Exhibit 2

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, Plaintiff, v. APPLE INC., *et al.*, Defendants.	12 Civ. 2826 (DLC)

THE STATE OF TEXAS, THE STATE OF CONNECTICUT, *et al.*, Plaintiffs, v. PENGUIN GROUP (USA) INC., *et al.*, Defendants.	12 Civ. 03394 (DLC)

APPLE INC.'S OPPOSITION
TO PLAINTIFF STATES' SUPPLEMENTAL MEMORANDUM OF LAW
ON STATE LAW CLAIMS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Regulations

PRELIMINARY STATEMENT

No reported decision has ever imposed liability under section 1 of the Sherman Act on a record like this: involving (1) a new entrant; (2) facing a dominant player with a 90% market share; (3) that entered into separate, vertical agreements; (4) motivated by legitimate and independent business objectives; (5) enabling entry into a market for an emerging technology; (6) where average prices fell and output continued to grow following entry. Apple has demonstrated that ruling against it here would create a dangerous precedent and risk deterring new entry into concentrated markets and punishing innovation.

As Apple has further pointed out, plaintiffs attempt to distort the purpose and meaning of early discussions Apple had with the publishers during their negotiations about Amazon's below-cost pricing of e-books. A dispute over the way e-books were being priced defined the state of the e-book market at the time Apple began its negotiations. Conflating discussions with conspiracy, plaintiffs attempt to portray any discussions Apple had with the publishers about the state of the market as evidence of Apple's role in an alleged conspiracy. However, the law is clear that discussion of pricing to understand the dynamics of an indisputably turbulent market falls far short of proving a conspiracy—either directly or circumstantially.

Despite plaintiffs' numerous attempts to confound this Court, the Supreme Court's decision in *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984)—which itself involved vertical conduct—applies with full force in this case. And under *Monsanto*'s strict "tends to exclude" requirement (*id.* at 768), the substantial, corroborated and undisputed record confirms that Apple acted to further its independent business goals, and not a conspiracy. That same evidence also disproves plaintiffs' make-or-break allegation against Apple: that Apple's

"Most Favored Nation" clause ("MFN") clause "sharpen[ed]" the publishers' "incentives" to demand that Amazon change its business model. Apple did not conspire to fix e-book prices.

The evidence proves that the retail MFN was a price-lowering provision that gave Apple the right to lower prices on its e-bookstore to match the lowest prices available for a category of e-books. The MFN was designed by Apple to make prices on its e-bookstore competitive, not to affect the prices or business models of other retailers. Indeed, Apple made clear that other retailers could stay on wholesale while selling e-books on Apple's platform on agency. Plaintiffs cannot rebut this dispositive evidence of Apple's intent behind the MFN—an intent to bring about competition on Apple's e-bookstore while remaining agnostic about other retailers' business approaches to e-book prices. Plaintiffs want the court to believe the MFN was a forcing or commitment mechanism that caused Amazon to change its entire business model by moving to agency. The opposite is true: the MFN is the mechanism by which Apple became indifferent to Amazon's business model. Whether Amazon embraced agency or remained on wholesale, Apple could compete. The MFN is also powerful evidence that Apple did not know how prices would react to its entry, which is exactly why it negotiated hard for such a price-lowering provision.

Apple also demonstrated that every indicator of market health—including increased competition, millions of new consumers in the market, and innovations and improvements in product quality—followed Apple's entry into the e-books business. These undisputed record facts make clear that this is not—and cannot be—a per se case. Plaintiffs cannot show that Apple's entry had "demonstrable" "manifestly anticompetitive effects" that "lack ... any redeeming virtue." *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 886–87 (2007). Nor can they claim that "courts have had considerable experience with the type of

restraint at issue." *Id.* at 886. To the contrary, this case presents unique facts involving a new entrant injecting competition into a concentrated and new market. The per se rule cannot apply to this record, as a matter of law, fact, or logic. And the record evidence proves that after Apple's entry, prices went down while output soared. Plaintiffs' section 1 conspiracy claims against Apple cannot succeed.

The states' May 6, 2013 Supplemental Memorandum of Law on State Law Claims does nothing to suggest a contrary result.[1] In fact, it hardly does anything at all. This Court ordered the states to provide—"*at minimum*"—"citations to opinions ... describing the elements of the state law cause of action" and "authority describing the extent to which any finding under Section 1 of the Sherman Act might affect those state law claims." Order 1–2, Apr. 29, 2013. In response, the states neglect to address all but one of the asserted state common-law claims,[2] repeatedly fail to provide citations to opinions for the elements of state law claims,[3] and even raise new claims for the first time in their brief.[4]

---

[1] In light of the bifurcated trial proceedings in this case, Apple notes that the parties have not yet had the opportunity to brief the various complex issues surrounding the states' requested relief, including (but not limited to) any overlap in the states' claims, the need to avoid double recovery, potential election-of-remedies concerns, the propriety of seeking civil penalties and other forms of relief in this action, and still others. Apple respectfully submits that these issues are to be addressed in the later, damages proceedings of this litigation, and that Apple has not—either in this brief, or otherwise—waived or conceded any arguments regarding these issues.

References are as follows: "Second Am. Compl." to the States' Second Amended Complaint of May 17, 2012; "Apple Br." to Apple Inc.'s Pre-Trial Memorandum of Law of April 26, 2013; "P. Br." to Plaintiffs' Pre-Trial Memorandum of Law of April 26, 2013; "Apple Opp. Br." to Apple, Inc.'s Opposition to Plaintiffs' Pre-Trial Memorandum of Law of May 3, 2013; "State Law Claims Br." to the States' Supplemental Memorandum of Law on State Law Claims of May 6, 2013.

[2] Although the states' second amended complaint alleged claims under the common law of Alaska, Arkansas, Colorado, Nebraska, Ohio, Tennessee, and Utah (*see* States' Second Am. Compl. ¶¶ 132, 136, 138, 171, 179, 187, 191), the states' brief makes no mention of them. *See generally* State Law Claims Br. These claims should therefore be deemed waived. *See Callahan v. Campbell*, 427 F.3d 897, 924 (11th Cir. 2005) (deeming claim waived where court ordered supplemental briefing on a claim and party failed to address it).

[3] For example, the states fail to provide any analysis regarding Arkansas's claim under its Deceptive Trade Practices Act, Ark. Code Ann. § 4-88-101 et seq. *See* States' Second Am. Compl. ¶ 136. In addition, they provide no case law describing the elements of Nebraska's claim under its Uniform Deceptive Trade Practices

The states' brief highlights the fact that the state law claims remain an afterthought—the states do not identify *even a single fact* to show that any element of any state law claim has been met. Instead, the states have cobbled together an ersatz legal treatise that leaves both Apple and this Court at a complete loss to understand—let alone address—the factual basis of the state law claims. Even if this bare-bones, fact-free brief is found to comply with this Court's order, the brief remains grossly insufficient to provide Apple or this Court with any indication of how the states' evidence is sufficient to prove their state law claims. This failure is all the more troubling because their Sherman Act section 1 claim against Apple must fail. The burden squarely lies on the states to offer proof of their claims, and they have failed to do so.[5]

A thorough review of these claims reveals why the states continue to hide the ball: None of the 44 state law claims referenced in the states' latest brief has any merit. For the overwhelming majority of these claims (36 of 44), the states themselves have alleged that the claims parallel section 1 of the Sherman Act. As plaintiffs' section 1 claims against Apple fail, so too must these co-extensive state claims.

Act (Neb. Rev. Stat. § 87-303.01 (*see* State Law Claims Br. 26; States' Second Am. Compl. ¶ 171)) or New Mexico's claim of "unconscionable trade practices" (N.M. Stat. Ann. § 57-12-2(E) (*see* State Law Claims Br. 27)), which, contrary to the states' contention (*id.*), has in fact been elucidated by New Mexico's appellate courts, *see, e.g.*, *Hernandez v. Wells Fargo Bank N.M., N.A.*, 139 N.M. 68, 69-71 (Ct. App. 2005).

[4] For example, as recently as their April 26, 2013 supplemental memorandum, the states represented that they were asserting claims under sections 257 and 258 of Puerto Rico's Antitrust and Restrictions of Commerce Law, P.R. Laws Ann. tit. 10, §§ 257, 258. Pl. States' Supp. Mem. Law 23 n.122, Apr. 26, 2013. In their most recent brief, they now assert for the first time violations of Regulation on Fair Competition No. VII, PRS ADC JUS Reg 2648 (May 29, 1980) [hereinafter "Regulation 2648"], and Regulation Against Deceptive Practices and Advertisements, PRS ADC DACO Reg 7932 (Oct. 15, 2010) [hereinafter "Regulation 7932"]. *See* State Law Claims Br. 32–33. These claims are improper. *See, e.g.*, *Scott v. City of N.Y. Dep't of Corr.*, 641 F. Supp. 2d 211, 222 (S.D.N.Y. 2009) (noting that "claims ... not contained in the complaint" are "not part of this case"). And curiously, the states also mention that a provision of the Utah state constitution mirrors section 1 of the Sherman Act. State Law Claims Br. 36 (citing Utah Const. art. XII, § 20).

[5] This is not the first time that the states have relied on silence to proceed with their state law claims. *See* Proposed Joint Pre-trial Order 8, Apr. 26, 2013 (states' insistence that Apple had "notice that the Plaintiff States would pursue their state law claims at trial" because "[a]t no time did the States indicate that they would *not* pursue these claims at trial") (emphasis added).

The remaining eight state law claims, which the states do not expressly tie to plaintiffs' section 1 claims, fare no better. Notwithstanding the states' obstinate refusal to provide *any* application of state law to fact, the available legal authorities and record evidence in this case make clear that none of them provide any independent basis for liability against Apple. The state law claims should therefore be rejected in their entirety.

ARGUMENT

I. The Vast Majority Of The State Law Claims Should Be Dismissed Because Plaintiffs Cannot Prove Their Conspiracy Claims Under Section 1 Of The Sherman Act

A. The State Law Claims That Parallel Section 1 Of The Sherman Act Fail

The states insist that this Court's decision on plaintiffs' Sherman Act section 1 conspiracy claims directly control the disposition of 29 of the state law claims. As shown in Figure 1 below, they do so on the ground that the state laws undergirding these 29 claims parallel section 1 of the Sherman Act:

Figure 1: State Law Claims That Parallel Sherman Act Section 1

	State	State Law	Alleged Scope
1.	**Alaska**	Restraint of Trade Act, Alaska Stat. § 45.50.562 et seq.	• "[T]he legislature intended that Alaska courts would look to cases decided under the Sherman Act." State Law Claims Br. 2.
2.	**Arizona**	Uniform State Antitrust Act, Ariz. Rev. Stat. § 44-1402	• "Arizona courts follow federal precedent in determining whether an antitrust violation has occurred ...." State Law Claims Br. 4.
3.	**Colorado**	Antitrust Act of 1992, Colo. Rev. Stat. § 6-4-104	• "[T]he courts shall use as a guide interpretations given by the federal courts to comparable federal antitrust laws." State Law Claims Br. 5 (quotations omitted).

4.	**Connecticut**	Conn. Gen. Stat. § 35-24 et seq.[6]	• Connecticut's Antitrust Act incorporates "various provisions of the federal antitrust laws, especially the Sherman Act." State Law Claims Br. 6 (quotations omitted).
5.	**Delaware**	Antitrust Act, Del. Code Ann. tit. 6, § 2103	• "[A] finding of a violation of Section 1 of the Sherman Antitrust Act would amount to a finding of a violation ... of the Delaware Antitrust Act." State Law Claims Br. 8.
6.	**D.C.**	Antitrust Act, D.C. Code § 28-4502[7]	• D.C.'s Antitrust Act "parallels § 1 of the Sherman Act." State Law Claims Br. 9 (quotations omitted).
7.	**Idaho**	Competition Act, Idaho Code Ann. § 48-104[8]	• Idaho's Competition Act is interpreted "in a manner consistent with how the federal courts interpret Section 1 of the Sherman Act." State Law Claims Br. 11.
8.	**Illinois**	Antitrust Act, 740 Ill. Comp. Stat. 10/3(1)(a)	• "Illinois courts look to federal law on section 1 of the Sherman Act." State Law Claims Br. 12.
9.	**Indiana**	Ind. Code §§ 24-1-1-1, 24-1-2-1[9]	• "[S]tate and federal courts look to decisions under the federal Sherman Act in interpreting Indiana antitrust statutes." State Law Claims Br. 12–13.
10.	**Iowa**	Competition Law, Iowa Code § 553.4	• "[C]ourts presented with claims under the Iowa Competition Law have applied the same standards applied by the courts in interpreting the Sherman Act." State Law Claims Br. 13.
11.	**Louisiana**	Monopolies Act, La. Rev. Stat. Ann. § 51:122-23[10]	• "Courts have analyzed state antitrust claims by citing the elements of a claim under section 1 of the Sherman Act." State Law Claims Br. 16.

[6] In addition to civil penalties, Connecticut seeks damages as *parens patriae* under Conn. Gen. Stat. § 35-32(c)(1). *See* States' Second Am. Compl. ¶ 142; *id.* at 43.

[7] D.C. seeks "monetary relief" as *parens patriae* under D.C. Code §§ 28-4507, 28-4509. *See* States' Second Am. Compl. ¶ 148; *id.* at 43.

[8] In addition to civil penalties, Idaho seeks relief both in its own name and as *parens patriae*. Idaho seeks injunctive relief, civil penalties, and attorney's fees under Idaho Code Ann. § 48-108(1), and treble damages on behalf of Idaho persons under Idaho Code Ann. § 48-108(2). *See* States' Second Am. Compl. ¶¶ 151–52; *id.* at 43.

[9] Indiana makes no specific request for relief under this claim. *See* States' Second Am. Compl. 42–45.

[10] In addition to civil penalties, Louisiana attempts to seek restitution under La. Rev. Stat. Ann. § 51:137, which provides for damages. *See* States' Second Am. Compl. 43.

12.	**Maryland**	Antitrust Act, Md. Code Ann., Com. Law § 11-201 et seq.	• "[T]he elements of a price-fixing case under the Maryland Act are essentially the same as those required for a claim under § 1 of the Sherman Act." State Law Claims Br. 17 (internal quotations omitted).
13.	**Michigan**	Antitrust Reform Act, Mich. Comp. Laws § 445.771 et seq.	• "This Court should analyze Michigan's [state law claim] using the federal courts' interpretation of the comparable federal statute, Section 1 of the Sherman Act." State Law Claims Br. 19.
14.	**Missouri**	Antitrust Law, Mo. Rev. Stat. § 416.031[11]	• "The elements of a violation of Missouri's Antitrust Law are virtually identical to those required under the Sherman Act ...." State Law Claims Br. 20.
15.	**Nebraska**	Unlawful Restraint of Trade Act, Neb. Rev. Stat. § 59-801 et seq.[12]	• It "is essentially identical to § 1 of the Sherman Act." State Law Claims Br. 25 (quotations omitted).
16.		Consumer Protection Act, Neb. Rev. Stat § 59-1603	• "Courts reviewing claims under the [Consumer Protection Act] have looked to interpretations of federal antitrust law ...." State Law Claims Br. 25.
17.	**New Mexico**	Antitrust Act, N.M. Stat. Ann. § 57-1-1	• "[I]f the States establish a violation of Section 1 of the Sherman Act, they have also established a violation of the New Mexico Antitrust Act." State Law Claims Br. 27.
18.	**New York**	Donnelly Act, N.Y. Gen. Bus. Law §§ 340(5), 342, 342-a	• "[I]f the States establish that Defendants violated Section 1 of the Sherman Act, they should also be held to have violated the Donnelly Act." State Law Claims Br. 28.
19.	**North Dakota**	Uniform State Antitrust Act, N.D. Cent. Code § 51-08.1-02	• "[A] violation of the Sherman Act suffices to establish a violation of Section 51-08.1-02." State Law Claims Br. 30.
20.	**Ohio**	Valentine Act, Ohio Rev. Code Ann. § 1331.01 et seq.	• "Ohio courts ... look to federal law regarding the interpretation of Ohio's Valentine [A]ct, including establishing its elements." State Law Claims Br. 30.

[11] Missouri makes no specific request for relief under this claim. *See* States' Second Am. Compl. 42–45.

[12] Nebraska's attempt to obtain relief through this claim is wholly improper. *See* States' Second Am. Compl. ¶ 171. The plain text of Neb. Rev. Stat. § 59-801 makes clear that it is a criminal, not civil, statute. *Id.*

21.	**Pennsylvania**	Pennsylvania Common Law[13]	• "[T]he Court should deem a violation of Section 1 of the Sherman Act a violation of the Pennsylvania common law doctrine against unreasonable restraint of trade." State Law Claims Br. 31.
22.	**Puerto Rico**	Antitrust and Restrictions of Commerce Law, P.R. Laws Ann. tit. 10, § 258	• "[A] violation of the Sherman [sic] would violate the Puerto Rico Antitrust Law if the conduct restricts business or commerce in Puerto Rico or in any area within it." State Law Claims Br. 32.
23.	**South Dakota**	Antitrust Law, S.D. Codified Laws § 37-1-3.1 et seq.	• "[T]his Court should apply federal case law construing Section 1 of the Sherman Act to determine whether a state law violation has occurred." State Law Claims Br. 33.
24.	**Tennessee**	Trade Practices Act, Tenn. Code Ann. § 47-25-101 et seq.[14]	• "The State antitrust statute ... is quite similar to the Sherman Antitrust Act." State Law Claims Br. 34 (quotations omitted, ellipsis in original).
25.	**Texas**	Tex. Bus. & Com. Code Ann. §§ 15.04, 15.05(a)	• "The Texas Antitrust Act requires that its provisions be read in harmony with federal antitrust law." State Law Claims Br. 35.
26.	**Utah**	Antitrust Act, Utah Code Ann. §§ 76-10-911 to 926, 76-10-914(1)	• "Federal Courts have long recognized the close relationship between the Utah Antitrust Act and parallel federal antitrust laws ...." State Law Claims Br. 36–37.
27.	**Virginia**	Antitrust Act, Va. Code Ann. §§ 59.1-9.1 to 59.1-9.17	• "[A] finding that the Defendants in this matter violated Sherman Act § 1 will, of necessity, mean that the [D]efendants also violated [Virginia's Antitrust Act]." State Law Claims Br. 39.
28.	**West Virginia**	Antitrust Act, W. Va. Code § 47-18-1 et seq.	• West Virginia courts must "apply federal decisional law interpreting the Sherman Act to West Virginia's own parallel antitrust statute." State Law Claims Br. 40 (quotations omitted).
29.	**Wisconsin**	Antitrust Act, Wis. Stat. § 133.03	• "Wisconsin's antitrust act is intended to be a reenactment of the first two sections of the Sherman Act and generally follows federal antitrust law." State Law Claims Br. 40.

[13] Pennsylvania makes no specific request for relief under this claim. *See* States' Second Am. Compl. 42–45.

[14] Tennessee improperly seeks civil penalties under Tenn. Code Ann. § 47-25-106, which only permits recovery of "the full consideration or sum paid." *Id.*; *see* States' Second Am. Compl. 44.

Apple has comprehensively demonstrated in its pre-trial papers that Apple did not participate in the conspiracy alleged by plaintiffs. Since plaintiffs' section 1 claims are wholly without merit, the 29 state law claims alleged to parallel section 1 must also fail.

B. The State Law Claims That Parallel Federal Trade Commission Act Section 5 Equally Depend On The Meritless Sherman Act Section 1 Claims

The states bring seven claims under laws that they assert parallel section 5 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 45, which prohibits, among other things, "unfair methods of competition in or affecting commerce." *Id.*

Figure 2: State Law Claims That Parallel Federal Trade Commission Act Section 5

	State	State Law	Alleged Scope
1.	**Alabama**	Deceptive Trade Practices Act, Ala. Code § 8-19-5(27)	• "The [FTC] has interpreted the FTC Act to encompass violations of the Sherman Act." State Law Claims Br. 2.
2.	**Alaska**	Unfair and Deceptive Trade Practices Act, Alaska Stat. § 45.50.471 et seq.[15]	• "Violations of the Alaska Antitrust Act can also be violations of" this statute. State Law Claims Br. 3.
3.	**Connecticut**	Unfair Trade Practices Act, Conn. Gen. Stat. § 42-110a et seq.[16]	• "Violations of the Connecticut Antitrust Act" also violate this statute, since the FTC Act "cover[s] ... conduct of essentially the same character as the Sherman Act." State Law Claims Br. 7.
4.	**Louisiana**	Unfair Trade Practices Act, La. Rev. Stat. Ann. § 51:1401 et seq.[17]	• The statute "mirrors the Federal Trade Commission Act" and "[t]he [FTC] has interpreted the FTC Act to encompass violations of the Sherman Act." State Law Claims Br. 16–17.

[15] Alaska makes no specific request for relief under this claim. *See* States' Second Am. Compl. 42–45.

[16] In addition to civil penalties, Connecticut seeks under Conn. Gen. Stat. § 42-110m restitution and disgorgement of "revenues, profits, and gains" obtained through the alleged conduct. *See* States' Second Am. Compl. 43.

[17] In addition to civil penalties, Louisiana seeks restitution under La. Rev. Stat. Ann. § 51:137 and 1408. *See* States' Second Am. Compl. 43.

5.	**Massachusetts**	Consumer Protection Act, Mass. Gen. Laws ch. 93A, § 2 et seq.[18]	• "The Commission has interpreted the FTC Act to encompass violations of the Sherman Act." State Law Claims Br. 18.
6.	**Nebraska**	Consumer Protection Act, Neb. Rev. Stat § 59-1602	• "Since Section 5 ... condemns violations of the Sherman Act, a Sherman Act violation would also violate" this statute. State Law Claims Br. 25.
7.	**Vermont**	Consumer Protection Act, Vt. Stat. Ann. tit. 9, § 2453(a)	• "[T]he Federal Trade Commission Act encompasses practices that violate the Sherman Act." State Law Claims Br. 38.

As shown above in Figure 2, the states assert these claims on the ground that a violation under Sherman Act section 1 (or a parallel state law) is also a violation of a state statute that parallels FTC Act section 5.

Section 5 of the FTC Act has long been understood to reach conduct that would also violate the Sherman Act. *See Times-Picayune Publ'g Co. v. United States*, 345 U.S. 594, 609 (1953); *FTC v. Cement Inst.*, 333 U.S. 683, 693 (1948); *Union Circulation Co. v. FTC*, 241 F.2d 652, 656 (2d Cir. 1957). The states have never argued (and nowhere do so in their briefs) that Apple should be held liable under state laws that parallel section 5 of the FTC Act even if the Sherman Act section 1 claims fail.

Nor would such an argument be likely to succeed. The Second Circuit has expressly discouraged the application of section 5 to conduct that does not violate the Sherman Act. *See, e.g., E.I. Du Pont De Nemours & Co. v. FTC*, 729 F.2d 128, 137 (2d Cir. 1984) ("As the [FTC] moves away from attacking conduct that is ... a violation of the antitrust laws ... the closer must be our scrutiny upon judicial review"); *Official Airline Guides, Inc. v. FTC*, 630 F.2d 920, 927 (2d Cir. 1980); *see also Boise Cascade Corp. v. FTC*, 637 F.2d 573, 582 (9th Cir. 1980) (holding

[18] In addition to civil penalties, Massachusetts seeks restitution under Mass. Gen. Laws ch. 93A, § 4. *See* States' Second Am. Compl. 43.

that where conduct "was a natural and competitive development" and "where there is a complete absence of evidence implying overt conspiracy," finding a violation of section 5 of the FTC Act "would be to blur the distinction between guilty and innocent commercial behavior").

As a consequence, the failure of the Sherman Act section 1 claims in this case also dooms the states' claims under laws that mimic section 5 of the FTC Act.

II. The Remaining State Law Claims Are Baseless

A. Arkansas Cannot Show That Apple's Conduct Violates Its Unfair Practices Act

Arkansas does not cite any authority for their claim that Apple is liable under Ark. Code Ann. § 4-75-309, nor could it.[19] Section 4-75-309 penalizes a corporation that "creates, enters into, or becomes a member of, or a party to, any ... agreement, combination ... or understanding" to "regulate or fix ... the price of ... any article or thing whatsoever." *Id.* As discussed in Apple's pre-trial papers, Apple never created, entered into, or became a party to any horizontal "agreement, combination ... or understanding" to "regulate or fix" prices market-wide. Importantly, Apple did not have any involvement in or knowledge of any meetings among the publishers (Apple Br. 21), and plaintiffs do not claim otherwise.

Plaintiffs' theory is that Apple participated in a conspiracy to fix prices market-wide by adopting an MFN clause that "sharpen[ed]" the publishers' incentives" to force Amazon to agency. P. Br. 13. But the record evidence leaves no doubt that Apple adopted the terms of the agency agreements—including the MFN—purely to further its own, independent business goals. Apple Br. 24–27. The plain terms of Apple's agency agreements say *nothing* about the prices or business models of other retailers. Apple Opp. Br. 15. And the MFN cannot support the alleged

[19] In addition to civil penalties, Arkansas seeks restitution pursuant to Ark. Code Ann. § 4-75-213(a)(3). *See* States' Second Am. Compl. 42.

conspiracy when both Amazon and Barnes & Noble adopted similar MFN provisions. Apple Br. 30, 35.

Arkansas may not stretch section 4-75-309 beyond its plain terms. "Under Arkansas law, the Court is required to 'construe the statute so that no word is left void, superfluous, or insignificant; and meaning and effect are given to every word in the statute if possible.'" *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 787 F. Supp. 2d 1036, 1044 (N.D. Cal. 2011) (quoting *Barclay v. First Paris Holding Co.*, 42 S.W.3d 496, 500 (Ark. 2001)). Accordingly, federal courts construing Arkansas statutes have relied on the plain language of those statutes to decide cases. *See, e.g., California v. Infineon Techs. AG*, 531 F. Supp. 2d 1124, 1143 (N.D. Cal. 2007); *FTC v. Mylan Labs., Inc.*, 62 F. Supp. 2d 25, 44 (D.D.C. 1999). Indeed, because section 4-75-309 "is penal in nature," it "must be strictly construed in favor of those upon whom the burden of the penalty is sought to be imposed." *Chalmers v. Toyota Motor Sales, USA, Inc.*, 326 Ark. 895, 907 (1996).

B. Kansas Cannot Show that Apple's Conduct Violates Its Restraint Of Trade Act

Under Kan. Stat. Ann. § 50-112, "a person violates the statute by *agreeing* to control prices." *In re W. States Wholesale Natural Gas Antitrust Litig.*, 633 F. Supp. 2d 1151, 1159 (D. Nev. 2007) (emphasis added) (discussing Kan. Stat. Ann. § 50-112).[20] Nothing in *O'Brien v. Leegin Creative Leather Products, Inc.*, 294 Kan. 318 (2012), frees Kansas of its burden of proving that Apple entered into an "arrangement" or "agreement." *Id.* at 333, 335 (quoting Kan. Stat. Ann. § 50-112). And both law and fact make clear that it cannot do so.

[20] In addition to civil penalties, Kansas seeks injunctive relief, treble damages, and its attorney's fees and costs under Kan. Stat. Ann. §§ 50-103, 50-160, 50-161. *See* States' Second Am. Compl. ¶ 160; *id.* at 43.

To prove a violation of section 50-112 under plaintiffs' theory, Kansas must show that Apple entered into an "arrangement" or "agreement" that was "designed" or "tend[s] to" raise prices market-wide. *O'Brien*, 294 Kan. at 333, 335 (quoting Kan. Stat. Ann. § 50-112). The phrase "designed" "contemplates a subjective standard" that "requires examination of the intent behind a defendant's behavior." *Id.* at 335. The "tend[s] to" prong, by contrast, "contemplates an objective standard" that "requires examination of the defendant's behavior to discern whether it would reasonably be expected to produce a particular result, regardless of the defendants' intention." *Id.*

At the start, this claim fails for the same reasons plaintiffs' Sherman Act claim fails. The Kansas Restraint of Trade Act and "federal antitrust statutes share some similarities," and thus "cases interpreting federal antitrust statutes may be persuasive authority." *Id.* at 322. In situations such as the present one, where "Kansas' antitrust law ... remains largely undeveloped" and "the bulk of its provisions have not been meaningfully interpreted by Kansas courts" (*id.*), this Court may apply Kansas antitrust law by "identify[ing] the state antitrust provision under which plaintiff proceeds and the most analogous federal antitrust statute[]," *Folkers v. Am. Massage Therapy Ass'n, Inc.*, 2004 WL 306913, at *8 (D. Kan. Feb. 10, 2004). Here, the most analogous statute for finding an "arrangement" or "agreement" to fix prices is most obviously section 1 of the Sherman Act, under which Kansas cannot show that Apple participated in the alleged conspiracy.

Kansas cannot prove that plaintiffs' conspiracy allegations against Apple—specifically, that Apple facilitated a horizontal conspiracy among the publishers to raise e-book prices—constitutes a violation of section 50-112. As discussed in Apple's pre-trial papers, the record provides overwhelming evidence that Apple acted at all times in its own, independent business

interests and had no intent to raise prices. Apple Br. 24–27. Apple's sole purpose in negotiating for the MFN was to ensure competitive prices on its bookstore—the precise *opposite* of what Kansas seeks to prove. Apple Opp. Br. 14–15. Consequently, Kansas cannot show that Apple was part of any arrangement or agreement "designed" to raise e-book prices. *O'Brien*, 294 Kan. at 333, 335 (quoting Kan. Stat. Ann. § 50-112).[21]

Nor can Kansas show that Apple participated in a scheme that "tend[s] to" raise e-book prices. To prevail, Kansas must demonstrate that the terms of Apple's agency agreements would "reasonably be expected" to raise prices market-wide. *O'Brien*, 294 Kan. at 335–36. It cannot do so. Again, the MFN had absolutely nothing to do with raising prices. The MFN is silent on the prices or business models of other retailers. Indeed, Kansas's inability to specify any conduct by Apple that can "reasonably be expected" to raise e-book prices speaks for itself. Kansas therefore cannot show a violation of its Restraint of Trade Act.

C. Missouri Cannot Show That Apple's Conduct Violates Its Merchandising Practices Act

Missouri alleges that Apple violated two state regulations promulgated under its Merchandising Practices Act. State Law Claims Br. 22 (citing 15 C.S.R. 60-8.020; 15 C.S.R. 60-8.090). Neither regulation supports a finding against Apple.

15 C.S.R. 60-8.020 states that a practice is "unfair" where it: (1) violates a public policy "established by the Constitution, statutes or common law of [Missouri], or by the Federal Trade Commission, or its interpretive decisions"; or (2) is "unethical, oppressive or unscrupulous." *DePeralta v. Dlorah, Inc.*, 2012 WL 4092191, at *8 (W.D. Mo. Sept. 17, 2012) (quoting 15

[21] Similarly, Kansas cannot rely on the vertical agency agreements between Apple and the publishers to prove a violation of § 50-112. The Supreme Court has long held that "genuine contracts of agency" are not "violations of the Anti-Trust Act" (per se or otherwise) as a "matter of principle." *United States v. Gen. Elec. Co.*, 272 U.S. 476, 488 (1926); *see also Valuepest.com of Charlotte, Inc. v. Bayer Corp.*, 561 F.3d 282, 294 (4th Cir. 2009) (upholding lawfulness of genuine agency agreements).

C.S.R. 60-8.020). 15 C.S.R. 60-8.090, in turn, prohibits "any method, use or practice" "in connection with the ... sale of merchandise" that "[v]iolates state or federal law intended to protect the public." *DePeralta*, 2012 WL 4092191, at *8.

Missouri does absolutely nothing to show that Apple violated either of these regulations. Missouri does not identify *any* public policy established by Missouri state law or the FTC—let alone any conduct alleged to violate such a policy. Further, Missouri nowhere asserts that Apple's conduct was "unethical, oppressive, or unscrupulous." *Id.* In sum, Missouri's reliance on 15 C.S.R. 60-8.020 amounts to a naked citation.

Missouri makes no more progress with 15 C.S.R. 60-8.090. The only allegation based on federal law is a violation of section 1 of the Sherman Act, which Apple has shown to be false. Turning to state law, the only other Missouri law allegedly at issue is Missouri's Antitrust Law (Mo. Rev. Stat. § 416.031), which Missouri asserts does no more than parallel section 1 of the Sherman Act. 15 C.S.R. 60-8.090 is therefore inapplicable to this case.

D. Nebraska Cannot Show That Apple's Conduct Violates Its Uniform Deceptive Trade Practices Act

Nebraska does little more than quote language from Neb. Rev. Stat. § 87-303.01 and make the conclusory assertion that Apple's conduct violates this provision. State Law Claims Br. 26. Nebraska's claim under its Uniform Deceptive Trade Practices Act is meritless.

Section 87-303.01 provides that "an unconscionable act or practice by a supplier in connection with a consumer transaction" violates Nebraska's Uniform Deceptive Trade Practices Act. It further provides that whether an act or practice is "unconscionable" is a question of law for a court. *Id.* In determining whether an agreement is "unconscionable," Nebraska's Supreme Court has previously held that the term means "manifestly unfair or inequitable." *Myers v. Neb. Inv. Council*, 272 Neb. 669, 692 (2006). And in addressing substantive unconscionability, the

Nebraska Supreme Court has held that conduct "is not substantively unconscionable unless the terms are grossly unfair under the circumstances that existed when the parties entered the contract." *Id.* Put differently, "[s]ubstantive unconscionability involves those cases where a clause or term in the contract is alleged to be one-sided or overly harsh." *Adams v. Am. Cyanamid Co.*, 1 Neb. App. 337, 356 (1992) (quoting *Schroeder v. Fageol Motors, Inc.*, 544 P.2d 20, 23 (Wash. 1975)).

The basis of Nebraska's claim is entirely unclear. Nebraska seems to (but does not actually) make the argument that Apple's alleged participation in a horizontal conspiracy should also constitute "unconscionable" conduct under its Uniform Deceptive Trade Practices Act. But consistent with Nebraska law, federal courts have rejected such an argument. *See, e.g.*, *Schoenbaum v. E.I. DuPont de Nemours & Co.*, 517 F. Supp. 2d 1125, 1152–54 (E.D. Mo. 2007) (holding that, under Nebraska's Uniform Deceptive Trade Practices Act and analogous state statutes, "[p]laintiffs' allegation that Defendants failed to disclose that they were selling [products] at supracompetitive, rather than competitive prices does not ... rise to the level of an 'oppressive and unfairly surprising contract'" and thus does not allege "any unconscionable conduct"). This Court should do the same.

E. New Mexico Cannot Show That Apple's Conduct Violates Its Unfair Practices Act

New Mexico argues that Apple's conduct violates two subsections of its Unfair Practices Act. *See* N.M. Stat. Ann. § 57-12-2(D)-(E). Neither provision establishes any basis for liability against Apple.

New Mexico's contention that Apple's conduct constitutes "unfair or deceptive trade practices" under section 57-12-2(D) of its Unfair Practices Act is wholly unsupported. To demonstrate an "unfair or deceptive trade practice[]," New Mexico must show that Apple: (1)

"made an oral or written statement, a visual description or a representation of any kind that was either false or misleading; (2) "the false or misleading representation was knowingly made in connection with the sale ... of goods ... in the regular course of [Apple's] business; and (3) the representation was of the type that may, tends to, or does deceive or mislead any person." *Lohman v. Daimler-Chrysler Corp.*, 142 N.M. 437, 439 (Ct. App. 2007).

In this case, New Mexico fails to identify *any* alleged "false or misleading" statement, visual description, or representation made by Apple. Further, the states' second amended complaint offers no substance with which to fill this gap. New Mexico's "unfair or deceptive trade practice[]" claim is therefore meritless.

New Mexico's fleeting assertion that Apple's conduct constitutes "unconscionable trade practices" under section 57-12-2(E) of New Mexico's Unfair Practices Act is similarly unfounded. A practice is "unconscionable" under 57-12-2(E) if it: (1) "takes advantage of the lack of knowledge, ability, experience or capacity of a person to a grossly unfair degree"; or (2) "results in a gross disparity between the value received by a person and the price paid." *Taylor v. United Mgmt., Inc.*, 51 F. Supp. 2d 1212, 1217 (D.N.M. 1999); *see also Richardson Ford Sales, Inc. v. Johnson*, 100 N.M. 779, 783 (Ct. App. 1984) (same). Here, New Mexico nowhere points to any allegations in the states' complaint—let alone *evidence*—even remotely suggesting that Apple ever took advantage of any person to any degree. The absence of such evidence or allegations is sufficient to dismiss this claim. *Richardson*, 100 N.M. at 783 (trial court "properly denied the request to find an unconscionable trade practice" where "[t]here [was] nothing showing that [one party] took advantage of [the others]").

Nor can New Mexico show, under the second prong of section 57-12-2(E), that any conduct by Apple resulted in a "gross disparity between the value received by a person and the

price paid." *Id.* The overwhelming evidence in this case shows that as a result of Apple's entry to the e-books market, prices went *down*. Apple Br. 18. New Mexico thus cannot claim that there was a "gross disparity" in value received and the price paid. *Cf. Taylor*, 51 F. Supp. 2d at 1217 (no "gross disparity" under 57-12-2(E) between the $4,000 paid to plaintiff for a Corvette and $4,600 paid to defendant when it sold the Corvette). Finally, New Mexico may not rely on the argument that it believes e-book prices were too high: Its law is clear that such subjective beliefs are irrelevant to this inquiry. *See Hernandez v. Wells Fargo Bank N.M., N.A.*, 139 N.M. 68, 71 (Ct. App. 2005) (holding that plaintiff's beliefs are not relevant under 57-12-2(E) "except as to the value he received in a transaction"). This Court should therefore reject these claims.

F. Puerto Rico Cannot Show That Apple's Conduct Violates Regulation 2648 Or 7932

Remarkably, Puerto Rico raises claims under two regulations that it has never before mentioned in this litigation. *See* Pl. States' Supp. Mem. of Law 23 n.122, Apr. 26, 2013 (alleging claims solely under P.R. Laws Ann. tit. 10, §§ 257, 258). In any event, Puerto Rico cannot establish any basis for liability under either regulation.

Puerto Rico's sole argument regarding Regulation 2648 is that Apple's conduct violates Article IV, paragraph 14 of that regulation. State Law Claims Br. 32–33. The plain language of that provision, however, makes clear that Regulation 2648 only prohibits "[a]greements or combinations *between competitors* to fix ... a product's prices." Reg. 2648 art. IV ¶ 13 (emphasis added). Interpreting this provision in Regulation 2648 to apply only to agreements "between competitors" is further supported by other, inapplicable provisions that prohibit agreements "between competitors *or between competitors and producers.*" Reg. 2648 art. IV ¶ 14 (emphasis added). Puerto Rico points to no other authority suggesting otherwise. Puerto Rico has never contended, and the states' second amended complaint nowhere alleges, that

Apple is a competitor of any other alleged participant in the conspiracy. Thus, Puerto Rico's Regulation 2648 claim must be rejected.

Puerto Rico's claim under Regulation 7932 finds even less support. Puerto Rico commits nothing more than a conclusory sentence to its Regulation 7932 argument. In fact, Puerto Rico has even failed to provide an English-language version of Regulation 7932. *See* State Law Claims Br. Ex. 25 (providing only a Spanish-language version of Regulation 7932).

Puerto Rico's inability to offer any support is unsurprising. Even a cursory review of an English-language version of Regulation 7932[22] makes clear that it has absolutely nothing to do with Apple's alleged conduct. For example, Puerto Rico's allegations against Apple have nothing to do with practices that "create a false or deceptive appearance about goods or services" (Reg. 7932 Rule 2), advertising or offering "a given good as new when the same is used or rebuilt" (Reg. 7932 Rule 7.B.4), or offering for sale products "that have been frozen as if they were fresh" (Reg. 7932 Rule 7.B.8). This Court should therefore reject this claim out of hand.

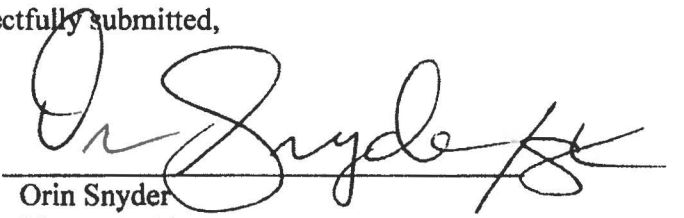
[22] An English-language version of Regulation 7932 is available on the Puerto Rico Department of Consumer Affairs' official website at http://www.daco.gobierno.pr/Repositorio/Reglamentos/Regulation_against_Deceptive_Practices_and_Advertisements.pdf.

CONCLUSION

For the foregoing reasons and those in Apple's pre-trial memorandum, this Court should reject the state law claims in their entirety and order judgment for Apple.

Dated: May 17, 2013
New York, New York

Respectfully submitted,

By: 

Orin Snyder
Lisa H. Rubin
Gibson, Dunn & Crutcher, LLP
200 Park Avenue, 47th Floor
New York, NY 10166
(212) 351-4000
osnyder@gibsondunn.com

Daniel S. Floyd (*Pro Hac Vice*)
Daniel G. Swanson (*Pro Hac Vice*)
Gibson, Dunn & Crutcher, LLP
333 South Grand Avenue
Los Angeles, CA 90071
(213) 229-7000
dfloyd@gibsondunn.com

Cynthia Richman (*Pro Hac Vice*)
Gibson, Dunn & Crutcher, LLP
1050 Connecticut Avenue, N.W.
Washington, DC 20036
(202) 955-8500
crichman@gibsondunn.com

Howard E. Heiss
Edward N. Moss
O'Melveny & Myers LLP
Times Square Tower
7 Times Square
New York, NY 10036
(212) 326-2000
hheiss@omm.com

On behalf of Defendant Apple Inc.