

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE ELECTRONIC BOOKS ANTITRUST
LITIGATION

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

This Document Relates to:

ALL ACTIONS

CLASS ACTION

**MEMORANDUM OF LAW IN SUPPORT OF CLASS PLAINTIFFS'
MOTION TO EXCLUDE THE EXPERT OPINIONS
OFFERED BY APPLE'S EXPERT JONATHAN ORSZAG**

SUBMITTED UNDER SEAL
Pursuant to Protective Order

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I. INTRODUCTION

Class Plaintiffs respectfully request the Court preclude Apple, through Mr. Orszag, from offering four categories of opinions to oppose class certification or contest any element of liability or estimation of damages (whether at summary judgment or trial). Each challenged opinion is irrelevant, unreliable, or both. Mr. Orszag's sworn testimony that he approached his assignment with objectivity is completely belied by his result-driven "methodologies." This Court, as a neutral observer, will readily see Mr. Orszag's opinions are not rooted in the reliable application of the scientific method; instead his opinions are simply Apple's spoon-fed narrative thinly cloaked in "economic" garb.

Without performing any econometric analysis of the increase in e-book retail prices caused by the conspiracy, Mr. Orszag opines that damages were no more than \$30 million.¹ To land on this figure, Mr. Orszag engages in a series of "illustrative" guesses that he admits are not reliable. In particular, he offers four opinions to reduce or "offset" damages: (1) without the conspiracy, Amazon would have either raised retail e-book prices in the but-for world, lowered e-reader prices less than it did in the actual world, or an *inestimable version of both*; (2) the price-fixing conspiracy caused an increase in self-published e-books and free e-books; (3) some of the e-books purchased through the iBookstore and Barnes & Noble's Nook Store would not have been purchased in the but-for world; and (4) Dr. Noll's multiple regression analysis used *too much data* – that is, *too long* of a time period and *too many publishers* as a control group.

These four categories of opinions should be excluded under the standards of Federal Rules of Evidence 401, 402, 403, or 702. As an overarching matter, *none* of Mr. Orszag's opinions are the product of regression analysis or any other form of rigorous econometric or

¹ Declaration of Jonathan Orszag ("Orszag Decl."), ¶ 10 submitted under seal on Nov. 15, 2013.

statistical analysis. Instead, they consist entirely of speculative, “illustrative” analytical leaps from demonstrably false assumptions. Mr. Orszag’s opinions about Amazon’s conduct in the but-for world are based on extrapolation from a one-page summary of a single year of pre-conspiracy contribution profits, layered with assumptions based on ignoring the record evidence. Moreover, Mr. Orszag omits obvious alternative explanations, including the most likely eventuality (expected by Defendants and many other industry participants) that Amazon would negotiate lower wholesale prices from publishers instead of raising consumer prices. His opinions about offsets are based on demonstrably false assumptions that Amazon improved its self-publishing royalty in response to the agency agreements and that Apple introduced free e-books that were not previously available to consumers. Moreover, they are irrelevant, because price-fixers are not permitted to offset damages by pointing to supposed benefits on non-price-fixed products. His opinion about an expansion of purchases owing to the iBookstore and Nook Store are literally pure guesswork, relying on untested assumptions that are contradicted by the record. And his criticisms of Dr. Noll’s time period and control group are specious and, in fact, squarely contradict positions taken by Apple earlier in this litigation. Additionally, several of Mr. Orszag’s opinions are barred by collateral estoppel. Accordingly, the Court should give no weight to Mr. Orszag’s opinions in deciding class certification, and exclude Mr. Orszag’s testimony from trial.

II. ARGUMENT²

A. Mr. Orszag’s “Offset” Opinions Should be Excluded as Irrelevant Because the Court Has Already Found Apple Guilty of a *Per Se* Sherman Act Violation

The Court found based on “compelling direct and circumstantial evidence” that “Apple

² Plaintiffs set out the applicable legal standards in their concurrently filed Memorandum of Law in Opposition to Apple’s Motion to Exclude the Testimony of Roger Noll.

participated in and facilitated a horizontal price-fixing conspiracy,” resulting in a *per se* violation of the Sherman Act.³ Consequently, Apple is not entitled to any of the offsets that Orszag posits; any and all opinions that he offers relating to alleged pro-competitive effects are simply not relevant and should be excluded.

The Eastern District of Pennsylvania recently addressed a somewhat similar issue in a price-fixing case involving a horizontal conspiracy to fix the price of blood reagents. Defendants argued that price increases should be offset by lower prices for other reagents and related equipment.⁴ The court rightly rejected the argument, finding that, unlike in the merger cases relied upon by the defendants, “[i]t is far less plausible . . . that a price-fixing conspiracy would have offsetting benefits to consumers.”⁵ And the court added that defendants could “cite[] no case in which a court required plaintiffs to account for potential decreases in the price of some products as the result of an alleged horizontal price-fixing conspiracy.”⁶

Indeed, we have not identified any decision allowing an offset theory to be presented to a jury after a defendant has been found to have engaged in a horizontal price fixing conspiracy. This is understandable given that, as this Court has noted, horizontal price-fixing conspiracies are conclusively presumed to be unreasonable because of their pernicious effect on competition

³ *United States v. Apple Inc.*, No. 12 Civ. 2826, 2013 U.S. Dist. LEXIS 96424, at *140 (S.D.N.Y. July 10, 2013). All internal citations and quotations omitted and all emphasis added unless otherwise indicated.

⁴ *In re Blood Reagents Antitrust Litig.*, 283 F.R.D. 222, 239 (E.D. Pa. 2012).

⁵ *Id.*

⁶ *Id.*; see also *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481, 503-04 (1968) (rejecting offsetting of benefits in related segments of the market); *In re Relafen Antitrust Litig.*, 346 F. Supp. 2d 349, 369 (D. Mass. 2004) (“*Hanover Shoe* permits a direct purchaser to recover the ‘full amount of the overcharge,’ even if he is otherwise benefited.”); *In re Airline Ticket Comm’n Antitrust Litig.*, 918 F. Supp. 283, 286 (D. Minn. 1996) (“In a horizontal price-fixing case, however, mitigation and offset generally do not affect the ultimate measure of damages.”) (citing *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 745-46 (1977)).

and lack of any redeeming virtue.⁷

B. Mr. Orszag's "Offset" Opinions Should be Excluded Because the Court Has Already Found that the Price-Fixing Agreements Had No Pro-Competitive Effects

Even if the pro-competitive effects about which Mr. Orszag opines would otherwise have some relevancy under the rule of reason, the Court also found that Apple's anti-competitive conduct had no independent pro-competitive benefits.⁸ The Court's ruling that no pro-competitive effects resulted from the price-fixing conspiracy is binding under estoppel principles.⁹ Therefore, Apple is estopped from introducing Mr. Orszag's offset opinions. These opinions are simply re-purposing Apple's pro-competitive effects arguments. But the Court already found none exist.

Indeed, Mr. Orszag admits that, if the Court truly did find that the price-fixing conspiracy had no pro-competitive effects, his opinions would need to change. When asked if he accepted as true the Court's findings that there were no pro-competitive effects caused by the conspiracy,

⁷ *Apple*, 2013 U.S. Dist. LEXIS 96424, at *140 (price-fixing "agreements . . . 'are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality. . . .')"; *see also e.g., In re Publ'n Paper Antitrust Litig.*, 690 F.3d 51, 67 (2d Cir. 2012) *cert. denied, sub nom, Stora Enso N. Am. v. Parliament paper, Inc.*, __U.S.__, 133 S. Ct. 940 (2013) ("Price-fixing agreements are conclusively presumed to be unreasonable and therefore illegal precisely because of their pernicious effect on competition and lack of any redeeming virtue . . . i.e., because such agreements are so likely to result in artificially higher prices being charged to consumers without accomplishing any legitimate business purpose.").

⁸ *Apple*, 2013 U.S. Dist. LEXIS 96424, at *141 (footnote omitted). The Court also found, with respect to the purported benefits of the iPad, that the "iBookstore was not an essential feature of the iPad, and the iPad Launch would have occurred without any iBookstore." *Id.*, at *182.

⁹ The Court has explained that federal common law determines the preclusive effect of federal court judgments and that, under federal law:

The preclusive effect of a judgment is defined by claim preclusion and issue preclusion, which are collectively referred to as 'res judicata.'" . . . "Under the doctrine of claim preclusion, a final judgment forecloses 'successive litigation of the very same claim, whether or not relitigation of the claim raises the same issues as the earlier suit.'" . . . Meanwhile, "[i]ssue preclusion, in contrast, bars successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment, even if the issue recurs in the context of a different claim.

In re Michael G. Tyson, 433 B.R. 68, 99 (S.D.N.Y. 2010) (alteration in original).

Mr. Orszag stated he was “confused” whether the Court was making “economic” or “legal” conclusions and went so far as contending the Court’s ruling was self-contradictory on this point.¹⁰ Orszag ultimately admitted that if the Court clarified its findings for him – that, when the Court found the execution of the agency agreements had no pro-competitive effects, the Court indeed meant what it said – Mr. Orszag would need to modify his “assumptions” and “output,” that is, his conclusions.¹¹ The Court, however, could not have been more clear in finding that “Apple has not shown that the execution of the Agreements had any pro-competitive effects.”¹²

Apple, through Mr. Orszag, is simply attempting to offer a pro-competitive effects analysis through the backdoor after the Court rejected these purported effects when Apple presented them during the liability trial. They are thus irrelevant and should be excluded.¹³

C. In addition to Being Irrelevant, Mr. Orszag’s Offset Opinions Should be Excluded Because They Are Unreliable

A damages model must isolate the effect of the harmful act: “Because the but-for scenario differs from what actually happened only with respect to the harmful act, damages measured in this way isolate the loss of value caused by the harmful act *and exclude any change in the plaintiff’s value arising from other sources.*”¹⁴ In determining this “but-for world,” the

¹⁰ Exhibit 9 to the Declaration of Steve W. Berman in Support of Class Plaintiffs’ Reply in Support of Motion for Class Certification and *Daubert* Motions (“Berman Declaration”) at 191:21-195-18, concurrently filed herewith. All exhibit references hereto are to the Berman Declaration, unless otherwise noted.

¹¹ *Id.* at 193:25-196:1.

¹² *Apple*, 2013 U.S. Dist. LEXIS 96424, at *141.

¹³ *See, e.g., See, e.g.*, Ex. 43 at 33-34 *United States v. Cunningham*, 679 F.3d 355, 380 (6th Cir. 2012), *cert. denied*, U.S., 133 S.Ct. 1584 (2013) (upholding exclusion of expert testimony that conflicted with both the district court’s prior rulings and state law); *Bailey v. Allgas, Inc.*, 148 F. Supp. 2d 1222, 1242-43 (N.D. Ala. 2000), *aff’d*, 284 F.3d 1237 (11th Cir. 2002) (excluding testimony concerning the relevant market when expert opinion conflicted with Eleventh Circuit law).

¹⁴ Fed. Judicial Center, Reference Manual on Scientific Evidence 432 (3d ed. 2011).

expert *must adequately account for obvious alternative explanations*.¹⁵ Although an expert's failure to consider all variables generally affects the analysis' probativeness and not admissibility, the failure to account for major factors may render an analysis "so incomplete as to be inadmissible as irrelevant" under Rule 401.¹⁶

For example, in *Bickerstaff*, a discrimination case, the expert's multiple regression analysis controlled for experience, rank, productivity, and discipline, but the opinion was excluded because it did not control for important nondiscriminatory causes such as teaching and service.¹⁷ Similarly, in *Raskin v. The Wyatt Co.*, an expert opinion was excluded because the expert arrived at his conclusion while making "no attempt to account for other possible causes."¹⁸

This Court has applied these Second Circuit decisions to exclude expert testimony. In *In re Wireless Telephone Services Antitrust Litigation*, the Court found an expert's regression analysis "methodologically unsound" and inadmissible because the expert failed to account for alternative explanations that could have affected his analysis.¹⁹ Acknowledging that a multiple regression analysis "is a commonly accepted statistical tool used to examine 'the effect of independent variables on a dependent variable,'" ²⁰ the Court found that the expert's regression failed to test for other reasons why prices for wireless handsets were higher – reasons such as the shift from analog to digital technology, related advances in handset features, and improvements

¹⁵ See, e.g., *Claar v. Burlington N. R.R. Co.*, 29 F.3d 499, 502 (9th Cir. 1994).

¹⁶ *Bickerstaff v. Vassar Coll.*, 196 F.3d 435, 449 (2d Cir. 1999).

¹⁷ *Id.*

¹⁸ 125 F.3d 55, 67-68 (2d Cir. 1997); see also *In re Exec. Telecard, Ltd. Sec. Litig.* 979 F. Supp. 1021, 1025-26 (S.D.N.Y. 1997) (excluding damages analysis under Fed. R. Evid. 702 because the expert "fail[ed] adequately to distinguish between fraud related and non-fraud related company specific influences on [the company's] stock price").

¹⁹ 385 F. Supp. 2d 403, 427-28 (S.D.N.Y. 2005).

²⁰ *Id.* at 427 n.33.

in handset quality.²¹ In a later opinion, the Court excluded the supplemental testimony of the same expert when he again omitted the same significant variables from the regression analysis, calling the regression analysis “essentially worthless” and inadmissible under Fed. R. Evidence 401 and 702.²²

Mr. Orszag’s opinions are “essentially worthless.” He fails to control for and test a whole host of critical variables, ignores alternative explanations that are contrary to his results-driven conclusions, and predicates his opinions on faulty assumptions.

1. **Mr. Orszag’s opinion that, “but for” the conspiracy, either Kindle device prices or e-book prices would have been higher (than Dr. Noll calculates) is based on an unreliable methodology.**

Mr. Orszag claims the introduction of the iPad (with or without the iBookstore) would have changed Amazon’s incentives in how it priced Kindle devices, e-books, or both. His story goes: Had there been no conspiracy, Amazon could not have used its additional e-book margin to subsidize its overall e-book and Kindle device business. According to Orszag, this would have caused Amazon to either set higher device prices than it did in the actual world or higher “but-for” e-book prices than Dr. Noll is estimating. Orszag constructs his Rube Goldberg opinion based on these assumptions:


1. In a single year before the conspiracy [REDACTED]
[REDACTED]²³
2. In part of the year when the iPad came on the market and Amazon began developing the Kindle Fire, Amazon’s aggregate profits on the Kindle decreased as the price for

²¹ *Id.* at 428.

²² *Freeland v. AT&T Corp.*, 238 F.R.D. 130, 149 (S.D.N.Y. 2006); *see also Louis Vuitton Malletier v. Dooney & Bourke, Inc.*, 525 F. Supp. 2d 558, 667-68 (S.D.N.Y. 2007) (upholding findings of special master that, because expert testimony “did not take account of any of these plausible alternative causes, the regression analysis must be excluded under Rule 702”).

²³ Orszag Decl., ¶¶ 50-53.

the Amazon Kindle fell. The prices for e-readers sold by Barnes & Noble and Sony decreased as well. Conversely, Amazon's profits on e-books increased.²⁴

3. The prices of e-readers and e-books are linked, and the higher margins on e-books resulting from the agency agreements gave retailers an additional incentive to lower device prices.²⁵
4. In the absence of the price-fixing agreements, prices for e-reader devices would have fallen less because the iBookstore made it "possible that in the actual world consumers benefited from additional competition on device prices that may not have occurred in a but-for world without the iBookstore."²⁶ However, in the but-for world, Amazon would not have lowered device prices so much that it lost money across its combined device and e-book business.²⁷
5. 

To arrive at this conclusion, Mr. Orszag applied *no* econometric or statistical analysis. Instead, the totality of his analysis was to look at a one-page summary pre and post conspiracy,

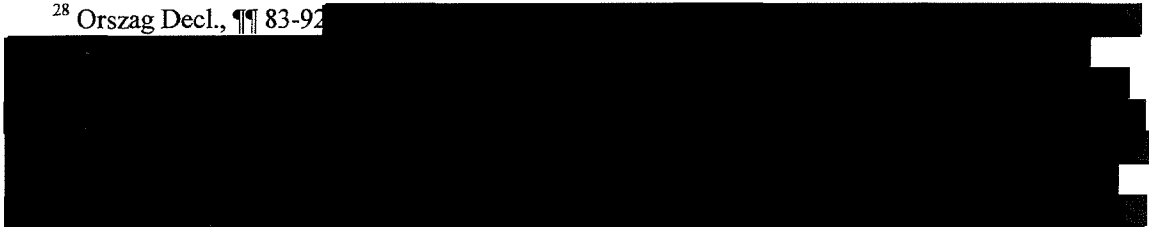
²⁴ *Id.*, ¶¶ 54-58.

²⁵ *Id.*, ¶¶ 76-82.

²⁶ *Id.*, ¶¶ 59-75.

²⁷ *Id.*, ¶¶ 85-89.

²⁸ Orszag Decl., ¶¶ 83-92


Id. at ¶¶ 88-92. Orszag admits that the Amazon revenue information was gleaned from unaudited financial documents. Ex. 9 at 235:1-238:25.

showing Amazon's profits over a 22-month period and two months of projected profits. From this he observes device profits falling, e-book profits rising, and the mix for Amazon's overall Kindle device and e-book profitability changing year-over-year. Orszag then draws on general economic theory of prices and demand for complementary products to conclude, with the introduction of the iPad, Amazon would have made a strategic change in the but-for world to either raise e-book prices, not lower Kindle prices as much, or some combination of both – which he could not calculate.

Mr. Orszag's "methodology" is no methodology at all. It is unreliable and inadmissible for scores of reasons, including: there is too great of an "analytical gap" between Mr. Orszag's evidence and his conclusions; Mr. Orszag failed to analyze alternative explanations; Mr. Orszag did not conduct an econometric regression analysis with appropriate controls for relevant factors; and Mr. Orszag has not estimated his claimed actual increases in e-book prices (or increase in device prices) that purportedly would have occurred absent the conspiracy, the only conclusion potentially relevant to Plaintiffs' damages.²⁹

a. Mr. Orszag admits to not being able to reliably quantify the "complementary effects" about which he opines.

Mr. Orszag admits he has no way to reliably allocate the purported price effects between e-reader and e-book sales in a scientific manner. Instead, he maintains that "[d]evice prices would have been higher in the but-for world in an amount equal to 12.9 percent of e-book prices, . . . or e-book prices would have been higher by 12.9 percent or some combination thereof."³⁰ But he "cannot ascertain the relative proportions that would have occurred." Indeed, "[i]t could have been a 12 percent increase in e-book prices and the equivalent .9 percent

²⁹ Reply Declaration of Roger G. Noll ("Noll Reply Report") *generally* at 59-83, filed concurrently herewith.

³⁰ Ex. 9 at 157:8-12.

decrease in Kindle prices” or any other combination.³¹

Mr. Orszag can only speculate. He did not test the question econometrically, failing to do a substitution analysis or any elasticity or cross-elasticity analysis whatsoever.³² Mr. Orszag admits that he failed to model transaction prices, the supply and demand of e-readers or e-books, or competition among the Kindle and its competitors in any manner.³³ As such, he cannot quantify how much higher e-book prices purportedly would be to support his opinions.³⁴ These opinions are not based on sufficient empirical analysis and are the result of a huge analytical gap between the data and the opinion proffered.³⁵

Mr. Orszag’s speculative opinion that Amazon would have raised e-book prices somewhere between 0 percent and 12.9 percent is unhelpful to resolution of the sole question before the jury: how *prices of e-books sold by the Defendants* in the actual world compare to the prices of those products in the but-for world. Mr. Orszag’s testimony would simply be a guess between \$0 and \$114,000,000. This sort of naked guesswork has no place in a courtroom.

b. Mr. Orszag fails to construct an econometric model to estimate if, or by how much, Kindle device prices would have been higher without Apple’s conspiracy.

Mr. Orszag admits, as he must, that increased e-reader competition caused at least part of

³¹ *Id.* at 158:6-23.

³² *Id.* at 245:10-249:11. Orszag did not attempt to do a regression analysis, even though this technique is a well-established, reliable, and “mainstream” tool for determining damages. *See Johnson Elec. N. Am. Inc. v. Mabuchi Motor Am. Corp.*, 103 F. Supp. 2d 268, 283 (S.D.N.Y. 2000).

³³ Ex. 9 at 161:24-163:18, 245:10-246:22, 248:4-21.

³⁴ *Id.* at 298-301.

³⁵ *See, e.g., Johnson Elec.*, 103 F. Supp. 2d at 283-85 (excluding econometric analysis drawn from assumptions that were not based on reliable data); *El Aguila Food Prods. v. Gruma Corp.*, 301 F. Supp. 2d 612, 620-24 (S.D. Tex. 2003), *aff’d*, 131 Fed. Appx. 450 (5th Cir. 2005) (excluding testimony “based on wholly insufficient data” while ignoring “the facts of the case”); *Gaskin v. Sharp Elecs. Corp.*, No. 2:05-CV-303, 2007 U.S. Dist. LEXIS 65532, at *26-*27 (N.D. Ind. Aug. 31, 2007) (rejecting causation opinion because “[s]ome greater methodology is required to bridge the analytical gap between general principles and particular conclusions, and to vest thereby the opinion with requisite reliability”).

the decline in e-reader device prices.³⁶ And Dr. Kalt admits that device prices had been continually declining since 2006. Thus, with or without the iBookstore, hardware price declines were going to occur – which is a natural response both to technology improvements as well as the entry of the Barnes & Noble Nook and the iPad.³⁷ Mr. Orszag’s “methodology” completely fails to model (and control for) these important “but-for” market effects in any reliable way.³⁸ Instead, he simply assumes that Amazon would have reduced device prices less in 2010 than it had in either of the preceding years or invested less in the development of the Kindle Fire, despite the recent entry of the Nook and iPad, as well as the proliferation of potential and actual entrants into the device market – such as Google, Samsung, etc. His “methodology” instead relies on implausible assumptions and illogical leaps.³⁹

c. Mr. Orszag forms opinions about Amazon’s pricing strategies by contradicting record evidence, selectively quoting sources, and relying on weak or baseless assumptions.

Mr. Orszag’s entire offset opinion regarding the interrelationship between Amazon’s e-book and Kindle pricing strategy posits that Amazon had a rigid, short-term strategy that it would not accept a loss on its e-book and e-reader business as a “whole” *for even a year*. Mr. Orszag’s assumptions further depend on his world view that [REDACTED]

[REDACTED]

³⁶ Orszag Decl., ¶ 57 (“The increase in competition to sell e-reader devices led to a reduction in device prices that outpaced the decline in manufacturing costs for electronic devices.”).

³⁷ Ex. 8 at 182:8-185:4; Declaration of Joseph P. Kalt, Ph.D., Ex. 1 Fig. 5, submitted under seal on Nov. 15, 2013.

³⁸ Orszag also failed to consider the deflationary impact that Moore’s Law has on the prices of electronics over time. Ex. 9 at 253:7-254:24.

³⁹ See, e.g., *In re Wireless Tel. Servs.*, 385 F. Supp. 2d at 427-28 (must control for alternative factors); *El Aguila Food Prods.*, 301 F. Supp. 2d at 623 (testimony cannot ignore “the facts of the case”); *Johnson Elec.*, 103 F. Supp. 2d at 280 (testimony must fit facts of the case).

[REDACTED]⁴⁰ But the record evidence demonstrates this was *not* Amazon's strategy or view of pricing. Amazon's Vice President for Kindle, Russell Grandinetti, explained that Amazon has "never used sales of ebooks directly to subsidize the Kindle device. We don't think of it simplistically as one part of the business subsidizing another part of the business. Rather, our goal has been to have both parts of the business sustainable in their own right."⁴¹ Mr. Orszag admitted at his deposition that [REDACTED]

Not only is Mr. Grandinetti best positioned to accurately state Amazon's strategy, his testimony is consistent with correct the application of economic theory closely tied to the specifics of the market place. As Dr. Noll explains in detail, it is a vast oversimplification to conclude that if the price of one product goes up its complement's price will *necessarily* go down.⁴³ This is because the "markets for a product (here, e-books) and its complement (here e-readers) are interconnected by more than simply the price in each market."⁴⁴ As such, other factors, such as qualitative improvements in one product, can increase the demand in the complement – even if there is a price increase in the other product. Without accounting (controlling) for these varied factors that impact demand for each complement – not just price – one cannot reliably draw the "causal" relationship Orszag does.⁴⁵ Orszag does nothing of the type.

⁴⁰ Orszag Decl., ¶¶ 50-53, 59-75.

⁴¹ Ex. 15, ¶ 26.

⁴² Ex. 9 at 226:10-12.

Id. at 240:19-22.

⁴³ Noll Reply Report at 62-63.

⁴⁴ *Id.* at 63.

⁴⁵ *Id.*

Instead, Mr. Orszag stitches together his unsound opinions; he jumps from assumption to assumption, using tiny pieces of information, selective quotations, and wilful blindness to evidence inconsistent with his story. For example, Orszag necessarily excludes the possibility that Amazon would – even for a single year – lose money in the but-for world on either its device sales, e-book sales, or both. But Amazon did just that in the as-is world,⁴⁶ and he was forced to admit Amazon’s long-standing model has been to operate its *overall business* at razor-thin margins or a loss as it invested for the future.⁴⁷ The record evidence also shows that *every* major company in the e-reader market saw value in investing money that did not immediately return same-year profits in the interest of building its e-book and e-reader business – every company except Apple.⁴⁸

Indeed, Mr. Orszag tries to rely on a recent book about Amazon to justify his assumptions. But the book makes clear that Amazon lost money on the development of the Kindle for years before it introduced it.⁴⁹ Mr. Orszag does not even consider the possibility that Amazon was continuing to follow that same strategy in 2010 while developing its Kindle Fire tablet to compete directly with the iPad. Nor does he consider another obvious possibility: that Amazon’s losses on its devices were in service of sales on its many content businesses in addition to e-books, such as the streaming video service Amazon has massively expanded since

⁴⁶ Ex. 9 at 239:11-40:22.

⁴⁷ *Id.* at 224:5-26:19.

⁴⁸ *See, e.g.*, Ex. 44 at SEL-R0005270 & SEL-R0005277 (Sony: [REDACTED])

⁴⁹ Brad Stone, *The Everything Store: Jeff Bezos and The Age of Amazon* 243 (Little, Brown and Co. 2013).

2010.⁵⁰

Mr. Orszag goes beyond simply ignoring obvious alternatives and engages in selective editing. Mr. Orszag argues that Amazon switched to a “razors-and-blades” strategy in the wake of the agency agreements and was therefore more willing to lower device prices because it was making a higher margin on e-book content.⁵¹ For evidence, he points to a quote from Jeff Bezos that Amazon wanted “to make money when people use our devices, not when they buy our devices.”⁵² Mr. Orszag then omits the very next sentence: “But [Mr. Bezos] also said *he is not talking about the razor/razor blade model*, in which a company makes money selling one product (i.e., the expensive razor blades, by giving the other one away for free (the razor).”⁵³ Similarly, he quotes Mr. Bezos as saying that “People don’t want gadgets, they want services,”⁵⁴ omitting to mention that the sentence immediately preceding it made clear that those “services” were not e-books but instead *non-digital purchases on Amazon.com*.⁵⁵

Given the weight of the factual evidence against Mr. Orszag’s opinions about Amazon’s

⁵⁰ See, e.g., Erick Schonfeld, *The Kindle Fire Puts All Of Amazon’s Cloud Media Onto A Tablet*, Tech Crunch (Sept. 28, 2011), <http://techcrunch.com/2011/09/28/kindle-fire-cloud-media-tablet/> (“The \$199 Kindle Fire is designed to tap into all of the digital media products and services Amazon has been building for the past few years: Amazon Web Services, Instant Video, Kindle Books, Amazon’s MP3 music store, cloud storage, and Android app store.”); *Amazon Prime Members Now Get Unlimited, Commercial-free, Instant Streaming of More Than 5,000 Movies and TV Shows at No Additional Cost*, Amazon.com (Feb. 22, 2011), <http://phx.corporate-ir.net/phoenix.zhtml?c=176060&p=irol-newsArticle&ID=1531234>.

⁵¹ Orszag Decl., ¶¶ 57, 65-67.

⁵² *Id.*, ¶ 67 (quoting Therese Poletti, *How Amazon really declared war on Apple*, Market Watch (September 11, 2012), <http://www.marketwatch.com/story/how-amazon-really-declared-war-on-apple-2012-09-11>).

⁵³ Poletti, *supra* note 52.

⁵⁴ Orszag Decl., ¶ 73 (quoting Brad Stone, *As the Kindle Turns Five, Amazon Girds for a New Fight*, Bloomberg Businessweek (Nov. 19, 2012), <http://www.businessweek.com/articles/2012-11-19/five-years-after-the-first-kindle-amazon-girds-for-the-digital-fight>).

⁵⁵ Stone, *supra* note 54 (describing the Kindle Fire as “funnel[ing] customers into the universe of Amazon digital content, likely converting them into more voracious online shoppers as well”).

strategy, and his lack of econometric study, “there is no evidence that Amazon changed its pricing strategy for Kindles on the events in the e-book market” or “would have raised e-book prices” absent the conspiracy.⁵⁶

d. Mr. Orszag cannot reliably quantify the iBookstore’s impact, if any, on prices for Kindle devices or e-books.

Mr. Orszag claims Dr. Noll’s damages calculation does not account for some undefined amount of incremental effect that the iBookstore had on lowering either e-book or Kindle device prices (that would not have been present absent the conspiracy).⁵⁷ But he has done no econometrics to support his supposition. For example, he has not quantified the effect that the iBookstore purportedly had on increasing the demand for the iPad or attempted to quantify the value that the iBookstore, as a feature, provided to the iPad (even though Mr. Orszag believes that the iBookstore did not increase the price of the iPad).⁵⁸ He also admits to not having sufficient data to test what impact the iBookstore had, if any, on the demand for other e-reader devices⁵⁹ (even though he concludes the iBookstore decreased the demand for Kindle).⁶⁰ Mr. Orszag has not even considered what would have happened to device prices if the iBookstore had not been launched.⁶¹ He simply does not control for these factors, which are unrelated to the

⁵⁶ Noll Reply Report at 60.

⁵⁷ Ex. 9 at 186:3-91:19; Orszag Decl., ¶¶ 43-45.

⁵⁸ *Id.* at 185:12-91:19, 246:23-47:17. Orszag has to plead ignorance on these points because, if the iBookstore caused iPad prices to increase, then it would have been as a result of the price-fixing conspiracy.

⁵⁹ *Id.* at 191:5-19.

⁶⁰ Orszag cannot have it both ways. If the iBookstore decreased the demand for Kindle, as Orszag contends, then iBookstore had to have increased demand for iPads – which Orszag refuses to admit is the case. This exposes Orszag’s opinion for what it is: nothing more than hypocritical *ipse dixit*. *E.g.*, *Turpin v. Merrell Dow Pharms., Inc.*, 959 F.2d 1349, 1360 (6th Cir. 1992).

⁶¹ Ex. 9 at 202:1-8.

agency agreements,⁶² mandating exclusion of the opinion under this Court's decisions in *In re Wireless Telephone Services and Freeland*.

2. **The Court should also exclude Mr. Orszag's opinions that either device or e-book prices would have been higher, absent the conspiracy, because he ignores that Amazon likely would have negotiated lower wholesale e-book prices.**

Mr. Orszag claims that device prices, e-book prices, or both would have been higher in some undefined proportion absent the conspiracy. Mr. Orszag repeatedly relies on his "balloon" metaphor, but in doing so avoids being pinned down – likely hoping to escape his balloon from being popped. In doing so, he never even mentions an obvious and most likely alternative to Amazon raising e-book or device prices: Amazon would have eventually negotiated lower wholesale e-book prices had Amazon retained control over retail e-book prices. When confronted with this obvious omission, Mr. Orszag explained that he had ruled out that possibility because he "just ha[d] no way to know".⁶³

Q. No. My question to you is: Where in the report do you discuss the fact that in a but-for world, the potential likelihood was that wholesale e-book prices would come down?

A. I have made a determination that that was not the potential likelihood, because I had no way to know whether, A, they would come down, B, directionally whether they would come down, A, B, whether they would – the effect of them coming down. So it's not – without any evidence, you don't even know in the end that they would come down.⁶⁴

This exposes Mr. Orszag's opinions on this issue to what they are – rank speculation and result-oriented analysis. Mr. Orszag describes Amazon's options and strategy as a balloon - Amazon would seek a certain amount of profit and simply inflate or deflate prices across e-books

⁶² *Apple*, 2013 U.S. Dist. LEXIS 96424, at *141.

⁶³ Ex. 9 at 289: 21-25.

⁶⁴ *Id.* at 289:4-290: 21; see generally *id.* at 287-95.

and e-readers accordingly.⁶⁵ But Dr. Noll explains how Mr. Orszag's balloon opinions are filled with hot air – “based on incorrect economic analysis and are not supported by the factual record.”⁶⁶

Even giving credence to Mr. Orszag's balloon metaphor, however, his elimination of the possibility that Amazon would attempt to obtain desired profit levels by *decreasing its costs* rather than *increasing its prices* for the sole reason that he “had no way to know” whether it would happen is fatally unsound. If Mr. Orszag had no way to know whether Amazon would maintain the shape of the balloon by lowering wholesale costs, then it logically follows that he has no way to know whether it would do so by increasing retail prices – and cannot opine what Amazon would do with any reliability. On any record, Mr. Orszag's “failure to test for [this] obvious and significant alternative explanation[]” would render his opinion “essentially worthless.”⁶⁷

When the gravity of the evidence and this Court's findings are considered, Mr. Orszag's opinion is even less reliable. Mr. Orszag acknowledged that Mr. Jobs and the Publisher Defendants knew “more about the business” of pricing e-books and e-readers than Mr. Orszag.⁶⁸ And, as this Court found,⁶⁹ those more knowledgeable individuals all believed that Amazon would reduce the wholesale price it paid the publishers for those books before it raised retail prices. For example, at least three Publisher Defendant CEOs testified to this Court under oath

⁶⁵ See, e.g., Ex. 9 at 100:4-24, 104:9-13, 106:17-107:18, 157:16-21; Orszag Decl., ¶ 92.

⁶⁶ Noll Reply Report at 60.

⁶⁷ *In re Wireless Tel. Servs.*, 385 F. Supp. 2d at 428.

⁶⁸ Ex. 9 at 229:3-33:2.

⁶⁹ See generally *Apple*, 2013 U.S. Dist. LEXIS 96424.

that they believed Amazon would demand lower wholesale prices.⁷⁰ Apple's Mr. Cue testified on multiple occasions that the Publisher Defendants believed Amazon would keep retail prices low and lower wholesale prices to match.⁷¹ Mr. Jobs predicted that, if publishers did not switch to the agency model, "in the medium term Amazon will tell you they will be paying you 70% of \$9.99."⁷² Random House recognized that "[t]he most likely scenario is that Amazon will continue to put further pressure on wholesale prices"⁷³ Amazon's Russell Grandinetti testified that the publishers had it right, that "[t]here never has been any plan or assumption that at some point in the future consumer prices could or should be higher."⁷⁴ As one industry observer summarized in 2009:

Nobody expects Amazon to sustain this sell-at-a-loss strategy forever. And few expect Amazon to raise prices to the consumer. That leaves one alternative: use the leverage of all those Kindle owners to get reduced prices from the publisher.⁷⁵

Indeed, at least one Publisher Defendant was in the process of lowering wholesale prices for all retailers when Apple entered the market – but abandoned those plans after Apple proposed the

⁷⁰ See Ex. 17, ¶ 8 ("[W]e believed that Amazon would eventually refuse to sell e-books below their wholesale cost and would demand lower wholesale prices."); Ex. 19, ¶ 14 ("We believed that Amazon eventually would demand substantially lower wholesale prices so that it could make money selling e-books."); Ex. 18, ¶ 13 ("[W]e assumed they would force down the wholesale price they would pay for our titles").

⁷¹ See, e.g., Ex. 20 at 81:23-82:10 ("They were concerned that in that world the players would come back and demand the price to be lower."); Ex. 45 at 45: 9-12 ("[The publishers] felt that over time that would be established as the price point for books, and they expressed concern that no retailer was going to keep selling books at those prices without asking them to discount them further.").

⁷² Ex. 46.

⁷³ Ex. 47.

⁷⁴ Ex. 15, ¶ 29; see also *id.* ¶ 30 ("Of course, we asked for better terms every year, as I suspect customers of suppliers always do.").

⁷⁵ Ex. 48 at AMZN-TXCID -0017039; see also Stone, *supra* note 49 (Amazon aggressively negotiated discounts with publishers); Stone, *supra* note 49 at 251 (Bezos "believed publishers would eventually be forced to lower their wholesale prices on e-books to reflect the lower costs of publication"); Ex. 49 at BN00036578-79 ("Once consumers get used to paying the low price, publishers fear, retailers will insist on a reduction in wholesale prices.").

agency scheme.⁷⁶

So, Mr. Orszag's opinion is that the Defendants and the rest of the publishing industry had it all wrong – that the conspiracy was completely unnecessary (because prices were going to rise even without the agency agreements or entry by the iBookstore) – and that his own *post hoc* analysis is superior to the contemporaneous observations of the Publisher Defendants, Apple, Amazon, and independent industry participants, as well as this Court's uncontested findings. Mr. Orszag's unreasoned rejection of this possibility is the very definition of ignoring alternative explanations and renders his opinion wholly unreliable.⁷⁷

3. The Court should exclude as speculative and unreliable the remainder of Mr. Orszag's offset opinions

Mr. Orszag admitted during cross-examination that his remaining offset opinions are only “illustrative” and he cannot reliably quantify the amount of “offset” associated with each procompetitive effect about which he opines.⁷⁸ Plaintiffs nevertheless detail Mr. Orszag's consistent failure to employ sound empirical methodologies in formulating his opinions for the Court to have a complete record to assess Mr. Orszag's other opinions, which he claims he *has* used and reliably applied scientific methods to support his opinions.

a. Mr. Orszag's opinions that the price-fixing agreements accelerated growth in self-publishing are unreliable and should be excluded.

Mr. Orszag opines that the agency agreements provided another pro-competitive benefit:

⁷⁶ See Ex. 50 at 48:8-50:21; Ex. 51.

⁷⁷ See, e.g., *Cunningham*, 679 F.3d at 380; *In re Wireless Tel. Servs.*, 385 F. Supp. 2d at 427-28; *El Aguila Food Prods.*, 301 F. Supp. 2d at 623; *Johnson Elec.*, 103 F. Supp. 2d at 280. In addition to being unsupported by the evidence, Orszag's opinion is not based on reliable scientific methodology. To reiterate, Orszag cannot allocate the purported procompetitive effects between e-reader prices and the prices of e-books in a scientific manner, and he admits that he failed to model supply and demand of e-readers and e-books. See, *supra*, section II.C.1.a. Without having done this necessary work, Orszag simply cannot opine on what e-book prices would have been in the but-for world.

⁷⁸ Ex. 9 at 204:13-208:19.

a substantial increase in the availability of self-published titles.⁷⁹ This conclusion rests on “demonstrably false assumptions”⁸⁰ and is unsupported by any empirical analysis.

First, Mr. Orszag ignores ample evidence demonstrating that Amazon was moving to a 70 percent self-published author royalty *before* learning of the agency agreements and the iBookstore. Mr. Orszag claims that the conspiracy *caused* Amazon to move to this 70/30 percent royalty, because Amazon only devised this policy in response to learning about the imminent iBookstore launch and the Publisher Defendants’ coordinated move to agency, which occurred on January 18, 2010.⁸¹

In actuality, Amazon CEO Jeff Bezos suggested a 70 percent royalty on December 10, 2009.⁸² Amazon adopted this plan no later than January 11, 2010 and set two dates for announcing major self-publishing initiatives: a global expansion to be announced on January 15, 2010, and a 70 percent royalty to be announced on January 20, 2010.⁸³ Those announcements were, in fact, made on January 15 and January 20, 2010, respectively.⁸⁴ These facts, ignored by Mr. Orszag, establish Apple’s conspiracy was not the “but for” cause of Amazon’s self-publishing terms.⁸⁵ And Mr. Orszag admits – when pressed – his opinion would be wrong if

⁷⁹ Orszag Decl., ¶ 94.

⁸⁰ *Tse v. Ventana Med. Sys., Inc.*, 123 F. Supp. 2d 213, 227 (D.D.C. 2000), *aff’d*, 297 F.3d 210 (3d cir. 2002); *see also, e.g., Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 242 (1993) (“[W]hen indisputable record facts contradict or otherwise render [an expert] opinion unreasonable, it cannot support a jury’s verdict.”)

⁸¹ Ex. 9 at 217-19; Orszag Decl., ¶ 98. Again, it’s important to not conflate the inevitable launch of the iPad with Mr. Orszag’s assertion that he is assuming iBookstore would not have launched, absent the conspiracy. So it is the iBookstore on which he hangs his opinion’s hat.

⁸² Ex. 27.

⁸³ Ex. 28.

⁸⁴ Ex. 52; Ex. 53.

⁸⁵ Mr. Orszag leans heavily on his interpretation of the Court’s statement that Amazon’s announcement came in “respon[se]” to the Publisher Defendants’ push for pricing authority. *Apple*, 2013 U.S. Dist. LEXIS 96424, at *77; *see* Ex. 9 at 216:24-217:9, 219:4-13; Orszag Decl., ¶ 98. As explained

Amazon planned to launch the 70/30 split before Amazon knew about agency and the iBookstore.⁸⁶ This alone mandates exclusion of the opinion.

Second, Mr. Orszag's opinion is not based on reliable scientific methodology. His Figure VII-1 shows that self-publishing increased after April 2010. But this does not establish causality. Mr. Orszag does not measure what would have happened to self-publishing absent the adoption of the agency model. It is apparent from the graph, for example, that self-publishing was already growing at Barnes & Noble and Amazon before the advent of the agency model. Indeed, self-publishing on Amazon had [REDACTED] between January 2009 and January 2010, before Apple was even in the picture.⁸⁷ And Mr. Orszag does not even claim that Amazon's royalty rate would be any different in the but-for world; he testified that he has "no opinion one way or the other" whether Amazon would have offered a 70/30 royalty split to self-publishers in the absence of the conspiracy.⁸⁸

When challenged, Mr. Orszag *admitted* that he had no "model or evidence that I can point to to estimate" and quantify the purported offset.⁸⁹ And Dr. Kalt admitted there is no basis to opine that any particular amount of post April 1, 2010 growth in self-published e-book sales is attributable to the iBookstore.⁹⁰ Dr. Kalt could not opine that even 1 percent of the growth in

above, it is clear that Amazon was responding not to the agency model in particular, but to the Publisher Defendants' more general push for higher prices. When Mr. Bezos first suggested the 70 percent royalty rate on December 10, 2009, Apple had not met with a single publisher – but three Publisher Defendants had just announced plans to window e-books. *Apple*, 2013 U.S. Dist. LEXIS 96424, at *23-*36.

⁸⁶ Ex. 9 at 221:6-22:19.

⁸⁷ Ex. 8 at 111:2-15:25. Dr. Kalt admits that this growth was not attributable to Apple. *Id.*

⁸⁸ Ex. 9. at 216:18-23.

⁸⁹ *Id.* at 205:22-25.

⁹⁰ Ex. 8 at 122:20-25:5, 135:10-36:12.

self-published books was attributable to the conspiracy.⁹¹

- b. **The Court should exclude as speculative and unreliable Mr. Orszag's "illustrative" opinions about the purported benefits of free e-books, e-book sales through iBookstore in the but-for world, and Barnes & Noble's survival.**

Mr. Orszag maintains the conspiracy caused Apple to "dramatically expanded the supply of free e-books."⁹² This is another false assumption. The free e-books offered by Apple upon the launch of the iBookstore were all provided by Project Gutenberg, an online library that has been publishing public domain works as free e-books since 1971.⁹³ Apple simply helped make e-books that were *already available for free on the Internet* available to people who downloaded the iBookstore. Moreover, Orszag admits that he cannot econometrically model in a reliable manner the relationship between the price of e-books and the availability of free e-books.⁹⁴

Mr. Orszag's opinion that not all e-book sales from Apple's iBookstores would have occurred in the but-for world should also be excluded. He does not support the opinion econometrically, acknowledges that "it is difficult to estimate the exact share of e-book sales that would have occurred through other retailers in the absence of iBookstore," and therefore merely intends the opinion to be an "illustration."⁹⁵ Nor does he consider whether Apple would have ultimately succeeded in obtaining lower wholesale prices in the absence of conspiracy, as Apple

⁹¹ *Id.* at 135:22-36:23

⁹² Orszag Decl., ¶ 106.

⁹³ See Ex. 54 (noting that Project Gutenberg would be providing 30,000 free e-books to the iBookstore); Ex. 55 at APLEBOOK441288 (listing the top 20 free e-books downloaded from the iBookstore, all of which were public domain Project Gutenberg titles); see generally Project Gutenberg, <http://www.gutenberg.org>.

⁹⁴ Ex. 9 at 48:8-49:17.

⁹⁵ Orszag Decl., ¶¶ 111-16.

initially expected.⁹⁶ This again impermissibly asks the jury to speculate on the basis of “illustrative” assumptions rather than actual statistical or econometric analysis. Moreover, as discussed *supra*, Mr. Orszag’s own figures and admissions make clear that not only is the effect he is estimating *de minimis*, it is actually *zero* since he admits that iPad owners would have had the Kindle application on their iPads absent the conspiracy.

Lastly, Orszag opines that not all of Barnes & Noble’s e-books sales should be included in the but-for world because, he speculates, Barnes & Noble’s e-book business would have folded in the absence of the agency price-fixing agreements.⁹⁷ But Mr. Orszag admits that he did not take into consideration the possibility that Barnes & Noble could have benefitted from lower wholesale prices resulting from Amazon using its leverage or that Barnes & Noble could have entered into strategic partnerships to keep its business viable,⁹⁸ and he has no empirical evidence demonstrating that, if Barnes & Noble had exited the e-book market, fewer e-books would have been purchased.⁹⁹ Moreover, it is implausible that Barnes & Noble would have left the e-book business just two-and-a-half years after entering it and making a substantial investment in developing new e-reader technology. Indeed, Anthony Astarita, the Barnes & Noble executive who led the development of the Nook (and had left Barnes & Noble by the time of his deposition), provided uncontradicted testimony that the agency model did not factor into Barnes

⁹⁶ See, e.g., Ex. 56, ¶ 40 (“We felt this [wholesale] pricing was unreasonable and unsustainable. In our initial discussions with the publishers, assuming we would use the wholesale model for the Apple e-bookstore, I believed the publishers understood they would have to lower e-book wholesale prices to a more realistic level to work with Apple.”); *Apple*, 2013 U.S. Dist. LEXIS 96424, at *42 (“One idea that [Apple] considered proposing to the Publishers, but rejected, was an across-the-board 25% discount for e-books off the wholesale price for physical books. With many NYT Bestsellers having a \$12 wholesale price for the hardcover book, this would allow a \$9 digital wholesale price, which Apple’s Moerer thought should be ‘acceptable’ to the Publishers for all of their e-books with the possible exception of a few blockbusters.”).

⁹⁷ Orszag Decl., ¶¶ 117-123.

⁹⁸ Ex. 9 at 134:16-136:25.

⁹⁹ *Id.* at 139:14-140:7.

& Noble's plans to develop future Nook devices.¹⁰⁰ Consequently, Mr. Orszag's opinions about the sustainability of Barnes & Noble's e-book business should be excluded.

D. Mr. Orszag's Criticisms of the Time Period and Control Group in Dr. Noll's Analysis Lack Economic Justification and Are Barred by Judicial Estoppel

Finally, Mr. Orszag argues that Dr. Noll should have only used data from a shorter time period and from fewer publishers in estimating his regression model.¹⁰¹ These are plainly arguments of convenience. As Dr. Noll explains, basic economic logic recommends his choices. Regarding the time period, a two-year damages estimate is plainly more reliable where it examines the entire period than just the first few months, and analysis of titles that did not appear until later in the time period is improved by including those titles in the dataset.¹⁰² Regarding the control group, it is uncontested that all e-book publishers in Dr. Noll's data are in the relevant market, and thus by definition they are competitive substitutes.¹⁰³ Mr. Orszag has engaged in the type of substitution analysis that would be required to opine reliably that they are inappropriate comparators; without such an analysis, his opinion is unreliable and must be excluded.

Apple is also judicially estopped from offering these opinions. At trial, Dr. Michelle Burtis testified for Apple that an analysis *could not* "get at the issue of but-for prices in a relevant market" without accounting for the prices of all publishers in the market.¹⁰⁴ She testified that an analysis of "shorter durations of time, is incapable of measuring any longer-term effects of the competition . . . in the alleged relevant market post-agency."¹⁰⁵ She specifically decried

¹⁰⁰ Ex. 30 at 132:10-22, 139:12-18.

¹⁰¹ Orszag Decl., ¶¶ 28-36.

¹⁰² Noll Reply Report at 41-44.

¹⁰³ Noll Reply Report at 44-45.

¹⁰⁴ Transcript of Proceedings at 2263:8-2265-8, *United States v. Apple Inc.*, No. 12 Civ. 2826 (S.D.N.Y. July 1, 2013), ECF No. 320.

¹⁰⁵ Ex. 6, ¶ 17.

what Mr. Orszag now recommends: “examin[ing] only six months of sales after the first agency agreement, examin[ing] only certain of Publisher Defendants’ titles, and us[ing] Random House as a benchmark.”¹⁰⁶

The doctrine of judicial estoppel “prevents a party from asserting a factual position . . . clearly inconsistent with a position previously advanced by that party and adopted by . . . the court in some manner . . . when the risk of inconsistent results with its impact on judicial integrity is certain.”¹⁰⁷ Apple’s reversal is inconsistent with its position at trial: it currently argues that Dr. Noll cannot correctly evaluate but-for prices because he is doing *exactly what Apple previously said was necessary to evaluate but-for prices*.¹⁰⁸ Dr. Burtis’s testimony about prices in the entire e-book market was previously considered by the Court, as the Court analyzed her calculations of prices in the market as a whole.¹⁰⁹ Prohibiting a party from proffering two highly compensated professional expert witnesses who espouse directly contradictory opinions would “protect the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment.”¹¹⁰

III. CONCLUSION

For these compelling reasons, the Court should prohibit Apple from offering Mr. Orszag’s opinions concerning potential offsets or reductions in damages.

¹⁰⁶ *Id.*, ¶ 37.

¹⁰⁷ *Repub. of Ecuador v. Chevron Corp.*, 638 F.3d 384, 397 (2d Cir. 2011) (first two ellipses in original).

¹⁰⁸ *Ex. 7*, ¶ 24a; *see also Fox v. Taylor Diving & Salvage Co.*, 694 F.2d 1349, 1355 (5th Cir. 1983) (holding that the trial testimony of an economic expert was a “binding” adverse admission against the presenting party).

¹⁰⁹ *Apple*, 2013 U.S. Dist. LEXIS 96424, at *114-*15.

¹¹⁰ *New Hampshire v. Maine*, 532 U.S. 742, 749-50 (2001); *accord In re Adelphia Recovery Trust*, 634 F.3d 678, 696 (2d Cir. 2011).

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