UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE AMAZON.COM, INC. EBOOK ANTITRUST LITIGATION	Case Number 1:21-cv-351-GHW-DCF **JOINT RULE 26(F) REPORT AND DISCOVERY PLAN**

I. MEETING

Pursuant to Rule 26(f), a meeting was held telephonically on June 21, 2021,[1] and was attended by the following attorneys:

For Plaintiffs:[2]

- Barbara Mahoney
- Eamon Kelly

For Defendants:

- Jonathan Pitt (Amazon)
- Rich Snyder (Hachette)
- C. Scott Lent (HarperCollins)
- Joel Mitnick (Macmillan)
- Zachary Schrieber (Macmillan)
- Margaret Rogers (Penguin Random House)
- Jeff White (Simon & Schuster)
- Yehuda Buchweitz (Simon & Schuster)
- Lauren Morris (Simon & Schuster)
- Robert Swenson (Simon & Schuster)

II. NATURE OF THE CASE

1. Plaintiffs' Statement:

Defendants Hachette, HarperCollins, Macmillan, Penguin Random House and Simon & Schuster ("Big Five") are the five largest publishers and Defendant Amazon is the largest distributor of trade eBooks.[3] A decade earlier Judge Cotes presided over a virtually identical

[1] The Court ordered the parties in seven related cases to participate in a 26(f) conference. [ECF 56.] Subsequently, the Court consolidated six of the seven cases and issued an amended scheduling order under the present caption. [ECF 66 and 72.] Concurrent with this filing, the parties filed a separate 26(f) report in *Bookends & Beginnings v. Amazon*, Case No. 21-cv-02584-GHW-DCF, the one remaining case not included in the consolidation order.

[2] The Court appointed interim lead counsel, including Ms. Mahoney, to represent Plaintiffs and the proposed class in this consolidated action. [ECF 54.]

[3] "EBooks" refer to electronic books. "Trade" books refers to general interest fiction and non-fiction books, as distinguished from academic textbooks, reference materials, and other

antitrust lawsuit against the Big Five concerning their eBook distribution agreements with Apple.[4] Plaintiffs here allege that the Big Five Defendants' eBook distribution agreements with Defendant Amazon employ the same anticompetitive devices, which Judge Cotes—affirmed on appeal—previously found to violate Section 1 of the Sherman Act.[5] In both this and the prior *Apple* conspiracy case, the Big Five conspired with a retail distributor to raise trade eBook prices by combining an agency model of sales (where each publisher sets its own retail prices) with a most favored nations clause (MFN) (which ensures that every other retail site adheres to the same prices without engaging in price competition).[6] These anticompetitive agreements led to immediate, substantial, and lasting price hikes in the U.S. trade eBook market first with Apple (until Judge Cotes enjoined the agreements) and again with Amazon several years later.[7]

Defendants have publicly admitted that Amazon's agreements with each of the Big Five currently contain, and for the last six years have contained, both these components. Whereas in 2010, Amazon "yelled, screamed, and threatened" in response to the Big Five's demand that Amazon allow them to sell under an agency model,[8] Defendants publicly announced that

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texts. Consolidated Amended Complaint (CAC), ¶ 1; *United States v. Apple Inc.*, 952 F. Supp. 2d 638, 648 n.4 (S.D.N.Y. 2013).

[4] *See Apple*, 952 F. Supp. 2d 638, *aff'd*, 791 F.3d 290 (2d Cir. 2015), *cert. denied*, 136 S. Ct. 1376, 194 L. Ed. 2d 360 (2016).

[5] *United States v. Apple, Inc.*, 791 F.3d 290 (2d Cir. 2015). The Big Five settled for $166 million pre-trial, Apple settled for $450 million after its liability was affirmed on appeal. *In re Electronic Books Antitrust Litig.*, 639 F. App'x 724, 726-27 (2d Cir. 2016).

[6] *Apple*, 791 F.3d at 303-05; CAC, ¶¶ 2, 3; 98-103.

[7] *Id.* at 310-11; CAC, ¶¶ 3, 4; 98-103; *see also In re Electronic Books Antitrust Litig.*, 639 F. App'x 724, 727 (2d Cir. 2016) (consumer losses resulting from the conspiracy estimated to be approximately $280 million).

[8] CAC, ¶ 66; Greg Sandoval, *Apple ebooks trial: Amazon 'yelled ... and threatened' when publishers tried to control prices*, The Verge (Jun. 6, 2013), https://www.theverge.com/2013/6/6/4398648/apple-ebooks-trial-amazon-yelled-when-publishers-tried-to-control-prices.

Amazon acceded to this demand when they renegotiated their contracts in 2014 and 2015.[9] The Big Five also admitted that Amazon employs an MFN to prevent its retail rivals from discounting eBooks when the publishers approved a 2020 letter to the House Judiciary Committee on Antitrust from a publishers' trade organization, where the CEOs of each of the Big Five serve on the board of directors.[10] The House Antitrust Committee also found that Amazon has consistently employed MFNs or their equivalents in its contracts with trade publishers.[11]

Amazon's agreements with the Big Five are illegal for the very same reasons Judge Cote found them to be illegal in *Apple*—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

[9] CAC, ¶¶ 67-71; *S&S, Amazon Agree on 'Version' of Agency Pricing*, Publishers Weekly (Oct. 21, 2014, https://www.publishersweekly.com/pw/by-topic/industry-news/industry-deals/article/64461-s-s-amazon-agree-on-version-of-agency-pricing.html; Jillian D'Onfro, *Amazon and Big-5 Publisher Hachette Finally end their Pricing War*, Business Insider (Nov. 13, 2014), https://www.businessinsider.com/amazon-hachette-agreement-2014-11; *Macmillan Strikes Deal with Amazon, but "Irony Prospers in the Digital Age,"* The Authors Guild (Dec. 19, 2014), https://www.authorsguild.org/industry-advocacy/macmillan-strikes-deal-with-amazon-but-irony-prospers-in-the-digital-age/; *No Authors Held Hostage as HarperCollins and Amazon Come to Terms*, The Authors Guild (Apr. 16, 2015), https://www.authorsguild.org/industry-advocacy/no-authors-held-hostage-as-harpercollins-and-amazon-come-to-terms; *For the Big Five, Agency Now Holds Sway Across the Board*, Author's Guild (Sep. 9, 2015), https://www.authorsguild.org/industry-advocacy/for-the-big-five-agency-now-holds-sway-across-the-board/; *Amazon, HarperCollins reach multi-year publishing deal*, First Post (Apr. 14, 2015).

[10] Letter from Maria A. Pallante, Pres. & CEO, Ass'n of Am. Publishers, Mary E. Rasenberger, Exec. Dir., Authors Guild, Allison K. Hill, CEO, Am. Booksellers Ass'n, to Hon. David. N. Cicilline, Chairman, Subcomm. on Antitrust, Commercial and Admin. Law of the H. Comm. on the Judiciary, 3 (Aug. 17, 2020), https://publishers.org/wpcontent/uploads/2020/08/Joint-Letter-to-Rep-Cicilline-081720.pdf.

[11] House Judiciary Committee, Investigation of Competition in Digital Markets, Oct. 5, 2020 at 295-96, https://judiciary.house.gov/uploadedfiles/investigation_of_competition_in_digital_markets_majority_staff_report_and_recommendations.pdf ("House Report"); *Id.* at 295-96.

on price, and allowed the [Big Five] to raise the prices for their e-books, which they promptly did[.]"[12] In affirming Judge Cotes' decision, the Second Circuit likewise recognized that the Big Five's agreements improperly permitted them to set trade eBook prices, while ensuring that "Apple would not need to compete with [its rivals] on price[.]"[13] Like eBook consumers in the *Apple* case, Defendants here have harmed Plaintiffs and class members by causing them to overpay for trade eBooks that would have sold for a lower price in a competitive market. Indeed, after renegotiating with Amazon in 2014 and 2015, the Big Five immediately raised eBooks prices as much as 30% and—in the agreed absence of retailer discounting—trade eBook prices have remained elevated ever since.[14] Further, whereas Apple accounted for only about 20% of eBook sales when it conspired with the Big Five, Amazon currently has a lock on nearly 90% of eBook sales.[15] Plaintiffs allege that Amazon acquired and maintained its monopoly power in the U.S. retail market for trade eBooks not through superior service, pricing, or business acumen, but by enforcing Defendants' price restraints to substantially foreclose retail competition.[16]

Plaintiffs also briefly respond to Defendants' incorrect arguments in support of dismissal:

Conspiratorial conduct: The Big Five argue that Plaintiffs have not alleged conspiratorial conduct, by which they presumably mean clandestine conduct, but that is not

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

[13] *Apple,* 791 F.3d at 304.

[14] CAC, ¶¶ 4, 95-103.

[15] CAC, ¶¶ 3, 55; House Report at 295; Marco Tabini, *Apple grabs 22 percent of eBook market with iBooks* Macworld (Jun. 7, 2010), https://www.macworld.com/article/1151813/ibooks.html.

[16] CAC, ¶¶ 3, 9, 92, 107. Compare *Apple*, 791 F.3d at 334 (By "aligning its interests with those of the Publisher Defendants and offering them a way to raise prices across the ebook market," Apple "could gain quick entry into the market on extremely favorable terms, including the elimination of retail price competition" with its retail competitors).

necessary to establish a violation of Section 1. The Sherman Act prohibits all unreasonable restraints of trade, "whether by formal agreement or otherwise."[17] Contractual provisions—an agency model coupled with an MFN or the functional equivalents—that "specifically address the conduct the Plaintiffs argue is unlawful" satisfy the requirement of a contract to restrain trade.[18]

Parallel conduct/horizontal agreements: The Big Five incorrectly argue that Plaintiffs have only alleged parallel conduct; Amazon incorrectly argues that Plaintiffs allege purely vertical agreements. Courts "have long recognized the existence of 'hub-and-spoke' conspiracies in which an entity at one level of the market structure, the 'hub,' coordinates an agreement among competitors at a different level, the 'spokes.'"[19] As previously held in the *Apple* litigation, it is sufficient to assert a hub-and-spoke horizontal conspiracy facilitated by a vertical participant by alleging that Amazon offered each of the Big Five the same contractual terms, that each of the Big Five knew that they were all agreeing to the same terms, and that the acceptance of such terms "would have contravened [each publisher] defendant's self-interest in the absence of similar behavior by its rivals."[20] Amazon acted against its own self-interest, when it gave up its profitable practice of retailer discounting, but it did so with knowledge that the Big Five would not allow Amazon's competitors to compete with Amazon on price.[21] Co-conspirators "need not

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[17] *California ex rel. Harris v. Safeway, Inc.*, 651 F.3d 1118, 1133 (9th Cir. 2011).

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

[19] *Apple,* 791 F.3d at 314 (citation omitted).

[20] *In re Electronic Books Antitrust Litig.*, 859 F. Supp. 2d 671, 683 (S.D.N.Y. 2012); *see also Barry's Cut Rate Stores, Inc. v. Visa, Inc.*, 2019 U.S. Dist. LEXIS 205335, at *179-84 (S.D.N.Y. Nov. 20, 2019) (analyzing the requirements of hub-and-spoke conspiracies and declining to dismiss Section 1 claim, asserting "that logically, 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 that allegedly prevent competition that might affect interchange fee rates." *Id.* at 182).

[21] CAC, ¶ 159; *Apple,* 791 F.3d at 304.

share the same motive or goal; it is sufficient to allege that the co-conspirators 'acquiesc[ed] in an illegal scheme.'"[22] In *Apple*, the Big Five were motivated by their desire to control eBook prices; while Apple was motivated by its desire to avoid directly competing with other retailers on price.[23] The same motivations apply here, where the Big Five likewise publicly expressed their desire to control prices when they entered into agreements with Amazon, and they used this agreement as an opportunity to substantially raise their price of their eBooks.[24]

MFNs can be used for anticompetitive purposes: After the Second Circuit's opinion in *Apple* and numerous other decisions that challenge the anticompetitive use of MFNs, Defendants cannot seriously contend that MFNs are "presumptively lawful."[25]

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[22] *Dickson v. Microsoft Corp*., 309 F.3d 193, 205 (4th Cir. 2002) (quoting *United States v. Paramount Pictures, Inc*., 334 U.S. 131, 161 (1948)).

[23] *Apple*, 791 F.3d at 304-05.

[24] CAC, ¶¶ 67-71; 95-103.

[25] *See, e.g.*, *Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616, 619 (1975) (MFN in union's multiemployer bargaining agreement could violate Sections 1 and 2 by sheltering union subcontractors); *Staley v. Gilead Sciences, Inc*., 2020 U.S. Dist. LEXIS 36747, at *74-81 (N.D. Cal. Mar. 3, 2020) (MFN in drug manufacturers' settlement supported Sections 1 and 2 claims, where it was allegedly used to delay entry of a generic); *Sitts v. Dairy Farmers of Am., Inc.*, 417 F. Supp. 3d 433, 472-76 (D. Vt. 2019) (denying defendant milk marketing cooperative and its subsidiary's motions for summary judgment on Sections 1 and 2 claims, where they allegedly used MFNs in agreements with milk processors to depress prices paid to dairy farmers); *In re Pool Prods. Distrib. Mkt. Antitrust Litig*, 940 F. Supp. 2d 367, 375 (E.D. La. 2013) (declining to dismiss Section 1 illegal boycott claim, where the distributor allegedly used MFNs in contracts with manufacturers to suppress its competitors' ability to compete on price); *Shane Grp., Inc. v. Blue Cross Blue Shield of Mich.*, 2012 U.S. Dist. LEXIS 170201, at *7, 18 (E.D. Mich. Nov. 30, 2012) (declining to dismiss healthcare purchasers' Section 1 claim where the defendant insurer allegedly used an MFN in its agreement with hospitals that inflated prices by providing hospitals higher reimbursement if they agreed to charge other insurers no less than the defendant); *Nat'l Recycling v. Waste Mgmt. of Mass. Inc.*, 2007 U.S. Dist. LEXIS 107664, at *8 (D. Mass. July 2, 2007) (denying defendants' summary judgment motion on Section 1 claim where they allegedly used MFNs to set a price floor for their competitors). *United States v. Delta Dental*, 943 F. Supp. 172 (D.R.I. 1996) (denying motion to dismiss Section 1 claim based on MFNs in the defendant's provider agreement that required dentists to accept lower reimbursements if they offered the defendant's competitors or uninsured consumers a lower price).

DOJ scrutiny: Defendants argue that it would be incongruent for them to enter into anticompetitive agreements while under scrutiny by the DOJ and Attorneys General. But that disregards the 2017 findings of the Directorate of Competition in the European Union, that during the Directorate's prohibition against the Big Five's use of MFNs in their eBooks agreements in Europe, Amazon and the Big Five evaded that restriction by employing notice provisions that functioned the same as the prohibited MFN.[26] Critically, Defendants admit that they have agency agreements and do not deny that their agreements contain MFNs or functionally equivalent provisions or that the Big Five capitalized on their agreements with Amazon by promptly raising their price of their eBooks.[27]

Monopoly: Amazon's contention that it cannot be liable as a monopolist because the Big Five set their own eBook prices is contrary to the Supreme Court's decision in *Apple Inc. v. Pepper*, where it rejected similar contentions, and held: "we cannot assume in all cases—as Apple would necessarily have us do—that a monopolistic retailer who keeps a commission does not ever cause the consumer to pay a higher-than-competitive price. We find no persuasive legal or economic basis for such a blanket assertion."[28] Plaintiffs plausibly allege that Amazon has caused higher consumer prices by exercising its dominant share (circa 90%) of the eBook platform market, and that it uses its monopoly power in that market to impose contractual restrictions with the Big Five that prevent its competitors from competing on price.[29] That is sufficient to hold Amazon liable.

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[26] CAC, ¶¶ 74-90.

[27] CAC, ¶¶ 74-103.

[28] *Apple Inc. v. Pepper*, ___U.S.___ , ___, 139 S. Ct. 1514, 1523 (2019).

[29] CAC, ¶¶ 184-93.

2. Publisher Defendants' Statement:

The consolidated amended complaint (the "CAC")[30] purports to allege an entirely counterintuitive conspiracy in which five publishers allegedly agreed among themselves and Amazon to reduce the number of ways in which the publishers could reach consumers of their products, and make themselves entirely dependent on Amazon in the future. Because the object of such a fanciful conspiracy would be contrary to the interest of each of the publishers, it is implausible on its face and cannot fuel the expensive and intrusive engine of antitrust litigation under *Bell Atlantic v Twombly* and its progeny. In an effort to overcome this facial implausibility, plaintiffs trot out a decade old litigation involving an alleged conspiracy among five of the then six largest publishers and Apple aimed at creating a new competitor for Amazon by stopping Amazon's discounting at the time.[31] The CAC fails to state a claim for at least the following four reasons: (1) there is absolutely no evidence – none – alleged in the complaint to support an inference of conspiracy among the publishers; (2) parallel conduct absent conspiracy is lawful under U.S. antitrust law; (3) contrary to Plaintiffs' insinuation, the Second Circuit in *Apple* did not hold that MFNs[32] are presumptively anticompetitive under U.S. antitrust law; and (4) at the time the CAC alleges the current conspiracy began (2014-2015 eBook distribution agreement negotiations between publishers and Amazon), the Publisher Defendants were

[30] Filed as ECF No. 67 in Case No. 1:21-cv-00351-GHW-DCF. This case includes a series of consolidated cases involving e-books. There is a separate case (Case No. 1:21-cv-02584-GHW-DCF) which was filed involving print books, but Plaintiff is amending its complaint on July 9.

[31] *United States v. Apple, Inc.*, 791 F.3d 290 (2d Cir. 2015) ("*Apple*").

[32] Plaintiffs characterize certain challenged contractual provisions as "most favored nations" ("MFN") clauses, including an alleged price MFN. Although the Publisher Defendants dispute this characterization, the CAC fails to state a claim even if these provisions were correctly characterized as MFNs. To the extent appropriate, Publisher Defendants will amplify this point later in this proceeding.

operating under DOJ and State AG consent decrees (settling *Apple*) by which DOJ and the States were monitoring the Publisher Defendants' competitive behavior in the eBooks market, including monitoring the very agreements challenged here between the Publisher Defendants and Amazon.

First, the CAC fails plausibly to allege facts supporting an inference of conspiracy. The CAC plaintiffs seek to stand in the shoes of the *Apple* plaintiffs even though the facts alleged in *Apple* are more than 10 years old and the context of those facts no longer exists. The *Apple* Court found that in 2010, each publisher in that case[33] feared that Amazon's pricing of eBooks threatened to "cut[] out publishers entirely" and desired to resist Amazon's price cutting. The Court also found that each publisher feared retribution by Amazon, *Apple* at 300, and that this fear led the publishers to agree to enter into contracts with Apple on terms that would have the effect of preventing Amazon from continuing its price-cutting. Only by jointly agreeing with Apple, the Court found, could the publishers confront Amazon as "an organized group" and avoid individual retribution.[34] *Apple* at 305 (internal citations removed).

By contrast, here, no plausible necessity for a conspiracy among the publishers can be construed from the CAC. This very Court has already rejected similar conclusory allegations of collusion between eBook publishers and Amazon, finding that this approach fails because it does

[33] Penguin Random House LLC, a defendant here, was formed by merger in 2013, several years after the *Apple* case was brought. One of its predecessor companies, Random House, was not a party to the *Apple* case, while the other, Penguin Group, was a party. In connection with the merger, Random House agreed that the new combined company would abide by the consent judgment to which Penguin had agreed, even though no claims had been brought against Random House. Thus, Plaintiffs' effort to characterize this case as an extension of the *Apple* case ignores, among other things, the fact that the alleged participants, and the management teams of those participants, are not the same.

[34] The Court found that "Apple offered each Big Six publisher a proposed Contract that would be attractive only if the publishers acted collectively." *Apple* at 316.

"no more than raise theoretical possibilities" of an agreement among the Publisher Defendants. *See Bookhouse of Stuyvesant Plaza Inc. v. Amazon.com, Inc.*, 985 F. Supp. 2d 612, 619 (S.D.N.Y. 2013). The facts, as alleged, are merely that Amazon, each Publisher Defendant's largest customer by far, proposed a contractual term with each Publisher Defendant as a condition of doing business with it, and each Publisher Defendant, in accordance with its own economic interests of continuing to do business with its largest customer, acceded to the request. *See e.g.* CAC ¶ ¶ 66-73. That allegation is hardly newsworthy let alone justiciable – it is the very definition of lawful parallel conduct under antitrust law. Moreover, the notion that the publishers had conspired to have more channels than just Amazon as found in *Apple*,[35] only later to conspire with Amazon to eliminate other channels, as Plaintiffs allege here, without any explanation for why this abrupt shift makes any sense, is absurd on its face. That notion is counter to the publisher's individual economic interest and past behavior. Further, without a plausible basis for inferring a horizontal conspiracy among the publishers, the complaint alleges nothing but a series of vertical agreements between individual publishers and Amazon, and fails to allege, and could not allege, that any publisher has market power. Finally, the notion that the Defendants were engaged in a massive industry-wide conspiracy at the very moment that each Publisher Defendant was under an antitrust compliance microscope by the DOJ and States lacks plausibility.

Second, parallel conduct absent plausible evidence of conspiracy is not unlawful under the Sherman Act. "Parallel action is not, by itself, sufficient to prove the existence of a

[35] The Publishers' "strategies included . . . possibly creating an alternative ebook platform" to Amazon. *United States v. Apple, Inc.*, 791 F.3d 290, 300 (2d Cir. 2015); *see also United States v. Apple Inc.*, 952 F. Supp. 2d 638, 659 (S.D.N.Y. 2013), *aff'd*, 791 F.3d 290 (2d Cir. 2015) ("the Publishers were searching for an alternative to Amazon's pricing policies[.]").

conspiracy; such behavior could be the result of 'coincidence, independent responses to common stimuli, or mere interdependence unaided by an advance understanding among the parties' . . . Indeed, parallel behavior that does not result from an agreement is not unlawful even if it is anticompetitive." *Apple* at 315 (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 556 n.4 (2007)). As noted above, each publisher here faced a common stimulus – contract terms demanded by the operator of the largest eBook platform (Amazon's Kindle) – and could choose to accept those terms or risk not being able to sell to readers committed to that platform. That each responded in similar ways is neither surprising nor a basis for inferring a conspiracy.

Third, as a commercial term in a bilateral vendor-vendee contract, an MFN is presumptively lawful. True, an MFN, while "otherwise lawful," may be found to be anticompetitive when adopted by a "horizontal cartel." *Id.* at 319-320. Thus, in *Apple*: "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." *Id*. at 320. Here, in the absence of factual allegations of horizontal concerted action by the Publisher Defendants, Plaintiffs may only challenge the contract terms under the rule of reason. Because Plaintiffs fail to allege and could not allege market power by each Publisher Defendant, the challenged contract terms in this case are presumptively lawful.

Fourth, the contractual provisions cited in the CAC were all submitted to the DOJ and State AGs pursuant to the Publisher Defendant consent agreements settling *Apple*. In *Apple*, the publishers entered into consent agreements with DOJ and 33 States represented by three State AG liaisons (Connecticut, Ohio, and Texas, together, the "Liaison States"), the terms of which were incorporated by the District Court into a modified final judgment ("MFJ") under which each Publisher Defendant was subject to injunctive provisions against further collusion among

the Publisher Defendants, each Publisher Defendant was prohibited from entering into eBook distribution agreements containing price MFNs, and each Publisher Defendant was subject to strict, ongoing compliance reporting to DOJ and the Liaison States. Under the MFJs, each Publisher Defendant terminated each existing agency eBook distribution agreement to which it was a party at that time and, if they chose, entered into new eBook distribution agreements that were in compliance with the MFJs. Moreover, as part of their compliance reporting obligations, each Publisher Defendant was required to, and did, provide logs of all communications amongst any Publisher Defendant as well as copies of all subsequently negotiated eBook distribution agreements, including those with Amazon, to the DOJ and the Liaison States. The Publisher Defendants operated under those MFJs until September 2017 for Defendants Hachette, HarperCollins and Simon & Schuster, until May 2018 for Defendant Penguin Random House and until August 2018 for Defendant Macmillan. It begs credulity to believe, as Plaintiffs allege, that the Publisher Defendants hatched a horizontal conspiracy and provided five *per se* illegal e-Book distribution agreements, incorporating price MFNs that were prohibited by their consent decrees, and subsequent amendments, to the DOJ and Liaison States over a period of several years and that the DOJ and Liaison States all overlooked the alleged conspiracy and challenged MFNs in their entirety.

Based on the above as well as additional arguments, the Publisher Defendants plan to file a motion to dismiss the CAC.

3. Defendant Amazon.com, Inc.'s Statement

Amazon's innovative Kindle E-reader helped to popularize the electronic books format ("eBooks") as a competitive alternative to traditional print books. Amazon introduced consumers to this technology and discounted eBook prices below the prices retailers charged for the same books in print format—creating price competition for books. The Publisher Defendants believed

that this competition disrupted the retail sale of their print books, eventually leading them to join forces with Apple on a strategy aimed to neutralize Amazon. *See United States v. Apple*, 952 F. Supp. 2d 638, 647-48 (S.D.N.Y. 2013).

The Publisher Defendants' actions in response to Amazon's eBooks pricing became the subject of federal and state government litigation against the Publisher Defendants and Apple, concluding with a bench trial against Apple in which this Court found that Apple conspired "to eliminate retail price competition in order to raise e-book prices . . . ." *United States v. Apple*, 952 F. Supp. 2d 638, 647 (S.D.N.Y. 2013), *aff'd* 791F.3d 290 (2d Cir. 2015). That litigation also resulted in settlements by the Publishers Defendants and the entry of consent decrees that subjected the Publisher Defendants' contracts to compliance review by the Antitrust Division of the Department of Justice ("DOJ"). (Compl. ¶ 57 & nn. 65-66). At no time during *United States v. Apple* did the DOJ or this Court (or the Second Circuit) suggest that purely vertical agreements between Apple and the Publisher Defendants, including agency agreements, were unlawful; nor did they suggest that purely vertical Most Favored Nation provisions in the agreements between Apple and the Publisher Defendants would have been anticompetitive.[36]

In 2014-15, Amazon and each of the Publisher Defendants negotiated new agreements that were subject to DOJ review for compliance with the court-approved consent decrees. (Compl. ¶¶ 62-71). Under each agreement, Amazon gained only commissions in exchange for the right to distribute the respective publisher's eBooks as an agent, with retail prices set directly by the publisher. (*Id.* ¶¶ 2, 47, 62-71). Plaintiffs allege that these agency agreements contain price MFN

[36] Contrary to the misleading narrative set forth in Plaintiffs' Consolidated Amended Class Action Complaint, the defining legal issue in *United State v. Apple* was whether Apple joined and participated in a horizontal conspiracy among the Publisher Defendants to raise eBook prices, and if so, what legal standard should be used to evaluate the lawfulness of such a horizontal conspiracy. *See Apple*, 791 F.3d at 318-19.

provisions, and that the agreements are part of an overarching hub-and-spoke conspiracy among Amazon and all of the Publisher Defendants to collectively raise eBook prices and make Amazon a monopolist in an alleged trade eBook market. (*Id.* ¶¶ 4, 74-87). In other words, Plaintiffs claim that the Publisher Defendants, having agreed with the DOJ and various State Attorneys General to resolve claims that they conspired with Apple to fight *against* Amazon's competitive business practices regarding eBooks, now have entered into a new conspiracy *with* Amazon, the goal of which is to bolster and cement Amazon as a monopolist, all while being subject to antitrust oversight and compliance review by the DOJ.

Plaintiffs' allegations are factually misguided in many respects. Beyond the factual inaccuracies, Plaintiffs' Amended Complaint suffers from myriad legal deficiencies that Defendants will raise in Rule 12(b)(6) motions. As an initial matter, the Amended Complaint fails to allege facts that plausibly support the existence of an overarching conspiracy between and among Amazon and the Publisher Defendants. The Amended Complaint alleges only a series of similar vertical agreements; no facts support the existence of any horizontal conspiracy among the Publisher Defendants, much less that Amazon participated in such a conspiracy.

Plaintiffs also try to manufacture a monopolization claim only against Amazon. But Plaintiffs contend they purchased eBooks directly from the Publisher Defendants, not Amazon, and fail to allege how purely vertical agency agreements that give each Publisher Defendant control over retail eBook pricing of its own eBooks can result in Amazon monopolizing any market. As an agent, Amazon never takes title to any eBook, nor has authority to set prices for any eBook. Without any of these rights, Amazon cannot plausibly monopolize any alleged eBook

market. For these and other reasons that Amazon will set forth in a motion to dismiss, the Amended Complaint fails to state a claim for relief for monopolization against Amazon.[37]

III. DISCOVERY PLAN

1. Plaintiffs' Statement:

Plaintiffs disagree with Defendants' proposal to defer all scheduling, discovery, and submission of discovery protocols until after the Court rules on motions to dismiss that Defendants intend to file. "[D]iscovery should not be routinely stayed simply on the basis that a motion to dismiss has been filed."[38] To justify a stay in this action (which has been pending before the Court since January) Defendants would have to demonstrate good cause. This requires consideration of the breadth of discovery sought, the burden of responding to it, the prejudice that would result to the party opposing the stay, and the strength of the pending motion forming the basis of the request for stay.[39] The Court cannot evaluate Defendants' request in a vacuum. Defendants' decision to file prematurely a pre-motion letter brief in support of a stay of discovery in the absence of actual motions to dismiss or discovery requests only demonstrates Plaintiffs' point.

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[37] Plaintiffs' citation to *Apple, Inc. v. Pepper*, is inapposite. The language quoted by Plaintiffs is not a commentary on the viability of Plaintiffs' theory of monopolization; rather, it was a response to Apple's argument that the *Illinois Brick* indirect purchaser rule denied standing to Plaintiffs who purchased applications directly from Apple at prices set by others. *See* 139 S.Ct. 1514, 1522 (2019) (rejecting "Apple's effort to transform *Illinois Brick* from a direct-purchaser rule to a 'who sets the price' rule"). The Court expressly disclaimed addressing any other issues: "At this early pleadings stage of the litigation, we do not assess the merits of the plaintiffs' antitrust claims against Apple, nor do we consider any other defenses Apple might have." *Id.* at 1519.

[38] *O'Sullivan v. Deutsche Bank AG*, 2018 U.S. Dist. LEXIS 70418, at *13 (S.D.N.Y. Apr. 26, 2018) (quotation omitted).

[39] *Alapaha View Ltd. v. Prodigy Network, LLC*, 2021 U.S. Dist. LEXIS 89789, at *3-4 (S.D.N.Y. May 10, 2021); *Separ v. County of Nassau*, 2021 U.S. Dist. LEXIS 113865, at *5-6 (E.D.N.Y. June 17, 2021).

Defendants are also unlikely to meet the "strong showing" required to demonstrate "that the plaintiff's claim is unmeritorious."[40] The Second Circuit already found that essentially identical agreements between the Big Five and Apple violated federal antitrust laws. Amazon already acceded to demands of European regulators to withdrew its anticompetitive MFNs in the sale of eBooks and other products in Europe, and regulators in the U.S. are likewise investigating Amazon's anticompetitive conduct, including its use of MFNs in the eBooks market.[41]

Nevertheless, in the interests of reaching a reasonable compromise without the need for Court intervention, Plaintiffs offered to join the Defendants in their proposal to defer scheduling and discovery, provided Defendants agreed to produce during the pendency of their motions a discrete set of critical discovery: production of their contracts, documents they produced to governmental agencies that investigated the eBooks industry, and their eBooks sales data. Defendants declined and abstained from proposing their own deadlines. Plaintiffs therefore present the following table, representing their own proposed schedule for discovery and related deadlines:

Event	**Deadline or Date**[42]
Initial Disclosures	August 6, 2021
Service of initial document requests and interrogatories	July 30, 2021
ESI Agreement, Production Protocols & Stipulated Protective Order	July 30, 2021

[40] *O'Sullivan*, 2018 U.S. Dist. LEXIS 70418, at *13 (quotation omitted).

[41] CAC, ¶¶ 7, 60, 91-94.

[42] Plaintiffs seek to proceed as a class action. Because their estimates of the time necessary to complete discovery and prepare for their proposed class action trial depends on the timing of the Court's class certification order, they have presented some of the deadlines relative to the issuance of the Court's final order on class certification

Deadline for production of Defendants' unredacted eBook distribution agreements and documents Defendants provided to antitrust regulators investigating the eBooks market	August 30, 2021
Deadline for Defendant to produce eBooks sales data	September 30, 2021
Motion for joinder of other parties	July 6, 2022
Motion for amendment of pleadings	By the close of trial as permitted under Rule 15(b)
Class certification motion	July 6, 2022
Completion of non-expert discovery	Within 2 months after the Court's final order on class certification
Disclosure of merits expert reports	Within 3 months after the Court's final order on class certification
Disclosure of merits rebuttal expert reports	Within 4 months after the Court's final order on class certification
Completion of expert discovery	Within 5 months after the Court's final order on class certification
Dispositive and *Daubert* motion(s)	Within 6 months after the Court's final order on class certification
Trial	Within 10 months after the Court's final order on class certification

a. The exchange of initial disclosures

Unless otherwise agreed or ordered, initial disclosures are due 14 days after the Rule 26(f) conference. Rule 26(a)(1)(C). Defendants represent that summer holidays and their desire to coordinate with each other in the drafting of initial disclosures make it difficult for them to meet that deadline and propose a 64-day extension. Plaintiffs propose a one-month extension as a reasonable accommodation. Defendants also argue that they are entitled to 78 days because there

is considerable overlap between this case and the related *Bookends* action, but this is an arbitrary date, given that Defendants have not agreed to any deadlines in the *Bookends* action.[43]

b. Initial document requests and interrogatories

Plaintiffs identify specific categories of documents and data that are critical to the litigation of their claims and warrant production early in the litigation:

Unredacted contracts: Plaintiffs claims rely principally on Defendants' written agreements. It would not be burdensome for Defendants to provide copies of their contracts, given that they previously provided their print book distribution agreements for counsel's review in the related *Bookends* case (where Defendants, unlike here, contested the existence of MFNs in their contracts), although production of unredacted contracts would likely require a protective order.[44] Plaintiffs therefore propose that the parties submit their proposed protective order by July 30 and that Defendants complete their production of unredacted agreements no later than August 30, 2021.

Productions to government agencies: Defendants have produced documents to multiple government entities that have investigated Defendants' distribution and sale of eBooks. Because these documents are directly relevant for both merits and class issues and the burden to produce them to Plaintiffs appears to be minimal,[45] Plaintiffs propose that Defendants complete their production of these documents no later than August 30, 2021.

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[43] *See* Parties' Joint 26(f) report submitted in Bookends.

[44] *See* Amazon's letter brief and the plaintiff's response in *Bookends & Beginnings v. Amazon*, Case No. 21-cv-02584-GHW-DCF, ECF 44 at 1 n.2 and ECF 49 at 2.

[45] *See, e.g.*, *United States ex rel. D'Anna v. Lee Mem'l Health Sys.*, 2019 U.S. Dist. LEXIS 2099, at *4-5 (M.D. Fla. Jan. 7, 2019) (requiring production, while the motion to dismiss was still pending, of documents the defendant had already produced to the government during the government's investigation of the underlying claims); *In re Lithium Ion Batteries Antitrust*

Sales data: In the experience of Plaintiffs' counsel, the primary cause for delays in the litigation of class actions of this kind is the defendants' failure to produce promptly the relevant data, especially their sales data.[46] Defendants' eBook sales data are directly relevant both on the merits to establish injury and damages and for purposes of Plaintiffs' burden of proof to meet the requirements of proceeding as a class action. Plaintiffs therefore propose that Defendants produce the requested data no later than September 30, 2021.

Local Rule 33.3(a) limits interrogatories at the commencement of discovery to "those seeking names of witnesses with knowledge of information relevant to the subject matter of the action, the computation of each category of damage alleged, and the existence, custodian, location and general description of relevant documents, including pertinent insurance agreements, and other physical evidence, or information of a similar nature." But under Local Rule 33.3(b), during discovery, other types of interrogatories may be served: (1) if they are a more practical method of obtaining the information sought than a request for production or a deposition, or (2) if ordered by the Court. In this action, Plaintiffs believe that factual (non-contention) interrogatories could assist in efficiently uncovering facts concerning Defendants' pricing policies.

Plaintiffs therefore propose that initial document requests and interrogatories begin on July 30 and production of the specific categories of documents be produced by August 30 and

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Litig., 2013 U.S. Dist. LEXIS 72868, at *26 (N.D. Cal. May 21, 2013) (requiring production of documents produced to the DOJ before consolidated amended complaints were filed).

[46] *See, e.g.*, *In re Novartis & Par Antitrust Litig.*, 2019 U.S. Dist. LEXIS 191606, at *17-18 (E.D. Pa. Nov. 5, 2019) (granting motion to compel because "sales data pertaining to generic brands in antitrust cases" is "routinely produced") (collecting cases from multiple jurisdictions); *In re Namenda Direct Purchaser Antitrust Litig.*, 2017 U.S. Dist. LEXIS 173403, at *8 (S.D.N.Y. Oct. 19, 2017) (ordering production because there "is little question that the transactional sales information sought by the plaintiffs is relevant" and "would enable the plaintiffs to analyze the impact of generic manufacturers into the market more precisely").

data by September 30. Reaching an agreement on ESI, production protocols, and privilege logs by July 30 allows for discovery within Plaintiffs' proposed timeframe.

c. Subjects, timing, and potential phasing of discovery

The subjects of discovery that Plaintiffs seek include: eBook pricing; the Big Five's eBook contracts and contractual negotiations with Amazon and with Amazon's competitors; any communications within or between the Big Five relating to eBook pricing and eBook contracts; documents pertaining to the volume of sales; market shares in revenue and volume of sales; data concerning commission costs and other fees that the Big Five pay to Amazon or to its competitors to sell their eBooks.

Plaintiffs believe that discovery should not be bifurcated or phased. It is well-settled that class certification frequently overlaps with merits discovery.[47] The well-accepted treatise on class actions, Newberg, suggests that bifurcation is the exception, not the rule, noting that "[d]iscovery on the merits *should not* normally be stayed pending so-called class discovery, because class discovery is frequently not distinguishable from merits discovery[.]"[48] Plaintiffs identify specific categories of documents and data that are critical to the litigation of their claims and warrant production early in the litigation:

d. Electronically stored information ("ESI")

The Parties have an obligation to take reasonable and proportionate steps for preserving relevant and discoverable ESI within their possession, custody, or control. Plaintiffs propose that the Parties meet and confer on appropriate search terms and protocols for the

[47] *Comcast Corp. v. Behrend*, 569 U.S. 27, 34 (2013) (noting that "class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's case of action") (quotations omitted).

[48] 3 Alba Conte & Herbert Newberg, NEWBERG ON CLASS ACTIONS § 7.8 at 25 (4th ed. 2002) (emphasis added).

preservation, presentation, and form of production of ESI pursuant to FRCP 26(f)(2) and (3) and provide the Court a stipulated ESI Protocol by July 30, 2021.

e. Privilege issues

Plaintiffs propose that the Parties submit their proposed protective order and privilege log protocol by July 30, 2021.

f. Proposed limitations on discovery

Plaintiffs propose that the Parties follow the Federal Rules of Civil Procedure for the exchange of discovery and conducting depositions. Plaintiffs may ask the Court to expand Fed. R. Civ. P. 30(a)(2)(A)(i)'s limitation of 10 depositions and/or may ask the Court to expand Fed. R. Civ. P. 33 (a)(1)'s limitation of the number of interrogatories.

Plaintiffs also propose the following modifications in recognition of the efficiency of remote depositions and in light of Local Rule 30.2, presumptively permitting depositions to be taken remotely by means of video or telephone. First, the parties should waive all claim to costs and attorney's fees under Local Rule 30.1 for any depositions taken more than 100 miles from the courthouse. If any party chooses to take, defend, or otherwise participate in a deposition in-person, that party bears his/her/its own expense. Second, the parties should permit all witnesses, including the parties themselves, to appear for a deposition, remote or otherwise, within 100 miles of the witness's place of residence or place of work.

g. Service by email

Plaintiffs propose that all disclosures and discovery requests and responses may be served by e-mail.

h. Joinder

While Plaintiffs do not anticipate joining other parties to this litigation, discovery may disclose other parties' involvement in the alleged anticompetitive conduct. Plaintiffs therefore propose a one-year deadline from the date of submission of this report.

i. Amendment

Rule 15 (a) and (b) permits amendments to the complaint even at trial with Defendants' consent or the Court's permission, and the "court should freely" grant Plaintiffs "leave when justice so requires." 15(a)(2). These restrictions are sufficient to ensure that Plaintiffs act promptly to amend their complaint to conform to the evidence or otherwise to cure any deficiencies within the pleading.[49] Defendants' proposal to arbitrarily preclude amendment more than 30 days after the Court's order on Defendants' intended motions to dismiss is inconsistent with Rule 15 and serves no legitimate purpose.

2. Defendants' Statement

Event	Defendants' Proposed Deadline or Date
Initial Disclosures	September 7, 2021
Motions for amendment of pleadings or joinder of other parties	Having already amended once as of right, any further amendment, including the proposed joinder of new parties, should be made "only with the opposing party's written consent or the court's leave" (Rule 15(a)) and should be filed and served no later than thirty (30) days following an order on Defendants' Motion to Dismiss.
All dates and deadlines related to the ESI Agreement, Stipulated Protective Order, discovery, class proceedings and trial	Stayed pending resolution by the Court of Defendants' Motion to Dismiss. Parties are to meet and confer on a proposed schedule within 30 days of the Court's decision on Motion to Dismiss, unless granted or unless

[49] *See, e.g.*, *Myers v. Moore*, 326 F.R.D. 50, 60-65 (S.D.N.Y. 2018).

	the Court permits Plaintiffs to amend the complaint, in which case the stay will continue until further order of the Court.

(a) **Deadline to exchange initial disclosures**

Defendants respectfully request that the Court set the deadline for the exchange of initial disclosures to be no later than September 7, 2021 for the following two reasons. *First*, the Parties have agreed, and the Court has ordered, that Plaintiffs will file an amended complaint in a separate case addressing print books on July 9, 2021.[50] Defendants anticipate that discovery in the print books case will overlap to some extent with this proceeding. As such, the deadline for initial disclosures in the two cases should follow the same timeline. Setting a deadline of September 7 for initial disclosures in this case will not prejudice plaintiffs but would promote judicial economy and efficiency.

Second, Defendants will need to coordinate among themselves – between the representatives of the five different Publisher Defendants and Defendant Amazon, as well as their clients.

(b) **Plaintiffs should only be permitted to amend by leave of the Court**

Plaintiffs have already amended their initial pleading once – and one of the component cases of the CAC has now been amended twice – as a matter of right under Rule 15(a)(1). Any further amendment should be permitted only with written consent of Defendants or by leave of court as permitted under Rule 15(a)(2), and must be filed and served within thirty (30) days following the Court's order on any motion to dismiss. Should Plaintiffs wish to file an amended complaint beyond thirty (30) days following the Court's decision on any motion to dismiss, then

[50] *See* Case No. 1:21-cv-02584-GHW-DCF, ECF Nos. 58 and 59.

they must also demonstrate "good cause" for reason to amend the schedule in accordance with Rule 16(b)(4). Should Plaintiffs wish to amend their complaint during trial, they must do so under Rule 15(b)'s requirement that the Court only permit an amendment when it will "aid in presenting the merits" of the proceeding.

(c) **Publisher Defendants will move for a stay of all discovery**

Defendants contend that all discovery deadlines other than initial disclosures in this proceeding should be stayed until the resolution of the motions to dismiss. Simultaneous with the filing of this Rule 26(f) Report, Defendants will be submitting a pre-motion letter detailing their positions and arguments in support of a stay of all discovery deadlines.

DATED this 6th day of July 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 6, 2021, I electronically transmitted the foregoing document to the Court Clerk using the ECF System for filing. The Clerk of the Court will transmit a Notice of Electronic Filing to all ECF registrants.

/s/ Steve W. Berman
STEVE W. BERMAN