UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE AMAZON.COM, INC. EBOOK ANTITRUST LITIGATION

No. 1:21-cv-351-GHW-DCF

PLAINTIFFS' CONSOLIDATED OPPOSITION TO AMAZON'S AND PUBLISHER DEFENDANTS' MOTIONS TO DISMISS PLAINTIFFS' CONSOLIDATED AMENDED COMPLAINT

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INTRODUCTION

A decade ago, the Publisher Defendants, the five largest publishers (known as the "Big Five"), conspired with Apple to raise the prices of trade eBooks. They entered "agency agreements" with Apple that allowed the Big Five to control pricing and, through most-favored-nation provisions (MFNs), eliminated price competition on retail platforms. ¶¶ 39-55.[1] Their conduct led to class action litigation and concurrent investigations by federal and state prosecutors in the United States and the European Commission's Directorate General for Competition (the DG Comp)—ultimately resulting in orders on both continents that prohibited the publishers from using MFNs in connection with the sale of eBooks for a period of five years. In the United States, the Big Five paid $166 million in settlements, and after the Second Circuit confirmed its liability, Apple paid $450 million to the consumer class that initiated the proceedings. ¶¶ 56-59.

None of this deterred the Publisher Defendants. Whereas previously they conspired with Apple as the new entrant in an eBooks market dominated by Amazon, they next turned directly to Amazon—picking up where they had left off with Apple. Over a span of months in 2014 and 2015, each Publisher Defendant again entered into agency agreements with Amazon that contain MFN-equivalent provisions mirroring the illegal price restraints they had used in their conspiracy with Apple. ¶¶ 62-71. Like their illegal agreements with Apple, the Publisher Defendants' current agreements eliminate competition on the retail level—this time protecting Amazon—while again giving the Big Five the power to control eBook pricing. ¶¶ 104-110. And as they had done before, each Publisher Defendant promptly exercised that power. Within a week of entering its new agreement: Penguin raised its prices by 30.4%; HarperCollins by 29.3%; Simon & Schuster by

[1] All ¶ __ references are to the Consol. Am. Class Action Compl., ECF No. 67 (June 2, 2021).

15.8%; Macmillan by 10.7%; and Hachette Book Group by 8.3%. ¶ 98. These facts plausibly allege a conspiracy to limit retail competition and increase eBook prices. *See* section I.A-D.

In affirming Apple's *per se* liability for its role in the publisher's earlier conspiracy, the Second Circuit explained that when "multiple competitors sign vertical agreements that would be against their own interests were they acting independently," those agreements can "prove the existence of a horizontal cartel," which it termed the "archetypal example" of a *per se* unlawful restraint of trade. It confirmed that "the Contracts [with Apple] were only attractive to the Publisher Defendants to the extent they acted collectively" and therefore provided "strong evidence that Apple consciously orchestrated a conspiracy among the Publisher Defendants." So too here: Defendants' contracts replicate the same illegal arrangement in the *Apple* litigation and provide direct evidence of a horizontal price-fixing agreement. *See* Sections I.A and II.

In addition to these allegations, Plaintiffs also allege plus factors supporting the plausibility of the alleged conspiracy, consistent with the Second Circuit's decision in *Starr v. Sony BMG Music Entertainment*: (i) the market for eBooks is concentrated; (ii) Defendants shared twin motives to collude—for Amazon to dominate its retail competitors and for the Big Five to regain control over trade eBook pricing; (iii) without collective involvement, the agency model would have been against each publisher's independent business interests because it would not have been effective and would have put the publishers at risk of losing market share; (iv) the Big Five raised prices under the agency model even though eBook costs were not increasing; and (v) the Big Five have a history of collusive price-fixing, and Amazon is under investigation by multiple antitrust regulators. ¶¶ 62, 81, 97, 149, 157, 159, 166. These plus factors provide much more than the nudge required by *Twombly* to cross the line from conceivable to probable. *See* section I.B.3.

Defendants' response to all this is to posit their own competing factual explanations for their coordinated behavior. But the introduction of additional facts is inappropriate on a motion to

dismiss. As the Supreme Court made clear in *Twombly,* and the Second Circuit in *Anderson* and *Gelboim*: "the choice between two plausible inferences that may be drawn from factual allegations is *not* a choice to be made by the court on a Rule 12(b)(6) motion." *See* section I.C.

Even under the rule of reason, the Court does not need to inquire into Defendants' market power, "which is but a surrogate for detrimental effects," because Plaintiffs allege an actual adverse effect on competition—*i.e.*, Defendants' conspiracy resulted in significant price increases. And in any event, Plaintiffs allege market power. Thus, just as Judge Cote explained in the *Apple* litigation, if "it were necessary to analyze" the case "under the rule of reason," the agreements "destroyed" competition because they "removed the ability of retailers to set the prices of their e-books and compete with each other on price, relieved [Amazon] of the need to compete on price, and allowed the Publisher Defendants to raise the prices for their e-books." *See* section III.

Finally, Plaintiffs plausibly allege claims for monopolization and conspiracy to monopolize. ¶¶ 104-106, 190. The Big Five help Amazon maintain its monopoly because, in return, they control the prices of trade eBooks. Amazon in fact has monopoly power because it controls 90% of the retail market for eBooks in the United States. ¶ 131. *See* section IV. And Plaintiffs have standing to bring claims against Amazon for eBooks purchased directly from the Big Five through other retail platforms. ¶¶ 1, 2, 18-32, 146-150. *See* section V.

Plaintiffs respectfully ask this Court to deny Defendants' motions to dismiss.

ARGUMENT

At the pleading stage, Plaintiffs must plead "only enough facts to state a claim to relief that is plausible on its face"—enough to "nudge[] their claims across the line from conceivable to

plausible."[2] As the Supreme Court explained in *Twombly*, "[a]sking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage."[3] Indeed, "a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely."[4]

Moreover, "[b]ecause plausibility is a standard lower than probability, a given set of actions may well be subject to diverging interpretations, each of which is plausible."[5] But as the Second Circuit explained in *Gelboim*, the "choice between two plausible inferences that may be drawn from factual allegations is ***not*** a choice to be made by the court on a Rule 12(b)(6) motion."[6] A court must "accept as true the factual allegations of the complaint, and construe all reasonable inferences that can be drawn from the complaint in the light most favorable to the plaintiff."[7] Thus, for allegations of conspiracy, "although an innocuous interpretation of the defendants' conduct may be plausible, that does not mean that the plaintiff's allegation that that conduct was culpable is not also plausible" and should not be credited at the pleading stage.[8] A plaintiff's allegations need not "rule out the possibility of independent action, as would be required at later litigation stages such as a defense motion for summary judgment."[9]

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[2] *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Internal citations and quotations omitted and emphasis added throughout unless otherwise noted.

[3] *Id.* at 556.

[4] *Id.*; *see also Gelboim v. Bank of Am. Corp.*, 823 F.3d 759, 781 (2d Cir. 2016) ("Skepticism of a conspiracy's existence is insufficient to warrant dismissal.").

[5] *Id.* at 782.

[6] *Id.* at 781.

[7] *Anderson News, L.L.C. v. Am. Media, Inc.*, 680 F.3d 162, 185 (2d Cir. 2012).

[8] *Id.* at 190.

[9] *Id.* at 184; *Gelboim,* 823 F.3d at 781. Amazon suggests otherwise with a quote from a pre-*Twombly* decision. *See* Amazon Mot. at 7 (quoting *Apex Oil Co. v. DiMauro*, 822 F.2d 246 (2d Cir.

In addition, "plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each."[10] Rather, the "character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole."[11] Thus, in *United States v. Apple, Inc.*, "the evidence [taken] as a whole" painted a "a clear portrait of a conscious commitment" to "eliminate retail price competition [in order] to raise the retail prices."[12]

I. Plaintiffs allege sufficient facts to plausibly state a conspiracy to limit retail competition and increase eBook prices.

A. Defendants' contracts provide direct evidence of their conspiracy.

To demonstrate a conspiracy under the Sherman Act, Plaintiffs are required to present "direct or circumstantial evidence that reasonably tends to prove . . . a conscious commitment to a common scheme designed to achieve an unlawful objective."[13] A central question in a conspiracy case is therefore whether the challenged conduct "stemmed from independent decision or from an agreement, tacit or express."[14]

Under the agency model, the publisher sets the price and sells directly to the retail consumer, while the eBook retailer gets a commission for each book sold. ¶ 2. The effect of this provision was to transfer control of eBook prices to the publisher. *Id.* In general, an MFN is a contractual

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1987)). But *Apex Oil* was decided on summary judgment, and, in any event, *Twombly* from 2007, *Anderson* from 2012, and *Gelboim* from 2016 debunk this approach on a motion to dismiss.

[10] *Cont'l Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962).

[11] *Id.*; *see also Anderson News*, 680 F.3d at 190 (complaint must be "read as a whole, rather than piecemeal").

[12] 952 F. Supp. 2d 638, 697 (S.D.N.Y. 2013).

[13] *In re Currency Conversion Fee Antitrust Litig. v. Am. Express Co.*, 773 F. Supp. 2d 351, 365-66 (S.D.N.Y. 2011).

[14] *Theatre Enters., Inc. v. Paramount Film Distrib. Corp.*, 346 U.S. 537, 540 (1954).

provision that requires one party to give the other the best terms that it makes available to any competitor, but in the context of the *Apple* litigation and this case, it requires the publisher to sell any eBook on the retailer's platform for no more than what the same eBook was offered on any other retail site. ¶ 49. The effect of that provision is to penalize the publisher that permits retailers to discount the publisher's eBooks—*i.e.*, the publisher permitting discounts by one retailer must reduce its own price by the same amount on the platform of the retailer enforcing the MFN. *Id.* For example, if Amazon is enforcing the MFN, a Publisher Defendant that sells its eBook for $15 retains $10.50 after Amazon takes its 30% commission. But if that publisher sells the same book to another eBook retailer under the wholesale model and that retailer sells the eBook for $12, the publisher must lower its price on Amazon's platform to $12, so that it would retain just $8.40 after Amazon removed its commission.

The *Apple* court held that such a contractual arrangement—the type of arrangement that Plaintiffs challenge here and that was carried out through the same contractual mechanism by many of the same participants in *Apple*—constituted an illegal price-fixing scheme in violation of Section 1 of the Sherman Act. Because Defendants' common agency model and MFN provisions "specifically address the conduct the Plaintiffs argue is unlawful," they provide direct evidence of Defendants' conspiracy to restrain trade.[15]

B. Plaintiffs also allege plausible facts that indirectly support their conspiracy claim.

Along with the allegations of direct evidence, Plaintiff also alleges facts that, if proved true, would provide indirect evidence of the conspiracy. As the Second Circuit has explained, "conspiracies are rarely evidenced by explicit agreements" but "nearly always must be proven

[15] *FTC v. Actavis, Inc.*, 2018 U.S. Dist. LEXIS 99716, at *35 (N.D. Ga. June 14, 2018).

through inferences that may fairly be drawn from the behavior of the alleged conspirators."[16] Under *Twombly*, a "showing of parallel business behavior is admissible circumstantial evidence from which the fact finder may infer agreement," though "it falls short of conclusively establishing agreement or itself constituting a Sherman Act offense."[17]

Attempting to undermine Plaintiffs' allegations of parallel conduct, the Big Five contend that agreements entered "over the course of nine months" are not contemporaneous enough to establish parallel conduct.[18] But it is "elementary that an unlawful conspiracy may be and often is formed without simultaneous action or agreement on the part of the conspirators."[19] Indeed, courts have found allegations of defendants joining or effectuating a conspiracy over multiple years sufficient to allege parallel conduct.[20] Nor are Plaintiffs required to allege a "specific time, place or person involved in each conspiracy allegation."[21] All that is required is "some setting" for the parallel

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[16] *Anderson News*, 680 F.3d at 183; *see also Interstate Circuit v. U.S.*, 306 U.S. 208, 221 (1939) ("As is usual in cases of alleged unlawful agreements to restrain commerce, the Government is without the aid of direct testimony that the distributors entered into any agreement" so "[i]n order to establish agreement it is compelled to rely on inferences drawn from the course of conduct of the alleged conspirators.").

[17] 550 U.S. at 553. *See also In re Elevator Antitrust Litig.*, 502 F.3d 47, 51 (2d Cir. 2007) (citing *Twombly*). Plaintiffs do not allege that parallel contracting alone evinces a conspiracy. *See* Memo. of Law ISO Publisher Defs.' Mot. to Dismiss the Consol. Am. Class Action Compl., ECF No. 100 (Sept. 17, 2021) (Publishers Mot.) at 11; Memo. of Law ISO Amazon's Mot. to Dismiss Pls.' Consol. Am. Compl., ECF No. 99 (Sept. 17, 2021) (Amazon Mot.) at 10, 12.

[18] Publishers Mot. at 8, 9, 10; *see also* Amazon Mot. at 13 (Publisher Defendants' "actions were separated by months").

[19] *Laumann v. Nat'l Hockey League*, 56 F. Supp. 3d 280, 303 (S.D.N.Y. 2014) (quoting *Interstate Circuit*, 306 U.S. at 227); *Ross v. Am. Express Co.,* 35 F. Supp. 3d 407, 440 (S.D.N.Y. 2014) ("interdependent parallel conduct may be simultaneous or sequential").

[20] *In re Broiler Chicken Antitrust Litig.*, 290 F. Supp. 3d 772, 791 (N.D. Ill. 2017) (collecting cases, including *Ross*, 35 F. Supp. 3d at 440).

[21] *Starr v. Sony BMG Music Entn't*, 592 F.3d 314, 325 (2d Cir. 2010); *see also Twombly*, 550 U.S. at 570 n.10; *see also id.* at 570 ("we do not require heightened fact pleading of specifics"). In *In re Zinc*

conduct "suggesting the agreement necessary to make out a § 1 claim."[22] Courts use the term "plus factors" to refer to such a setting—*i.e.*, "circumstances demonstrating that the wrongful conduct was conscious and not the result of independent business decisions of the competitors."[23] As addressed below, Plaintiffs have more than alleged such circumstances.

1. Plaintiffs plausibly allege that Defendants coordinated their actions.

a. Defendants reintroduced the agency model after the consent decrees requiring the Big Five to allow retailer discounting expired.

As the complaint alleges, until 2010, the Big Five sold trade eBooks through the same century-old wholesale pricing model they used for print books. ¶ 40. Under that wholesale model, publishers sold books at wholesale to retailers, which could then discount from the suggested retail prices as they saw fit. *Id.* Amazon achieved market dominance in trade eBooks by charging just $9.99 for many new release and bestselling trade eBooks—a price that roughly matched the wholesale price for many of the Big Five's trade eBooks. *Id.* In response to Amazon's $9.99 pricing strategy, the Big Five turned to Apple in an effort to regain control of pricing. ¶ 45.

The result of the negotiations between the Big Five and Apple was an agency model in which the *publishers set the price* of their eBooks, and the retailers—acting as agents for the publisher—take a commission on the sale. ¶ 47. Unlike the wholesale model that Amazon exploited to achieve its dominance, the sales transaction under the agency model occurs directly between the publisher and the retail consumer, and the retailer-agent is not allowed to unilaterally discount. *Id.* Moreover, by agreeing on MFN clauses, the Big Five and Apple ensured that Apple would always enjoy the

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Antitrust Litig. the plaintiffs' claims also rested on direct evidence. 155 F. Supp. 3d 337, 368 (S.D.N.Y. 2016). *See* Publishers Mot. at 9-10.

[22] *Twombly*, 550 U.S. at 557.

[23] *In re Domestic Airline Travel Antitrust Litig.*, 221 F. Supp. 3d 46, 58 (D.D.C. 2016).

lowest retail price available for any Big Five trade eBook that Apple sold. ¶ 49. Apple would never have to compete on price because, if another retailer set a lower price, the publisher's MFN required the same lower price for Apple's eBook store. *Id.*

As a practical matter, by agreeing to the MFNs, the Big Five had to adopt the agency model with other eBook retailers, including Amazon, to prevent retail price competition. *Id.* For example, if Amazon stayed at a wholesale model and continued to sell eBooks at $9.99, the MFN required the publishers to sell at that same price on Apple's platform, less Apple's 30% commission—meaning that they would lose revenue and the ability to control prices. ¶ 49.[24] The Publisher Defendants also recognized that none of them individually had the power to force Amazon to accept the agency model. ¶ 50.[25] So they acted collectively by threatening to withhold publication of their trade eBooks for multiple months after their release as print publications. ¶ 52. The result of the agency agreements and MFNs was a significant and pervasive increase in trade eBook prices. ¶ 54.

A consumer class action was filed by the same law firm representing Plaintiffs as Lead Counsel here. ¶ 56. The Department of Justice and attorneys general from 33 states followed with their own enforcement actions. *Id.* Rather than risking an adverse judgment, the Big Five settled their claims. ¶ 57. Under the terms of the 2012 and 2013 consent decrees with the DOJ, the Big Five agreed to terminate their contract with Apple and any other eBook retailer that restricted the retailers' ability to discount eBooks. *Id.* For a period of two years, the Big Five agreed that they would permit eBook retailers to discount eBook prices and to offer promotions to encourage consumers to purchase eBooks, and for a five-year period the Big Five agreed not to enter into any agreement with an eBook retailer that contained a price MFN for the sale of eBooks. *Id.*

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[24] *See also United States v. Apple, Inc.*, 791 F.3d 290, 305 (2d Cir. 2015).

[25] *See also id.* at 300 and 309.

After a 20-day bench trial against Apple, Judge Cote found that Apple and the Big Five had engaged in a horizontal price-fixing agreement that was *per se* unlawful. ¶ 58. The evidence showed that Apple "made a conscious commitment to join a scheme with the Publisher Defendants to raise the prices of e-books" and that only "the coordinated effort and conscious commitment of the Publisher Defendants and Apple" allowed the defendants to "effect a significant increase in the retail prices of e-books." *Id.*[26] The court also found that the plaintiffs had proved an unreasonable restraint on trade under the rule of reason by demonstrating that the agreements "removed the ability of retailers to set the prices of their e-books and compete with each other on price, relieved Apple of the need to compete on price, and allowed the [the Big Five] to raise the prices for their e-books, which they promptly did[.]" *Id.*[27]

The court enjoined Apple from entering any agreements with the Big Five that would prevent Apple from lowering eBook prices beyond the 2-year restriction in the publishers' consent decrees, and entered a $450 million judgment against Apple in the class case. The Second Circuit affirmed. *Id.* DG Comp likewise found that the Big Five had colluded with Apple to raise prices. ¶ 59.

The consent decrees' prohibition against the Big Five agreeing to MFNs in the sale of trade eBooks remained in place, depending on the publisher, until 2017 or 2018. ¶ 62. But the requirement that the Big Five permit retailer discounting of trade eBooks expired (except with respect to Apple's sales) in 2015. *Id.* It was against that backdrop that the Defendants negotiated new contracts. On expiration of the court-mandated discounting requirement, the Big Five, aided by Amazon, promptly reclaimed the power to control pricing for trade eBooks. *Id.* By reintroducing the agency model and

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[26] *Quoting Apple*, 952 F. Supp. 2d at 697.

[27] *Quoting Apple*, 952 F. Supp. 2d at 694.

MFN provisions in their agreements with Amazon, they effected market-wide increases eBook prices, eliminated retail discounting, and ensured that no retailer could compete with Amazon on price. ¶ 73.

b. Within a span of months, each of the Big Five reintroduced the agency model, along with MFN-equivalent provisions.

Executives from three of the Big Five involved in the agreements with Apple were still at the helm of their companies during the negotiations with Amazon in 2015: Carolyn Reidy, President and CEO of Simon & Schuster; Brian Murray, CEO of HarperCollins; and John Sargent, CEO of Macmillan. ¶ 63. And although Amazon had "yelled, screamed, and threatened" in response to the Big Five's demand in 2010 for the agency model, in 2015 it quickly adopted Apple's role. Amazon no longer insisted on retailer discounting and, like Apple before, made clear that it provided the same terms for each of the Big Five. ¶ 66. Indeed, Defendants publicly disclosed that each of the Big Five were entering into the same agency model arrangement with Amazon ¶ 65:

> **October 2014:** When Amazon and Simon & Schuster disclosed the first deal in October 2014, Simon & Schuster CEO Carolyn Reidy made no secret in her public letter to authors and agents that Simon & Schuster secured control over the price of its trade eBooks. ¶ 67.
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> **November 2014:** Amazon and Hachette issued a joint statement at the conclusion of their negotiations in November 2014, stating that: "Hachette will have responsibility for setting consumer prices of its e-books[.]" ¶ 68.
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> **December 2014**: In his public letter announcing Macmillan's December 2014 deal, [former CEO] Sargent stated that Macmillan had negotiated an "agency model for e-books" with Amazon and that all "our other retailers will also be on the agency model, leaving Apple as the only retailer which is allowed unlimited discounting." ¶ 69.
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> **April 2015:** HarperCollins also announced an agreement to proceed under an agency model for eBooks when it finalized its deal with Amazon in April 2015. HarperCollins also disclosed that it would set the eBook prices of most new releases at $14.99, considerably higher than the $9.99 favored by Amazon and consistent with the cap the

> Big Five Defendants set for new releases in the *Apple* conspiracy. ¶ 70.
>
> **June 2015:** While negotiations with Penguin were underway, Amazon's spokesperson, Tarek El-Hawary, made clear that the deal would be the same: "I can say that we have long-term deals in place already with the other four major publishers and we would accept any similar deal with Penguin Random House UK." When it concluded its deal with Amazon in June 2015, Penguin disclosed that it, too, negotiated an agency model for trade eBooks. It also revealed that it would sell new releases at $12.99 or $13.99, much higher than Amazon's preferred $9.99 price under the wholesale model and within the range the Big Five Defendants set for new releases in the *Apple* conspiracy. ¶ 71.

These announcements signaled that Amazon had set aside its staunch opposition to the agency model and, because the model would be acceptable for Amazon only with MFN commitments, that such commitments were in place. Indeed, to circumvent the consent orders' prohibitions on MFNs, the Big Five and Amazon agreed to implement their MFN commitments through provisions that were not labeled MFNs but that achieved the same result of ensuring no retailer could compete with Amazon on price and product availability. ¶ 73.

Specifically, the Big Five and Amazon agreed to implement their MFN commitments through "notification" provisions that achieved the same function as the prohibited MFNs. ¶ 78. Each publisher was required to notify Amazon if its agency prices on Amazon were higher than the retail prices charged through any competing eBook retailer. ¶ 79. The Big Five's promotion-notification provisions likewise obliged each of them to notify Amazon if they offered any promotional agency price or promotional content to an eBook retailer competing with Amazon and that the Big Five had not also offered to Amazon. *Id.* And Amazon's right to impose matching

"requests" ensured that the Big Five would turn down promotions proposed by Amazon's retail competitors because they would need to provide the same terms to Amazon.[28] *Id.*

These functional-MFN provisions were not publicly disclosed and did not come to light until the DG Comp reopened its investigation into anticompetitive conduct in the eBook market in June 2015. ¶ 73. At the conclusion of its two-year investigation, the DG Comp found that Amazon employed MFNs with eBook publishers and similar provisions in its agreements with the Big Five (who were at that time prevented by their settlements with the DG Comp from employing MFNs in their contracts). *Id.* The DG Comp found that the MFNs and analogous provisions in the Big Five contracts had probable anticompetitive effects. ¶¶ 78-89. Last year, a House Judiciary Committee report likewise found that "Amazon's price MFN causes publishers to incur significant financial penalties if they offer Amazon's rivals better pricing." ¶ 76. That report also concluded that, "[a]lthough Amazon has changed the name and specific mechanisms over the years, it appears that the company continues to impose contract provisions that effectively function as MFNs on book publishers." *Id.*

Thus, by signing agency agreements with Amazon "each of the Publisher Defendants signaled a clear commitment" to pick up where they left off with the last conspiracy and move expeditiously to raise eBook prices, which they each did in the immediate aftermath of signing their respective agreements. ¶ 99.

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[28] Moreover, since about 2017 the consent decrees no longer prohibit MFNs in the Big Five contracts. ¶ 80. So rather than relying on the notification provisions, Amazon and the Big Five likely agreed to some or all of Amazon's explicit MFN provisions (*i.e.*, Amazon's agency price parity, promotion price parity, discount pool provision, wholesale price parity, and agency commission parity provisions). ¶¶ 80-87.

2. Plaintiffs' allegations are sufficient to allege a Sherman Act violation.

Under established precedent, these allegations amply support a conspiracy. For example, in *Interstate Circuit*, the Supreme Court addressed allegations that a movie theater sent a letter addressed to all eight major national film distributors stating that it would show a distributor's films only if the distributor imposed certain restrictions on later runs in secondary theaters.[29] The Supreme Court held that, even though no direct evidence was offered at trial that the distributors communicated with one another, there was nonetheless sufficient evidence to infer that the defendants reached a mutual understanding, because (a) "each of the distributors knew that the proposals were under consideration by the others"; (b) "the prospect of increased profits" was a "strong motive for concerted action"; (c) "without substantially unanimous action with respect to the restrictions for any given territory there was risk of a substantial loss of the business"; and (d) the result was "substantially unanimous action of the distributors [] as to the terms of the restrictions."[30]

In denying the motions to dismiss in Big Five's earlier conspiracy with Apple, Judge Cote followed *Interstate Circuit* and found that the plaintiffs had plausibly alleged a horizontal conspiracy based on a series of vertical agreements:

> Just like . . . *Interstate Circuit*, Apple coordinated a series of substantively-identical vertical agreements and made clear to its vertical partners that it was offering each of them a similar deal. Just as with . . . *Interstate Circuit*, cooperation among Apple's vertical partners was essential to the success of its plan, and the net effect of its vertical agreements was to limit the ability of its horizontal competitors, such as Amazon, to compete on price.[31]

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[29] 306 U.S. at 215-19.

[30] *Id.* at 222.

[31] *In re Elec. Books Antitrust Litig.*, 859 F. Supp. 2d 671, 685 (S.D.N.Y. 2012) (*eBooks*).

The Second Circuit agreed. "[V]ertical agreements, lawful in the abstract, can in context be useful evidence for a plaintiff attempting to prove the existence of a horizontal cartel, particularly where multiple competitors sign vertical agreements that would be against their own interests were they acting independently."[32] And the Second Circuit further explained that the "MFNs in Apple's Contracts created a set of economic incentives pursuant to which the Contracts were only attractive to the Publisher Defendants to the extent they acted collectively."[33] No "one Publisher could effect an industry-wide shift in prices or change the public's perception of a book's value," but collectively the Publisher Defendants could do so.[34] If they failed to act collectively, the agency and MFN provisions they agreed to individually would result in "the worst of both worlds: lower short-term revenue and no control over pricing."[35] So in that economic context, the Publisher Defendants' contracts with Apple provided "strong evidence that Apple consciously orchestrated a conspiracy among the Publisher Defendants."[36]

The same analysis applies here because the Big Five and Amazon simply picked up where the Big Five's conspiracy with Apple left off. As in *Interstate Circuit*, and *Apple*, the Big Five knew that each publisher was negotiating with Amazon to bring back the agency model and eliminate retailer discounting. ¶¶ 65-71. They knew that, given the economic context, they had to act collectively to achieve their goals and could not afford to act alone. ¶¶ 81, 85, 105, 149, 158. They in fact entered

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[32] *Apple*, 791 F.3d at 320.

[33] *Id. See also Apple*, 952 F. Supp. 2d at 699 ("the MFN was the term that effectively forced the Publisher Defendants to eliminate retail price competition and place all of their e-tailers on the agency model").

[34] *Apple*, 791 F.3d at 305.

[35] *Id.*

[36] *Id.* at 316.

the agreements with Amazon. ¶¶ 74-87. And immediately after entering their respective agreements, each publisher significantly raised its prices. ¶¶ 95-103. As courts have found in many analogous cases, these allegations plausibly allege a horizontal price-fixing conspiracy.[37]

Seeking to avoid this analysis, the Big Five rely on the decision in *Bookhouse of Stuyvesant Plaza, Inc. v. Amazon.com, Inc.*[38] But nothing in that decision undermines Plaintiffs' plausible claims. The plaintiffs in *Bookhouse* based their claim on the "closed ecosystem" used by Amazon for its e-reader and alleged, for example, that "there may have been oral discussions or agreements directly between one or more of the [Publishers] and AMAZON" regarding the closed ecosystem.[39] Observing that the "evasiveness of this allegation is remarkable," the court pointed out all the ways in which the plaintiffs fell short of alleging a plausible claim—including that the plaintiffs did not

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[37] *See, e.g., Laumann v. Nat'l Hockey League*, 907 F. Supp. 2d 465, 486-87 (S.D.N.Y. 2012) (finding that plaintiffs "adequately alleged participation on the part of the [regional sports networks] in the conspiracy to geographically divide the market for professional hockey and baseball games," because "where parties to vertical agreements have knowledge that other market participants are bound by identical agreements, and their participation is contingent upon that knowledge, they may be considered participants in a horizontal agreement in restraint of trade"); *Meyer v. Kalanick*, 174 F. Supp. 3d 817, 823-24 (S.D.N.Y. 2016) (finding that plaintiffs "plausibly alleged a conspiracy in which drivers sign up for Uber precisely on the understanding that the other drivers were agreeing to the same pricing algorithm, and in which drivers' agreements with Uber would be against their own interests were they acting independently"); *In re Keurig Green Mountain Single-Serve Coffee Antitrust Litig.*, 383 F. Supp. 3d 187, 244-45 (S.D.N.Y. 2019) (finding that "the coffee and beverage brands' agreements not to deal with Competitive Cup makers that could otherwise increase their product output and sales revenue" supported inference of conspiracy orchestrated by Keurig "to sustain supra-competitive prices for K-Cups"); *Barry's Cut Rate Stores Inc. v. Visa, Inc.*, 2019 WL 7584728, at *29 (E.D.N.Y. Nov. 20, 2019) (finding "allegations of agreement and knowledge are sufficient to allege hub-and-spoke conspiracies" where "it would be disadvantageous for Bank Defendants to adhere to the restraints unless they possessed knowledge that all others similarly situated would also adhere to those same restraints"); *PharmacyChecker.com, LLC v. Nat'l Ass'n of Bds. of Pharm.*, 2021 WL 1199363, at *17 (S.D.N.Y. Mar. 30, 2021) (finding that "series of identical bilateral agreements" was "sufficient to allege a conspiracy").

[38] 985 F. Supp. 2d 612 (S.D.N.Y. 2013). *See* Publishers Mot. at 6-7, 8-9.

[39] *Id.* at 617.

allege an unlawful agreement; did not allege "why the Publishers would even want to enter the type of restrictive agreement alleged"; and did not allege that "any arrangement between the Publishers and Amazon was unreasonable."[40] They asserted mere "theoretical possibilities, and accordingly [fell] well short of the line between possibility and plausibility of entitlement to relief."[41]

In this case, by contrast, Plaintiffs do not rely on theoretical possibilities but adequately alleged facts—including that the Big Five entered agreements to reintroduce the agency model, giving the Big Five control over pricing and, through MFNs, eliminating the ability of other retailers to compete with Amazon. ¶¶ 67-71, 157. As discussed below, these plausible allegations are further confirmed by a number of plus factors, including investigations into Amazon's use of MFNs and Defendants' efforts to disguise their MFN provisions to avoid antitrust scrutiny. And the result of the agreements between Amazon and the Big Five was immediate increases in the prices for trade eBooks. ¶¶ 98-99. These allegations state a plausible claim.

3. Plaintiffs allege additional plus factors supporting the plausibility of the alleged conspiracy.

Not only are the allegations discussed above sufficient, but the complaint does not rest on those allegations alone. Plaintiffs also allege "plus factors" that push Plaintiffs' allegations even further across the plausibility threshold. And although Defendants try to take apart Plaintiffs' allegations piece by piece, the Supreme Court long ago cautioned that "[t]he character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole."[42] In a highly fact-intensive case like this one, it is even more important that

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[40] *Id.* at 618-20.

[41] *Id.* at 618.

[42] *Cont'l Ore*, 370 U.S. at 699.

the ultimate fact-finder "look at the whole picture and not merely at the individual figures in it."[43] Taken together, the alleged facts present "plausible grounds to infer an agreement" existed.[44]

The Second Circuit addressed "plus factors" in *Starr*, in which the complaint alleged collusive action by music distributors that controlled over 80% of digital music sold on the Internet and through CDs.[45] The Second Circuit extensively addressed the "plus factors" that supported the inference of collusive activity, including:

- a highly concentrated industry;
- the defendants' motive "to stop the continuing devaluation of music";
- agreeing to unfavorable economic terms that would be unprofitable without collusive action;
- the existence of similar price increases despite a decline in the costs of providing Internet music;
- the pendency of government investigations; and
- that the defendants "attempted to hide their MFNs because they knew they would attract antitrust scrutiny."[46]

As in *Starr*, Plaintiffs here have alleged multiple "plus factors" providing sufficient context to support an inference of collusive conduct, including:

- a concentrated market (¶ 166);
- twin motives to collude (¶¶ 62, 157);

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[43] *Id.*

[44] *Twombly*, 550 U.S. at 556.

[45] *Starr*, 592 F.3d at 323-24; *see also Todd v. Exxon Corp.*, 275 F.3d 191, 198 (2d Cir. 2001) ("even in the absence of direct 'smoking gun' evidence, a horizontal price-fixing agreement may be inferred on the basis of conscious parallelism, when such interdependent conduct is accompanied by circumstantial evidence and plus factors such as defendants' use of facilitating practices").

[46] *Starr*, 592 F.3d at 323-24.

- actions against interests in the absence of coordination (¶¶ 81, 97, 149, 159);
- similar price increases unrelated to an increase in costs (¶¶ 95, 97-99);
- a history of price-fixing and the existence of government investigations; and
- Defendants' use of notification provisions to get around the prohibition on express MFNs while achieving the same purpose (¶¶ 6, 7, 56-61, 73, 88-89, 91-94, 157).

a. The market for eBooks is concentrated.

Market concentration on the seller side is a condition propitious for the emergence of collusion,[47] and eBooks is a concentrated market. Amazon controls about 90% of the retail market for eBooks in the United States. ¶ 131. Publisher Defendants account for about 80% of trade publications in the United States. ¶ 1. This is a plus factor.

b. Defendants shared twin motives to collude.

As alleged in the complaint, Amazon was motivated to "dominate its retail competitors, which it achieve[d] by including MFNs or similar provisions to ensure that no rival retail platform c[ould] differentiate itself from, or otherwise compete with, Amazon." ¶ 157; *see also* ¶¶ 4-9, 73-87. At the same time, each of the Publisher Defendants had a motive to enter into agency agreements "as a means to control trade eBook pricing in the industry." ¶ 157; *see also* ¶ 62. Those twin motives are a plus factor.

The Publisher Defendants argue in response that they do not have a motive to help Amazon monopolize the eBook market, (ECF 100 at 16-17), but that argument gets them nowhere because, as the Second Circuit explained in *Apple*, "[a]ntitrust law has never required identical *motives* among

[47] *See, e.g.*, Richard A. Posner, *Antitrust Law*, pp. 69-70 (2d ed. 2001); *Starr*, 592 F.3d at 324.

conspirators when their independent reasons for joining together lead to collusive action."[48] Thus, as the Second Circuit concluded in *Apple* and Plaintiffs allege here, "the Publisher Defendants' motives, coupled with the unambiguous increase in the prices of their ebooks, was sufficient to confirm that price fixing was the goal, and the result, of the conspiracy."[49] ¶¶ 95-106.

Defendants also argue—without citing any particular paragraph of the complaint—that allegations of intent are purportedly contradicted by assertions that the Publishers' interest in fostering "alternative channels to reach customers."[50] There is no contradiction. What the complaint actually says is that *absent the conspiracy* "the Big Five would have a financial incentive to lower their eBook prices on rival platforms that charge lower commissions than Amazon and steer more sales to those platforms, thereby increasing the publishers' overall revenues[.]" ¶ 81. Any Publisher Defendant could have gone down that road—and in a competitive market they would have—but they collectively chose to forgo fostering alternative channels in order gain control over retail pricing and maintain supracompetitive trade eBook prices. *Id.*

c. Without collective involvement, the agency model was against each Publisher Defendant's independent business interests.

In the *Apple* litigation, the court found that the complaint "contain[ed] allegations of parallel conduct placed in a context that raises a suggestion of preceding agreement," because it had "plausibly alleged that each Publisher Defendant's decision to sign its particular agency agreement with Apple" would have "contravened that defendant's self-interest in the absence of similar

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[48] 791 F.3d at 317.

[49] *Id.* at 328; *see also Meyer*, 174 F. Supp. 3d at 823-24 ("drivers' ability to benefit from reduced price competition with other drivers by agreeing to Uber's Driver Terms plausibly constitutes a common motive to conspire").

[50] Publishers Mot. at 17.

behavior by its rivals."[51] As the trial court explained in its order denying motions to dismiss: in "a counterfactual universe in which each Publisher Defendant would have acted without any assurance of similar behavior by rivals," the "costs of such a unilateral switch to the agency model would be substantial. The publisher would be selling its eBooks at a higher price than its competitors and would therefore be losing market share."[52] The court thus concluded: "it is at least plausible that no Publisher Defendant would have signed an agency agreement with Apple absent a firm understanding with its rivals that they would do the same."[53] And in its order affirming judgment against Apple, the Second Circuit agreed that the Publisher Defendants had no individual economic incentive to agree to the MFN without the assurance that the conspirators could in fact "wrest control over pricing from ebook retailers generally."[54]

The same conclusion follows here and, in fact, is particularly compelling because the Big Five's "jump in prices" in this case "coincided with the downturn in e-book sales"—yet none of the publishers risked any loss of market share because of their collusion. ¶ 97; *see also* ¶¶ 81, 149, 159.

d. Publisher Defendants raised prices under the agency model even though eBook costs were not increasing.

Pricing behavior that is not explained by business costs is a well-recognized plus factor that, together with price parallelism, raises an inference of conspiracy. As Judge Posner states in his antitrust treatise, "[s]imultaneous price increases and output reductions unexplained by an increase

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[51] *eBooks*, 859 F. Supp. 2d at 683 (citing *Starr,* 592 F.3d at 327).

[52] *Id.* at 683-84.

[53] *Id.* at 684; *see also Apple*, 791 F.3d at 320 ("The MFNs in Apple's Contracts created a set of economic incentives pursuant to which the Contracts were only attractive to the Publisher Defendants to the extent they acted collectively."); *Meyer*, 174 F. Supp. 3d at 823-24; *In re Keurig*, 383 F. Supp. 3d at 244-45; *Barry's*, 2019 WL 7584728, at *29.

[54] *Apple*, 791 F.3d at 305.

in cost may [] be good evidence of the initiation of a price-fixing scheme."[55] And the courts, including the Second Circuit in *Starr*, confirm that pricing practices with little or no relationship to costs are probative of a conspiracy.[56]

Here, the complaint alleges that, "[b]ecause trade eBooks do not require printing, storage, or shipping, Defendants' marginal cost for producing and distributing each additional eBook is close to zero." ¶ 95. In "a competitive market, lower production costs should significantly reduce eBook prices," but book sales data analyzed by Nielsen Book (now known as NPD BookScan) found that the "return of agency pricing by the Big Five trade houses in 2015 raised e-book prices by an average of $3." ¶¶ 95, 97.

Indeed, the price increases followed immediately after each of the Big Five entered its respective anticompetitive agreement with Amazon. The week after entering its agreement, Penguin increased its eBook prices by 30.4%; HarperCollins by 29.3%; Simon & Schuster by 15.8%, Macmillan by 10.7%, and Hachette Book Group by 8.3%. ¶ 98. As the following before-and-after pricing chart demonstrates, the Big Five faced competitive pricing for their eBooks only when they permitted retailers to discount their eBooks; as soon as the Big Five entered into their anticompetitive agreements, first with Apple and now with Amazon, they raised prices. ¶ 99.

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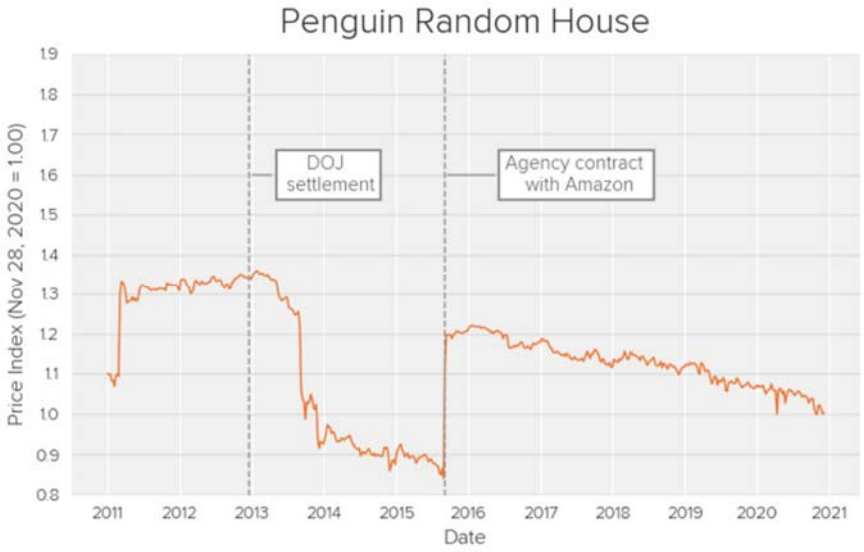
[55] Posner, *Antitrust Law*, p. 88.

[56] *See Starr*, 592 F.3d at 324 (noting as a "plus factor" that defendants raised the price of songs even though earlier in the year the costs of providing digital music had decreased); *In re NASDAQ Market-Makers Antitrust Litig.*, 894 F. Supp. 703, 714 (S.D.N.Y. 1995) ("allegations that defendants' pricing bore no reasonable relation to either the operation of defendants' business, or market or economic conditions, was sufficient to create a reasonable inference of conspiracy").



The complaint includes a similar before-and-after pricing chart for each Publisher Defendant showing similar pricing patterns for each—with rising prices related not to rising costs but to each Publisher Defendants' entry into agreement with Amazon. *Id.*

e. The Big Five have a history of collusive price-fixing, and Amazon is under investigation by multiple antitrust regulators.

History of illegal behavior also constitutes a plus factor. As Judge Cote stated in *eBooks*, "evidence of earlier jointly undertaken activity renders more plausible the claim that the Publisher Defendants were indeed colluding when they acted to end the wholesale model for distribution of eBooks and thereby to raise the prices of these books."[57]

While the Big Five tries to distance themselves from their past behavior, arguing that illegal behavior "elsewhere in time and place does not generally allow the inference of an immediate conspiracy,"[58] the treatise on which they rely also explains that, "if there is other evidence of a

[57] 859 F. Supp. 2d at 689.

[58] Publishers Mot. at 13 (citing Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application*, ¶¶ 1421a, 1421b1 (4th ed. 2020)).

present conspiracy, the defendants' sins elsewhere may cast doubt on the truthfulness of their innocent explanations."[59] That is exactly the case here: the Big Five engaged in the *same* collusive behavior in the past as Plaintiffs plausibly allege here—except with Apple then and Amazon now. As discussed above, this collusion was subject to government investigation followed by enforcement actions brought by the DOJ and 33 state attorneys general, and the Big Five ultimately entered into consent decrees prohibiting use of agency agreements with MFNs for a five-year period. ¶¶ 56-61. Those sins elsewhere are relevant and further bolster the plausible inference of liability in this case.

On top of that of their past behavior, investigations into Defendants' current practices are an additional plus factor.[60] ¶ 157. The complaint alleges that beginning in 2015, the DG Comp investigated Amazon's anticompetitive MFNs and similar provisions in the Publisher Defendants' contracts and found that these provisions harmed competition in the distribution and sale of eBooks in European markets. ¶¶ 7, 73, 88-89. As a result, Amazon agreed not to enforce those anticompetitive provisions in the European eBook market. *Id.* Likewise, here in the United States, the House of Representatives Judiciary Committee's Subcommittee on Antitrust, Commercial and Administrative Law launched an investigation into Amazon along with other dominant technology platforms, and in its October 2020 report, the Antitrust Committee concluded (like the DG Comp)

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[59] Areeda & Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application*, ¶ 1421a.

[60] *Starr*, 592 F.3d at 324; *Alaska Elec. Pension Fund v. Bank of Am. Corp.*, 175 F. Supp. 3d 44, 55 (S.D.N.Y. 2016) ("The mere existence of [ongoing government] investigations is a circumstance that, when combined with parallel behavior, might permit a jury to infer the existence of an agreement."); *In re Foreign Exch. Benchmark Rates Antitrust Litig.*, 74 F. Supp. 3d 581, 592 (S.D.N.Y. 2015) (investigations "in three countries against six Defendants as a result of some of the investigations detailed in the U.S. Complaint and for the very conduct alleged in the Complaint" constituted a plus factor); *Hinds Cty., Miss. v. Wachovia Bank N.A.*, 700 F. Supp. 2d 378, 394 (S.D.N.Y. 2010) ("government investigations may be used to bolster the plausibility of § 1 claims"); *Barry's*, 2019 WL 7584728, at *7 (in aftermath of litigation and DOJ consent decree, "domestic and global actions further support an inference of conspiracy").

that Amazon's use of MFNs was harmful to competition. ¶¶ 7, 91-93. The Connecticut Attorney General's office also is conducting its own investigation into Amazon's eBook business, focusing on Amazon's agreements with publishers, and each Publisher Defendant received a subpoena in 2019 pursuant to that investigation. *Id.*

f. Defendants attempted to hide their MFNs from antitrust regulators.

All of this is even more problematic for Defendants because they tried to avoid antitrust scrutiny by disguising their MFNs—conduct that is itself yet another plus factor.[61] Rather than using the same MFN provisions as before, Defendants used notification provisions that, as the DG Comp concluded in 2017, had the same purpose and effect of protecting Amazon from retail competition. ¶ 73.

In sum, the six plus factors alleged in the complaint provide much more than the nudge required by *Twombly* to cross the line from conceivable to probable.

C. Defendants' competing factual justifications for their collusive behavior are improperly raised at the pleading stage and are squarely contradicted by the complaint.

As discussed above in section I.A., the "choice between or among plausible inferences or scenarios is one for the factfinder."[62] Plaintiffs are "not require[d] to show that the allegations suggesting agreement are more likely than not true or that they rule out the possibility of independent action."[63] Indeed, the "choice between two plausible inferences that may be drawn

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[61] *Starr*, 592 F.3d at 324.

[62] *In re Keurig*, 383 F. Supp. 3d at 242.

[63] *Id.* (citing *Anderson News*, 680 F.3d at 184).

from factual allegations is ***not*** a choice to be made by the court on a Rule 12(b)(6) motion."[64] Under this standard, Defendants' competing inferences must be rejected.

First, the Publisher Defendants argue that "no inference of conspiracy may arise from the unsurprising fact that each Publisher Defendant, consistent with its individual interest, ultimately agreed to a contract with Amazon."[65] In this same vein, Publisher Defendants proffer competing facts: that they needed to preserve their "ability to distribute eBooks through the largest eBook retailer" in the United States, to "compete for deals with authors," and to have "access to Kindle users."[66] Likewise, Amazon asserts that Publisher Defendants each observed "common market conditions and independently decided that they each needed to pursue agency agreements with Amazon to 'control' their respective eBook pricing," and Amazon insists that this "self-interest d[id] not depend on coordinated action."[67]

A plaintiff's allegations need not "rule out the possibility of independent action, as would be required at later litigation stages such as a defense motion for summary judgment."[68] And regardless, none of these interests required the terms agreed to here. Moreover, neither the Big Five nor Amazon persuasively address that, without collective action, Publisher Defendants lacked market power to raise their eBook prices without losing market share and that it was against their individual interests to agree to an MFN that protected Amazon from competitive pricing from other retailers. ¶¶ 44, 74-87, 104-07, 149. As the court explained in the *eBooks* litigation, "it is at least plausible that

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[64] *Gelboim*, 823 F.3d at 781.

[65] Publishers Mot. at 7, 10-11, 17, 18-19.

[66] *Id.* at 18, 19.

[67] Amazon Mot. at 10-13.

[68] *Anderson News*, 680 F.3d at 184.

no Publisher Defendant would have signed an agency agreement with [Amazon] absent a firm understanding with its rivals that they would do the same."[69] And like the agreements in the *Apple* litigation, the agreements here "created a set of economic incentives pursuant to which the [agreements] were only attractive to the Publisher Defendants to the extent they acted collectively."[70]

Defendants cannot avoid the Big Five's own precedent by citing the Ninth Circuit's decision in *Musical Instruments*.[71] In that case, "the complaint itself … provide[d] ample independent business reasons why each of the manufacturers adopted and enforced MAP [minimum advertising price] policies even absent an agreement among the defendant manufacturers."[72] The plaintiffs had alleged that "each manufacturer was pressured by Guitar Center to adopt MAP policies that were advantageous to Guitar Center, and the complaint concedes that each manufacturer responded to Guitar Center's pressure and coercion by adopting MAP policies in exchange for Guitar Center's agreement to purchase large volumes of the manufacturer's product stock."[73] Given those allegations, the Ninth Circuit held that the "[m]anufacturers' decisions to heed similar demands made by a common, important customer do not suggest conspiracy or collusion."[74]

That decision has no relevance here. Amazon did not demand that each of the Big Five reintroduce the agency model in exchange for Amazon's purchase of large volumes of books. To the

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[69] 859 F. Supp. 2d at 864.

[70] 791 F.3d at 320. *See* section II.C.3., above.

[71] *See* Publishers Mot. at 10-11; Amazon Mot. at 10-11.

[72] *In re Musical Instruments & Equip. Antirust Litig.*, 798 F.3d 1186, 1195 (9th Cir. 2015).

[73] *Id.*

[74] *Id.*; *see also In re Propranolol Antitrust Litig.*, 249 F. Supp. 3d 712, 720 (S.D.N.Y. 2017) ("In *Musical Instruments*, the Ninth Circuit (in a split decision) affirmed the dismissal of the case because the complaint itself provided ample independent business reasons why each of the defendants adopted and enforced the minimum prices even absent an agreement. In particular, each defendant was responding to similar demands made by a common, important customer.").

contrary, Plaintiffs allege that "Amazon had "yelled, screamed, and threatened" in response to the Big Five's demand for the agency model in 2010. ¶ 66. The Big Five pushed for the reintroduction of the agency model in a way that would have put any publisher acting alone at risk of losing market share.[75] ¶¶ 62, 157. The Big Five try to align this case with *Musical Instruments* by pointing to paragraph 79 of the complaint, which discusses a circumstance in which "Amazon retaliated or threatened to retaliate" against the Big Five.[76] But that paragraph was about how the MFN-equivalent provisions worked—in particular, how Amazon enforced its right to "matching." Nothing about that allegation suggests that Amazon forced its way into agency agreements or that entering such agreements was otherwise in a publisher's self-interest acting individually. Amazon argues that the Publisher Defendants insisted on the agency model for other retailers of eBooks, but this was required by MFN provisions, *i.e.*, the result of conspiracy not absolution for it.[77]

Second, the Publisher Defendants argue that "Plaintiffs' attempt to cast the Publisher Defendants' alleged conspiracy with Apple as support for their alleged conspiracy with Amazon is inherently illogical."[78] In support, the Publisher Defendants rely on Plaintiffs' allegations regarding

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[75] *In re Inclusive Access Course Materials Antitrust Litig.*, cited by Amazon, is also distinguishable because there the allegation that the "adoption of the Inclusive Access [digital textbook] program for courses was significantly more profitable for a publisher than the sale of hardcopy textbooks" did "not support" an inference of conspiracy. 2021 WL 2418333, at *9 (S.D.N.Y. June 14, 2021). Amazon Mot. at 10-11. *Mayor & City Council of Balt. v. Citigroup, Inc.*, cited by all Defendants, is also inapposite because the plaintiffs alleged "only parallel conduct," which "could just as easily turn out to have been rational business behavior as they could a proscribed antitrust conspiracy." 709 F.3d 129, 137, 138 (2d Cir. 2013). Publishers Mot. at 17-18; Amazon Mot. at 11-12.

[76] Publishers Mot. at 19.

[77] *United States v. Apple, Inc.*, 791 F.3d at 305 ("The MFN Clause changed the situation by making it imperative, not merely desirable, that the publishers wrest control over pricing from ebook retailers generally.").

[78] Publishers Mot. at 13-14.

the Big Five's fear of "Amazon's growing power."[79] But that fear is precisely why the Big Five wanted to take control over the pricing of their eBooks—both before in their agreements with Apple and now in their agreements with Amazon. ¶¶ 48,[80] 62, 158. And that is why they picked up the conspiracy where they left off: they wanted to reintroduce the agency model to regain their control over pricing, even if that meant letting Amazon entrench its dominance in the retail market for trade eBooks. ¶¶ 62, 157.

Third, Amazon argues that each Publisher Defendant "already had a form of agency agreement with Amazon and other retailers at the time the 2015 contracts were negotiated.[81] But that argument impermissibly contradicts the complaint's well-pleaded allegations that "the requirement that the Big Five permit retailer discounting of trade eBooks" expired in 2015 and that, "[u]pon expiration, the Big Five promptly reintroduced the agency model by renegotiating their agreements with Amazon, thus reclaiming the right to set prices." ¶ 62. Moreover, the complaint alleges that "Big Five eBooks experienced competitive pricing only when the Big Five permitted retailers to discount them." ¶ 99. "But as soon as the Big Five entered into their combined agency and MFN agreements, first with Apple and now with Amazon, they raised trade eBook prices and maintained them at supracompetitive levels for the duration of those agreement," as depicted in the complaint's series of before-and-after pricing charts. *Id.*

Fourth, the Publisher Defendants posit that "government oversight over the Publisher Defendants' eBook contracting during the relevant period undermines any plausible inference of

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[79] *Id.* at 13.

[80] ¶ 48 ("The Big Five stood to make less money on each sale under the agency model than they would under the wholesale model, but agreeing to Apple's proposal would accomplish their overarching long-term goal: retaking control of pricing back from the eBook retailers.").

[81] Amazon Mot. at 13.

conspiracy among the Publisher Defendants."[82] They base this assertion on consent decrees entered against them in 2012 and 2013 in the *Apple* litigation, which required them for five years to refrain from MFNs in their eBook agreements and to submit them to the DOJ and state attorneys general for review. But as Plaintiffs allege, it was not until 2017—years after the Publisher Defendants finalized their contracts with Amazon—that the DG Comp learned that the Publisher Defendants had evaded this restriction by agreeing to notification provisions that operated like an MFN. ¶¶ 78-79. Defendants' consent decrees do not establish that the DOJ and state attorneys general understood the effect of the notice provision, much less that they gave the provision their blessing. To the contrary, the consent decrees specifically state that the failure of the DOJ to bring an action under the antitrust laws "shall n[ot] give rise to any inference of lawfulness."[83]

II. The alleged conspiracy is subject to *per se* condemnation.

Under section 1 of the Sherman Act, "[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is . . . illegal."[84] No matter the motive for the agreement or the apparent reasonableness of the resulting prices,[85] any time horizontal competitors, like the Big Five, (i) agree formally or informally to price their goods at

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[82] Publishers Mot. at 5, 14-15.

[83] Final Judgment as to Defendants Verlagsgruppe Georg Von Holtzbrinck GMBH & Holtzbrinck Publishers, LLC D/B/A Macmillan, *U.S. v. Apple, Inc.*, No. 12-cv-2826 (DLC), ECF No. 354 (S.D.N.Y. Aug. 12, 2013), at p. 9; Final Judgment as to Defendants the Penguin Group, a Division of Pearson PLC, and Penguin Group (USA), Inc., *U.S. v. Apple, Inc.*, 2013 WL 4838881, *4 (S.D.N.Y. May 17, 2013); Final Judgment as to Defendants Hachette, HarperCollins, and Simon & Schuster, *U.S. v. Apple, Inc.*, No. 12-cv-2826 (DLC), ECF No. 119 (S.D.N.Y. Sept. 6, 2012), at p. 9.

[84] 15 U.S.C. § 1

[85] *See, e.g.*, *FTC v. Super. Ct. Trial Lawyers Ass'n*, 493 U.S. 411, 424 (1990) ("[I]t was settled shortly after the Sherman Act was passed that it is no excuse that the prices fixed are themselves reasonable.").

a certain level or according to a certain system, (ii) act on that agreement, and (iii) affect interstate commerce, they engage in a per se violation of the Sherman Act.[86]

To establish a horizontal conspiracy, Plaintiffs need only establish that horizontal competitors (Publisher Defendants) entered into "vertical agreements" with "knowledge that other market participants are bound by identical agreements" and that "their participation is contingent upon that knowledge."[87] Plaintiffs have plausibly alleged that each Publisher Defendant entered identical agreements and knew that other Publisher Defendants were doing so, too. ¶¶ 62-73. Plaintiffs also plausibly allege that each Publisher Defendant's agreement was contingent on the participation of the others based on the same allegations that supported this inference in the *Apple* litigation. ¶¶ 50, 162. There the Second Circuit recognized that the combined agency and MFN price restraints "were only attractive to the Publisher Defendants to the extent they acted collectively."[88] While "no one Publisher could effect an industry-wide shift in prices or change the public's perception of a book's value, if they moved together they could."[89] So, by "the very act of signing a Contract" with these price restraints, "then, each of the Publisher Defendants signaled a clear commitment to move against" competitive pricing, "thereby facilitating their collective action."[90]

The same holds true for Defendants' identical arrangement with Amazon. Here Plaintiffs allege agreements with the same MFN and agency provisions and common public announcements that each Publisher Defendant had agreed to the same terms. ¶¶ 62-73. These factual assertions, if

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[86] *Id.* at 421-22; *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 893 (2007).

[87] *Barry's Cut Rate Stores, Inc.*, 2019 U.S. Dist. LEXIS 205335, at *183-84.

[88] *United States v. Apple, Inc.*, 791 F.3d at 320.

[89] *Id.* at 305 (quoting *United States v. Apple Inc.*, 952 F. Supp. 2d at 665).

[90] *Id.* at 317.

proved, provide direct evidence of a horizontal agreement in conjunction with the reasonable inference, drawn in *Apple*, that the Publisher Defendants' participation hinged on the participation of the others.[91]

The Publisher Defendants argue that Plaintiffs' allegations fail because they do not allege "any direct communications among the Publishers."[92] But "anticompetitive coordination" need not occur through direct communications; it "can also be arranged through public signals and public communications."[93] Plaintiffs have alleged both in furtherance of the conspiracy. First, the Defendants publicly announced that they had entered into agency agreements and, consistent with *Apple*, the "very act of signing a Contract . . . signaled a clear commitment" to facilitate "their collective action."[94] ¶¶ 50, 62-73. Nor was it necessary for Defendants to announce publicly that they had entered into the exact same terms that the *Apple* court had deemed to be illegal,[95] given that each Publisher Defendant was under antitrust scrutiny, knew what was in its own contract, and knew from Defendants' signaling that Amazon offered each Publisher Defendant the same terms. ¶¶ 62-73.

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[91] Defendants misplace their reliance on *Howard Hess Dental Labs. Inc. v. Dentsply Int'l, Inc.*, where, unlike Plaintiffs here, the plaintiffs asked the court "to *infer* that the Dealers [the horizontal competitors] were aware of each other's involvement in the conspiracy." 602 F.3d 237, 255 (3d Cir. 2010) (emphasis added), and the plaintiffs failed to provide "enough factual matter to suggest" that the horizontal competitors knew that the defendant was using its contracts with them "to squash its competitors." *Id.* at 258.

[92] ECF 100 at 9.

[93] *In re Delta/AirTran Baggage Fee Antitrust Litig.*, 733 F. Supp. 2d 1348, 1360 (N.D. Ga. 2010).

[94] *Apple*, 791 F.3d at 317.

[95] Publisher Mot. at 9.

The Publisher Defendants also argue that their "vertical distribution agreements with Amazon" should be analyzed under the rule of reason.[96] But the Second Circuit rejected the same argument in *Apple*, holding that the "relevant agreement in restraint of trade" was "not Apple's vertical Contracts with the Publisher Defendants;" but "the horizontal agreement that Apple organized among the Publisher Defendants to raise ebook prices."[97] It further explained that its holding was consistent with *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.* because there the Supreme Court "made clear that it was addressing only the lawfulness of the manufacturer's vertical agreements and not the plaintiff's claim that the manufacturer also participated in an unlawful horizontal cartel with competing retailers."[98] For the same reasons, Plaintiffs plausibly allege a *per se* violation.

III. Even if analyzed under the rule of reason, the complaint sufficiently alleges harm to competition.

To state a claim under the rule of reason, Plaintiffs need only plead an anticompetitive effect in a relevant market arising from the claimed violation.[99] In *Apple*, Judge Cote held in the alternative that the Publisher Defendants' arrangement violated Section 1 under the rule of reason because it eliminated competitive pricing and allowed the Publisher Defendants to raise eBook prices.[100]

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[96] Publisher Mot. at 19-20; *id.* at 11.

[97] *Apple*, 791 F.3d at 323; *see also eBooks*, 859 F. Supp. 2d at 692 ("the CAC plausibly alleges a horizontal agreement among the publishers, furthered by Apple, to raise the prices of eBooks and eliminate retail competition," which is "*per se* unreasonable"); *id.* at 686 ("coordinating a horizontal agreement among publishers to raise prices and eliminating horizontal price competition among Apple's competitors at the retail level . . . . is a horizontal agreement").

[98] *Apple*, 791 F.3d at 323, 324 (citing 551 U.S. at 907-08). *See* ECF 100 at 20 (arguing incorrectly that *Leegin* requires the Publisher Defendants' conduct to be analyzed under the rule of reason).

[99] *See, e.g.*, *CDC Techs., Inc. v. IDEXX Labs., Inc.*, 186 F.3d 74, 80 (2d Cir. 1999).

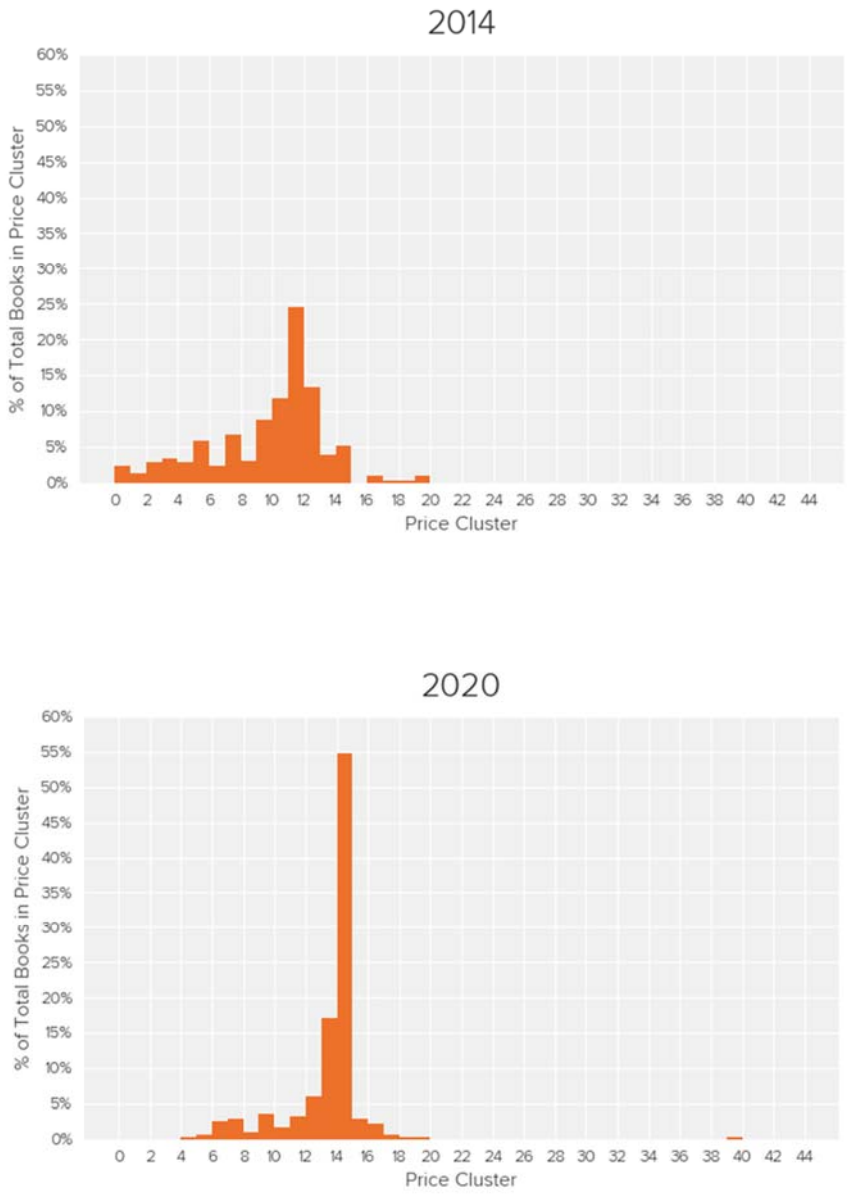
[100] *United States v. Apple, Inc.*, 952 F. Supp. 2d at 694.

Because Plaintiffs here allege the same competitive harm, their claim would readily withstand dismissal if the Court applied the rule of reason analysis. ¶¶ 74-87, 95-103.

A. Plaintiffs have alleged significant price increases caused by the conspiracy.

Under the rule of reason, allegations that prices have increased in the relevant market satisfy the required element of harm to competition.[101] Plaintiffs have plainly alleged price increases. *First*, the complaint alleges that the week after each of their respective agency contracts with Amazon took effect, "Penguin increased its eBook prices by 30.4%, HarperCollins by 29.3%, Simon & Schuster by 15.8%, Macmillan by 10.7%, and Hachette Book Group by 8.3%." ¶ 98. *Second*, book sales data analyzed by Nielsen Book (now known as NPD BookScan) found that the "return of agency pricing by the Big Five trade houses in 2015 raised e-book prices by an average of $3, leveling off at about $8 per book." ¶ 97. *Third*, as the before-and-after pricing charts discussed above demonstrate, "as soon as the Big Five entered into their combined agency and MFN agreements, first with Apple and now with Amazon, they raised trade eBook prices and maintained them at supracompetitive levels." ¶ 99. *See also* section II.C.4. And, *fourth*, the following bar graphs show that "[a]fter adjusting for inflation, trade eBook prices in 2014 clustered around $12 and only about 5% of titles sold for around $15," whereas in 2020, "55% of titles sold for around $15 and less than 5% sold around $12". ¶ 101.

[101] *See, e.g.*, *Todd*, 275 F.3d at 214.



These facts unquestionably allow a plausible inference of anticompetitive effects in a relevant market at this stage of the litigation.

In response to Plaintiffs' price-effect allegations, the Publisher Defendants assert that the alleged facts are "misleading" and "cherry picked."[102] Yet not only is such an attack unavailable at

[102] Publishers Mot. at 21.

the pleading stage, but it is unsupported in any event. Plaintiffs do not simply "assume" that consumers "would have paid less for eBooks"; they demonstrate that would have paid less through their before-and-after pricing charts. ¶ 99.

The Publisher Defendants also contend that their actions did not result in market-wide price increase.[103] But the Publisher Defendants control 80% of the trade book market, and as the before-and-after pricing charts show, *all of the Publisher Defendants* raised prices significantly in the immediate aftermath of entering into the new agency agreements with Amazon. ¶¶ 1, 99. Moreover, because such price increases would result in loss of market share for any Publisher Defendant acting alone, this parallel pricing conduct reflects coordination among Publisher Defendants.[104]

Finally, even if the anticompetitive effects were solely the result of vertical agreements (and they are not), the aggregate effects alleged by Plaintiffs would be sufficient to support a rule of reason claim.[105]

B. Plaintiffs need not (but do) allege market power.

Defendants also argue that Plaintiffs have not alleged that they have market power.[106] As an initial matter, that argument is misguided because, as the Supreme Court has held, allegations of market power are unnecessary when there are plausible allegations of a price increase.[107] The Second

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[103] Publishers Mot. at 21.

[104] *See* section I.B.3.c above.

[105] *See* section III.B below.

[106] Publishers Mot. at 20, 22-24; Amazon Mot. at 14-16.

[107] *See FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 460-61 (1986) ("Since the purpose of the inquiries into market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition, proof of actual detrimental effects, such as a reduction of output, can obviate the need for an inquiry into market power, which is but a surrogate for detrimental effects.").

Circuit likewise explained in *K.M.B. Warehouse Distribs., Inc. v. Walker Mfg. Co.* that, "[i]f a plaintiff can show an actual adverse effect on competition, . . . we do not require a further showing of market power."[108]

While Plaintiffs need not allege market power, they have clearly defined a relevant market—the retail sale of trade eBooks in the United States—and alleged that Publisher Defendants control 80% of trade books sales, which encompasses trade eBook sales. ¶¶ 1, 113, 124, 166, 187. Relying on *Bookhouse*, however, the Publisher Defendants argue that "Plaintiff cannot sum the Publisher Defendants' market shares to show that the Publisher Defendants have market power collectively."[109] But the Supreme Court has long held that is precisely how it should be assessed. When a defendant enters into a series of vertical agreements, the anticompetitive effect is not measured by the separate effect of each individual agreement, but rather by their aggregate effect.[110] For example, in *Standard Oil Co. v. U.S.*, the Court evaluated the extent of competition foreclosed by the aggregate "proportion of retail sales of petroleum" affected by the defendant's vertical exclusive dealing arrangements with 5,937 independent retail dealers.[111] And in *Ohio v. Am. Express Co.*, the Court held that plaintiffs could have prevailed by showing that the cumulative effect of the defendant's vertical agreements with 3.4 million retail merchants increased costs, reduced output, or

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[108] 61 F.3d 123, 129 (2d Cir. 1995); *see also Todd*, 275 F.3d at 206 ("In this Circuit, a threshold showing of market share is not a prerequisite for bringing a § 1 claim."); *accord Toys "R" Us, Inc. v. FTC*, 221 F.3d 928, 936-37 (7th Cir. 2000) (addressing market power in the alternative and finding that "however TRU's market power as a toy retailer was measured, it was clear that its boycott was having an effect in the market").

[109] Publishers Mot. at 22.

[110] *Standard Oil Co. v. U.S.*, 337 U.S. 293, 295, 314 (1949); *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2282, 2287 (2018).

[111] 337 U.S. at 295, 314.

stifled competition in the relevant market increased costs, reduced output, or stifled competition in the relevant market.[112]

Because the Big Five collectively represent 80% of the market, the aggregate effect of Amazon's anticompetitive arrangements with all Big Five members is to stifle competition in 80% of the eBooks market. Multiplying Amazon and the Publisher Defendants' respective shares, as the *Bookhouse* court proposed, is therefore inconsistent with Supreme Court precedent.[113] By that logic, there could be no impact on the market in the Apple litigation because Apple had not entered the market and had 0% market share when it finalized its agreements with the Publisher Defendants.[114] But even under the erroneous *Bookhouse* approach, the agreements between the Publisher Defendants and Amazon would affect approximately 72% of the trade eBook market (*i.e.*, 80% x 90%). ¶¶ 1, 131. This is sufficient to establish market power regardless of actual anticompetitive effects.[115]

In addition, the "inherently anticompetitive nature" of Defendants' behavior, the competitive restraints they placed on Amazon's retail competitors, and the resulting reduction on consumer choices provide "other grounds" to suggest that the Defendants' agreements have harmed

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[112] 138 S. Ct. at 2282, 2287. *See also United States v. Microsoft Corp.*, 253 F.3d 34, 68-71 (D.C. Cir. 2001) (affirming judgment against defendant based on aggregate effect of defendant's exclusive agreements with 14 of the top 15 internet-access providers); *In re Keurig*, 383 F. Supp. 3d at 235-36 (denying motion to dismiss claim based on multiple vertical agreements between defendants and large distributors and retailers that in aggregate foreclosed 80% of the market to competitors).

[113] *Bookhouse*, 985 F. Supp. 2d at 622.

[114] *See Apple*, 791 F.3d at 308.

[115] *Broadway Delivery Corp. v. United Parcel Serv., Inc.*, 651 F.2d 122, 129 (2d Cir. 1981) ("a share above 70% is usually strong evidence of monopoly power"); *see also New York v. Actavis, PLC*, 2014 U.S. Dist. LEXIS 172918, at *102 (S.D.N.Y. Dec. 11, 2014) (Depending "on other market factors, courts in the Second Circuit have permitted findings of market power with shares less than 50%.") (collecting cases).

competition[116]—and for the same reasons explained by Judge Cote in *Apple*: were "it were necessary to analyze" the case "under the rule of reason," the agreements there "destroyed" competition because they "compelled the Publisher Defendants to move Amazon and other retailers to an agency model for the distribution of e-books, removed the ability of retailers to set the prices of their e-books and compete with each other on price, relieved Apple of the need to compete on price, and allowed the Publisher Defendants to raise the prices for their e-books, which they promptly did on both New Releases and NYT Bestsellers, as well as backlist titles."[117] Judge Livingston, who wrote the Second Circuit panel's majority opinion, affirming Judge Cote's decision, separately opined that "the same evidence supporting our determination that *per se* condemnation is the correct way to dispose of this appeal also supports at most a 'quick look' inquiry under the rule of reason."[118]

And on top of the destruction of price competition, the Plaintiffs also allege a reduction in consumer choice: "Competitors lack any incentive to offer promotional advantages or alternative business models, like eBook rentals, to gain a following because Amazon demands that the Big Five offer that same option on the Amazon platform."[119] ¶ 107. That "results in higher consumer prices, fewer technical innovations in eBooks, and fewer innovations in the business of distributing eBooks." *Id.* While the Publisher Defendants attempt to dismiss the reduction of consumer choice as "unsupported legal conclusion,"[120] it is the parity provisions in their own agreements that make it

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[116] Publishers Mot. at 23-24.

[117] *United States v. Apple Inc.*, 952 F. Supp. 2d at 694.

[118] *Apple*, 791 F.3d at 330. *See* Publishers Mot. at 20 n.4 (disregarding the *Apple* litigation and arguing against the application of the quick-look).

[119] *See Laumann v. Nat'l Hockey League*, 105 F. Supp. 3d 384, 397 (S.D.N.Y. 2015) ("anticompetitive conduct is injurious if it limits consumer options").

[120] Publishers Mot. at 21-22.

impossible to know what innovations may have developed in the eBooks market. That is precisely the problem.

In sum, by showing supracompetitive trade eBook pricing Plaintiffs adequately plead actual harm to competition. In the alternative, they also adequately allege market power and ample grounds suggesting anticompetitive harm.

IV. Plaintiffs adequately allege claims for monopolization and conspiracy to monopolize.

A. Plaintiffs allege a conspiracy and intent to monopolize.

The same factual allegations supporting a concert of action to restrain trade also support Plaintiffs' claim that the Publisher Defendants conspired with Amazon to acquire or maintain its monopoly in the eBook market.[121] Both the Publisher Defendants and Amazon take issue with Plaintiffs' allegation that the Publisher Defendants intended to confer a monopoly on Amazon. For example, the Publisher Defendants argue that any alleged intent to help Amazon monopolize the eBook market is contradicted by allegations that Publisher Defendants want to "diversify their distribution."[122] And Amazon argues that "Plaintiffs do not plausibly allege that the Publisher Defendants actually intended to make Amazon a monopolist" and that "any seller of a product . . . would prefer multiple competing buyers."[123]

But Defendants ignore what Plaintiffs actually plead: "*In a competitive market*, it would be in each of the Big Five Defendants' own economic self-interest to expand their share of the retail sales of their eBooks and diversify their distribution." ¶ 149. Plaintiffs stand by that allegation: absent their collective agreement, it would have been in each publisher's self-interest to expand their market

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[121] *See* Section I above.

[122] Publishers Mot. at 25.

[123] Amazon Mot. at 16 and 17 (quotation omitted).

share and diversity distribution. But as it actually happened, the Publisher Defendants did not act individually but, instead, entered into a horizontal agreement. They did so—knowing that they were giving up what would have been in their economic self-interest if acting alone—because they wanted to gain control over retail pricing and maintain supracompetitive trade eBook prices. ¶¶ 149, 157.

The Publisher Defendants also argue that allegations of their intent to help Amazon monopolize the eBook market are undermined by other allegations describing the Big Five's fear of "Amazon's growing power."[124] But, as previously discussed, the Publisher Defendants' fear of Amazon is precisely the impetus for the Publisher Defendants entering into anticompetitive agreements. *See* Section I.C above.

E&L Consulting, Ltd. v. Doman Indus. Ltd.[125] cited by Amazon, supports Plaintiffs, not Defendants. Amazon cites that decision for the proposition that "any seller of a product … would prefer multiple competing buyers,"[126] but Amazon takes that snippet out of context. The full sentence in the decision reads: "Like any seller of a product, a monopolist would prefer multiple competing buyers *unless* an exclusive distributorship arrangement provides *other benefits* in the way of, for example, product promotion or distribution."[127] That full statement supports Plaintiffs' allegations: When acting individually in a competitive market, the Publisher Defendants preferred multiple buyers. They acted collectively in this case because, by eliminating competition through agreements with Amazon, they were provided "other benefits"—*i.e.*, the power to fix supracompetitive prices.

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[124] Publishers Mot. at 25; Amazon Mot. at 17.

[125] 472 F.3d 23 (2d Cir. 2006).

[126] Amazon Mot. at 17 (ellipsis in Amazon's quotation).

[127] 472 F.3d at 30 (emphasis added).

B. Plaintiffs plausibly allege that Amazon has monopoly power.

Amazon argues that Plaintiffs' do not plausibly allege that it has monopoly power,[128] but respectfully, that argument does not pass the laugh test. To be clear, Plaintiffs are not combining Amazon's market share with that of Publisher Defendants in claiming that the MFNs give Amazon the ability to *control price*.[129] As Plaintiffs allege, "Amazon sells more books than any other single retail outlet in history," and it "enjoys nearly 90%" of the *retail* eBook market. ¶¶ 127, 131.

Amazon urges the Court to find that Amazon's share of the retail market does not count because Amazon "does not directly control the prices charged" by Publisher Defendants.[130] But *Apple Inc. v. Pepper* likewise concerned an alleged monopolist that like Amazon operates under an agency model and charges a percentage commission on the price set by the vendor.[131] As the Supreme Court held there: the "arrangement between the [publisher] and the retailer" should not determine "whether a monopolistic retailer can be sued" by a consumer who purchased "directly from the retailer" and "paid a higher-than-competitive price."[132] "If the retailer's unlawful monopolistic conduct caused a consumer to pay the retailer a higher-than-competitive price, the consumer is entitled to sue the retailer under the antitrust laws."[133] And while Amazon is correct that

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[128] Amazon Mot. 18-19.

[129] Amazon Mot. at 19-21.

[130] Amazon Mot. at 21.

[131] 139 S. Ct. 1514 (2019).

[132] *Id.* at 1523.

[133] *Id.* (holding that consumers who bought apps from Apple's electronic retail store were direct purchasers who could sue it for alleged monopolization).

Pepper "did not consider any other defenses Apple might have,"[134] its holding dispenses with Amazon's argument that it cannot be considered a monopolist if it does not directly control prices.

And as Amazon itself acknowledges, monopoly power requires the ability "to control prices *or* exclude competition."[135] Amazon has used the MFNs in its agreements with the Publisher Defendants to eliminate the discounting of its competitors and to ensure that no rival retail platform can differentiate itself from, or otherwise compete with, Amazon. ¶¶ 6, 74-87. Indeed, according to the House Antitrust Committee, whether Amazon uses explicit MFN clauses (business-model-parity, agency-price-parity, agency-commission-parity, price-promotion-parity, selection-parity, or discount-pool provisions) or notice provisions that achieve the same ends, the objective is always the same: to prevent "publishers from partnering with any of Amazon's competitors" and to reinforce "Amazon's 'stranglehold' and 'control' over book distribution." ¶ 107. Amazon's "[c]ompetitors lack any incentive to offer promotional advantages or alternative business models, like eBook rentals, to gain a following because Amazon demands that the Big Five offer that same option on the Amazon platform." *Id.* All this is more than sufficient to allege Amazon's possession of monopoly power.

V. Plaintiffs have standing to bring claims against Amazon for eBooks purchased from Publisher Defendants through other retail platforms.

A. Under *Illinois Brick*, Plaintiffs may bring claims against Amazon based on their direct purchases of trade eBooks from non-Amazon retailers.

Amazon argues that individual Plaintiffs who purchased Publisher Defendants' eBooks from "retailers other than Amazon" lack standing to sue Amazon, because they are "indirect purchasers"

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[134] Amazon Mot. at 21 n.8 (citing 139 S. Ct. at 1519).

[135] Amazon Mot. at 18 (citing *Tops Mkts., Inc. v. Quality Mkts., Inc.,* 142 F.3d 90 (2d Cir. 1998)).

under *Illinois Brick*.[136] That argument is incorrect. Indeed, Amazon acknowledges that there is authority permitting "purchasers to bring claims against the alleged co-conspirators of the seller with whom they directly dealt," but it argues that the Second Circuit has not addressed "this exception." But as Amazon's own authority "aptly noted, this co-conspirator exception is not really an exception at all. . . . If the direct purchaser conspires to fix the price paid by the plaintiffs, then the plaintiffs pay the fixed price directly and are not indirect purchasers (i.e., there is no pass-on theory involved)."[137] And as the Fourth Circuit likewise explained in *Dickson v. Microsoft*, which Amazon also relies on, "the rationale for concluding that *Illinois Brick* does not apply to a price-fixing conspiracy is that no overcharge has been passed on to the consumer."[138]

Given that the very case law it relies on rejects the notion that conspirator-liability is an exception to the direct purchaser rule, Amazon's argument about "the importance of rejecting judicially-created exceptions" goes nowhere. The same holds true for Amazon's puzzling criticism of *Laumann*, where Judge Scheindlin rejected the argument that suing a co-conspirator of the seller from whom the purchaser directly purchased is "an exception to *Illinois Brick*."[139] Under the analysis

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[136] *Id.* at 22-23 (citing *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 745-46 (1977)).

[137] *In re ATM Fee Antitrust Litig.*, 686 F.3d 741, 750 (9th Cir. 2012). *See also Paper Sys. Inc. v. Nippon Paper Indus. Co., Ltd.*, 281 F.3d 629, 632 (7th Cir. 2002) (ruling that "[n]othing in *Illinois Brick* displaces the rule of joint and several liability, under which each member of a conspiracy is liable for all damages caused by the conspiracy's entire output" and, thus, "any direct purchaser from any conspirator can collect its own portion of damages (that is, the damages attributable to its direct purchases) from any conspirator"); *Nat'l Football League's Sunday Ticket Antitrust Litig. v. DirecTV, LLC*, 933 F.3d 1136, 1157 (9th Cir. 2019) ("[W]hen co-conspirators have jointly committed the antitrust violation, a plaintiff who is the immediate purchaser from any of the conspirators is directly injured by the violation[;] . . . *Illinois Brick* is simply not applicable.").

[138] 309 F.3d 193, 215 (4th Cir. 2002). Moreover, the plaintiff in *Dickson v. Microsoft Corp.* did not claim to have purchased the defendant's allegedly overpriced product from a business that conspired with the defendant to fix the price of that product. *Id.* *See* Amazon Mot. at 22.

[139] *Laumann*, 907 F. Supp. 2d at 482 (citing *Paper Sys. Inc.*, 281 F.3d at 631-32 (emphasis in original)).

employed by its own case law, Amazon's characterization of *Laumann* as a decision applying a "co-conspirator exception" is incorrect and renders its entire argument against the creation of "judicially-created exceptions" irrelevant.[140] Because Amazon is a co-conspirator of the Big Five, it is joint and severally liable for all of Plaintiffs' direct purchases from them, whether or not on its own retail platform. ¶ 2.

B. Plaintiffs have standing under *AGC* to bring claims based on their direct purchases of trade eBooks from Publisher Defendants through non-Amazon retailers.

Amazon also argues that individual Plaintiffs who purchased Publisher Defendants' eBooks from "retailers other than Amazon" lack standing to sue Amazon under *Associated General Contractors* because they are not "efficient enforcers" of the antitrust laws.[141] This argument is meritless. The four efficient-enforcer factors require a court to consider: "(1) the directness or indirectness of the asserted injury; (2) the existence of an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement; (3) the speculativeness of the alleged injury; and (4) the difficulty of identifying damages and apportioning them among direct and indirect victims so as to avoid duplicative recoveries."[142]

The asserted injury here is the payment of supracompetitive prices, and such "injury plainly is of the type the antitrust laws were intended to prevent."[143] As discussed above, this is a direct injury experienced by consumers purchasing Publisher Defendants' trade eBooks from them at

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[140] Amazon Mot. at 23 n.10.

[141] Amazon Mot. at 23-25 (citing *Assoc. Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519 (1983)).

[142] *In re Keurig*, 383 F. Supp. 3d at 220 (citing *In re DDAVP Direct Purchaser Antitrust Litig.*, 585 F.3d 677, 688 (2d Cir. 2009)).

[143] *Id.* at 221 (citing *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977)).

supracompetitive prices as result of the conspiracy.[144] Such consumers are "significantly motivated due to their natural economic self-interest in paying the lowest price possible."[145] And while Amazon attempts to muddy the waters,[146] Plaintiffs' overcharge injury is not speculative but of the type routinely established by econometric analysis as litigation advances to the merits. Nor are there apportionment difficulties, because the direct consumer Plaintiffs in this case were purchasing for their own end-uses. So "all four efficient enforcer factors support" antitrust standing under *AGC*.[147]

Amazon attempts to draw an analogy to *Paycom Billing Servs., Inc. v. Mastercard Int'l, Inc.* by focusing on the potential actions of other retailers, who are unable to compete with Amazon on price because of the conspiracy.[148] The Second Circuit rejected this very argument in *In re DDAVP Direct Purchaser Antitrust Litigation*.[149] There the defendants—like Amazon here—argued that their anticompetitive conduct targeted defendants' competitors and therefore the harm to the direct purchaser plaintiffs was too far removed.[150] The Second Circuit disagreed because even though the direct purchasers' injuries were "derivative of the direct harm experienced by the defendants' competitors, harming competitors was simply a means for the defendants to charge the plaintiffs

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[144] *See, e.g., In re Nat'l Football League's Sunday Ticket Antitrust Litig.*, 933 F.3d at 1157 ("[W]hen co-conspirators have jointly committed the antitrust violation, a plaintiff who is the immediate purchaser from any of the conspirators is directly injured by the violation.").

[145] *In re Keurig*, 383 F. Supp. 3d at 222.

[146] Amazon Mot. at 24.

[147] *In re Keurig*, 383 F. Supp. 3d at 223; *see also Laumann*, 907 F. Supp. 2d at 484 (finding standing under *AGC* for "[p]urchasers of the out-of-market packages, whether television or Internet, [who] are clearly consumers in the relevant market of professional hockey and baseball games, and allege not only increased price, but also reduced consumer choice from lack of competition").

[148] Amazon Mot. at 24-25 (citing 467 F.3d 283 (2d Cir. 2006)).

[149] 585 F.3d 677 (2d Cir. 2009).

[150] *Id.* at 689; *see also In re Keurig*, 383 F. Supp. 3d at 222.

higher prices."[151] It also held that "defendants' competitors, unlike the plaintiffs, would be seeking lost profits, not overcharges. . . . Denying the plaintiffs a remedy in favor of a suit by competitors would thus be likely to leave a significant antitrust violation undetected or unremedied."[152]

Plaintiffs' overcharge injuries are separate and distinct from the injuries suffered by Amazon's retail competitors, not derivative of them. As such, *AGC* standing is clear; only direct purchasers, like Plaintiffs, have standing to sue for overcharges. Nor are Plaintiffs' injuries speculative. Once Publisher Defendants raised their eBook prices following the reintroduction of the agency model agreements, those prices necessarily became artificially inflated across the board, directly injuring the Plaintiffs that purchased them from Publisher Defendants through any retail platform. ¶¶ 78-81, 107. Thus, Plaintiffs have standing under *AGC* to bring claims based on their direct purchases from non-Amazon retailers.

Finally, for all the reasons outlined in this brief, Plaintiffs plausibly allege a broad conspiracy among the Publisher Defendants and Amazon to control eBook prices. Alternatively, Plaintiffs' allegations also plausibly demonstrate that Amazon maintains its monopoly by colluding individually with each Publisher Defendant to raise eBook prices and exclude price competition from other retailers. Should the Court find allegations of a conspiracy between the Publisher Defendants deficient, Plaintiffs ask leave to amend to assert their alternative monopoly claim.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request the Court to deny Defendants' motions to dismiss in their entirety; however, if either motion is granted in any part, Plaintiffs request leave to amend.

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[151] *Id.* at 688.

[152] *Id.* at 689.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the above document was served on ALL DEFENSE COUNSEL OF RECORD through the Court's electronic filing service on November 1, 2021, which will send notification of such filing to the e-mail addresses registered.

/s/ Steve W. Berman
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