UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE ELECTRONIC BOOKS ANTITRUST LITIGATION	No. 11-md-02293 (DLC)
This Document Relates to: ALL ACTIONS	

MACMILLAN, PENGUIN, AND SIMON & SCHUSTER'S REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF THE PUBLISHER DEFENDANTS' MOTION TO DISMISS THE CONSOLIDATED AMENDED CLASS ACTION COMPLAINT

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PRELIMINARY STATEMENT

The viability of Plaintiffs' case is premised on the supposed existence of a *per se* illegal horizontal conspiracy among competitors, which Plaintiffs fail to allege. When stripped of conclusory labels and assertions of "conspiracy," Plaintiffs allege nothing more than a series of lawful parallel vertical agreements between each individual Publisher Defendant[1] and Apple and between each individual Publisher Defendant and Amazon. Macmillan, Penguin, and Simon & Schuster entered into these separate, vertical agreements unilaterally as a rational response to a new development in the marketplace – namely, the offer by Apple of a new alternative platform for distributing eBooks with the launch of the iPad and iBookstore.

In their Motion to Dismiss the Consolidated Amended Class Action Complaint (the "Motion to Dismiss"), the Publisher Defendants demonstrate that Plaintiffs allege a series of parallel actions that constitute mere "independent responses to common stimuli" and that, critically, Plaintiffs fail to allege sufficient facts that plausibly "raise[] a suggestion of a preceding agreement." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 n.4, 557 (2007) (quoting 6 Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 1425, pp. 167-85 (2d ed. 2003)). Specifically, Plaintiffs do not allege facts concerning the existence or formation of any agreement among the Publisher Defendants to jointly adopt an agency model of distribution, let alone to raise prices in the alleged eBooks market. To the contrary, any facts alleged merely confirm that the timing and fact of each Publisher Defendant's decision to pursue agency-based distribution agreements was driven entirely by Apple's announcement and launch of its revolutionary iPad device in April 2010 and Apple's interest in using the new iPad to enter the

[1] Unless otherwise defined herein, all capitalized terms are defined in the Memorandum of Law in Support of Publisher Defendants' Motion to Dismiss the Consolidated Amended Class Action Complaint [Docket No. 89], filed on March 2, 2012. Although that Motion was made on behalf of all Publisher Defendants, this Reply is submitted only on behalf of Macmillan, Penguin, and Simon & Schuster.

eBooks market under a different distribution model than any of the Publisher Defendants had previously obtained from existing distributors, including Amazon.

Plaintiffs' opposition brief (the "Opposition" [Docket No. 113]) focuses heavily on a single comment from the Supreme Court in *Twombly*: "complex and historically unprecedented changes in pricing structure made at the very same time by multiple competitors, and made for no other discernible reason, would support a plausible inference of conspiracy." *Twombly*, 550 U.S. at 556 n.4 (citations omitted) (emphasis added). As Plaintiffs' own brief makes clear, however, the glaringly apparent "discernible reason" that each of the Publisher Defendants entered into new, agency-based distribution contracts is that Apple, with the introduction of the iPad, actively sought to create a credible alternative in the market that publishers, including the Publisher Defendants, could choose over then-existing distribution arrangements – *i.e.*, Apple sought to create competition in the marketplace. That each of these Publisher Defendants chose to accept Apple's offer of a new alternative is not at all surprising. Each had individual, rational business reasons to do so.[2]

Critically, given the market conditions at the time and the manner in which Apple was offering to contract with any publisher, the facts alleged in the Complaint do not plausibly suggest that the Publisher Defendants' conduct and choices would have needed a horizontal agreement to make sense. Indeed, many facts alleged are inconsistent with any pre-existing horizontal agreement, including that Penguin is not alleged to have engaged in "windowing" and the absence of the largest publisher, Random House, from entering into an agency agreement

[2] It also cannot be ignored that Apple's entry demolished what the Complaint admits was a "barrier to new entrants"—Amazon's business practice of selling certain new release eBooks below cost—and prevented Amazon, as the Complaint alleges, from cementing itself as a monopolist that not only would and could continue to dominate the sale of eBooks, but, as alleged, was planning on using its monopoly power to leverage its dominance into other lines of business. (Complaint (cited hereafter as "CAC") [Docket No. 47] ¶ 112.)

prior to Apple's iPad announcement and launch.[3] In short, Plaintiffs fail to allege facts and circumstances that cross the necessary threshold under *Twombly* from a mere "possibility" of horizontal agreement to "plausibility." *Id.* at 545-46.

The Publisher Defendants' respective decisions to sign agency distribution agreements with Apple, even accounting for the alleged proximity in timing and alleged uniformity of the terms of those contracts, does not warrant an inference from this Court that the alleged parallel conduct resulted from an agreement among the Publisher Defendants. *See Wellnx Life Sciences Inc. v. Iovate Health Sciences Research, Inc.*, 516 F. Supp. 2d 270, 290 (S.D.N.Y. 2007) ("While the amended complaint adequately pleads the existence of vertical agreements between Iovate and the individual publishers, it fails to allege facts sufficient to infer a horizontal agreement between any two publishers"). When the entire context of the Publisher Defendants' alleged conduct is considered, a picture clearly emerges of a situation in which each of the Publisher Defendants faced deep, below-cost discounting by Amazon, each was seeking a way to protect its own long-term interest, and each was presented with an opportunity when Apple offered each Publisher Defendant a new solution and alternative distribution platform that each rationally concluded to be in their best interest. All that these alleged facts demonstrate is parallel conduct, and nothing more. The Complaint's other allegations are background noise.

The Opposition, including Plaintiffs' April 5, 2012 letter to this Court notifying it of the Second Circuit's recent decision in *Anderson News, L.L.C. v. American Media, Inc.*, mischaracterizes the Publisher Defendants' brief as attempting to establish a "battle of the inferences" that Plaintiffs need not win in order to survive the Motion to Dismiss. But the

[3] Of course, that Random House, which is not alleged to have participated in the conspiracy alleged here, later signed an agency-based agreement with Apple and other distributors indicates that there are compelling business justifications for doing so independent of any alleged conspiracy.

Motion to Dismiss attempts no such thing. Rather, the Motion to Dismiss simply reveals that the Complaint fails to set forth "allegations plausibly suggesting (not merely consistent with) agreement." *Twombly*, 550 U.S. at 557. In identifying the "discernible reason" for the Publisher Defendants' alleged conduct (*i.e.*, Apple's entry), the absence of sufficient factual allegations to support a plausible inference of conspiracy, and the lack of plausibility of the "conspiracy" generally, the Motion to Dismiss demonstrates that the Complaint describes nothing more than "rational and competitive business strategy unilaterally prompted by common perceptions of the market" and is therefore inadequate as a matter of law. *Id.* at 554.

Finally, as this Court is aware, on April 11, 2012, two days before the date of this brief, the United States Department of Justice (the "DOJ") filed a complaint in this Court in a related matter, No. 12-cv-2826. That same day, the DOJ filed a consent decree settling that matter as to three of the Publisher Defendants. The three publishers who have settled have not admitted any wrongdoing or liability in connection with the proposed consent decree. Macmillan and Penguin have not settled with the DOJ and offered Plaintiffs the opportunity to amend the pleadings to incorporate allegations made in the DOJ's complaint in lieu of continued briefing of this Motion to Dismiss. Plaintiffs declined the offer. Accordingly, they should be held to their current pleading and precluded from any further opportunity to amend the Complaint, as they have already declined two such opportunities. *See, e.g.*, *Berman v. Morgan Keegan & Co., Inc.*, No. 11-2725-cv, 2012 WL 147907, at *4 (2d Cir. Jan. 19, 2012) (upholding denial of leave to amend where the district court had invited plaintiffs to amend the complaint, but plaintiffs declined); *Rosner v. Star Gas Partners, L.P.*, No. 07-1687-cv, 2009 WL 2581565, at *2 (2d Cir. Aug. 20, 2009) (same).

For all the reasons set forth above and as explained in more detail below, and for the reasons set forth in the Motion to Dismiss, Macmillan, Penguin, and Simon & Schuster respectfully request that this Court dismiss the Complaint because Plaintiffs fail to allege sufficient facts to raise a plausible inference of conspiracy among the Publisher Defendants and Apple, as opposed to lawful parallel conduct.

ARGUMENT

II. THE ALLEGATIONS IN THE COMPLAINT ARE INSUFFICIENT TO PLEAD A CONSPIRACY AS REQUIRED BY *TWOMBLY*.

The Supreme Court in *Twombly* clarified that, to survive a motion to dismiss, a plaintiff must allege sufficient facts that give rise to a plausible inference of conspiracy. Plaintiffs fail to do so for two related reasons. First, the Complaint, by its own allegations, establishes a rational and lawful reason for each Publisher Defendant's unilateral decision to accept Apple's take-it-or-leave-it proposal to switch to an agency model – in the absence of a conspiracy – in order to induce Apple to enter as a distributor of eBooks. Second, viewing the entire factual context of the Complaint as a whole, the totality of Plaintiffs' allegations about Macmillan, Penguin, and Simon & Schuster undercut the idea that each entered into a horizontal agreement to adopt the agency model of distribution and/or to enter into a contractual relationship with Apple. Thus, this Court need not engage in a balancing of competing inferences: There is nothing beyond parallel conduct to create a plausible inference of a conspiracy involving Macmillan, Penguin, or Simon & Schuster.

A. Apple's entry was the "discernible reason" why each of the Publisher Defendants entered into agency-based contracts.

The Opposition opens with a quote from the Supreme Court's decision in *Twombly*, a refrain that it repeats frequently in mantra-like fashion: "complex and historically unprecedented changes in pricing structure made at the very same time by multiple competitors, and made for

no other discernible reason, would support a plausible inference of conspiracy." (Opposition (cited hereafter as "Opp.") at 1, 10, 27 (emphasis added).) In this case, the Court should not ignore the key element of the story the Complaint tells: Each of the Publisher Defendants chose to pursue agency-based distribution agreements for the clearly "discernible reason" that Apple was offering agency arrangements as the basis for its launch of a new eBooks distribution channel – a development that each Publisher Defendant individually concluded was in its best interest and, therefore, that resulted in each Publisher Defendant entering into the individual, vertical distribution agreements on the terms and conditions that Apple offered. (CAC ¶ 134.)

In *Twombly*, the Supreme Court acknowledged that there may be instances like this one in which market participants would react the same way when presented with the same circumstances. The Court, therefore, required that a claim based on parallel conduct contain allegations of "'parallel behavior that would probably not result from chance, coincidence, independent responses to common stimuli, or mere interdependence unaided by an advance understanding among the parties.'" *Twombly*, 550 U.S. at 556 n.4 (quoting 6 Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 1425, at 167-85 (2d ed. 2003)); *see also In re LTL Shipping Servs. Antitrust Litig.*, No. 1:08-MD-01895-WSD, 2009 WL 323219, at *8 ("A plaintiff cannot state an antitrust claim by merely showing parallel conduct and from it divine that an agreement must be the source from which the parallel conduct arose."). In sum, allegations of parallel conduct alone are legally insufficient to sustain a claim unless there are allegations suggesting that the parallel conduct would not plausibly have occurred absent an actual horizontal agreement to engage in the parallel conduct. Any other result would condemn procompetitive, rational reactions by similarly-situated market participants to common market circumstances.

The Complaint and Opposition ignore, even though the facts of it are alleged, the significance to the Publisher Defendants of Apple's proposal and the powerful, rational incentives motivating each Publisher Defendant's unilateral decision to accept that proposal. Plaintiffs correctly allege that Apple has an unprecedented track record of success with respect to marketing its products. (CAC ¶¶ 8, 112, 114-115.) Apple's proposal to enter the eBooks market presented the prospect of a viable alternative distribution outlet and thus a more diversified and competitive retail market – indeed, the Complaint alleges that Amazon had a 90% share of the eBooks market in February 2010 – as well as market growth, spearheaded by Apple's prowess as "the most powerful digital content distribution company other than Amazon." (CAC ¶¶ 68, 112.) The benefits of Apple's entry were obvious and provided the necessary incentive for each Publisher Defendant to accept Apple's condition of market entry, the execution of an agency distribution agreement for each Publisher Defendant's eBooks. *See, e.g.*, *Wellnx*, 516 F. Supp. 2d 270 at 291 ("Each responded to this choice in identical fashion, but the facts alleged do not imply that this was the result of an agreement among any of them."); *RxUSA Wholesale Inc. v. Alcon Labs.*, 391 F. App'x 59, 61 (2d Cir. 2010) (finding that a claim "fails because RxUSA's allegation of an agreement is entirely conclusory, and the alleged parallel activities [...] when viewed in light of common economic experience, could just as well be independent action") (citation omitted). When viewed against this backdrop, the context of the Publisher Defendants' similar "independent responses" to the powerful stimulus that Apple presented becomes clear, and conspiracy cannot be inferred. As in *Twombly*, "[b]ecause the plaintiffs here have not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed." *Twombly*, 550 U.S. at 570.

The mere fact that the Publisher Defendants each signed agency distribution contracts with Apple containing similar terms close in time to one another is not sufficient to push Plaintiffs' deficient allegations "across the line" delineated by *Twombly*. Again, it is entirely circular and contrary to *Twombly* for Plaintiffs to point to proximate, parallel conduct in a common marketplace as the basis for inferring the existence of the "agreement" required by *Twombly* and Section 1. Thus, for example, it is not enough for Plaintiffs to make non-factual, conclusory allegations that Apple and the Publisher Defendants "coordinated their activities" when the facts as alleged make clear that rapid, near simultaneous conduct by each of the Publisher Defendants makes perfect sense as a response to common market conditions and does not require, let alone suggest, that any agreement among the Publisher Defendants likely explains the parallel conduct. (CAC ¶¶ 121, 123.) Given the alleged timing of (i) Apple's first overture to each Publisher Defendant in mid-December 2009; (ii) Apple's planned announcement date of the iBookstore and iPad on January 27, 2010 (both of which were determined exclusively by Apple); and (iii) Apple's April 1, 2010 launch of the iPad, it is neither surprising nor suggestive of conspiracy that each of the Publisher Defendants would have been meeting with distributors and executing agency distribution contracts during this compressed, critical period. (CAC ¶ 124.) Nor can an inference of horizontal conspiracy be drawn by the fact that parallel and similar agreements ensued. *See In re Elevator Antitrust Litig.*, 502 F.3d 47, 51 (2d Cir. 2007) ("Similar contract terms can reflect similar bargaining power and commercial goals (not to mention boilerplate); similar contract language can reflect the copying of documents that may not be secret[.]").

Nor is there any merit to Plaintiffs' suggestion that each Publisher Defendant's awareness of Apple's representation that it would open the iBookstore only if a certain minimum number of

publishers signed on is tantamount to – or an adequate substitute for – an actual agreement among the Publisher Defendants to proceed in concert. (Opp. at 16.) In *Wellnx Life Sciences Inc. v. Iovate Health Sciences Research, Inc.*, the Court considered this exact issue and concluded, "[t]he fact that each publisher knew that its horizontal competitors were going to be presented with the same offer or threat, or that others had already capitulated to Iovate [a consumer of advertising space], or 'believ[ed]' that other competitors would fall in line, does not suffice to 'raise[ ] a suggestion of a preceding agreement.'" *Wellnx*, 516 F. Supp. 2d at 291 (citations omitted) (emphasis added); *see also Howard Hess Dental Labs., Inc. v. Denstply Int'l, Inc.*, 602 F.3d 237, 255 (3d Cir. 2010) (distributors' knowledge that manufacturer required all dealers to agree to same distribution terms was insufficient to establish a horizontal agreement among dealers who agreed to those terms). *Wellnx* makes clear that the understanding alleged in the Complaint – that each Publisher Defendant knew that its agency-based agreements with Apple would only be enforced if others also signed up – falls short of placing the allegations of parallel conduct "in a context that raises a suggestion of a preceding agreement." *Twombly*, 550 U.S. at 557. Indeed, such an understanding would, under *Starr v. Sony BMG Music Entertainment*, provide an additional reason to infer that the parallel conduct alleged was in the individual interest of each Publisher Defendant and not, as in that case, rational only in the context of agreement. *See Starr*, 592 F.3d 314, 324 (2d Cir. 2010). That is, to the extent that any individual Publisher Defendant had concerns about provoking Amazon, by far the largest and most powerful distributor of eBooks with its ninety percent market share (CAC ¶ 14), or about selling eBooks on an agency basis while others stayed on a wholesale basis, Apple's requirement of a minimum number of publishers would have allayed those concerns – and no

agreement among the Publisher Defendants would be suggested or needed to explain their resulting, individual decisions to enter into the agency agreements with Apple.

Finally, although Plaintiffs try to paint it with significance (Opp. at 6, 34), that Barnes & Noble introduced its Nook eReader a few months before Apple and opened an eBookstore using the wholesale model is irrelevant to the business terms that Apple ultimately proposed to Macmillan, Penguin, and Simon & Schuster (the agency model).

B. The Complaint lacks sufficient factual allegations of a preceding agreement.

A complaint must allege sufficient facts to support a plausible inference that an agreement was reached; courts will not take it upon themselves to assume that parallel conduct is the result of agreement. *See Starr*, 592 F.3d at 319 n.2 (declining to accept as true the conclusory allegation that "defendants 'agreed' to a wholesale price floor of about 70 cents per song"). The class Complaint contains no allegations that: (i) the Publisher Defendants met with one another at a certain time and place in order to conspire about agreeing with Apple, (ii) agreed among each other to contract with Apple under the agency model, (iii) agreed among each other to re-negotiate their contracts with Amazon to move to the agency model, and/or (iv) agreed among each other to implement a higher (let alone identical) price point for e-books. *See, e.g.*, *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1048 (9th Cir. 2008) (upholding dismissal where plaintiffs "pleaded only ultimate facts, such as conspiracy, and legal conclusions" but "failed to plead the necessary evidentiary facts to support those conclusions"); *LaFlamme v. Societe Air France*, 702 F. Supp. 2d 136, 147-48 (E.D.N.Y. 2010) (where plaintiffs fail to allege specific facts, "conclusory allegations are not entitled to the presumption of truth by a reviewing court deciding a Rule 12(b)(6) motion to dismiss"). *Cf. Anderson News, L.L.C. v. American Media, Inc.*, No. 10-4591-cv, 2012 WL 1085948, at *11-14, 21 (2d. Cir. Apr. 3, 2012).

Rather than making such specific allegations with respect to agreement, Plaintiffs merely speculate that an agreement among the Publisher Defendants existed that precipitated the conduct described in the Complaint. For example, Plaintiffs cite to portions of the Complaint purporting to describe certain details of how "Defendants executed their plan," and how the "conspiracy was implemented." (Opp. at 17, 18 (emphasis added).) Notably absent are allegations concerning how the alleged conspiracy among the Publisher Defendants was formed. But it is specifically this factual allegation that an antecedent agreement was formed that *Twombly* demands.

The Opposition claims that the Complaint supports a plausible inference of conspiracy because it includes "plus factors," including allegations of "inter-firm communications and opportunities to conspire." (Opp. at 23-27.) Yet, aside from a tellingly-vague reference to a meeting between one executive and "industry representatives" (which Plaintiffs do not specifically allege involved any Defendants), each of the Complaint's alleged meetings occurred between a publisher and a single distributor or involved unilateral statements by a single publisher quoted in a news article. (CAC ¶¶ 99-109.) Further, the law is well-settled that opportunities to conspire – such as competitors attending an industry trade meeting (*see* CAC ¶¶ 153-155) – do not give rise to a plausible inference of conspiracy or constitute a violation of the law. *See* 6 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law*, ¶ 1417, at 117 (3d ed. 2010) ("Mere conspiratorial opportunity is routinely and correctly held insufficient to support a conspiracy finding"). *See also Capital Imaging Assocs., P.C. v. Mohawk Valley Medical Assocs.*, 996 F.2d 537, 545 (2d Cir. 1993) ("The mere opportunity to conspire does not by itself support the inference that such an illegal combination actually occurred.").

Another purported "plus factor" that Plaintiffs argue creates an inference of conspiracy is that the parallel conduct alleged would be intolerably risky for any one Publisher Defendant to undertake alone, because the prospect of causing Amazon to stop distributing that publisher's books (eBooks and/or print books) would be catastrophic. (CAC ¶ 95.) But this argument ignores what is alleged in the Complaint: That "Apple brokered the simultaneous switch to the agency model" (CAC ¶ 134) and each Publisher Defendant knew, and lawfully acted on its understanding, that Apple would not enter without a minimum number of publishers signed on. (Opp. at 16.) Thus, no Publisher Defendant had to determine whether this risk was worth taking and each knew that it would only sign an agency-based distribution contract with Apple if others did so as well. There was no need to do anything contrary to any Publisher Defendant's own interest, and there was no need to conspire to ensure this was the case.

In their Motion to Dismiss, the Publisher Defendants highlight this failure to allege "enough factual matter (taken as true)" about the formation of any agreement that purportedly led to the Publisher Defendants' conduct "to suggest that an agreement was made." *Twombly*, 550 U.S. at 556. (Motion to Dismiss at 14-17). In their Opposition, Plaintiffs argue that the Complaint not only provides details of the alleged conspiracy, but that it does so with far greater detail about the "who," "what," "when," "where," and "how" of the alleged conspiracy than did the complaint in *Twombly*. (Opp. at 12.) But while Plaintiffs do provide some modicum of detail, that detail merely describes the alleged parallel conduct (CAC ¶¶ 126-127), not the required preceding agreement to the conduct, or the specific acts from which such agreements plausibly could be inferred. *See Anderson*, 2012 WL 1085948, at *11-14, 21. For example, the meetings about which Plaintiffs purport to plead specific details are all vertical interactions between one single Publisher Defendant and a distributor. (CAC ¶¶ 152, 164.) Such allegations

could not possibly give rise to an inference of conspiracy among more than one Publisher Defendant. Thus, Plaintiffs' argument is entirely circular: Parallel conduct must have been preceded by an illegal conspiracy and the factual support demonstrating the existence of an illegal conspiracy is the description of the parallel conduct. That illogic is exactly what *Twombly* precludes. No matter how detailed the description of the parallel conduct, Plaintiffs still must allege independent factual support of an underlying conspiracy to survive a motion to dismiss.[4] *Twombly*, 550 U.S. at 557.

C. There are many facts pled in the Complaint which are inconsistent with any claim of conspiracy.

In addition to all the arguments above showing why Plaintiffs claims are not plausible, certain allegations as to particular defendants further undercut the plausibility as to those defendants – and indeed the entire suggestion of a conspiracy among the Publisher Defendants and Apple.

1. Inconsistent facts concerning Macmillan.

Besides the fact that the allegations in the Complaint contain a perfectly rational and lawful reason for each Publisher to have independently decided to switch to the agency model without a conspiracy – Apple's opening of the iBookstore – the Complaint must concede that Macmillan did not participate in what is alleged to be one of the key overt acts of the conspiracy – insisting that Amazon adopt the agency model. Macmillan did not propose the agency model as the exclusive way it would do business with Amazon. (CAC ¶ 148.) The Complaint alleges that in renegotiating its contract with Amazon, Macmillan proposed either the agency model or

[4] This Court should not be distracted by Plaintiffs' argument that an agreement may be shown using circumstantial, rather than direct, evidence. (Opp. at 10-12.) The Publisher Defendants argue that the Complaint offers no evidence of agreement at all, not that the nature of such proof is circumstantial.

the wholesale model.[5] (*Id.*) What kind of conspiracy to force Amazon to the agency model involves a proposal to do either the agency model or an alternative? This is not compatible with the conspiracy as Plaintiffs allege it.

The allegations about Macmillan's supposed participation in the windowing part of the alleged conspiracy are inherently improbable as well. The Complaint says that Macmillan announced plans to window certain eBook titles on December 16, 2009. (CAC ¶ 107 (citing a December 16, 2009 *The Wall Street Journal* article)). Of course, as the Complaint must admit, this was eight days after *The Wall Street Journal* reported publicly decisions by each of Simon & Schuster and Hachette to window certain of their eBooks and six days after *The Wall Street Journal* reported that HarperCollins would window its eBooks. (CAC ¶¶ 105-107.) Just as it does not take a conspiracy for gas stations located across the street from one another to look at their competitor's sign posts and adjust their prices, it did not take a conspiracy to read about other publishers' decisions in one of the most widely read newspapers in America. *See In re Travel Agent Comm'n Antitrust Litig.*, 583 F.3d 896, 910 (6th Cir. 2009) (noting that a decision to copy a competitor's actions does not imply agreement).

2. Inconsistent facts concerning Penguin.

Similarly, the Complaint does not even allege, nor could it, that Penguin planned, announced, or implemented any policy of windowing eBooks at all, even after it was publicly known that certain other publishers had decided to do so. (CAC ¶ 108.) Plaintiffs simply choose to ignore this fact in their Opposition. It defies credulity to assert that Penguin was involved in

[5] The allegation that Macmillan coupled its wholesale proposal to Amazon with "windowing" does not lend credence to a conspiracy to raise eBook prices, because the Plaintiffs concede that windowing had no anticompetitive effects. (Opp. at 15 ("But consumers could simply wait to buy the eBook title until Defendants opened the 'window.' Thus, windowing would not achieve the Publisher Defendants' stated desire to raise eBook prices.").)

an ongoing horizontal conspiracy, one centerpiece of which is alleged to have been windowing eBooks, when Penguin simply did not do it.

Likewise, without explanation, the Complaint does not allege that Penguin participated in another piece of the supposed conspiracy – simultaneously informing Amazon on January 20, 2010 that Amazon would be required to move to the agency model. (CAC ¶ 147.) Penguin is simply absent from these allegations. Penguin also is conspicuously absent from the list of communications between individual publishers and Amazon (which, as discussed above, are all vertical meetings which could not possibly suggest a horizontal conspiracy) from late January to early February (described as a "critical time period" (CAC ¶ 153.) after the announcement of the Apple distribution agreements. (CAC ¶ 152.) How and when did Penguin join this alleged competitor conspiracy if it was not participating in any of the alleged activities prior to deciding to do business with Apple, a business deal that Apple unilaterally proposed to Penguin, and which made independent economic sense for Penguin to pursue? Again, Plaintiffs ignore this fact in their Opposition.

D. The main cases upon which Plaintiffs rely are distinguishable.

Plaintiffs rely heavily on four cases. Each is distinguishable.

1. *Interstate Circuit and Toys "R" Us.*

Plaintiffs rely heavily on two "hub-and-spoke" cases, while ignoring the fundamental distinction identified in Defendants' moving brief. (Opp. at 38 (citing *Interstate Circuit, Inc. v. United States*, 306 U.S. 208 (1939), a seventy-year old case, and *Toys "R" Us, Inc. v. FTC*, 221 F.3d 928 (7th Cir. 2000).) Those cases involved a dominant distributor using its dominant position to orchestrate the exclusion of competing distributors. In *Interstate Circuit*, the distributors allegedly accounted for 75% of the market of all first-class feature films in the United States. 306 U.S. at 214. Likewise, Toys "R" Us was a "giant in the toy retailing

industry." 221 F.3d at 930. By contrast here, each Publisher entered into an agency agreement with Apple, a new entrant with no presence in the alleged market, to increase competition against Amazon, the dominant distributor of eBooks who possessed nearly ninety percent of sales volume. (CAC ¶ 14.) Moreover, *Interstate Circuit* is easily distinguishable as the finding of an agreement in that case was predicated upon the finding that the defendants had provided no explanation for the joint conduct alleged. 306 U.S. at 226-27. Here, Apple's offer and the opening of an online bookstore provide exactly that. Even if an agreement were alleged here – and none is under *Twombly* – these cases are inapposite in considering conduct, such as that alleged here, to facilitate a new entrant against a dominant firm.

2. The Second Circuit's recent decision in *Anderson News*.

A few days after Plaintiffs filed their Opposition, the Second Circuit vacated and remanded the decision in *Anderson News, L.L.C. v. American Media, Inc.*, which the Publisher Defendants cited in their Motion to Dismiss. As a threshold matter, nothing in *Anderson News* changes the *Twombly* standard. In bringing the *Anderson News* decision to this Court's attention, Plaintiffs purport to describe the allegations which the Second Circuit found sufficient in that case:

> The Second Circuit distinguished *Twombly's* conclusory allegations from the allegations in *Anderson*, which included: (1) defendants invited plaintiff to drop the proposed surcharge in exchange for exclusive territorial rights, and plaintiff refused; (2) defendants understood joint action was necessary because no single defendant could unilaterally cut-off distribution through plaintiff, who had twenty-seven percent market share, without harming its economic self-interest; and (3) soon after plaintiff refused defendants' invitation to solve the industry problem, defendants coordinated their refusal to enter into distribution agreements with plaintiff on the proposed terms and cut off distribution through plaintiff.

Plaintiffs' April 5, 2012 letter to Judge Cote (cited hereafter as "Not. Supp. Auth.") at 2. Unlike here, however, the allegations in *Anderson News* are made against a well-pled backdrop from

which conspiracy may be inferred. *See Anderson News, L.L.C. v. American Media, Inc.*, 2012 WL 1085948, at *11-14 (2d. Cir. Apr. 3, 2012).

Importantly, the court expressly noted in *Anderson News* that the proposed amended complaint "contains specific additional allegations as to meetings, conversations, and e-mails between or among various named individual coconspirators on or about specific dates" and proceeds to list three pages worth of detailed allegations such as, for one example, "[o]n or about January 25, 2009, the presidents of competitors TWR and Kable scheduled a breakfast meeting for Thursday, January 29, 2009 to discuss the conspiracy." *Anderson News, L.L.C. v. American Media, Inc.*, 2012 WL 1085948, at *11-14 (2d. Cir. Apr. 3, 2012) (emphasis added). Indeed, the court in Anderson News specifically held that, "the [proposed amended complaint] alleges actual agreement; it alleges not just that all of the defendants [acted] in virtual lock-step." *Anderson News*, 2012 WL 1085948, at *21. Here, by contrast, class Plaintiffs have not alleged any similar facts that "place [the allegations] in a context that raises a suggestion of a preceding agreement." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 557 (2007).

Nor are the alleged "facts" cited in the numerous footnotes in Plaintiffs' April 5, 2012 letter to this Court specific factual allegations of agreement. (*See* Not. Supp. Auth. nn.4-8, 10, 13, 16.) Apart from one stray citation in a footnote (Not. Supp. Auth. n.6), Plaintiffs do not compare factual allegations at issue in *Anderson News* to the actual allegations in the Complaint. Rather, they simply rehash the arguments that Plaintiffs made in their Opposition.

Moreover, Plaintiffs' citation to *Twombly* (*see* Not. Supp. Auth. n. 4, citing Opp. at 10) omits the critical relevant language from its quote of that decision. The type of conduct recognized in *Twombly* that would support an plausible inference of conspiracy if it appeared to

occur "for no other discernible reason" than conspiracy. 550 U.S. at 556 n.4. As discussed above, that is not the case here.

3. The Second Circuit's *Starr* decision.

Plaintiffs' Opposition seeks to draw analogies to the Second Circuit's decision in *Starr*, an analogy that does not withstand scrutiny. In *Starr*, the plaintiffs alleged a conspiracy, implemented by two joint ventures, to raise the price of the defendants' digital music to a specific price ("a wholesale price floor of about 70 cents per song"), while simultaneously restricting output ("to 'restrain the availability and distribution of Internet Music'"). *Starr v. Sony BMG Music Entm't*, 592 F.3d 314, 319 (2d Cir. 2010).

A key factor animating the Court's conclusion in *Starr* that the complaint placed the allegations of parallel conduct "in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action," 550 U.S. at 557, is the fact that the defendants' action, if they were independent, would lead to decreased revenues and thus be completely irrational. The court determined that this constituted a "plus factor" suggesting the existence of a conspiracy. Specifically, the court held that, "one industry commentator noted that 'nobody in their right mind' would want to use [either of the defendants' joint ventures], suggesting that some form of agreement among defendants would have been needed to render the enterprises profitable." *Starr*, 592 F.3d at 324.

By contrast, as discussed above, the Publisher Defendants each believed that signing an agency distribution contract with Apple would, by creating an alternative distribution platform and thereby breaking Amazon's monopoly, lead to an increase in sales volume, even if revenues per unit might decrease. (*See* CAC ¶¶ 112-114.) Furthermore, as the Complaint alleges repeatedly, the Publisher Defendants each individually feared for the future of their industry and unilaterally adopted a rational cause of action, even if it meant choosing bad over worse in terms

of revenue prospects. (*See, e.g.*, CAC ¶¶ 3, 6, 74.) *See In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 327-28 (3d Cir. 2010) ("[T]he obvious explanation for each insurer's decision to enter into a contingent commission agreement with a broker that was consolidating its pool of insurers was that each insurer independently calculated that it would be more profitable to be within the pool than without."). Moreover, Plaintiffs' conclusory allegations otherwise are directly contradicted not only by the more specific allegations in the Complaint regarding the broad distribution capacity that made Apple such an appealing retail outlet (CAC ¶¶ 112, 114), but also by virtue of the admission that Random House, the biggest U.S. trade publisher who is not alleged to be part of the conspiracy, made its own independent decision to switch to the agency model effective March 1, 2011. (CAC ¶ 171.) It is not plausible to suggest that a non-conspiring publisher would have moved to agency selling a year later if it was an economically disadvantageous model.

CONCLUSION

For the foregoing reasons, Macmillan, Penguin, and Simon & Schuster respectfully request that Plaintiffs' Consolidated Amended Class Action Complaint be dismissed.

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Respectfully submitted,

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