateral estoppel questions via a motion for summary adjudication. While there is the potential for such a motion to be heard before the close of merits discovery, it should be scheduled (if brought) after a decision on class certification. *See* Fed. R. Civ. P. 23(c)(1)(A) ("the court must determine" class certification "[a]t an early practicable time after a person sues or is sued as a class representative"). And unlike a situation in which a defendant's dispositive motion may be heard prior to class certification to "protect the parties from needless and costly further litigation," *In re Starbucks Emp. Gratuity Litig.*, 264 F.R.D. 67, 75 (S.D.N.Y. 2009), delaying class certification proceedings until a collateral estoppel determination would not serve the parties' interest in efficient litigation.

While a stay of all proceedings pending Apple's appeal would maximize efficiency, it this Court decides not to grant a stay, the remaining proceedings should be organized logically and with the objective of avoiding duplication of efforts in the States' action and class action. Attached as Exhibit A is a chart setting forth Apple's proposal as to how any such proceedings should be structured in the interests of fairness and efficiency.

CONCLUSION

The Court should stay the second phase of trial in the States' action, as well as the class action, pending Apple's appeal of the liability findings in the DOJ and States' action. In the alternative, this Court should resolve class certification first, and then hold a joint jury trial on all remaining issues in the States' action and the class action.

Dated: August 2, 2013

Respectfully submitted,

By: /s/

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EXHIBIT A

Apple's Proposal Concerning Further Proceedings Absent a Stay

EVENT	**PLAINTIFFS' PROPOSED DATE**	**APPLE'S PROPOSED DATE**
Class Plaintiffs' Motion for Class Certification and Accompanying Papers, Including Expert Reports Relating to Class Certification	October 11, 2013	October 11, 2013
Apple's Opposition to Class Certification and Accompanying Papers, Including Expert Reports Relating to Such Opposition and *Daubert* Motions (if any) Concerning Plaintiffs' Experts Relating to Class Certification	November 15, 2013	December 6, 2013
Class Plaintiffs' Reply in Support of Class Certification and Accompanying Papers, Including Any Rebuttal Expert Reports Relating to Class Certification and Opposition to Apple's *Daubert* Motions (if any)	December 13, 2013	January 10, 2014
Apple's *Daubert* Replies (if any) and Apple's Sur-Reply in Opposition to Class Certification (only in the event reply contains new evidence or subject matter)		January 24, 2014
Class Certification Hearing		February 2014
Class Plaintiffs and States' Opening Expert Damages Report		February 21, 2014
Apple's Rebuttal Expert Damages Report		April 18, 2014
Class and States' Expert Damages Reply Report	December 13, 2013	May 16, 2014
Phase II discovery ends		May 30, 2014
Motions for Summary Judgment	January 24, 2014	June 20, 2014
Oppositions to/Cross Motion for Summary Judgment; *Daubert* Motions (if any) re: Plaintiffs' Damages Experts	February 14, 2014	July 18, 2014
Replies in Support of Summary Judgment; Oppositions to Apple's *Daubert* Motions (if any)	February 28, 2014	August 1, 2014
Apple's *Daubert* Replies (if any)		August 8, 2014
Motions *in Limine*	March 14, 2014	September 5, 2014
Oppositions to Motions *in Limine*		September 19, 2014
Final Pre-Trial Conference		September 28, 2014
Trial	April 7, 2014	October 6, 2014

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

STATE OF TEXAS, et al.,
Plaintiff,

v. 12 CV 3394

PENGUIN (USA) INC., et al,
Defendant.

UNITED STATES OF AMERICA
v. 12 CV 2826
APPLE, INC., et al.,
Defendant

New York, N.Y.
August 9, 2013
3:00 p.m.

Before:

HON. DENISE COTE,

District Judge

APPEARANCES

For Plaintiff:

Mark Ryan
Eric Lipman
Jeff D. Friedman

For Defendant:
Orin Snyder
Daniel Floyd

(In open court; case called)
THE DEPUTY CLERK: All rise.
Please beat seated.
United States v. Apple, Inc. and others, and the State of Texas and others against Penguin, USA, Inc.
Counsel for the United States, please state your names for the record.
MR. RYAN: Mark Ryan for the United States.
MR. BUTERMAN: Lawrence Buterman.
MR. GERVEY: Good afternoon, your Honor Gabriel Gervey.
THE COURT: Is there anyone else for plaintiff.
MR. LIPMAN: Eric Lipman, for Texas.
MR. BECKER: Gary Becker, for Connecticut.
THE COURT: Excuse me, we have someone at the first table, if you could identify yourself.
MR. FRIEDMAN: Jeff Friedman, from the class. Good afternoon.
THE DEPUTY CLERK: Counsel for defendant, Apple, please state your names for the record.
MR. SNYDER: Orin Snyder, for Apple.
MR. LE: Casey Lee, for Apple.
MR. HEISS: Howard Heiss, for Apple.
THE COURT: Excuse me for one second.
So, Mr. Lee, I don't think your name is on the

appearance sheet, is it?
MR. LE: Casey Lee, your Honor.
MR. FLOYD: Daniel Floyd.
MS. RICHMAN: Cynthia Richman, for Apple.
MR. SWANSON: Daniel Swanson, for Apple.
MS. RUBIN: Lisa Rubin, for Apple.
THE DEPUTY CLERK: Counsel, for Hachette, please state your name for the record.
MR. RUBIN: Samuel Rubin.
MR. GOLDFEIN: For Harper Collins, good afternoon, your Honor Shep Goldfein and Scott Lent.
THE DEPUTY CLERK: For MacMillan.
A VOICE: Your Honor, no one will be officially appearing from MacMillan today.
THE COURT: Thank you very much, sir.
THE DEPUTY CLERK: For Penguin and Random House.
MR. MORGENSTERN: Good afternoon, your Honor Saul Morgenstern.
THE DEPUTY CLERK: For Simon & Schuster.
MR. BUCHWEITZ: Good afternoon, Yehudah Buchweitz.
THE COURT: Is there anyone else who wishes to make an appearance in this case.
Thank you.
I have before me three sets of issues in connection with entering an injunction in this case and devising a

schedule going forward.

The three sets of issues are: Request for a stay that Apple has made. And I want to address that first and then we'll move on to the schedule. And then we'll move on to the specific terms of the injunction.

I want to thank everyone for coming earlier than originally scheduled. Given the number of issues raised in your submissions, I thought we'd try to get ourselves some more time, if we could.

In connection with the stay, I think, it's appropriate to begin with the standard. Everyone's very familiar with it. I'll take the standard as articulated by the Second Circuit in the World Trade Center Disaster case, 503 F.3d at 170. The four factors to be considered in issuing a stay pending appeal are well known; whether the stay applicant has made a strong showing, that he is likely to succeed on the merits, whether the applicant will be irreparably injured absent a stay, whether the issuance of the stay will substantially injure the other parties interested in the proceeding, and where the public interest lies.

I have, in connection with the stay, Apple's submission. I have a submission from the States of August 6, from the Department of Justice of August 5th, from the class of August 5th. There are related issues in other letters. And then I have the letter of August 7 from Apple, clarifying that

it intends to move for a stay of the injunction, only at this point -- I'm sorry, I should start again.

It intends to move for a stay of all proceedings in this action after the Court issues an injunction, but it also reserves its right to move for a stay of any injunction that is issued. I think that's probably the right way to put it.

So we're not addressing whether an injunction should be stayed, that would be premature. We don't know the contours of the injunction yet. And we're going to get to that. So all we're addressing, right now, is whether other proceedings beyond an injunction should be stayed at this point.

And I thought I had a pretty good handle on what Apple was referring to in its motion papers when it talked about its likelihood of success on appeal, and the fact that it could make a strong showing. It listed four different issues. I thought the first three were issues that I specifically addressed in my opinion. And I just want to confirm that.

And, then, I think we can just move on. Because if I have missed something, then I should evaluate that.

And then the fourth category, I was uncertain as to what Apple was referring to. I issued an order and asked them to clarify it, which they did very helpfully. And I want to thank them for that. In terms of the first of their four categories, Apple indicates that it believes it can show a strong likelihood of success in explaining that I erred

regarding how controlling Supreme Court authority applies in the circumstances here.

And I thought that was a reference to my discussion of the Monsanto decision, principally, which you have the Westlaw version. It is the section that begins at page 45. And its title is The Monsanto Decision and Apple's Independent Business Interests.

Am I right, Mr. Snyder, that that is the issue to which you were first referring in your motion for a stay?

MR. SNYDER: I think it goes beyond that, your Honor.

It more broadly relates to how the Court applied all relevant controlling Supreme Court authority and harmonized the authority. That is how the Court applied and interpreted it to the facts. Both Monsanto Matsushita and also cases that predate those decisions. For example, Interstate Circuit.

So I think, more broadly, our appeal will be based, that first point, on whether the Court correctly applied controlling Supreme Court precedent to the facts of the case, Monsanto being certainly one of the important controlling decisions, but not -- not solely Monsanto.

THE COURT: Okay. Well, I think I have said what I need to say about Monsanto. And in that same section of the opinion, Matsushita. And I discussed elsewhere Interstate Circuit, so I think if that is what you are referring to, I can move along.

MR. SNYDER: Yes, your Honor.
THE COURT: Okay, good.
The second category is whether the per se rule of antitrust law applies. And, again, on page 5 of Apple's brief -- and I think that is what I addressed again at the Westlaw version at page 56. But, it is under the caption Per Se Liability. And that's, I think, the second category of error to which you are pointing. Am I right?
MR. SNYDER: Yes, your Honor.
THE COURT: Good.
The third category of error is whether Apple can prevail under the rule of reason. And I think that is a reference to my discussion that begins on the Westlaw version at page 44. But it is a discussion for several paragraphs, at least two, applying the rule of reason.
Is that what you are referring to there?
MR. SNYDER: Yes, your Honor.
THE COURT: Good. Okay.
And then we have a letter about the evidentiary issues. And that's Apple's letter of August 8, which lists nine categories of error. And I think we can -- I can address those quickly.
The first has to do with Ms. Macintosh's testimony, which was received in the form of her direct testimony by affidavit. Apple indicates that, in its opinion, I disregarded

her testimony. I assure it, I did not. I'm not sure that Apple's characterization here actually correctly captures Ms. Macintosh's testimony. Ms. Macintosh chose, in her direct testimony, not to discuss each of the issues that led Random House to adopt an agency agreement. She chose, instead, for whatever reasons, not to discuss some of the e-mails and correspondence, that path of communications between Apple and Random House. But instead, paragraph 23 talked about what the decision had been, based upon, in her words, primarily.

When it came time for me to address Random House, I did that in a separate section of the opinion, which is entitled Random House Adopts an Agency Model. Because the focus of the trial was on Apple and its motives, and what Apple did and thought, I didn't find it necessary to make a judgment with respect to Random House's, all of its motives or judgments. And, instead, recited some of the principle interactions between Random House and Apple. And those are set forth in a paragraph that deals with Apple's own evaluation that its retaliatory conduct towards Random House was one of the facts that drove Random House to finally, in Mr. Cue's words, capitulate.

With respect to the second issue identified by Apple, and that has to do with Ms. Horner's testimony, again I didn't disregard her testimony. In connection with Ms. Horner's testimony, Apple purports or suggests that I disregarded her

testimony that Barnes & Noble was the first retailer to propose agency, and pursued agency, with publishers.

Well, in my opinion I make a reference to the fact that in their discussions with Apple, Hachette actually told Apple that it had already discussed switching to an agency model with Barnes & Noble. So I don't think it can be fairly said that I disregarded that one.

The third issue has to do with the pattern of phone calls. I think the opinion speaks for itself. I have Appendix A, which shows the data from which I was relying. I don't believe counsel, or anyone, actually gave me the data with respect to phone call patterns beyond a two-month period. And that's a choice that was made to not give me that additional data. And that's just fine.

Point number 4, has to do with the characterization of what happened at a dinner on January 20th between Apple and MacMillan. I don't think it is correct, as Apple would like it to be construed, that the documents and testimony to which it refers was directly inconsistent with my fact findings.

Indeed, I think PX208 and 42 are, especially are confirmatory but, largely, that was based on an assessment of credibility. And I don't need to go into that further.

The next three categories listed have to do with expert testimony. And while I enjoyed each of the experts who testified here, obviously from the opinion, the findings of

fact were principally drawn from the business records from the time, and the testimony of witnesses who were engaged in those activities. This is not one of those cases in which expert testimony was a principle driver of a decision.

And I don't think I need to say more about paragraph eight, which is the issue about Google and Amazon credibility. I found those witnesses credible in any pertinent part to the facts at issue.

The last point made was a question about the adequacy of discovery concerning Amazon. And, again, there is a record of those discovery rulings. I think Apple had more than adequate discovery of Amazon witnesses' depositions. They testified, three of them, at trial. And they were available for cross-examination. I have a duty to balance the Rule 1 and Rule 26 factors in assessing the extent of any discovery. And, therefore, I don't find that that is likely to be a successful argument on appeal either.

Therefore, with respect to the first factor, I don't believe that Apple has shown that it is likely to succeed on appeal in connection with any of the four categories of issues it raises.

The next issue is irreparable injury absent a stay. Apple argues that continued litigation will be costly to Apple, it won't be able to recover its attorneys fees. And I don't find, in Apple's particular circumstances, that this is an

injury that should give me much pause when it can't prevail with respect to other factors.

Apple's in a fortunate position to be able to fund litigation of this size and magnitude. And there are other factors that suggest, including the strong public interest, that this litigation go forward.

The third factor is whether a stay will substantially injure other parties. And Apple argus in that context that a substantial amount of money is already being distributed to the class, many millions of dollars, 76 percent before treble damages are calculated of the damages sustained from the publisher defendants' activities. And I considered that argument, but I think the activities here concern events that began unfolding in terms of their impact on the market in April of 2010. That's now over three years ago -- well, yes, over three years ago. Consumers still have a strong interest in being fully compensated for losses they have suffered.

In terms of the public interest, here we have I think the strongest factor in favor of a continuation of this litigation. Again, the consumers have a right to full compensation, which includes treble damages under other antitrust laws. We have states as plaintiffs. They have their own independent interest in protecting the rights of their residents and making sure that they are fully compensated.

And so I'm going to deny the application for a stay.

Let's move on to the schedule here. And I think this is a very important part of this proceeding. And I appreciate counsel working so closely together to give me two competing proposals. And I'm very glad, Mr. Floyd, that you're present, because I expect you to remember your comment to me on June 22 when I was trying to figure out how many trials we have, what those trials would consist of, and how we should organize this litigation. And you indicated, at page 22, that you did not anticipate the need for any second trial, you thought that the parties would be realistic after the first trial, and that the first trial's results would drive the remainder of the litigation. So we'll proceed, nonetheless, to set a schedule. And I'm still hopeful that you will be right on that score.

To set a schedule for this litigation, I think I need to have a better understanding of what is actually going to be litigated.

Let's start with collateral estoppel. Apple, at page 8 of its memorandum, indicates that it disagrees with class counsel that collateral estoppel will apply with respect to liability issues in the class action. And I would like Apple to explain to me why.

MR. SNYDER: Yes, your Honor.

As to collateral estoppel, your Honor, the plaintiffs have asserted in their August 2nd letter to the Court, that the only issue to be decided at the second trial is the amount of

damages. And we have several responses to that. That's not, in our view, correct.

First, your Honor, it's not clear whether collateral estoppel would apply, in any respect to the class plaintiffs. Collateral estoppel gives preclusive effect only to more limited issues that were necessary to support a valid and final judgment. And in the Bear Stearns case, Judge Jacobs with Justice Oakes and Straub joining.

And even if your Honor -- and I'm happy to brief that more fully. But even if collateral estoppel can apply to the class with respect to those of the Court's findings that were closely linked to the elements of the government's claim, both the states and the class must still prove causal injury and damages.

THE COURT: That's fine.

MR. SNYDER: Right.

THE COURT: That's fine. But my question is, the question I posed to you, and we'll get to other elements in a moment. But are you disputing that the principle of collateral estoppel will apply to the class?

MR. SNYDER: Only to those findings that are closely linked to elements of the government's claim. And the Court could, your Honor, for example based on the Court's per se violation ruling with respect to the class, could give collateral estoppel effect to its finding that Apple

participated in, and facilitated, a horizontal price fixing conspiracy. But it is not clear how broad the collateral estoppel effect would go beyond that to other aspects of the class' cause of action, because there are myriad causes of action. So we're not suggesting that we're going to retry liability, of course, your Honor, in this case.

THE COURT: Well, that's what you said at page 8 of your memorandum. You disagreed that collateral estoppel and liability applies to the class action. So, I wanted to make sure I understood that correctly. And you've --

MR. SNYDER: Well, let me just say, your Honor, I mean there are arguments that we would brief, that beyond the causal injury, and point which has to be adjudicated, there is a question about where there are alternative rulings, the Court ruled in the alternatives, these are per se violation, and rule of reason violation, which findings relate to which ruling. And there are cases that suggest that some findings might govern a subsequent proceeding where there are alternate rulings, and some would not. And it's a complicated subject. Circuits come out differently on it. And it's something that we would want to brief to this Court more fully not, frankly, your Honor, in a scheduling proposal, which we view not as a motion, but a presentation of those issues that need to be litigated in the subsequent proceedings. And so collateral estoppel would be an issue to litigate, but it's just one of

many that need to be litigated in a subsequent proceeding.
THE COURT: Okay.
MR. SNYDER: It's --
THE COURT: Look, Apple has the right to litigate anything that it has a good-faith basis to believe should be litigated. And so do the plaintiffs.
MR. SNYDER: Well --
THE COURT: But we're going to set a schedule for repeat on collateral estoppel. But I would be surprised if the doctrine of collateral estoppel did not apply to Apple's liability for violation of this nation's antitrust laws. And, so, I'm going to set a schedule that gives you and class counsel an opportunity to hopefully reach a stipulation so you'll know the boundaries of the collateral estoppel effect. And then we'll have an opportunity for briefing to the extent that there is a good-faith disagreement about the parameters.
MR. SNYDER: Thank you, your Honor.
I just want to -- I think the Court overstated our position. Our position is not that there would be zero collateral estoppel effect. That is that there would be no collateral estoppel effect. Our position is that the extent to which there would be collateral estoppel effect is not a clear-cut question and one in which Apple not only has good-faith basis to make arguments, but we think strong arguments. And we're not suggesting, as I said at the outset,

your Honor, we do believe that the Court could likely, under the controlling law give collateral estoppel effect to its finding that Apple participated and facilitated in a horizontal price-fixing conspiracy. But the Court had enumerable other facts that were found in its decision. And the extent to which other facts may or may not be given preclusive effect in subsequent proceedings, is something that we want the opportunity to litigate.

THE COURT: Well, in the abstract, is difficult to know how much of a disagreement we have. But, I'm going to assume then that I can breathe a sigh of relief with respect to the first full sentence at the top of page 8 of your brief, where you said: While Apple disagrees that the Court's findings may be used as collateral estoppel to establish liability in the class action, et cetera.

MR. SNYDER: There is another point I want to give the Court notice on collateral estoppel, so that if you hear it anew down the line, you don't think it was something that was belated, which is that Apple obviously has been open and public about it's intent to appeal this Court's ruling on liability and any injunction entered. And, so long as Apple's appeal is ongoing, it is our position that no finding will be entitled to collateral estoppel effect. Only issues actually revealed on appeal, we respectfully submit, have collateral estoppel effect. And that's the Gell vs. Royal Globe case, Second

Circuit, Judge Newman, Feinberg, Winter joining, and that was another reason why we believe a stay of further proceedings made sense. Your Honor denied that there are additional complications, we respectfully submit on the question of collateral estoppel.

THE COURT: I don't think that is actually an argument you made in your brief, but that's fine. That's fine. Good.

So, my next question for you, Mr. Snyder, what precisely is the nature of your challenge to class certification.

MR. SNYDER: Our challenge is substantial and, we believe, robust. Particularly in light of the change, what we would say is the key change in class action jurisprudence that the Supreme Court has announced in the 2011 term in the Wal*Mart versus Dukes case and last term in the Comcast case.

And plaintiff's truncated schedule, which would literally force us to conduct all discovery in a hyper expedited schedule, that even many preliminary injunctions exceed, assumes that there is no class certification process, much less fight. And they assume that it is a formality. And we respectfully submit that they misunderstand, sorely, the law here. And so the Wal*Mart versus Dukes case, the Comcast case have changed, fundamentally, the landscape. And in fact, your Honor, just this morning, the DC Circuit issued its decision that, just this morning, vacated class certification in a price

fixing case. In re: Rail Freight Fuel Surcharge Litigation. And that opinion, it's a quick read -- we read it this morning -- highlights that class certification and price fixing case is far from automatic. And that under the Supreme Court's brand new Comcast decision, the Court must engage in rigorous analysis of the evidence, including expert testimony to determine whether common issues predominate.

And also underscores, as the Supreme Court has stated lately, that an antitrust class action meeting the predominance requirement demands more than common evidence that the defendant's colluded to raise prices.

And so our view, your Honor, that Rule 23(a) requires

the plaintiff to demonstrate that class members have suffered the same injury, the same injury. And that's the Dukes case. And, here, the effect of Apple's conduct, as your Honor adjudicated it on book prices, varied by title. There is no dispute about that. Some eBooks became more expensive as a result of Apple's entry, and others less. And True Compass, ironically the infamous book True Compass, which I hope a lot of people read as a result of the trial, is perfect example. We established at the trial, the price of True Compass, which the government used as exhibit A of the price-fixing scheme that your Honor found, the price of True Compass dropped immediately after Apple opened the iBookstore, dropped. So different members of any proposed consumer class will have

purchased different titles. Some eBooks purchasers may have benefited from lower prices caused by entry and suffered no injury. And a broadly defined and ascertainable class would, therefore, defy the requirement under Rule 23(a) that all class members have suffered the same injury. And this is not a mere formality. Dukes and Comcast, put an exclamation point on the rigor with which trial courts must now scrutinize class, proposed classes, even when there is a demonstration of price fixing, which your Honor found here.

And then on 23(b)(3), which must be satisfied for any damages class, requires that the plaintiffs establish that common questions predominate over individual ones. And we have grave doubts, your Honor, based upon what we know about the class so far, that plaintiffs can come close to meeting this stringent standard. And in Comcast, just a few months ago, the Supreme Court confirmed that a damages calculation in an antitrust class action must, quote: Measure damages resulting from the particular antitrust injury in which plaintiffs' liabilities in the action is premised.

And the plaintiffs argue here, in their letter to the Court that the evidence is across-the-board price increases. That's what they say. But that's just the kind of sort of group argument by group amalgamation that doesn't work. And the pricing picture here is nuanced, and that's what the Supreme Court says this Court will have to scrutinize.

For example, as I said certain titles declined in price in both the New York Times front lists and back lists. On a per title basis. Not a weighted sales basis, and because of this, not all class members will sustain the same damages, or any damages for that matter.

So, it's our belief that the plaintiffs are going to have difficulty. And Mr. Friedman is a talented lawyer, but even Mr. Friedman is going to have difficulty, we submit, an experienced class action lawyer, creating a damages model that can accurately calculate the effect of Apple's adjudicated conduct on each individual eBook purchaser. And that's their burden. Because it's gonna require then that the plaintiff show which eBooks each class member purchased, for each title, what the effect of Apple's conduct was on the price of that title. And that was the problem in Comcast. And I think -- I think this Court says it was unanimous. No? Oh, okay. Dukes was unanimous. But questions of individual damage calculations, the Supreme Court said, will inevitably overwhelm questions common to the class. And then, the Supreme Court said, putting a stake in the heart of many class actions that attempted to just lump everything together, that plaintiffs cannot rely on statistical shortcuts. This is what Duke said. To avoid individual issues. Trial by formula is not allowed anymore in class actions. And so it's a brand new world in scrutinizing these kinds of alleged common injuries. And,

again, your Honor, I directed your Honor to the DC Circuit case.

So those are at least two, at least, significant legal grounds to oppose class certification. And it needs time, your Honor. Requires time to give Apple a fair shake to conduct related fact and expert discovery. And I can tell your Honor why.

The transactional data on eBooks, that Apple collected during the liability phase ended in March of 2012. But we expect that the plaintiffs, like the states, will assert damages up to the present. And this is what Mr. Gervery told your Honor on August 5 in his letter.

So to fairly defend ourselves against what are massive damages claims, Apple needs, has a right, to update transactional data, which means if discovery commenced today, we would have to propound subpoenas to third parties. And it took 6 months last time. Hopefully, it will be quicker this time. But, then, we would have to get them all the data, give them to our experts, share them, and the experts will have to crunch the data. And beyond the updating of data, which is fundamental to any fair damages trial, there is a second piece of information that we need in a damages phase, which is data about individual purchasers. Not their names, but to challenge class certification we need to know whether a consumer bought a book for $6.99 and $12.99, and, therefore, suffered no damage.

Because there is a question of some prices, some books went down, some went up. And Apple needs time for expert discovery relating to this issue. And Amazon and other retailers refused this level of detail during the liability phase. And then we need to get the data, prepare expert reports relating to class certification, depose plaintiff's class reps. There were 25, maybe there are four now, I don't know. There were 25, there were four, I don't know how many, it is unclear. Then, we have to depose the experts. Depose the class reps. And then there are Dalbert challenges to plaintiff's experts. And we need time to do that.

We are asking for less time to do -- and there is much more than that. We are asking for less time for everything that needs to be done in phase two, which we have only gone through two parts of than we spent in phase one on liability, and less than -- I would respectfully submit -- in this courthouse, defendants in complex class actions involving hundreds of millions of dollars, are given. It's rare for a complex commercial class action of this magnitude to go from soup to nuts in the 9 months that we're proposing. That would be -- even in the Eastern District rocket docket, it takes about a year. That would be -- not unheard of, but it would be -- it would be -- we respectfully submit, highly unusual and there is no reason, we submit, for Apple to not have a fair opportunity to defend itself. So, plaintiff's proposal

provides only five weeks for Apple to take the discovery relating to class certificate.

THE COURT: Mr. Snyder, this will go on until the night, unless you're sort of focused on answering the questions that I have posed.

MR. SNYDER: I tried to -- I tried to give you -- then, the second question, how much time we need. I have told you what our issues are in class cert, and now I have told you what we need to do to tee that up for the Court.

THE COURT: Let me ask you a question about an example you used there. You're saying that an individual consumer, if they bought a book for $6.99, and a book for $12.99, that somehow those two transactions should be considered together and cancel each other out?

MR. SNYDER: That if -- yes. If a class member, whether -- if, as a result of our entry, some books went down in a -- and some went up, in a but-for world is there an injury. That's a question that the expert will have to address and testify to.

It's our view that if, as a result of agency, some prices went down and some prices went up, then there was a benefit, and a harm which, we think, under controlling law, would cancel it out. And a properly instructed jury would be entitled to find no injury, separate and apart from the issue of we think the entire purported class has already been

overcompensated based on the 76 percent of proceeds, based on a pie-in-the-sky number that the government put in as their damage number. That's a separate issue, separate kind of offset issue. The one we are talking about is an individualized -- individualized review of eBook purchases so that we can discern whether, in fact, on an individualized basis purchasers suffered harm or not.

THE COURT: And I believe you indicated that the transactional data that was gathered during the litigation, to date, and analyzed by your experts, was through March of 2012. Did I get that date right?

MR. SNYDER: That's my understanding, yes.

THE COURT: Thank you.

So I believe you have identified three issues which may all be interrelated, or may not be three separate issues. But I think with respect to class certification, you are arguing that the issues that you wish to litigate are whether a class may be maintained because some books became less expensive as a result of the conspiratorial conduct; two, you argue that a class should not be certified because the damages need to be calculated separately for each eBook purchaser; and thirdly, you argue that a class should not be certified because for each individual purchaser, a purchaser may both have benefited and experience losses due to the conspiratorial behavior.

I think those are the three issues you identified.
MR. SNYDER: I'm not sure I -- I think I took them down in my brain, your Honor, but if I can state it. Just under Rule 23(a), we believe that the plaintiffs cannot demonstrate that the class members have suffered the same injury.
THE COURT: Thank you.
MR. SNYDER: Under Dukes. And we believe under Rule 23(b) the plaintiffs cannot establish that common questions predominate over individualized ones under the Supreme Court's recent decision in Comcast. And so I think it would be without prejudice to our, of course right, to challenge a class on other grounds, that we may determine as the case develops. But those are the ones that we have identified immediately as what we think are serious and fatal problems.
And in the Comcast case, I'll just tell your Honor --
THE COURT: I read the Comcast case, thank you for citing it to me, so you don't need to explain it.
I am anxious that we conclude this afternoon, if at all possible.
MR. SNYDER: Okay.
THE COURT: At least this phase. So my next question for you is the following, and I think you have already begun to address this. What additional discovery does Apple want in

order to litigate a trial for damages.
MR. SNYDER: I have identified those two discrete areas in terms of our class certification challenge. But, beyond that, your Honor --
THE COURT: Actually, I don't know what you are referring to. I think you are referring to the following.
If the plaintiffs are pursuing damages for a period past March of 2012, you want additional transactional data for that period.
MR. SNYDER: Yes, your Honor.
THE COURT: And two, I think you are indicating that you want to go back for the entire period, whatever it is, and get data per consumer, though you don't need access to their name.
MR. SNYDER: Yes, your Honor.
THE COURT: Okay. And anything else?
MR. SNYDER: Yes, your Honor.
We also will need damages discovery on causation that goes -- and damages that go beyond what it needs to oppose class certification. And, obviously, it would be ideal if we had it all before the class certification process. But we've actually agreed to proceed with the class certification challenge before we even have all of that data.
And, as I said, we talked about those two transactional data; the transactional data, we need that both

to contest the class and to defend itself with respect the damages. And there may be other documents we need from Amazon, your Honor, that were denied to us in the liability phase for reasons that your Honor stated on the record, but what we believe, now that we are entering a damages phase, are critical to analyze a but-for world, and in particular -- and I don't need to get into any more detail than that. But we believe that we would be severely prejudiced in defending ourselves against the damages claim if we didn't have access to those Amazon documents, so --

THE COURT: So what --

MR. SNYDER: -- it would be discovery about a but-for world, in other words --

THE COURT: Okay.

MR. SNYDER: -- and had we not entered, what would Amazon have done, and not have done. That would be number 3. I think number 4 is other pro competitive benefits of Apple's entry, we believe, would be relevant to a determination of individual consumer harm. And, then, that's fact discovery. Then, of course, there would be expert work, because as we envision --

THE COURT: No. So, with respect to causation, you identify that you will want additional discovery from Amazon, is that --

MR. SNYDER: Yes. Separate and apart from discovery

we need from all other retailers to update the transactional data and individualize it. So separate and apart from that, we additionally will need separate discovery from Amazon and maybe Barnes & Noble. Frankly, I'm not prepared, your Honor, to give you a categorical list of all discovery that we will seek, but I'm giving you categories of areas where we need discovery. So in a but-for world, what would Amazon and Barnes & Noble have done. And that goes to business strategies. It goes to other internal documents that we were not given the opportunity to see before the DOJ case.

THE COURT: Thank you, Mr. Snyder.

Now, procompetitive benefits, that was litigated already. There was discovery on that issue. So, why do you need additional discovery on procompetitive benefits?

MR. SNYDER: Your Honor, it was litigated in the context of whether, under a rule of reason analysis, there was liability. And there may be other aspects of our entry that don't relate specifically to that question, that do relate to damages. And we want to reserve the right to explore that. And then, if we think it is appropriate under Rule 26, propound requests, if the question before the jury is whether a purchaser or consumer suffered harm.

THE COURT: Anything else?

MR. SNYDER: I would say in a general category of but-for world discovery, meaning to say what would the world of

eBooks look like had Apple not entered. And I'm not prepared, now, to give the Court a categorical list of every potential deponent or custodian that we think might be relevant there. But, rather, I have identified several illustrative, and it may be exhaustive, Amazon, Barnes & Noble, and other eRetailers. There may be others that we need to inquire of.

THE COURT: Thank you, Mr. Snyder, I appreciate it. I have some questions for some other counsel. I'll come back to you.

Let me ask the States. There is a reference here in your papers to civil penalties. What are you seeking, besides injunctive relief, which I'm willing to address. What would you be seeking that would necessitate further discovery. I don't know what the civil penalties are.

MR. LIPMAN: The civil penalties we are referring to are monetary civil penalties under the various state laws, the congruent state laws that you have found Apple violated in the liability phase. And that's remedies that are additional to damages and any injunctive relief. In terms of what additional discovery we think is necessary, we think the answer is very little, if any. We think the findings and conclusions in the Court's liability opinion suffice on the issue of entitlement to civil penalties. On the issue of amount of civil penalties, we would anticipate not asking the Court to make that determination until after the conclusion of the damages phase.

THE COURT: So, if a jury awards damages, and I treble them, what additional monetary relief are you seeking?

MR. LIPMAN: Your Honor, there is -- we are dealing with the statutes of many states. Obviously I'm not in a position to address each of them in great detail. But using Texas an example, the Texas antitrust statute provides, in addition to damages and any injunctive relief, for the imposition of a civil penalty up to $1 million. I would anticipate that, for Texas, we would be asking for the maximum.

THE COURT: Okay. And what is the award of that $1 million triggered by, a decision on liability?

MR. LIPMAN: Yes, your Honor. We believe that a finding of liability under the Texas antitrust statute which your Honor has already found, is sufficient to trigger the civil penalties.

THE COURT: So Texas' view is you don't need a second trial in order to obtain that civil penalty.

MR. LIPMAN: We believe that the liability finding is sufficient to trigger the entitlement to a civil penalty. We believe that based on the factors that a Court generally considers in determining the amount of a civil penalty, that damages issues that might be resolved in the second trial might be relevant to the determination of the amount.

THE COURT: Is the award of that civil penalty under Texas law an award made by a jury or by a Court.

MR. LIPMAN: By a Court, your Honor. And to be clear, it is federal law that determines whether these particular issues are decided by the Court or by a jury. And that's in the United States case that Apple's counsel cited in the June 9 letter to you about additional remedies. So we believe that the determination of the amount of civil penalties is to be made by the Court.

THE COURT: Could you, and maybe you have already done this, make a list of the civil penalties that you are going to seek in the state action, so that we know concretely what we're talking about here, and identify whether or not those civil penalties need to be awarded by the Court or by a jury, and whether their right to be awarded, in your view now -- Apple may disagree strenuously with you -- or whether they require a second trial?

MR. LIPMAN: Yes, your Honor. We can do that, identify the statutes that we believe the Court has already found liability that trigger civil penalties. And we believe, again, the answer is that the Court would be the one to determine the amount under all of those statutes. But we can certainly list out the statutes that we believe the various states are entitled to civil penalties under.

THE COURT: I need to determine whether I need a second trial. Whether it is a jury trial or not. If we're going to have a jury trial, whether I would use the record

created at the jury trial to make a decision with respect to these civil penalties. I need to understand what you are seeking.

How long would it take you to get us all a document that would describe what you want in terms of civil penalties?

MR. LIPMAN: Your Honor, probably longer than you would like, because of the fact that we're dealing with 33 odd different states. But we could endeavor to do that in three or four weeks. Would that be sufficient?

THE COURT: That's fine. And that will give you and Apple an opportunity to discuss the issue afterwards, and to see if you agree or disagree about all of this.

So that would be September 6th. And then I'm going to give you and Apple two weeks thereafter to talk about these issues. And so I'll take a submission on September 20th from you from the states, and from Apple with respect to these civil penalties. So we'll know the areas of agreement or disagreement.

MR. LIPMAN: So, your Honor, would you like a submission from us on the 6th and then another submission on the 20th? Or on the 6th we begin conversing with Apple and then submit something on the 20th.

THE COURT: I want you to serve Apple with something on the 6th.

MR. SNYDER: May I be heard, because it is relevant to

this issue as it impacts the schedule that he Court may impose. It's directly relevant.

THE COURT: I'll come back to you, Mr. Snyder.

MR. SNYDER: Okay.

THE COURT: Thank you so much.

I don't know if I need to hear from the class and the states both, or if one of you is authorized to speak on behalf of both. But with respect to a jury trial on damages, how do you expect that trial the be configured, what is the period of time, what is the category of damages you are seeking.

Who can speak to that?

MR. FRIEDMAN: I can. Jeff Friedman, from the class.

Your Honor, we would envision a trial that would encompass, provided the Court certified the class, approximately 23 states and jurisdictions. We would think there would be a single trial, obviously depending upon -- and the Court has put its finger correctly on sort of the central issue about scope -- the impact of collateral estoppel. In our view, if the Court adopts what our view of the extent of collateral estoppel will be on the matter for the damages phase, it would be an expert on behalf of the class and the states. And we believe there would be an expert on behalf of Apple. And so we believe that a trial, in terms of testimony, would be a day, maybe two. And that would be the entirety of the matter, for the total damages in the United States.

THE COURT: And what period of time are you seeking damages for?

MR. FRIEDMAN: Through May of 2012 your Honor. So Mr. Snyder is incorrect -- and I have conferred with the states and the states agree with us on this, we're on the same page -- that we are seeking through May of 2012.

THE COURT: So that would be two months more of transactional data that would have to be gathered.

MR. FRIEDMAN: We don't believe it is necessary, your Honor. But if you accepted their argument, it was then, at most, it would be two months.

THE COURT: And are the damages calculations, or the damages that you are expecting to seek at trial, based on the sales by the five publisher defendants' books, or the sale of the five publisher defendants' books only, or something broader than that.

MR. FRIEDMAN: Only the five publisher defendants' books, and only for eBooks, your Honor.

THE COURT: And so the period would be, roughly April of 2010 to May of 2012, and the five publisher defendants' eBooks.

MR. FRIEDMAN: Correct.

THE COURT: So you wouldn't be focusing on Random House?

MR. FRIEDMAN: Correct. And when I say focus, we

would not be seeking damages. They may be used as a control, your Honor. But certainly we are not seeking damages for Random House books.

THE COURT: Thank you. And that's a much better way of putting it.

Okay. So, briefly, and very briefly, I'll give anyone else who would like to be heard on the schedule an opportunity to be heard. I have had the answers to the questions that I needed answered. You may -- we have a lot more to cover on the injunction, so, I'm going to ask counsel to be targeted in their comments.

MR. FRIEDMAN: Thank you, your Honor, Jeff Friedman for the class.

I want to highlight, because I think it would be most -- as the Court raised it initially -- one of the biggest drivers of the schedule, and that is the collateral estoppel issue. And we appreciate the Court's focus on it and potential efforts to have it early the proceedings. I just want to highlight the following.

Even if we do, early in the proceedings, which we think would likely be beneficial, we want also the Court to understand why we were doing it after class certification. And in particular, after the damages reports were being exchanged.

The reason, your Honor, is there is some devil in the details that we anticipate, and Mr. Snyder alluded to it, about

their construction of a but-for world. We think their experts, that they now say they're going to hire another one, a new one, that their expert will try and construct a but-for world that, as part of that construction, may depend upon findings this Court already made and, in fact, contradict.

For example, they may say -- the Court put its finger on it. There is a procompetitive justification that they may use, let's say hypothetically windowing. The Court addressed windowing. We don't believe it is proper for their expert to construct a but-for world to credit Apple with defeating windowing. So there is going to be -- and so what I would just highlight for the Court is that we think, in terms of the broad strokes, for example, of whether the Court found facts that support summary judgment, or an impact, the fact of injury to the Court's decision on page 94 to 101, we think it is replete with factual determinations that there was impact, there was anticompetitive effects. They shouldn't be entitled to now reargue whether there was an anticompetitive impact as a result of agency.

We think those broad issues should be determined. While retaining the ability, your Honor, to then, when their experts construct a but-for world that will be arguing the procompetitive benefits, for example, that Apple's entry caused some books to go up and some books to go down, that to the extent they are undergirding their argument with facts this

Court conclusively decided, they should be precluded from doing so.

So we are just, the reason we scheduled it the way we did is because until we see, although it was already previewed and the Court already saw the bleeding together of facts this Court already decided, and how they're going to try and then still reargue and litigate those issues in their but-for construct, that until we see that construct, we're unable to then say you can't use this fact, or this is a way that they attempted to maneuver around factual findings are determined by the Court.

I won't belabor it, I wanted the Court to understand that is the import of us being able to see their damages model and still have the ability to point to the Court and say, he cannot, or she cannot, whichever the expert, the expert cannot rely on these positive facts to construct their but-for world.

THE COURT: So you think if we tried to litigate collateral estoppel issues now, and figure out what the disputes are, what the areas of dispute are, that we would really have to reengage in the entire exercise later on?

MR. FRIEDMAN: Other than if we did some of the broad ones. For example, impact, your Honor. I mean impact is an easy one, from our view. And once we determine impact, that they are calling causation, once we look at pages 94 to 101, then the rest of it, your Honor, after we get passed that, I

think is gonna be the details of how they try and create a but-for world trying to work around your findings.

THE COURT: What if we did this. Of course I'm going to give Apple an opportunity to react, too. But, what if we didn't have a period of time for the parties to see if they can come up with a collateral estoppel stipulation, what they agree on, and reserving of course rights to disagree on other categories, but at least take some issues off the table. And then we talk again after that and look at what the principal areas of disagreement are, but not have the formal motion practice until later on.

MR. FRIEDMAN: I think it would be beneficial, your Honor.

THE COURT: Okay, good. Anyone else on behalf of the plaintiffs wish to speak before I turn to Apple?

Mr. Snyder.

MR. SNYDER: Yes. I'll be brief, your Honor.

First, Apple's fine with deferring collateral estoppel briefing until after the class certification process. We have no objection to that, if that's what the class wants and your Honor thinks it is appropriate.

THE COURT: And what about the idea I just threw out now.

MR. SNYDER: Great, in terms of if we can agree. That's great.

THE COURT: Okay. So I'll ask counsel for Apple and the class to meet and confer. And I am going to give you a more extended schedule here. And, get me a report by September 27th, hopefully with the proposed stipulation. But if no stipulation, at least a report on where you stand in the process on addressing collateral estoppel. We're not going to have a formal briefing at this point. We'll reserve that. But we'll try to get some issues off the table.

Anything else Mr. Snyder?

MR. SNYDER: Yes, your Honor. I'll be targeted.

I want to put the states and the Court on notice that Apple, as your Honor anticipated, strenuously agrees, strenuously disagrees with what we see as a kind of -- damages proposal that the states have propounded. They're suggesting duplicate penalties, 23 states, automatically administered by the Court without --

THE COURT: Well, Mr. Snyder, I have a schedule in place where you're going to get notified of what, in concrete terms, they are proposing.

MR. SNYDER: It impacts the schedule, your Honor. I am saying we have substantial due process challenges. And under the excessive fines clause of the Constitution and other grounds to the imposition of these blanket penalties that we think are not automatic and require the same types of scrutiny that Comcast and Dukes command be applied in the class action

context. We do not believe --

THE COURT: I think you should be thrilled, then, with what I have proposed. Actually, which is that they're going to identify, to you, in concrete terms in September what they want. You will have a two-week period to discuss it with each other. You can make all of your arguments to them. They may agree with you.

MR. SNYDER: No, your Honor I'm delighted. And they won't agree with us. The reason I'm relating it to your Honor is we need to brief, and have time to brief, our challenges to these so-called state penalties that we believe are infirmed under the procedures that the states have identified. And that is your Honor asked what do we need the time for from here until the trial in phase two. So there is another phase of this case, which is going to involve discovery into and then, challenges to the state penalty provisions. And so, that is another point.

And I'll just wrap up by saying, your Honor, we obviously in our proposed scheduling order also indicated that we needed an opportunity obviously for notice and opt out procedures and summary judgment. And none of these, your Honor, Apple is going to undertake for any filibuster or any kind of delay. And for example, Mr. Friedman says they say they will hire another expert. Of course we will, your Honor, we're defending against damages claims in the hundreds of

millions of dollars. It is our right to hire experts and defend ourselves and take whatever is appropriate time to conduct those procedures. And so summary judgment here is not only going to be a significant phase of this case. But we think that when all of the damages discovery is done, that we may have dispositive argument under Rule 56 about the damages claims here.

And so what we're proposing, in summary, your Honor, is where as plaintiffs in a complex class action want discovery to end in December of this year, which is, by the time we hit Labor Day, mere weeks away. And summary judgment motions will be filed in January of next year. We think that is outlandish and would literally deny us an opportunity to conduct this discovery that we need to defend ourselves. We are proposing an aggressive and ambitious schedule of 9 months for all class and damages related discovery. And the schedule we have set forth we think is the least amount of time that would give us a fair opportunity to defend ourselves here, whereas plaintiff's schedule doesn't build in sufficient time for any of these.

Thank you, your Honor.

THE COURT: Thank you Mr. Snyder.

Well, the positions of the parties have flipped. Apple came wanting a fast trial on liability and, now, it wants a slow trial on damages.

MR. SNYDER: Can I -- we --

THE COURT: Excuse me, Mr. Snyder.
MR. SNYDER: That's not a correct characterization.
THE COURT: I think it is.
You may be seated, Mr. Snyder.
THE COURT: So we are going to move a pace with respect to discovery here, and with respect to litigation on the class certification motion. I don't see any need for separate discovery or separate briefing schedule for Dalbert motions.
If Apple has a desire to challenge any of plaintiffs' experts, or expert reports submitted with its motion papers, it should bring those challenges in its opposition papers.
So I will adopt the plaintiffs' proposed date for class certification motion practice. The motion is due October 3rd. The opposition is due November 15th. The reply is due December 13th.
Now --
MR. FRIEDMAN: I apologize, your Honor. Just so we are clear, proposed date was October 11?
THE COURT: October 11.
MR. FRIEDMAN: Thank you, your Honor.
THE COURT: October 11, November 15, December 13.
With respect to discovery, I want the parties to serve any additional document demands or notices of deposition within the next two weeks. That would be August 23rd. And we'll have

a period for exchange of expert reports.
With respect to the trial, when can the plaintiffs serve their expert reports. Are they planning to serve them in, the same expert reports, in connection with the class certification motion.
MR. FRIEDMAN: For the class, that was our proposal. That the damages, expert reports, would be exchanged in connection with the class certification proceedings on both, because of what we really think the issue is to be tried.
THE COURT: So the plaintiffs' expert reports would be served on October 11?
MR. FRIEDMAN: Correct.
THE COURT: And so the defendant's expert reports under the plaintiffs' proposal would be served on November 15.
MR. FRIEDMAN: Correct.
THE COURT: And that's why you believe that both fact and expert discovery, in essence, would be over in 2013?
MR. FRIEDMAN: Correct.
THE COURT: And this case would be ready for summary judgment practice with motions filed on January 24.
MR. FRIEDMAN: Yes, your Honor.
THE COURT: Okay. It seems reasonable to me.
MR. SNYDER: May I be heard, your Honor, please?
This schedule denies Apple the ability to defend itself. And just because we have been found liable in the

liability phase, doesn't mean we should be disadvantaged with what is a hyper expedited schedule, your Honor. That is uncharacteristic for this courthouse in a complex class action where plaintiffs are seeking hundreds of millions of damages against the defendant.

We are not seeking to slow down any trial. We are suggesting a trial in a year and two months. That's what we're suggesting. If your Honor wanted to make a date between April and the fall , that might be reasonable. But the idea that we could submit expert reports on November 13, it's not possible and not fair. Because even if we propound discovery in the dog days of August to five or six or twelve eRetailers, there is no chance that they're going to produce those documents to us in four weeks. It took 6 months to get everything. Motion practice. It was a very, significant undertaking.

So let's assume in the best case scenario, lightening strikes and we have everything by the end of September, or early October. We can't then prepare an expert report. We have to take depositions, and we have to give those, that data, to our experts. They can't, in a week, turn that data. Why should Apple be prejudiced, your Honor, with a schedule that is, literally, faster than most schedules for significant preliminary injunction hearing cases. Why aren't we afforded the same 6 months or 9 months or 12 months that every other defendant gets in a case of this nature. Is it because we're

found liable? I don't think that's fair, your Honor. Because we're going to appeal that. We respectfully disagree with that ruling. But for us to be forced to conduct discovery in weeks, is to put us at an extreme disadvantage in defending ourselves against multi hundred million dollar claims. We're not asking for years, we're asking for 9 months to conduct discovery on damages, to do class cert, to do summary judgment, to litigate collateral estoppel, to litigate 23 states' penalties that they said should apply automatically.

And it seems to us, your Honor, that forcing us to submit expert reports on November 13 of 2013, and close discovery in December of 2013 is, somehow, treating Apple unfairly. Because in any other big 500 or 300 hundred million dollar civil class action with this multitude of issues, defendants get 6 months, 9 months, not two and a half months, your Honor. Particularly in light of our experience and wisdom from the liability phase.

THE COURT: Thank you very much, Mr. Snyder, I appreciate that. So let's just put this in perspective and step back.

This litigation really stems from 2012. Apple had several experts retained, who spent an enormous amount of time studying data and studying facts. They produced extensive reports. One of their experts, I think the name was Dr. Burdis, did a very sophisticated, detailed analysis of

transactional data that showed the uniform rise in prices for each of the five publisher defendants after the agency agreements went into effect. For each of them, it was one of the principal charts at trial. So, we are not starting discovery anew today. Discovery has been ongoing since 2012.

And so I think the proper measurement for the length of this litigation is the date it was filed, and the length of discovery we have already had. We have enormous detailed transactional data for all but two months of the damages period that plaintiffs wish to go to trial on. Which means I very much doubt while the numbers may shift that the theory with respect to how one approaches the numbers is going to be affected, whatsoever, by an additional two months of data.

The defenses are there, or they're not there, based on all of the evidence that has been gathered to date, and has been studied for probably a year now. Obviously, Apple has a right to retain yet another expert to look at that same material over again and have new ideas and fresh ideas about how to approach it, and what argument to make, and how to massage it. That's absolutely within their rights. But to suggest that we're starting at day one, today, is to blink reality.

And I go back to Apple's statements to me last summer about predicting what was going to happen here and how they saw this litigation unfolding. And so I think that we have to put

it all in context. I am not sure that I understand that some of this discovery is necessary. At all. Apple has identified four categories of additional discovery. The period between March and May of 2012 for additional transactional data, transactional data per consumer, additional discovery of Amazon and perhaps others. And, in the fourth category, additional discovery about procompetitive benefits. I'm not sure that that entails third-party discovery, but it certainly was a topic that was already the subject of discovery previously, and is probably information that Apple has in-house that it would like to present if it feels it didn't adequately address that already.

Why I'm suggesting that the document demands be formulated in the next two weeks, is so that the parties are then, when you have the specifics of what you want and, you know, developed in a thoughtful way, you can meet and confer. And if there is a dispute with respect to the scope or quantity of discovery, there is a process then where you can be heard. You may convince plaintiff's counsel that some of this discovery is absolutely essential and necessary. But there may be disagreements. I don't think today is the day for me to hear discovery disputes about the scope and nature of discovery. But I would like to hear those late August, early September, so that we can get them resolved, give you the rulings you need, and you can go about then gathering the

information that you need.

This case will principally be driven by expert analysis. Not entirely, perhaps, but principally. And Apple has already run this by numerous experts and can consult with them to assist them and save them time in developing expert testimony on the next phase. So, that's our schedule.

MR. SNYDER: Might I ask a quick clarifying question? Is that two months for Apple to conduct all damages discovery? Is that -- am I -- I mean is that -- is that -- am I correct? Or is it September, October, 4 months to conduct all damages discovery? I want to make -- is that discovery will commence on August 23rd and terminate around Christmas or New Years of December, is that the Court's proposed schedule?

THE COURT: Actually, I'm sorry that I didn't make myself clearer, Mr. Snyder.

I think, actually, that Apple, for about a year, has been gathering the data that it needs in connection with the analysis of damages in this case. And, for many months, perhaps not a year, has been consulting with experts about the very issues that will inform a damages analysis.

So, I don't think the measurement that you're suggesting here is the appropriate one. And it's a little hard, before we know whether there are agreements or disagreements about the scope of discovery, to know how much additional discovery is actually necessary. So I am hoping

that that will be tee'd up after a meet-and-confer process in late August or early September for me to give everybody an opportunity to be heard again if that's necessary. So then we'll have any summary judgment motions due January 24th, opposition February 14th, replies on February 28th.

And we'll wait. I'll reflect on a schedule with respect to submission of a pretrial order. Whatever I choose as the pretrial order date, that's the date on which motions in limine will be due, as well.

I think that we should fold in the issue of collateral estoppel with our summary judgment practice. And I assume that's the right time to do it. So, I'm not going to set a separate schedule for collateral estoppel. I'm going to assume that is done at the time of summary judgment practice.

Good. And thank you. And those are the only dates that I'm going to set right now.

Let's turn to the very important issue about the injunctive relief.

Let me start with a statement of the standard, obviously Rule 65(d) sets out the standard. And as a result, an injunction must be both specific and definite enough to apprise those who will be subject to its terms of its scope and of the scope of the conduct that is being proscribed. City of New York, 645 F.3d at 143.

I have wide discretion in framing an injunction in

terms that I deem reasonable to prevent wrongful conduct, ibid. at 144, and the Ford Motor Company, 405 US at 573.

Nonetheless, the relief a Court imposes must be no broader than necessary to cure the effects of the harm of the violation. The City of New York 645 F.3d at 144.

Injunctive relief should, therefore, be narrowly tailored to fit specific legal violations and molded to the necessities of the particular case. It may not enjoin all possible breaches of the law, ibid.

The purpose of relief in an antitrust case is to cure the ill effects of the illegal conduct, and to assure the public freedom from its continuance. United States against Glaxo 410 US at 64.

Thus, the remedy must include appropriate restraints on a party's future activities, both to avoid a recurrence of the violation and to eliminate its consequences. National Society 435 US at 697.

It must also be effective to restore competition. Ford, 405 US at 573.

To prevent a recurrence of a violation, a Court is not limited to imposing a simple proscription against the precise conduct previously pursued. National Society 435 US at 698.

Indeed, it may impose relief that represents a reasonable method of eliminating the consequences of illegal conduct, Ibid.

In this way a Court has broad power to restrain acts which are the same type or class as unlawful acts which the Court has found to have been committed, or whose commission in the future, unless enjoined, may fairly be anticipated from the defendant's past conduct. Zenith Radio, 395 US at 132.

As the Supreme Court has instructed, where the purpose to restrain trade appears from a clear violation of law, it is not necessary that all of the untraveled roads, to that end, be left open, and that only the worn one be closed. National society 435 US at 698.

In aiming to restore competition, a Court also is not limited to the restoration of the status quo anti 405 US at 573.

Instead, the key is that relief be directed to that which is necessary to protect the public from further and competitive conduct, and to address any competitive harm. F. Hoffman LaRoche 542 US at 170.

In addition, it is well settled that once the government has successfully bourne the considerable burden of establishing a violation of law, all doubt as to the remedy are to be resolved in its favor. United States against Dupont, 366 US, at 334, Hoffman LaRoche 542 US at 170.

It perhaps is also important to add the following observation from United States against Oregon, 343 US, at 333. When defendants are shown to have entered into a conspiracy

violative of antitrust laws, Courts will not assume that it has been abandoned without clear proof. It is the duty of the Courts to beware of efforts to defeat injunctive relief by protestations of repentance or reform --

Which I don't have before me.

-- especially when abandonment seems time to anticipate suit or there is a probability of resumption.

Now, I thank you all for your submissions about the scope of injunctive relief. I don't think I'm in a position to decide on the final scope of the injunction this afternoon.

I want to share some thoughts with you, and some ideas, and some reactions to what I have read. And then I would like you to meet and confer next week. And for us to meet the following week.

I'm hoping that the issues of dispute will be narrowed. I'm hoping I will have a more fulsome response from Apple on some issues I'm going to describe here.

Among the things that I learned at the trial were that the big six publishers, now five, do not compete with each other on price.

I also learned that Amazon strongly prefers to control retail pricing.

I also learned that to be successful as an eBooks store it is important to have all of the big six, now five, participating. Apple, in particular, believes this to be

essential.

I learned that the publisher defendants want to raise eBook prices significantly from their 2009 price point to protect a business model that was developed before the digital age.

I learned, as well, that the publishing business is changing rapidly and significantly, in large part because of the digital age and the creation of eBooks. There was some evidence at trial that certain publishers have come to understand that they should embrace this change and be flexible and creative.

I also learned, and believe strongly, that none of us can foresee the future, and that change in the digital world is happening fast, and that this is true in the eBook business as well.

A second series of observations.

The trial demonstrated that Apple and the publisher defendants colluded with each other to violate the antitrust laws. I have written extensively on that in my opinion. But it's important to underscore some of these issues in connection with the injunction. They colluded to strip Amazon of control over retail prices. They colluded to eliminate retail price competition. They colluded to raise eBook prices.

They used several different means. These included, agency agreements with an MFM. Apple used its app store to

pressure Random House to adopt an agency agreement. And the publisher defendants made essentially simultaneously demands on Amazon. And because they were simultaneous, those demands were effective in coercing Amazon's capitulation to their demands that it execute agency agreements.

A third set of observations.

The publisher defendants' and Apple's joint opposition to the injunctive relief requested here by the government reflects, I believe, a continuing, and a seriously continuing danger of collusion.

As the government has expressed, and this Court has written, there is nothing inherently illegal or wrong with an agency agreement. The proper use and the misuse of an agency agreement is, I believe, a very context-;specific inquiry. Apple objects to the bar on an agency agreement running beyond two years, or even as a term of an injunction in light of the consent decrees. The publisher defendants submitted a joint opposition to the bar on the agency agreement in the injunction as an improper amendment of their consent decrees.

It's a question in my mind whether the agency model, with a return of price control to the publisher defendants, would happen in a truly competitive world. But if it does happen, it should happen as a result of negotiations between a publisher and a retailer, free of both illegal collusion and government interference. I think my goal in shaping an

injunction is to get us to a world where there can be such independent negotiations.

The only conclusion I can draw from the record created at trial, and the parties' positions before me, is that they still want to collectively force an agency model on Amazon and to raise eBook prices. At the very least, an injunction has to guard against this very real risk of collusion to eliminate price competition.

Again, we are addressing an industry in which the largest book publishers do not engage in price competition with each other. And if there is no retail price competition, there will be no price competition among their books.

There was a reference in Apple's submission to it considering moving an eBook apps to the iBookstore. I have some questions about what that might entail. And this leads me to my fourth series of observations.

Apple asserted that there was no evidence admitted at trial that showed that the conspiracy involved the app store. That is not precisely true. Indeed, Mr. Cue's own direct testimony at trial addressed that issue, as do PX518 and 519. And this is the efforts that Apple made to coerce Random House to adopt its agency agreement and enter the iBookstore, through denial of access to the app store, in the certain instance referred to by Mr. Cue and in those documents.

Now, Apple strongly objects to any aspect of the

injunction touching upon its app store. But there are certain principles with which it does not seem to take issue. They are that all eBook retailer apps that are compliant with its policies may be offered in the app store.

I'm taking this from your brief.

And that consumers can download eBooks purchased through another website onto Apple devices without charge.

So, I would like to ask Apple's counsel to turn to Section 4 of the proposed amendment that is entitled Required Conduct. I know that it objects to a passage in subsection C that begins with the phrase "except that" In the third line.

Do you see where I'm pointing, Mr. Snyder?

MR. SNYDER: I'm looking now, your Honor. Yes, your Honor.

THE COURT: So my question is, putting aside for the moment the material in subsection C that follows the phrase "except that," does Apple have any other objection to any other component of Roman Numeral IV?

MR. SNYDER: Meaning the first the verbiage starting from, "apple shall" up until the word "store," your Honor? In other words the first three lines up to words "except" in subsection (c).

THE COURT: Let's go to page 6. Do you see where Roman Numeral IV starts?

MR. SNYDER: Yes, your Honor.

THE COURT: Do you object to paragraph A. I take it you do.
MR. SNYDER: Yes, your Honor.
THE COURT: That's not really an app store issue.
Do you object to paragraph B?
MR. SNYDER: Yes, your Honor, we do. That for 10 years we can't change the terms or conditions with respect to --
THE COURT: Okay page 6, the bottom, Roman Numeral IV, B.
MR. SNYDER: We object to IV B, your Honor.
THE COURT: For any eBook apps that any person offered to consumers through Apple's eBooks store as of July 10, 2013, Apple shall continue to permit such person to offer that eBook apps, or updates to that eBook apps on the same terms and conditions between Apple and such person or on terms and conditions that are more favorable to such person.
You object to that?
MR. SNYDER: Yes your Honor. It precludes us from making general changes in the policies with respect to all of the other 850,000 apps developers. So, it simply --
THE COURT: Thank you. I have your statement.
MR. SNYDER: Yes.
THE COURT: Turning to C.
I am just trying to figure out what is in dispute

here.
MR. SNYDER: Yes, your Honor.
THE COURT: Do you object to the beginning of paragraph C, Apple shall apply the same terms and conditions to the sale or distribution of an eBook apps through Apple's app store, as Apple applies to all other apps sold or distributed through Apple's app store?
MR. SNYDER: No, your Honor, that is Apple's general apps policy for all apps developers.
THE COURT: Okay. Thank you, that's helpful.
MR. SNYDER: May I give the Court information that might be helpful on C to frame it that was not in our brief? Or I can submit something in writing in more detail about this.
THE COURT: I think I would like to continue with --
MR. SNYDER: Sure.
THE COURT: -- my questions to you --
MR. SNYDER: Yes, your Honor.
THE COURT: -- in a moment, Mr. Snyder.
I think the debate around 4C, which is allowing eBook retailers to provide a hyper link to their websites or eBook store through an eBook apps, without further compensating Apple, is a debate about whether that is necessary --
You can be seated, Mr. Snyder.
MR. SNYDER: I'm sorry, your Honor.
THE COURT: -- to protect the existence of retail

price competition.

As of now, as I understand it, a reader can use an iPad, hold an iPad in his hand, use the iPad to go to the internet, go -- let me use Amazon as an example. Go to the Amazon site. Purchase an eBook at Kindle eBookstore, with no payment going to Apple, and have that eBook wirelessly sent to the iPad, and opened on the iPad, in the iPad's Kindle apps, all at no -- without Apple receiving a penny.

On the other hand, as I understand it -- and Kobos' submission today was very helpful and informative -- Apple does not allow a reader to purchase an eBook -- and, again, I'll use Amazon as an example -- through a Kindle app directly. Or at least does not allow it to do so without the payment of the 30 percent commission for such sales that Apple believes is customary in its app store. Kobo's submission indicates that Apple adopted this policy in 2011. If I understand it's submission correctly.

MR. SNYDER: It's highly misleading, the submission, your Honor. Apple adopted -- if I can be heard, your Honor, because the submission from a competitor basically wanting to not pay a commission, we think, you know, was highly misleading to this Court. If I can be heard on this, I think I can be very helpful to the Court on this.

Which is that the basic argument is that to restore competition that Apple has to be prevented from, they say,

discriminating against rival eBook apps like Kobo's and, therefore, they want an exception to having to pay a commission on any hyperlink from their sight, from the Apple apps to their site. And there are a couple of arguments, your Honor.

THE COURT: Well, why don't you start with the facts.

MR. SNYDER: I'm going to give your Honor the facts.

THE COURT: Okay. In terms of, factually, have I described it correctly how it works?

MR. SNYDER: Yes. Except the suggestion that we somehow changed our apps policy to discriminate against eRetailers, is absurd. What happened was, and the evidence showed, that Apple's policies -- there was no evidence, because the first point is, and this is why we think this is actually egregious for them have to included this in their proposal, they had, your Honor, a proposed finding of fact on this very issue relating to the app store's supposed discriminatory treatment of eBook retailer apps. They did not admit any evidence that they cite in support of their proposed findings because we objected to it, and they withdrew the evidence, was never submitted to this Court. So now they want a remedy for assertions made, proposed findings of fact, that they did not deem sufficient to try to proffer evidence in support of.

And so, A, there is no evidence in this record of that. And, B, there is no finding, obviously. But more importantly, your Honor, Apple's policies that regulate the app

store, uniformly, applicable to each and every one of the 850,000 apps in its store, from Amazon's apps, to Zappos.com's apps, to Kobo's apps. And this includes a policy, universal, all the 850,000 app developers.

I think it is important to know that the app store is a critical engine of this American economy in terms of how many billions of dollars it pays out to app developers and the role it plays in employment, and in our economy. And what they want to do is regulate our app policy to make a special exception for eRetailers. And, the in app purchase rule, which uniformly applies across the board, Apple gets a 30 percent commission for purchasers of all electronic goods across the board. There was no special discriminatory change made to punish eRetailers which make up an infinitesimal amount of Apple's app revenue, much less total revenue, so --

THE COURT: Mr. Snyder, I have no desire to regulate the app store. What I'm trying to do here is to fashion as narrow a remedy as possible to create, restore, promote, price competition in eBooks.

MR. SNYDER: And --

THE COURT: So, I need to understand, factually, how these things work.

MR. SNYDER: So the consumer can go to the Safari browser, as your Honor said --

THE COURT: So if I got it right, I got it right.

So I am concerned about your statement in page 17 of your brief that you may move the publisher defendants' apps to the iBookstore. I'm concerned as to whether or not that is going to be an end run around any injunction, and create the opportunity for the reintroduction of an agency agreement to making it possible for a consumer, seamlessly, to purchase an eBook from one of the publisher defendants paying Apple a 30 percent commission.

MR. SNYDER: Oh, I understand, your Honor.

No, your Honor. Your Honor, what we did is, in arguing why a 10 year, what we said regulation of our app policies, giving an exception to eRetailers, would be improper, were among other reasons that we might seek, over time, to change our policies. And this was a what if, a possibility. There is no, as I understand it, plan or design to do that. We're just saying that there are a myriad of outcomes, because no one knows the future, of what might happen in 2020, or 2018, or 2021 in the eBook ecosystem. But we're not suggesting here that there is a plan to end run around anything. And if that was the impression given to the Court, then it was wholly inadvertent and unintended. Our view is that if there is a hyperlink in Amazon.com, to a particular book, we get from a defendant publisher, we get 30 percent. The same way if there is a hyperlink to buy shoes, we get 30 percent across the board.

THE COURT: Well, let me say that any injunction I think has to make sure that the app store is not used as an engine of retaliation.

MR. SNYDER: We agree, your Honor.

THE COURT: And it is not used to do an end run around an injunction. It's not used as a back doorway for introduction of an agency agreement, de facto agency agreement, as imagined by the discussion on page 17.

If we can adequately protect price competition without touching, in any way, Apple's flexibility in its management of the app store, that would be my preference. I do not assume -- I know I don't know how Apple will innovate through the app store in the future. I know I don't know that. I could imagine that even Apple doesn't fully appreciate how the app store might evolve in the coming years. My preference would be that no injunction would limit innovation in the app store. But, at the same time, that there be full price competition in the eBook market. And so if counsel can formulate an injunction that permits that, I expect that that would be satisfactory to me.

Let me get to another issue. We do need an injunction here. There was blatant price fixing. There was structural collusion by the publisher defendants. All of the defendants, and other players, were absolutely willing to play hard ball with each other. This was a rough and tumble game played for

high stakes by one and all. And the consumer suffered significantly from the price increases and the lack of competition at any level.

None of the publisher defendants -- and this is true for Apple, as well -- have expressed any remorse over their actions, made any public statements admitting wrongdoing, undertaken any voluntary program to prevent a recurrence. They are, in a word, unrepentant.

Mr. Sergeant, in two statements in December and February to certain constituencies of importance to him authors, illustrators, and agents, made statements that underscore this point. He drew a distinction between real books and eBooks. He asserted that MacMillan did no wrong. He explains that the settlements of the publisher defendants means that retailers will be able, quote, "To discount MacMillan eBooks for a limited time."

He conveys his disappointment in the discounting but comforts his audience with a message that, quote, "This round will shortly be over."

Now, this injunction is a remedy imposed upon Apple and not the publisher defendants. But it would be reckless for me to ignore the industry in which Apple is operating, and the ease with which it will be able to find partners willing to eliminate price competition and to raise eBook prices.

To the extent possible, any injunction against Apple

should be tailored to prevent the repetition of price fixing and to encourage price competition. But it should not be broader or in place longer than necessary since this is a swiftly-changing world and I want to make sure nothing I do discourages innovation and dynamic change.

So I have a proposal I want the parties to consider.

I'm thinking in terms of an injunction that would place no restrictions on -- using the language that DOJ has proposed -- that Apple wouldn't enter into any agreements that restricted its ability to set retail prices for five -- terms, with six to eight month intervals, the first term ending in two years, and assign each of the publisher defendants to one of those terms, so there would be separate intervals for contract renegotiation between Apple and each of the publisher defendants.

The first would be up for renegotiation roughly two years from now; the second two years; and six or eight months thereafter; the third another six or eight months thereafter, the fourth another six or eight months thereafter, and then the last, after another similar interval.

This means that there would be no one point in time when Apple would be renegotiating with all of the publisher defendants at once. And no one point in time when the publisher defendants could be assured that it was taking the same bargaining position as its peers vis-a-vis Apple.

Let's talk about the external compliance monitor. Apple vehemently objects to this. I would have appreciated a presentation by Apple that a monitor is unnecessary. At this point, it has made no such showing. There is no admission of wrongdoing. There is no contrition. There is no showing of any awareness of illegality or the danger of collusion by publisher defendants to raise eBook prices. There is no showing of institutional reforms to ensure that its executives will never engage again in such willful and blatant violations of the law.

My preference would be to appoint no external compliance monitor. I would prefer that Apple adopt a vigorous in-house antitrust enforcement program and convince the plaintiffs, and this Court, that there is no need for a monitor. All I have on page 10 of Apple's submission is a very cryptic reference to the fact that it enhanced some compliance program, it adopted at some point during this litigation.

I don't want to do more than necessary here. I want to protect the market, protect the consumer, encourage price competition and, if possible, at the same time, allow this market to develop and change and prosper in ways we all can't imagine today. And that goes for Apple as well.

So that's my goal. And I want to thank you all for your first round of efforts at thinking about an injunction. I may be wrong, maybe there is nothing to be accomplished by a

further meet and confer, and perhaps maybe I should ask you, both, is there anything to be accomplished from further reflection on my comments, and a further opportunity to talk with each other, or not?

THE COURT: Mr. Ryan.

MR. RYAN: Mark Ryan, your Honor. Yes, your Honor, both, in both respects.

We, and others at the Justice Department, would like to reflect on your Honor's comments, and then we would like to sit down with Apple on the schedule that your Honor suggested, meeting next week, and we'll be back here in two weeks.

THE COURT: Mr. Snyder -- I'm sorry someone else has stood up.

MR.GOLDFEIN: Shep Goldfein, for Harper Collins.

Can I have two minutes?

THE COURT: Can I have Mr. Snyder's reaction to my comments first?

MR. SNYDER: Yes, your Honor. We would be pleased to participate in that process.

THE COURT: Thank you.

MR. GOLDFEIN: What I wanted to say was I believe we would like to be included in that process. Because with all due respect, your Honor, our consent decrees that have been previously entered by the Court, contain very lengthy antitrust compliance programs, and compliance provisions. Your Honor

suggested that we had not undertaken anything in order to protect the market for the restoration of competition.

THE COURT: I don't believe I said that, sir.

MR. GOLDFEIN: Well, I apologize if I misheard. But the publishers, we -- we filed a joint brief only for the convenience of the Court. We didn't file a joint brief because we were colluding with each other.

The Noerr-Pennington doctrine, in fact, suggested we should file a joint brief if we have a common position with the Court.

So I don't think there was anything unusual in the filing of a joint brief. And I don't think, with respect, your Honor, that we, from day one, showed contrition in this case by coming into the Court from the very first conference, when we appeared and said we were in the settlement mode. That we were -- that we were prepared to negotiate settlements. We negotiated clearly for near a year with the Justice Department for the resolution of this matter. And entered into consent decrees that clearly contemplated the cooling off period that your Honor noted in the opinion. And that contemplated that we would be free to go to a model, whatever we could negotiate, unilaterally, unilaterally, not collusively, with any eRetailer as to terms and conditions of sale of books. Whether it be on agency model, or on a reseller model, or any other model. That's what we bargained for, specifically, with the five year

limit with the government. And we negotiated long and hard. We didn't want two years, we wanted much shorter. We settled with the government on two years. And the government came back and said they didn't want to regulate, there was innovation and the market is rapidly changing. And that the two years was justified as a cooling-off period. We agreed and your Honor agreed when you approved and entered the opinion approving of our consent decrees.

I want the record, your Honor, to be clear that -- that with all due respect -- I know you have sat through a lengthy trial and I appreciate that, but I don't think it is -- I don't think it is correct to say that the -- that at least for Harper Collins, I'll speak for Harper Collins. I can't on this issue address something from MacMillan. We stepped up to the plate from day one in this case. And we stepped up to plate and we settled this case. We settled with 49 states and six attorneys general. We spent a lot of money. We also settled with Minnesota with the Minnesota class with Mr. Berman. So we have acknowledged our responsibility. We have stepped up in terms of our customers, ultimately, or indirect customers. And we tried to do the right thing, your Honor. And from day one, we didn't we didn't stand here and say we were not prepared to resolve the matter. It's routine, in any settlement agreement, for a whole host of reasons, including some tax law reasons that you don't admit liability. But I

think our actions speak louder than words for how we have performed and stepped up to the plate here in order to -- and bargained over what the relationships should be moving forward in a free market. In a free market where the marketplace will determine. I mean there is an assumption, with respect, your Honor, that you're assuming. You are assuming that we have the bargaining power one on one with Amazon or with Apple in terms of what those terms and conditions of resale, or the sale of books are gonna be. I think that's a big assumption. Because those are huge retailers with tremendous bargaining power.

THE COURT: I'm very aware of that. Counsel, thank you.

MR. GOLDFEIN: You're welcome.

THE COURT: And, yes, I'm aware that two, and one could say three of the publisher defendants entered early settlements and, over the months that followed, the two additional ones did. I'm aware of the fact that the publisher defendants' consent decrees included a compliance program. I'm not aware of any statement of contrition by any of the publishers' statements, or admission of wrongdoing. I didn't find the submission of the joint brief a problem. Indeed, I appreciated the fact that if they had a unified position that it be submitted to me once, not five times, so I thank you for that.

I think my statements about no description of any

compliance program, in-house antitrust enforcement program, was a reference solely to Apple. And page 10 of their brief. I'm aware of the consent provision which imposes upon the publisher defendants on certain obligations in that regard.

And I am very aware that a publisher defendant may not, depending on the circumstances, have bargaining power vis-a-vis some of the significant retailers. They are not alone in that position. I expect lots of American business would be able the testify to that fact. Nonetheless, my focus is on making sure we don't have collusive illegal activity again in the marketplace with respect to eBooks. It's all I'm focused on.

Well, I don't want to simplify it. I'm trying to be focused on everything that I should under the standards that I articulated before, but that's my core focus, is to create a narrowly tailored injunction that will promote price competition and prevent collusive behavior in eBook pricing. And negotiation of eBook agreements.

Okay, I think what I would like to do then, since both -- and I don't want the publisher defendants to be involved in these negotiations, certainly not now. This is an injunction that is going to be imposed on Apple, not on the publisher defendants. I'm not blind to the impact it will have on the publisher defendants. And the publisher defendants will certainly have an opportunity to be heard on any proposed

injunction. But I think the first round of discussions here should be just between the parties who went to trial. I'm conscious of the fact this is August. I would love it if we could reschedule a conference on the injunction for the week of August 19th, but why don't you, Mr. Ryan and Mr. Snyder, and your teams, consult with each other briefly and tell me what week I should be looking at for a conference schedule.

We'll go off the record here just to talk with each other briefly.

(Recess)

MR. SNYDER: Would it be all right if we got back to the Court by noon tomorrow. Because there has been a lot of -- I need to talk to my client and review schedules.

THE COURT: Why don't I get a letter from counsel, hopefully, it will be a joint application, by the close of business on Monday with respect to a proposed schedule for when we would reconvene on the injunction, and when I get written submissions from you with respect to that conference. And I would like at least two business days between the submissions and the conference, so I have a chance to read and reflect.

I want to thank you all for your submissions. I know how important these issues are to every participant here. And that there is a loss have lot of passion behind some presentations. And that's appropriate. And it's helpful for me to hear, even, to know that these issues are important to

everybody.
So thank you all, and I'll see you again in a couple of weeks.
ALL: Thank you.
THE CLERK: All rise.
(Adjourned)

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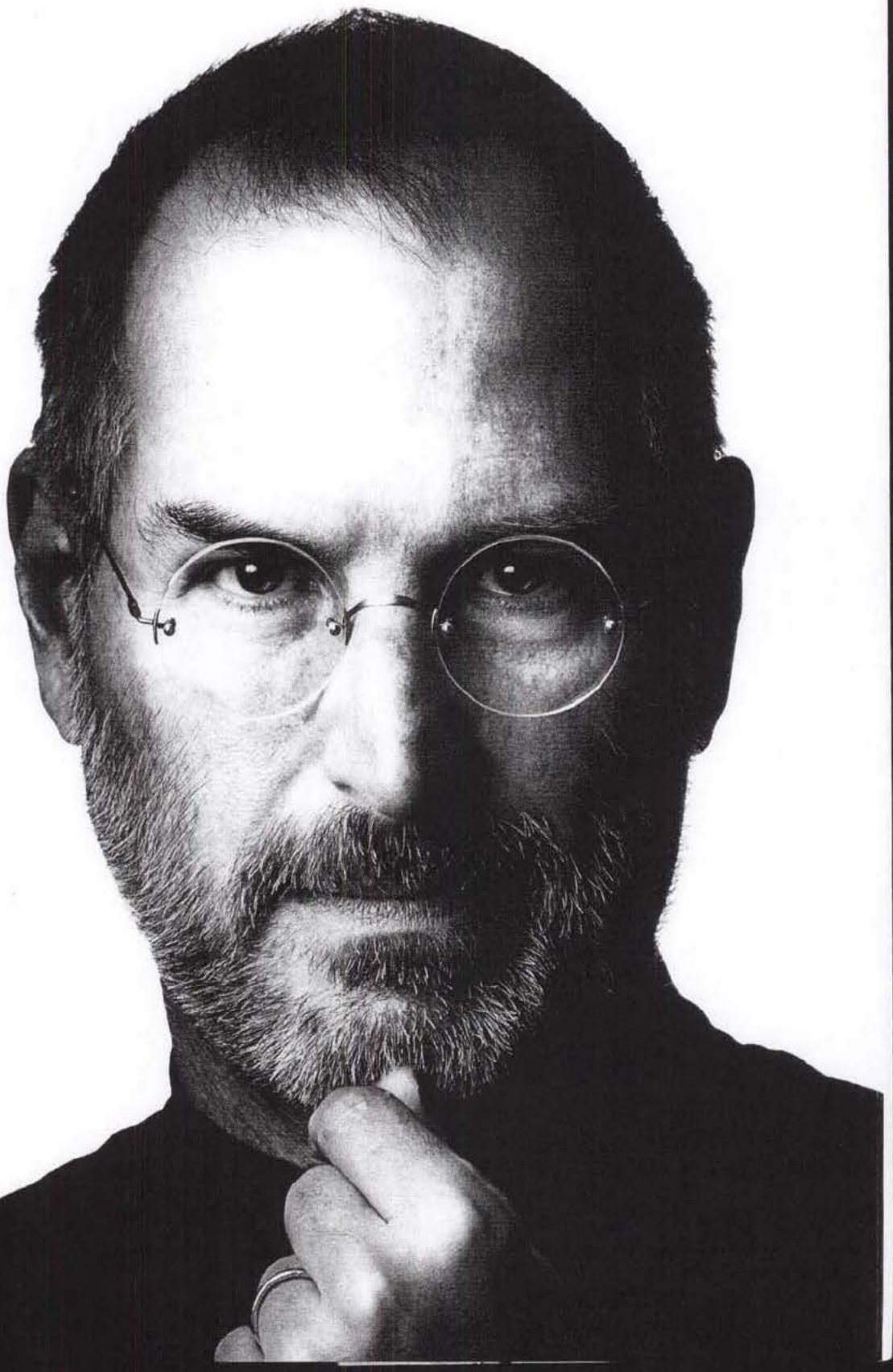
US v Apple
12-cv-02826
PX-0514

Steve Jobs by Walter Isaacson



STEVE JOBS

WALTER ISAACSON

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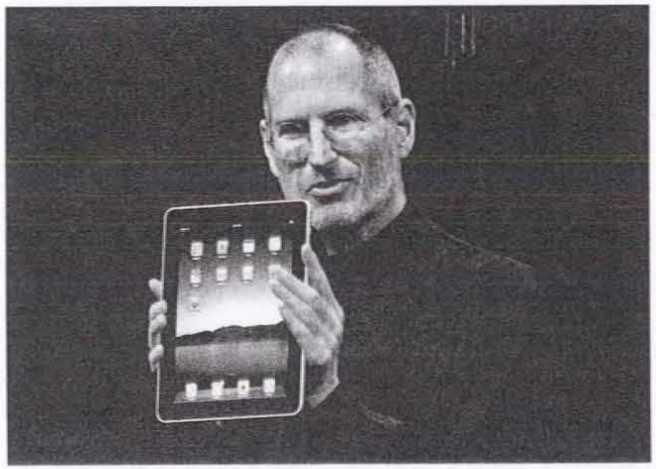
The people who are crazy enough
to think they can change
the world are the ones who do.

—Apple's "Think Different" commercial, 1997

CHAPTER THIRTY-EIGHT

THE iPAD

Into the Post-PC Era



You Say You Want a Revolution

Back in 2002, Jobs had been annoyed by the Microsoft engineer who kept proselytizing about the tablet computer software he had developed, which allowed users to input information on the screen with a stylus or pen. A few manufacturers released tablet PCs that year using the software, but none made a dent in the universe. Jobs had been eager to show how it should be done right—no stylus!—but when he saw the multi-touch technology that Apple was developing, he had decided to use it first to make an iPhone.

In the meantime, the tablet idea was percolating within the Macintosh hardware group. "We have no plans to make a tablet," Jobs declared in an interview with Walt Mossberg in May 2003. "It turns out people want keyboards. Tablets appeal to rich guys with plenty of other PCs and devices already." Like his statement about having a "hormone imbalance," that was misleading; at most of his annual Top 100 retreats, the tablet was among the future projects discussed. "We showed the idea off at many of these retreats, because Steve never lost his desire to do a tablet," Phil Schiller recalled.

The tablet project got a boost in 2007 when Jobs was considering ideas for a low-cost netbook computer. At an executive team brainstorming session one Monday, Ive asked why it needed a keyboard hinged to the screen; that was expensive and bulky. Put the keyboard on the screen using a multi-touch interface, he suggested. Jobs agreed. So the resources were directed to revving up the tablet project rather than designing a netbook.

The process began with Jobs and Ive figuring out the right screen size. They had twenty models made—all rounded rectangles, of course—in slightly varying sizes and aspect ratios. Ive laid them out on a table in the design studio, and in the afternoon they would lift the velvet cloth hiding them and play with them. "That's how we nailed what the screen size was," Ive said.

As usual Jobs pushed for the purest possible simplicity. That required determining what was the core essence of the device. The answer: the display screen. So the guiding principle was that everything they did had to defer to the screen. "How do we get out of the way so there aren't a ton of features and buttons that distract from the display?" Ive asked. At every step, Jobs pushed to remove and simplify.

At one point Jobs looked at the model and was slightly dissatisfied. It didn't feel casual and friendly enough, so that you would naturally scoop it up and whisk it away. Ive put his finger, so to speak, on the problem: They needed to signal that you could grab it with one hand, on impulse. The bottom of the edge needed to be slightly rounded, so that you'd feel comfortable just scooping it up rather than lifting it carefully. That meant engineering had to design the necessary con-

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nection ports and buttons in a simple lip that was thin enough to wash away gently underneath.

If you had been paying attention to patent filings, you would have noticed the one numbered D504889 that Apple applied for in March 2004 and was issued fourteen months later. Among the inventors listed were Jobs and Ive. The application carried sketches of a rectangular electronic tablet with rounded edges, which looked just the way the iPad turned out, including one of a man holding it casually in his left hand while using his right index finger to touch the screen.

Since the Macintosh computers were now using Intel chips, Jobs initially planned to use in the iPad the low-voltage Atom chip that Intel was developing. Paul Otellini, Intel's CEO, was pushing hard to work together on a design, and Jobs's inclination was to trust him. His company was making the fastest processors in the world. But Intel was used to making processors for machines that plugged into a wall, not ones that had to preserve battery life. So Tony Fadell argued strongly for something based on the ARM architecture, which was simpler and used less power. Apple had been an early partner with ARM, and chips using its architecture were in the original iPhone. Fadell gathered support from other engineers and proved that it was possible to confront Jobs and turn him around. "Wrong, wrong, wrong!" Fadell shouted at one meeting when Jobs insisted it was best to trust Intel to make a good mobile chip. Fadell even put his Apple badge on the table, threatening to resign.

Eventually Jobs relented. "I hear you," he said. "I'm not going to go against my best guys." In fact he went to the other extreme. Apple licensed the ARM architecture, but it also bought a 150-person microprocessor design firm in Palo Alto, called P.A. Semi, and had it create a custom system-on-a-chip, called the A4, which was based on

the ARM architecture and manufactured in South Korea by Samsung. As Jobs recalled:

> At the high-performance end, Intel is the best. They build the fastest chip, if you don't care about power and cost. But they build just the processor on one chip, so it takes a lot of other parts. Our A4 has the processor and the graphics, mobile operating system, and memory control all in the chip. We tried to help Intel, but they don't listen much. We've been telling them for years that their graphics suck. Every quarter we schedule a meeting with me and our top three guys and Paul Otellini. At the beginning, we were doing wonderful things together. They wanted this big joint project to do chips for future iPhones. There were two reasons we didn't go with them. One was that they are just really slow. They're like a steamship, not very flexible. We're used to going pretty fast. Second is that we just didn't want to teach them everything, which they could go and sell to our competitors.

According to Otellini, it would have made sense for the iPad to use Intel chips. The problem, he said, was that Apple and Intel couldn't agree on price. Also, they disagreed on who would control the design. It was another example of Jobs's desire, indeed compulsion, to control every aspect of a product, from the silicon to the flesh.

The Launch, January 2010

The usual excitement that Jobs was able to gin up for a product launch paled in comparison to the frenzy that built for the iPad unveiling on January 27, 2010, in San Francisco. The *Economist* put him on its cover robed, haloed, and holding what was dubbed "the Jesus Tablet." The *Wall Street Journal* struck a similarly exalted note: "The last time there was this much excitement about a tablet, it had some commandments written on it."

As if to underscore the historic nature of the launch, Jobs invited back many of the old-timers from his early Apple days. More

poignantly, James Eason, who had performed his liver transplant the year before, and Jeffrey Norton, who had operated on his pancreas in 2004, were in the audience, sitting with his wife, his son, and Mona Simpson.

Jobs did his usual masterly job of putting a new device into context, as he had done for the iPhone three years earlier. This time he put up a screen that showed an iPhone and a laptop with a question mark in between. "The question is, is there room for something in the middle?" he asked. That "something" would have to be good at web browsing, email, photos, video, music, games, and ebooks. He drove a stake through the heart of the netbook concept. "Netbooks aren't better at anything!" he said. The invited guests and employees cheered. "But we have something that is. We call it the iPad."

To underscore the casual nature of the iPad, Jobs ambled over to a comfortable leather chair and side table (actually, given his taste, it was a Le Corbusier chair and an Eero Saarinen table) and scooped one up. "It's so much more intimate than a laptop," he enthused. He proceeded to surf to the *New York Times* website, send an email to Scott Forstall and Phil Schiller ("Wow, we really are announcing the iPad"), flip through a photo album, use a calendar, zoom in on the Eiffel Tower on Google Maps, watch some video clips (*Star Trek* and Pixar's *Up*), show off the iBook shelf, and play a song (Bob Dylan's "Like a Rolling Stone," which he had played at the iPhone launch). "Isn't that awesome?" he asked.

With his final slide, Jobs emphasized one of the themes of his life, which was embodied by the iPad: a sign showing the corner of Technology Street and Liberal Arts Street. "The reason Apple can create products like the iPad is that we've always tried to be at the intersection of technology and liberal arts," he concluded. The iPad was the digital reincarnation of the *Whole Earth Catalog*, the place where creativity met tools for living.

For once, the initial reaction was not a Hallelujah Chorus. The iPad was not yet available (it would go on sale in April), and some who watched Jobs's demo were not quite sure what it was. An iPhone on steroids? "I haven't been this let down since Snooki hooked up with The Situation," wrote *Newsweek*'s Daniel Lyons (who moonlighted

as "The Fake Steve Jobs" in an online parody). Gizmodo ran a contributor's piece headlined "Eight Things That Suck about the iPad" (no multitasking, no cameras, no Flash . . .). Even the name came in for ridicule in the blogosphere, with snarky comments about feminine hygiene products and maxi pads. The hashtag "#iTampon" was the number-three trending topic on Twitter that day.

There was also the requisite dismissal from Bill Gates. "I still think that some mixture of voice, the pen and a real keyboard—in other words a netbook—will be the mainstream," he told Brent Schlender. "So, it's not like I sit there and feel the same way I did with the iPhone where I say, 'Oh my God, Microsoft didn't aim high enough.' It's a nice reader, but there's nothing on the iPad I look at and say, 'Oh, I wish Microsoft had done it.'" He continued to insist that the Microsoft approach of using a stylus for input would prevail. "I've been predicting a tablet with a stylus for many years," he told me. "I will eventually turn out to be right or be dead."

The night after his announcement, Jobs was annoyed and depressed. As we gathered in his kitchen for dinner, he paced around the table calling up emails and web pages on his iPhone.

> I got about eight hundred email messages in the last twenty-four hours. Most of them are complaining. There's no USB cord! There's no this, no that. Some of them are like, "Fuck you, how can you do that?" I don't usually write people back, but I replied, "Your parents would be so proud of how you turned out." And some don't like the iPad name, and on and on. I kind of got depressed today. It knocks you back a bit.

He did get one congratulatory call that day that he appreciated, from President Obama's chief of staff, Rahm Emanuel. But he noted at dinner that the president had not called him since taking office.

The public carping subsided when the iPad went on sale in April and people got their hands on it. Both *Time* and *Newsweek* put it on the cover. "The tough thing about writing about Apple products is that they come with a lot of hype wrapped around them," Lev Grossman wrote in *Time*. "The other tough thing about writing about Apple

products is that sometimes the hype is true." His main reservation, a substantive one, was "that while it's a lovely device for consuming content, it doesn't do much to facilitate its creation." Computers, especially the Macintosh, had become tools that allowed people to make music, videos, websites, and blogs, which could be posted for the world to see. "The iPad shifts the emphasis from creating content to merely absorbing and manipulating it. It mutes you, turns you back into a passive consumer of other people's masterpieces." It was a criticism Jobs took to heart. He set about making sure that the next version of the iPad would emphasize ways to facilitate artistic creation by the user.

Newsweek's cover line was "What's So Great about the iPad? Everything." Daniel Lyons, who had zapped it with his "Snooki" comment at the launch, revised his opinion. "My first thought, as I watched Jobs run through his demo, was that it seemed like no big deal," he wrote. "It's a bigger version of the iPod Touch, right? Then I got a chance to use an iPad, and it hit me: I want one." Lyons, like others, realized that this was Jobs's pet project, and it embodied all that he stood for. "He has an uncanny ability to cook up gadgets that we didn't know we needed, but then suddenly can't live without," he wrote. "A closed system may be the only way to deliver the kind of techno-Zen experience that Apple has become known for."

Most of the debate over the iPad centered on the issue of whether its closed end-to-end integration was brilliant or doomed. Google was starting to play a role similar to the one Microsoft had played in the 1980s, offering a mobile platform, Android, that was open and could be used by all hardware makers. *Fortune* staged a debate on this issue in its pages. "There's no excuse to be closed," wrote Michael Copeland. But his colleague Jon Fortt rebutted, "Closed systems get a bad rap, but they work beautifully and users benefit. Probably no one in tech has proved this more convincingly than Steve Jobs. By bundling hardware, software, and services, and controlling them tightly, Apple is consistently able to get the jump on its rivals and roll out polished products." They agreed that the iPad would be the clearest test of this question since the original Macintosh. "Apple has taken its control-freak rep to a whole new level with the A4 chip that powers the thing,"

wrote Fortt. "Cupertino now has absolute say over the silicon, device, operating system, App Store, and payment system."

Jobs went to the Apple store in Palo Alto shortly before noon on April 5, the day the iPad went on sale. Daniel Kottke—his acid-dropping soul mate from Reed and the early days at Apple, who no longer harbored a grudge for not getting founders' stock options—made a point of being there. "It had been fifteen years, and I wanted to see him again," Kottke recounted. "I grabbed him and told him I was going to use the iPad for my song lyrics. He was in a great mood and we had a nice chat after all these years." Powell and their youngest child, Eve, watched from a corner of the store.

Wozniak, who had once been a proponent of making hardware and software as open as possible, continued to revise that opinion. As he often did, he stayed up all night with the enthusiasts waiting in line for the store to open. This time he was at San Jose's Valley Fair Mall, riding a Segway. A reporter asked him about the closed nature of Apple's ecosystem. "Apple gets you into their playpen and keeps you there, but there are some advantages to that," he replied. "I like open systems, but I'm a hacker. But most people want things that are easy to use. Steve's genius is that he knows how to make things simple, and that sometimes requires controlling everything."

The question "What's on your iPad?" replaced "What's on your iPod?" Even President Obama's staffers, who embraced the iPad as a mark of their tech hipness, played the game. Economic Advisor Larry Summers had the Bloomberg financial information app, Scrabble, and *The Federalist Papers*. Chief of Staff Rahm Emanuel had a slew of newspapers, Communications Advisor Bill Burton had *Vanity Fair* and one entire season of the television series *Lost*, and Political Director David Axelrod had Major League Baseball and NPR.

Jobs was stirred by a story, which he forwarded to me, by Michael Noer on *Forbes.com*. Noer was reading a science fiction novel on his iPad while staying at a dairy farm in a rural area north of Bogotá, Colombia, when a poor six-year-old boy who cleaned the stables came up to him. Curious, Noer handed him the device. With no instruction, and never having seen a computer before, the boy started using

it intuitively. He began swiping the screen, launching apps, playing a pinball game. "Steve Jobs has designed a powerful computer that an illiterate six-year-old can use without instruction," Noer wrote. "If that isn't magical, I don't know what is."

In less than a month Apple sold one million iPads. That was twice as fast as it took the iPhone to reach that mark. By March 2011, nine months after its release, fifteen million had been sold. By some measures it became the most successful consumer product launch in history.

Advertising

Jobs was not happy with the original ads for the iPad. As usual, he threw himself into the marketing, working with James Vincent and Duncan Milner at the ad agency (now called TBWA/Media Arts Lab), with Lee Clow advising from a semiretired perch. The commercial they first produced was a gentle scene of a guy in faded jeans and sweatshirt reclining in a chair, looking at email, a photo album, the *New York Times*, books, and video on an iPad propped on his lap. There were no words, just the background beat of "There Goes My Love" by the Blue Van. "After he approved it, Steve decided he hated it," Vincent recalled. "He thought it looked like a Pottery Barn commercial." Jobs later told me:

> It had been easy to explain what the iPod was—a thousand songs in your pocket—which allowed us to move quickly to the iconic silhouette ads. But it was hard to explain what an iPad was. We didn't want to show it as a computer, and yet we didn't want to make it so soft that it looked like a cute TV. The first set of ads showed we didn't know what we were doing. They had a cashmere and Hush Puppies feel to them.

James Vincent had not taken a break in months. So when the iPad finally went on sale and the ads started airing, he drove with his family to the Coachella Music Festival in Palm Springs, which featured some of his favorite bands, including Muse, Faith No More, and Devo. Soon after he arrived, Jobs called. "Your commercials suck," he said. "The

iPad is revolutionizing the world, and we need something big. You've given me small shit."

"Well, what do you want?" Vincent shot back. "You've not been able to tell me what you want."

"I don't know," Jobs said. "You have to bring me something new. Nothing you've shown me is even close."

Vincent argued back and suddenly Jobs went ballistic. "He just started screaming at me," Vincent recalled. Vincent could be volatile himself, and the volleys escalated.

When Vincent shouted, "You've got to tell me what you want," Jobs shot back, "You've got to show me some stuff, and I'll know it when I see it."

"Oh, great, let me write that on my brief for my creative people: I'll know it when I see it."

Vincent got so frustrated that he slammed his fist into the wall of the house he was renting and put a large dent in it. When he finally went outside to his family, sitting by the pool, they looked at him nervously. "Are you okay?" his wife finally asked.

It took Vincent and his team two weeks to come up with an array of new options, and he asked to present them at Jobs's house rather than the office, hoping that it would be a more relaxed environment. Laying storyboards on the coffee table, he and Milner offered twelve approaches. One was inspirational and stirring. Another tried humor, with Michael Cera, the comic actor, wandering through a fake house making funny comments about the way people could use iPads. Others featured the iPad with celebrities, or set starkly on a white background, or starring in a little sitcom, or in a straightforward product demonstration.

After mulling over the options, Jobs realized what he wanted. Not humor, nor a celebrity, nor a demo. "It's got to make a statement," he said. "It needs to be a manifesto. This is big." He had announced that the iPad would change the world, and he wanted a campaign that reinforced that declaration. Other companies would come out with copycat tablets in a year or so, he said, and he wanted people to remember that the iPad was the real thing. "We need ads that stand up and declare what we have done."

He abruptly got out of his chair, looking a bit weak but smiling. "I've got to go have a massage now," he said. "Get to work."

So Vincent and Milner, along with the copywriter Eric Grunbaum, began crafting what they dubbed "The Manifesto." It would be fast-paced, with vibrant pictures and a thumping beat, and it would proclaim that the iPad was revolutionary. The music they chose was Karen O's pounding refrain from the Yeah Yeah Yeahs' "Gold Lion." As the iPad was shown doing magical things, a strong voice declared, "iPad is thin. iPad is beautiful. . . . It's crazy powerful. It's magical. . . . It's video, photos. More books than you could read in a lifetime. It's already a revolution, and it's only just begun."

Once the Manifesto ads had run their course, the team again tried something softer, shot as day-in-the-life documentaries by the young filmmaker Jessica Sanders. Jobs liked them—for a little while. Then he turned against them for the same reason he had reacted against the original Pottery Barn–style ads. "Dammit," he shouted, "they look like a Visa commercial, typical ad agency stuff."

He had been asking for ads that were different and new, but eventually he realized he did not want to stray from what he considered the Apple voice. For him, that voice had a distinctive set of qualities: simple, declarative, clean. "We went down that lifestyle path, and it seemed to be growing on Steve, and suddenly he said, 'I hate that stuff, it's not Apple,'" recalled Lee Clow. "He told us to get back to the Apple voice. It's a very simple, honest voice." And so they went back to a clean white background, with just a close-up showing off all the things that "iPad is . . ." and could do.

Apps

The iPad commercials were not about the device, but about what you could do with it. Indeed its success came not just from the beauty of the hardware but from the applications, known as apps, that allowed you to indulge in all sorts of delightful activities. There were thousands—and soon hundreds of thousands—of apps that you could download for free or for a few dollars. You could sling angry birds with

the swipe of your finger, track your stocks, watch movies, read books and magazines, catch up on the news, play games, and waste glorious amounts of time. Once again the integration of the hardware, software, and store made it easy. But the apps also allowed the platform to be sort of open, in a very controlled way, to outside developers who wanted to create software and content for it—open, that is, like a carefully curated and gated community garden.

The apps phenomenon began with the iPhone. When it first came out in early 2007, there were no apps you could buy from outside developers, and Jobs initially resisted allowing them. He didn't want outsiders to create applications for the iPhone that could mess it up, infect it with viruses, or pollute its integrity.

Board member Art Levinson was among those pushing to allow iPhone apps. "I called him a half dozen times to lobby for the potential of the apps," he recalled. If Apple didn't allow them, indeed encourage them, another smartphone maker would, giving itself a competitive advantage. Apple's marketing chief Phil Schiller agreed. "I couldn't imagine that we would create something as powerful as the iPhone and not empower developers to make lots of apps," he recalled. "I knew customers would love them." From the outside, the venture capitalist John Doerr argued that permitting apps would spawn a profusion of new entrepreneurs who would create new services.

Jobs at first quashed the discussion, partly because he felt his team did not have the bandwidth to figure out all of the complexities that would be involved in policing third-party app developers. He wanted focus. "So he didn't want to talk about it," said Schiller. But as soon as the iPhone was launched, he was willing to hear the debate. "Every time the conversation happened, Steve seemed a little more open," said Levinson. There were freewheeling discussions at four board meetings.

Jobs soon figured out that there was a way to have the best of both worlds. He would permit outsiders to write apps, but they would have to meet strict standards, be tested and approved by Apple, and be sold only through the iTunes Store. It was a way to reap the advantage of empowering thousands of software developers while retaining enough control to protect the integrity of the iPhone and the simplicity of the customer experience. "It was an absolutely magical solution that hit

the sweet spot," said Levinson. "It gave us the benefits of openness while retaining end-to-end control."

The App Store for the iPhone opened on iTunes in July 2008; the billionth download came nine months later. By the time the iPad went on sale in April 2010, there were 185,000 available iPhone apps. Most could also be used on the iPad, although they didn't take advantage of the bigger screen size. But in less than five months, developers had written twenty-five thousand new apps that were specifically configured for the iPad. By July 2011 there were 500,000 apps for both devices, and there had been more than fifteen billion downloads of them.

The App Store created a new industry overnight. In dorm rooms and garages and at major media companies, entrepreneurs invented new apps. John Doerr's venture capital firm created an iFund of $200 million to offer equity financing for the best ideas. Magazines and newspapers that had been giving away their content for free saw one last chance to put the genie of that dubious business model back into the bottle. Innovative publishers created new magazines, books, and learning materials just for the iPad. For example, the high-end publishing house Callaway, which had produced books ranging from Madonna's *Sex* to *Miss Spider's Tea Party*, decided to "burn the boats" and give up print altogether to focus on publishing books as interactive apps. By June 2011 Apple had paid out $2.5 billion to app developers.

The iPad and other app-based digital devices heralded a fundamental shift in the digital world. Back in the 1980s, going online usually meant dialing into a service like AOL, CompuServe, or Prodigy that charged fees for access to a carefully curated walled garden filled with content plus some exit gates that allowed braver users access to the Internet at large. The second phase, beginning in the early 1990s, was the advent of browsers that allowed everyone to freely surf the Internet using the hypertext transfer protocols of the World Wide Web, which linked billions of sites. Search engines arose so that people could easily find the websites they wanted. The release of the iPad portended a new model. Apps resembled the walled gardens of old. The creators could charge fees and offer more functions to the users who downloaded them. But the rise of apps also meant that the openness and

linked nature of the web were sacrificed. Apps were not as easily linked or searchable. Because the iPad allowed the use of both apps and web browsing, it was not at war with the web model. But it did offer an alternative, for both the consumers and the creators of content.

Publishing and Journalism

With the iPod, Jobs had transformed the music business. With the iPad and its App Store, he began to transform all media, from publishing to journalism to television and movies.

Books were an obvious target, since Amazon's Kindle had shown there was an appetite for electronic books. So Apple created an iBooks Store, which sold electronic books the way the iTunes Store sold songs. There was, however, a slight difference in the business model. For the iTunes Store, Jobs had insisted that all songs be sold at one inexpensive price, initially 99 cents. Amazon's Jeff Bezos had tried to take a similar approach with ebooks, insisting on selling them for at most $9.99. Jobs came in and offered publishers what he had refused to offer record companies: They could set any price they wanted for their wares in the iBooks Store, and Apple would take 30%. Initially that meant prices were higher than on Amazon. Why would people pay Apple more? "That won't be the case," Jobs answered, when Walt Mossberg asked him that question at the iPad launch event. "The price will be the same." He was right.

The day after the iPad launch, Jobs described to me his thinking on books:

> Amazon screwed it up. It paid the wholesale price for some books, but started selling them below cost at $9.99. The publishers hated that—they thought it would trash their ability to sell hardcover books at $28. So before Apple even got on the scene, some booksellers were starting to withhold books from Amazon. So we told the publishers, "We'll go to the agency model, where you set the price, and we get our 30%, and yes, the customer pays a little more, but that's what you want anyway." But we also asked for a guarantee that if anybody else is selling the books

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cheaper than we are, then we can sell them at the lower price too. So they went to Amazon and said, "You're going to sign an agency contract or we're not going to give you the books."

Jobs acknowledged that he was trying to have it both ways when it came to music and books. He had refused to offer the music companies the agency model and allow them to set their own prices. Why? Because he didn't have to. But with books he did. "We were not the first people in the books business," he said. "Given the situation that existed, what was best for us was to do this akido move and end up with the agency model. And we pulled it off."

Right after the iPad launch event, Jobs traveled to New York in February 2010 to meet with executives in the journalism business. In two days he saw Rupert Murdoch, his son James, and the management of their *Wall Street Journal*; Arthur Sulzberger Jr. and the top executives at the *New York Times*; and executives at *Time*, *Fortune*, and other Time Inc. magazines. "I would love to help quality journalism," he later said. "We can't depend on bloggers for our news. We need real reporting and editorial oversight more than ever. So I'd love to find a way to help people create digital products where they actually can make money." Since he had gotten people to pay for music, he hoped he could do the same for journalism.

Publishers, however, turned out to be leery of his lifeline. It meant that they would have to give 30% of their revenue to Apple, but that wasn't the biggest problem. More important, the publishers feared that, under his system, they would no longer have a direct relationship with their subscribers; they wouldn't have their email address and credit card number so they could bill them, communicate with them, and market new products to them. Instead Apple would own the customers, bill them, and have their information in its own database. And because of its privacy policy, Apple would not share this information unless a customer gave explicit permission to do so.

Jobs was particularly interested in striking a deal with the *New York Times*, which he felt was a great newspaper in danger of declining because it had not figured out how to charge for digital content. "One of

my personal projects this year, I've decided, is to try to help—whether they want it or not—the *Times*," he told me early in 2010. "I think it's important to the country for them to figure it out."

During his New York trip, he went to dinner with fifty top *Times* executives in the cellar private dining room at Pranna, an Asian restaurant. (He ordered a mango smoothie and a plain vegan pasta, neither of which was on the menu.) There he showed off the iPad and explained how important it was to find a modest price point for digital content that consumers would accept. He drew a chart of possible prices and volume. How many readers would they have if the *Times* were free? They already knew the answer to that extreme on the chart, because they were giving it away for free on the web already and had about twenty million regular visitors. And if they made it really expensive? They had data on that too; they charged print subscribers more than $300 a year and had about a million of them. "You should go after the midpoint, which is about ten million digital subscribers," he told them. "And that means your digital subs should be very cheap and simple, one click and $5 a month at most."

When one of the *Times* circulation executives insisted that the paper needed the email and credit card information for all of its subscribers, even if they subscribed through the App Store, Jobs said that Apple would not give it out. That angered the executive. It was unthinkable, he said, for the *Times* not to have that information. "Well, you can ask them for it, but if they won't voluntarily give it to you, don't blame me," Jobs said. "If you don't like it, don't use us. I'm not the one who got you in this jam. You're the ones who've spent the past five years giving away your paper online and not collecting anyone's credit card information."

Jobs also met privately with Arthur Sulzberger Jr. "He's a nice guy, and he's really proud of his new building, as he should be," Jobs said later. "I talked to him about what I thought he ought to do, but then nothing happened." It took a year, but in April 2011 the *Times* started charging for its digital edition and selling some subscriptions through Apple, abiding by the policies that Jobs established. It did, however, decide to charge approximately four times the $5 monthly charge that Jobs had suggested.

At the Time-Life Building, *Time*'s editor Rick Stengel played host. Jobs liked Stengel, who had assigned a talented team led by Josh Quittner to make a robust iPad version of the magazine each week. But he was upset to see Andy Serwer of *Fortune* there. Tearing up, he told Serwer how angry he still was about *Fortune*'s story two years earlier revealing details of his health and the stock options problems. "You kicked me when I was down," he said.

The bigger problem at Time Inc. was the same as the one at the *Times*: The magazine company did not want Apple to own its subscribers and prevent it from having a direct billing relationship. Time Inc. wanted to create apps that would direct readers to its own website in order to buy a subscription. Apple refused. When *Time* and other magazines submitted apps that did this, they were denied the right to be in the App Store.

Jobs tried to negotiate personally with the CEO of Time Warner, Jeff Bewkes, a savvy pragmatist with a no-bullshit charm to him. They had dealt with each other a few years earlier over video rights for the iPod Touch; even though Jobs had not been able to convince him to do a deal involving HBO's exclusive rights to show movies soon after their release, he admired Bewkes's straight and decisive style. For his part, Bewkes respected Jobs's ability to be both a strategic thinker and a master of the tiniest details. "Steve can go readily from the overarching principals into the details," he said.

When Jobs called Bewkes about making a deal for Time Inc. magazines on the iPad, he started off by warning that the print business "sucks," that "nobody really wants your magazines," and that Apple was offering a great opportunity to sell digital subscriptions, but "your guys don't get it." Bewkes didn't agree with any of those premises. He said he was happy for Apple to sell digital subscriptions for Time Inc. Apple's 30% take was not the problem. "I'm telling you right now, if you sell a sub for us, you can have 30%," Bewkes told him.

"Well, that's more progress than I've made with anybody," Jobs replied.

"I have only one question," Bewkes continued. "If you sell a subscription to my magazine, and I give you the 30%, who has the subscription—you or me?"

"I can't give away all the subscriber info because of Apple's privacy policy," Jobs replied.

"Well, then, we have to figure something else out, because I don't want my whole subscription base to become subscribers of yours, for you to then aggregate at the Apple store," said Bewkes. "And the next thing you'll do, once you have a monopoly, is come back and tell me that my magazine shouldn't be $4 a copy but instead should be $1. If someone subscribes to our magazine, we need to know who it is, we need to be able to create online communities of those people, and we need the right to pitch them directly about renewing."

Jobs had an easier time with Rupert Murdoch, whose News Corp. owned the *Wall Street Journal*, *New York Post*, newspapers around the world, Fox Studios, and the Fox News Channel. When Jobs met with Murdoch and his team, they also pressed the case that they should share ownership of the subscribers that came in through the App Store. But when Jobs refused, something interesting happened. Murdoch is not known as a pushover, but he knew that he did not have the leverage on this issue, so he accepted Jobs's terms. "We would prefer to own the subscribers, and we pushed for that," recalled Murdoch. "But Steve wouldn't do a deal on those terms, so I said, 'Okay, let's get on with it.' We didn't see any reason to mess around. He wasn't going to bend—and I wouldn't have bent if I were in his position—so I just said yes."

Murdoch even launched a digital-only daily newspaper, *The Daily*, tailored specifically for the iPad. It would be sold in the App Store, on the terms dictated by Jobs, at 99 cents a week. Murdoch himself took a team to Cupertino to show the proposed design. Not surprisingly, Jobs hated it. "Would you allow our designers to help?" he asked. Murdoch accepted. "The Apple designers had a crack at it," Murdoch recalled, "and our folks went back and had another crack, and ten days later we went back and showed them both, and he actually liked our team's version better. It stunned us."

The Daily, which was neither tabloidy nor serious, but instead a rather midmarket product like *USA Today*, was not very successful. But it did help create an odd-couple bonding between Jobs and Murdoch. When Murdoch asked him to speak at his June 2010 News Corp. an-

nual management retreat, Jobs made an exception to his rule of never doing such appearances. James Murdoch led him in an after-dinner interview that lasted almost two hours. "He was very blunt and critical of what newspapers were doing in technology," Murdoch recalled. "He told us we were going to find it hard to get things right, because you're in New York, and anyone who's any good at tech works in Silicon Valley." This did not go down very well with the president of the Wall Street Journal Digital Network, Gordon McLeod, who pushed back a bit. At the end, McLeod came up to Jobs and said, "Thanks, it was a wonderful evening, but you probably just cost me my job." Murdoch chuckled a bit when he described the scene to me. "It ended up being true," he said. McLeod was out within three months.

In return for speaking at the retreat, Jobs got Murdoch to hear him out on Fox News, which he believed was destructive, harmful to the nation, and a blot on Murdoch's reputation. "You're blowing it with Fox News," Jobs told him over dinner. "The axis today is not liberal and conservative, the axis is constructive-destructive, and you've cast your lot with the destructive people. Fox has become an incredibly destructive force in our society. You can be better, and this is going to be your legacy if you're not careful." Jobs said he thought Murdoch did not really like how far Fox had gone. "Rupert's a builder, not a tearer-downer," he said. "I've had some meetings with James, and I think he agrees with me. I can just tell."

Murdoch later said he was used to people like Jobs complaining about Fox. "He's got sort of a left-wing view on this," he said. Jobs asked him to have his folks make a reel of a week of Sean Hannity and Glenn Beck shows—he thought that they were more destructive than Bill O'Reilly—and Murdoch agreed to do so. Jobs later told me that he was going to ask Jon Stewart's team to put together a similar reel for Murdoch to watch. "I'd be happy to see it," Murdoch said, "but he hasn't sent it to me."

Murdoch and Jobs hit it off well enough that Murdoch went to his Palo Alto house for dinner twice more during the next year. Jobs joked that he had to hide the dinner knives on such occasions, because he was afraid that his liberal wife was going to eviscerate Murdoch when

he walked in. For his part, Murdoch was reported to have uttered a great line about the organic vegan dishes typically served: "Eating dinner at Steve's is a great experience, as long as you get out before the local restaurants close." Alas, when I asked Murdoch if he had ever said that, he didn't recall it.

One visit came early in 2011. Murdoch was due to pass through Palo Alto on February 24, and he texted Jobs to tell him so. He didn't know it was Jobs's fifty-sixth birthday, and Jobs didn't mention it when he texted back inviting him to dinner. "It was my way of making sure Laurene didn't veto the plan," Jobs joked. "It was my birthday, so she had to let me have Rupert over." Erin and Eve were there, and Reed jogged over from Stanford near the end of the dinner. Jobs showed off the designs for his planned boat, which Murdoch thought looked beautiful on the inside but "a bit plain" on the outside. "It certainly shows great optimism about his health that he was talking so much about building it," Murdoch later said.

At dinner they talked about the importance of infusing an entrepreneurial and nimble culture into a company. Sony failed to do that, Murdoch said. Jobs agreed. "I used to believe that a really big company couldn't have a clear corporate culture," Jobs said. "But I now believe it can be done. Murdoch's done it. I think I've done it at Apple."

Most of the dinner conversation was about education. Murdoch had just hired Joel Klein, the former chancellor of the New York City Department of Education, to start a digital curriculum division. Murdoch recalled that Jobs was somewhat dismissive of the idea that technology could transform education. But Jobs agreed with Murdoch that the paper textbook business would be blown away by digital learning materials.

In fact Jobs had his sights set on textbooks as the next business he wanted to transform. He believed it was an $8 billion a year industry ripe for digital destruction. He was also struck by the fact that many schools, for security reasons, don't have lockers, so kids have to lug a heavy backpack around. "The iPad would solve that," he said. His idea was to hire great textbook writers to create digital versions, and make them a feature of the iPad. In addition, he held meetings with

the major publishers, such as Pearson Education, about partnering with Apple. "The process by which states certify textbooks is corrupt," he said. "But if we can make the textbooks free, and they come with the iPad, then they don't have to be certified. The crappy economy at the state level will last for a decade, and we can give them an opportunity to circumvent that whole process and save money."

CHAPTER THIRTY-NINE

NEW BATTLES

And Echoes of Old Ones

Google: Open versus Closed

A few days after he unveiled the iPad in January 2010, Jobs held a "town hall" meeting with employees at Apple's campus. Instead of exulting about their transformative new product, however, he went into a rant against Google for producing the rival Android operating system. Jobs was furious that Google had decided to compete with Apple in the phone business. "We did not enter the search business," he said. "They entered the phone business. Make no mistake. They want to kill the iPhone. We won't let them." A few minutes later, after the meeting moved on to another topic, Jobs returned to his tirade to attack Google's famous values slogan. "I want to go back to that other question first and say one more thing. This 'Don't be evil' mantra, it's bullshit."

Jobs felt personally betrayed. Google's CEO Eric Schmidt had been on the Apple board during the development of the iPhone and iPad, and Google's founders, Larry Page and Sergey Brin, had treated him as a mentor. He felt ripped off. Android's touchscreen interface was adopting more and more of the features—multi-touch, swiping, a grid of app icons—that Apple had created.