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' OBJECTION TO THE MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

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INTRODUCTION

Plaintiffs are consumers of trade eBooks—general interest fiction and non-fiction eBooks. They allege that Amazon dominates retail sales and that 90% of trade eBook sales occur on its retail platform. They further allege that Amazon's agreements with the "Big Five" book publishers (the "Publisher Defendants"), which sell 80% of trade books, include most-favored-nations ("MFN") clauses to prevent price competition for the Publisher Defendants' eBooks. Plaintiffs further allege that, as the intended consequence of their agreements with Amazon, the Publisher Defendants raised their eBook prices[1] and overcharged Plaintiffs on Amazon's platform and on all other retail platforms. (ECF No. 161, Report and Recommendation ("RR") at 2-13.) Those allegations are sufficient under the Sherman Act to set forth a *prima facie* antitrust claim against Amazon, regardless of any horizontal agreement among the Publisher Defendants. Price-parity requirements, by definition, restrict price competition. Here those restrictions are combined with Amazon's market share, the 30% fee that Amazon takes from each eBook sale, and the Publisher Defendants' ability to set the price of their eBooks market-wide. The expected result under basic economic theory (and the result in fact) is what Plaintiffs plead here: supracompetitive consumer prices. For this reason alone, Plaintiffs' claims against Amazon should proceed.[2]

The Court should reject the Report and Recommendation's contrary conclusion. Amazon cannot escape Plaintiffs' well-pleaded claims, as the Magistrate Judge recommends, by asserting that the effects of Amazon's vertical agreements with the Publisher Defendants must be analyzed in isolation. As another district court put it, "the Supreme Court has rejected that approach." *Sitts v. Dairy*

[1] For this objection, references to eBooks should be understood to refer to trade eBooks.

[2] *See, e.g.*, Boik and Corts, "The Effects of Platform Most-Favored-Nations Clauses on Competition," *Journal of Law and Economics*, Vol. 59 (Feb. 2016) at 105-07 ("PMFN [Platform Most Favored Nation] clauses typically raise platform fees and retail prices" and "lead to higher retail prices across all platforms").

Farmers of Am., Inc., 417 F. Supp. 3d 433, 470 (D. Vt. 2019). Where multiple agreements are alleged, "it would clearly be improper for the court to examine each agreement . . . without considering the impact of the aggregation." Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶ 310(c)(1) (4th ed. 2014) (quotation omitted). (*See* Section II *infra*.)

Nor is antitrust liability limited to Amazon. The Publisher Defendants are not innocent bystanders to Amazon's anticompetitive conduct. After a bench trial in June 2013, this Court found "overwhelming evidence that the Publisher Defendants joined with each other in a horizontal price-fixing conspiracy." *U.S. v. Apple Inc.*, 952 F. Supp. 2d 638, 691 (S.D.N.Y. 2013), *aff'd*, 791 F.3d 290 (2d Cir. 2015). As Plaintiffs have also alleged here, the objective of the Publisher Defendants' horizontal "*per se* violation of the Sherman Act" was to "eliminate retail price competition and to raise e-book prices," and "the conspiracy required the full participation of the Publisher Defendants … to change Amazon's pricing policies and to raise e-book prices." *Id.* at 691, 694, 706.

The Magistrate Judge concluded that the Publisher Defendants' conspiracy ended with the judgments in *Apple* and that it was implausible that the Publisher Defendants colluded while subject to those judgments. (RR at 40–42.) But the allegations here are to the contrary. To be sure, the Publisher Defendants extricated themselves from the proceedings in *Apple* by agreeing to final judgments with the United States, and those judgments imposed temporary restrictions on the Publisher Defendants to prevent them from enjoying the fruits of their conspiracy for several years. But those judgments did not require the Publisher Defendants to admit guilt or otherwise repudiate their horizontal price-fixing conspiracy.[3] The judgments were explicit that the Publisher Defendants

[3] As the Second Circuit has explained, "the cessation of conspiratorial activity is generally considered *insufficient* to demonstrate a withdrawal from a conspiracy." *U.S. v. Greenfield*, 44 F.3d 1141, 1149–50 (2d Cir. 1995) (emphasis added). Withdrawal requires "either the making of a clean breast to the authorities, or communication of the abandonment in a manner reasonably calculated to reach co-conspirators." *Id.* (quotation omitted).The Publisher Defendants did neither. *See* Sect. I.A below.

"d[id] not constitute any admission by Settling Defendants that the law has been violated," and that the Publisher Defendants "denied and continue to deny" that they "entered into an alleged unlawful agreement to fix, maintain, inflate, or stabilize prices of E-books" and "vigorously contend that the factual allegations (of conspiracy) are materially inaccurate."[4] And before the final judgments even expired, the Publisher Defendants picked up where they had left off, entering agreements, now with Amazon, to again fulfill the goals of their horizontal conspiracy—*i.e.*, eliminating retail price competition for eBooks and raising eBook prices throughout the market. (RR at 9–13.)

Defendants' primary retort—which the Magistrate Judge found persuasive—is that there is "no plausible explanation for why the Publishers would have been motivated to participate in a conspiracy that further entrenched Amazon's dominance as an eBook retailer." (RR at 32.) But that assertion ignores Defendants' undisputed conduct and relevant principles of economics. To borrow from the Court's explanation in *Apple*: "[Amazon] and the Publisher Defendants shared one overarching interest—that there be no price competition at the retail level. [Amazon] did not want to compete with … any other e-book retailer on price; and the Publisher Defendants wanted to end [retailers' discount] pricing and increase significantly the prevailing price point for e-books. With a full appreciation of each other's interests, [Amazon] and the Publisher Defendants agreed to work together to eliminate retail price competition in the e-book market and raise the price of e-books above [the prevailing price point]." *Apple*, 952 F. Supp. 2d at 647. (*See* Section I.B *infra*.)

As this Court already found, the Publisher Defendants initially approached Amazon—not Apple—to effectuate their horizontal conspiracy. Only after Amazon initially refused to participate did they turn to Apple, which offered an alternative mechanism for their anticompetitive goals. (RR at 4-5.) The Publisher Defendants enjoyed the conspiratorial fruits of their higher retail pricing and

[4] Final Judgments of Hachette, HarperCollins, and Simon & Schuster (9/6/12); *see also* Final Judgment of Penguin (5/17/13) (same); Final Judgment of MacMillan (8/12/13) (same).

an end to retail discounting until they were hauled before this Court. And although the final judgments entered by this Court required the Publisher Defendants to relinquish those fruits for a time, the Publisher Defendants never withdrew from their conspiracy.

Instead, the Publisher Defendants went back to Amazon to continue where they left off. To again borrow this Court's explanation in *Apple*: Amazon "did not want to compete with [other retailers] on price and proposed to the Publishers a method through which both [Amazon] and the Publishers could each achieve their goals." *Apple,* 952 F. Supp. 2d at 706. The agreement allowed "the publishers to wrest control over pricing from" retailers and "to eliminate all retail price competition" and in return the Publisher Defendants would "ensure that [Amazon's] Bookstore would be competitive at higher prices." *United States v. Apple,* 791 F.3d 290, 303-304 (2d Cir. 2015). Ending retail price competition gave all parties what they wanted: the Publisher Defendants obtained higher consumer prices across the entire eBooks market; Amazon excluded competition from other retailers and perpetuated the dominance of its retail platform, while taking a 30% commission on each eBook sale.

Nor are these the only errors in the Report and Recommendation. The Magistrate Judge improperly discounted the hub-and-spoke allegations and plus factors pleaded in accordance with the Second Circuit's decision in *Starr v. Sony BMG Music Entertainment*. (*See* Section I *infra*.) The Magistrate Judge improperly concluded that the adverse effects of Amazon's vertical agreements with the Publisher Defendants cannot be aggregated under the rule of reason. (*See* Section II *infra*.) The Magistrate Judge improperly concluded that Plaintiffs cannot allege Amazon's monopoly power unless Amazon set the prices of the Publisher Defendants' eBooks. (*See* Section III *infra*.) The Magistrate Judge improperly conflated the requirements of a *per se* conspiracy under Section 1, which requires an agreement *among* the Publisher Defendants, with a conspiracy to monopolize under Section 2, which requires only that they each agree to the *general goal* of the conspiracy. (*See* Section IV *infra*.) And the

Magistrate Judge improperly applied *Illinois Brick* to conclude that certain Plaintiffs lack standing to sue Amazon under the indirect-purchaser rule, even though Amazon is a co-conspirator and all Plaintiffs purchased eBooks from the Publisher Defendants. (*See* Section V *infra*.)

Plaintiffs respectfully ask the Court to reject the Report and Recommendation.

ARGUMENT

"The district judge must determine de novo any part of the magistrate judge's disposition that has been properly objected to" and "may accept, reject, or modify the recommended disposition; receive further evidence; or return the matter to the magistrate judge with instructions." Fed. R. Civ. P. 72(b)(3); *see also* 28 U.S.C. § 636(b)(1)(C) ("A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made."); *Catania v. United Fed'n of Teachers*, 2022 U.S. Dist. LEXIS 45016, at *4 (S.D.N.Y. Mar. 12, 2022) (conducting de novo review and rejecting report and recommendation). Even portions of a report that are not objected to are subject to review and may be adopted only on the finding the magistrate judge did not commit clear error. *Wowwee Grp., Ltd. v. Haoqin*, 2019 U.S. Dist. LEXIS 48408, at *1-2 (S.D.N.Y. Mar. 22, 2019) (rejecting report and recommendation). This Court has broad authority to reject or modify "in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1)(C).

In her Report and Recommendation, the Magistrate Judge recommended dismissal of Plaintiffs' complaint. Plaintiffs respectfully object to the Report and Recommendation with respect to (I) the dismissal of Plaintiffs' Section 1 *per se* horizontal conspiracy claims against Amazon and the Publisher Defendants (RR at 18-43); (II) the dismissal of Plaintiffs' Section 1 rule of reason claims against Amazon and the Publisher Defendants (RR at 43-48); (III) the dismissal of Plaintiffs' Section 2 monopolization claim against Amazon (RR at 49-53); (IV) the dismissal of Plaintiffs' Section II

conspiracy to monopolize claim against the Publisher Defendants (RR 48-49); and (V) the dismissal of thirteen Plaintiffs' claims against Amazon for lack of standing (RR at 15-18).

I. Plaintiffs adequately plead a horizontal price-fixing conspiracy.

To adequately plead their *per se* claim that "the Publishers and Amazon conspired to raise eBook prices and limit retail competition, in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1," Plaintiffs must allege "sufficient facts from which to plausibly infer a horizontal price-fixing conspiracy among the Publishers, or a hub-and-spoke conspiracy among the Publishers and Amazon." (RR at 44.) Plaintiffs meet that burden in three independent ways. *First*, this Court already found that the Publisher Defendants engaged in a horizontal price-fixing conspiracy in the *Apple* litigation, and Plaintiffs allege that, after the Publisher Defendants were temporarily curtailed by the legal proceedings in *Apple,* they picked up where they left off and successfully eliminated retail price competition and raised eBook prices through the same type of contractual mechanism. *Second*, the Publisher Defendants' agreements with Amazon meet the test for a hub-and-spoke conspiracy. *Third*, the alleged conduct and circumstances satisfies the standard for pleading circumstantial evidence of a conspiracy as set forth in *Starr v. Sony BMG Music Ent.*, 592 F.3d 314 (2d Cir. 2010).

A. Plaintiffs adequately allege a horizontal price-fixing conspiracy as already found by the Court.

In seeking dismissal of Plaintiffs' claims, Defendants ask this Court to ignore what it already found sufficient to "prove[] a *per se* violation of the Sherman Act," *i.e.*, that "the Publisher Defendants agreed to raise the prices of e-books by taking control of retail pricing" and that, consistent with their "collective, illegal restraint of trade," they forced retailers "to relinquish retail pricing authority and then they raised retail e-book prices." *Apple,* 952 F. Supp. 2d at 691, 694, 709. That is what Plaintiffs allege here. (CAC ¶ 4 ("Together, Defendants raised trade eBook prices" through "agreements to eliminate retailer discounting[.]"); ¶ 91 ("Amazon and the Big Five have employed and continue to employ the same devices to again fix the retail price of trade eBooks in violation of Section 1 of the

Sherman Act."). For this reason alone, Plaintiffs adequately plead a violation of Section 1 of the Sherman Act.

"As direct evidence of concerted action among Defendants," the Magistrate Judge concluded that "Plaintiffs rely solely on the vertical agency agreements between each Publisher and Amazon." (RR at 22.) But that conclusion is inconsistent with the Magistrate Judge's acknowledgement that "[t]hrough a coordinated effort, the Publishers forced Amazon to accept the agency model." (RR at 6.) That conduct constitutes a horizontal agreement as a matter of law, and it set the stage for their collusion with Amazon. (RR at 8 (through their commitment to wrest control of retail prices from retailers by moving the entire industry to the agency model, "the Publishers had engaged in a *per se* illegal horizontal price-fixing agreement, which had the intent and effect of eliminating price competition in the trade eBook market and increasing the retail price of trade eBooks")). This Court's earlier findings not only provide the "course of dealings or other circumstances" necessary to *allege* a horizontal agreement, but they also provide direct evidence that "the Publisher Defendants agreed to raise the prices of e-books by taking control of retail pricing," *id.*—an agreement the Publisher Defendants never disavowed or abandoned. *Greenfield*, 44 F.3d at 1149-50; *see also U.S. v. Esposito*, 2021 U.S. App. LEXIS 34780, at *7 (2d Cir. Nov. 23, 2021) (prior conviction was properly "admissible as direct evidence of the conspiracy itself").

The judgments entered against the Publisher Defendants in *Apple* imposed temporary restrictions to prevent them from enjoying the fruits of their conspiracy for several years after the consent judgments, but they did not require the Publisher Defendants to admit guilt or otherwise publicly acknowledge and repudiate their horizontal price-fixing conspiracy. To the contrary, the Publisher Defendants' final judgments were explicit that they "d[id] not constitute any admission by Settling Defendants that the law has been violated" and that the Publisher Defendants "denied and continue to deny" that they "entered into an alleged unlawful agreement to fix, maintain, inflate, or

stabilize prices of E-books" and "vigorously contend that the factual allegations (of conspiracy) are materially inaccurate."[5] Indeed, "at trial" and under oath, the Publisher Defendants denied "that they discussed the Apple Agreement with one another . . . or that those conversations occurred at all, in the face of overwhelming evidence to the contrary[.]" *Apple*, 952 F. Supp. 2d at 693 n.59. And before the final judgments even expired, the Publisher Defendants picked up where they had left off, entering into agreements (now with Amazon) to fulfill the goals of their horizontal conspiracy—*i.e.*, eliminating retail price competition for eBooks and raising eBook prices throughout the market. (RR at 9–13.)

In this case, Plaintiffs allege that the Publisher Defendants and Amazon "have employed and continue to employ the same devices to again fix the retail price of trade eBooks" that "'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 [Big Five] to raise the prices for their e-books, which they promptly did[.]'"(CAC ¶ 8 (quoting *Apple*, 952 F. Supp. 2d at 694).) This conduct was sufficient to prove a *per se* violation of the Sherman Act in *Apple*, and Plaintiffs' allegations of the same conduct are sufficient to allege a conspiracy that likewise resulted in sudden and substantial increases in eBook prices. (*Id.* ¶¶ 98-99.)

B. Plaintiffs adequately plead direct evidence of a hub-and-spoke conspiracy.

The Magistrate Judge relied on this Court's decision in *Zinc* for the applicable standard, under which "a hub-and-spoke theory is cognizable … only if there are both vertical agreements between the hub and each spoke, and also a horizontal agreement among the various spokes with each other." (RR at 19 (quoting *In re Zinc Antitrust Litig.*, 155 F. Supp. 3d 337, 376 (S.D.N.Y. 2016)).) The only "agreement" Plaintiffs were required to allege "among the spokes" is that they "'adhere to the [hub's] terms,' often because the spokes 'would not have gone along with [the vertical agreements] except on

[5] Final Judgments of Hachette, HarperCollins, and Simon & Schuster (9/6/12); *see also* Final Judgment of Penguin (5/17/13) (same); Final Judgment of MacMillan (8/12/13) (same).

the understanding that the other [spokes] were agreeing to the same thing.'" *Zinc*, 155 F. Supp. 3d at 376 (quoting Areeda & Hovenkamp, ¶ 1402c (3d ed. 2010)). In *Laumann v. NHL*, this Court similarly held that "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." 907 F. Supp. 2d 465, 486-87 (S.D.N.Y. 2012).

Applying the hub-and-spoke test, the Magistrate Judge correctly found that Plaintiffs adequately allege agreements between the hub (Amazon) and each spoke (the Publisher Defendants). (RR at 9.) And she properly found that Plaintiffs plausibly alleged that each Publisher Defendant agreed to the same contract to eliminate retail competition and raise eBook prices and knew that the others were negotiating or had negotiated those same terms with Amazon. (RR at 38.)

But in evaluating whether the Publisher Defendants' participation in the illegal restraint of retail competition was contingent upon that knowledge, the Magistrate Judge assumed contrary to Plaintiffs' well-pled allegations that the industry had irretrievably ended the wholesale model (RR at 29, 33; *contra* CAC ¶¶ 66-72, 80, 82, 106), and she applied the wrong test to determine whether the Publisher Defendants acted against their individual self-interests. "Evidence that the defendant acted contrary to its interests means evidence of conduct that would be irrational assuming that the defendant operated in a competitive market." *Starr*, 592 F.3d at 324 (quotation omitted). In applying this factor, the Magistrate Judge omitted the critical caveat that the Publisher Defendants' conduct must be analyzed in the context of a competitive market: Publisher Defendants are of course motivated individually to maximize their profits (RR at 32), but a test based on maximizing profits would be meaningless, because colluding helps to maximize profits. Similarly, the test is not whether it was in the self-interest of the Publisher Defendants to deal with Amazon as "a single dominant retailer." (RR at 30.) Again, such a test would be meaningless, because it would justify a host of

Sherman Act violations, including group boycotts of retailers, joint pricing among the Publisher Defendants, limits on author compensation, and mergers among themselves. *See Apple,* 952 F. Supp. 2d at 698 (noting that although such MFN restrictions may be facially neutral, "[t]hat does not … make it lawful for a company to use those business practices to effect an unreasonable restraint of trade").

The test instead focuses on whether in a competitive market the alleged behavior would "plausibly contravene each defendant's self-interest 'in the absence of similar behavior by rivals.'" *Starr*, 592 F.3d at 327 (quoting Areeda & Hovenkamp ¶ 1415a (2d ed. 2003)). Thus, in this case, the question is: Was it in the competitive self-interest of any Publisher Defendant to *unilaterally* (1) pay Amazon a 30% commission, while simultaneously restricting its own ability to differentially price across retail platforms, so as to ensure Amazon's continued dominance, and (2) raise prices to consumers? The answer is no. Those actions were not in the competitive self-interest of any Publisher Defendant unless all (or at least a "critical mass" of) the Publisher Defendants took the same actions collectively. *In re Elec. Books Antitrust Litig.*, 859 F. Supp. 2d 671, 684 (S.D.N.Y. 2012).

First, it was not in any Publisher Defendant's competitive self-interest to unilaterally restrict all eBook retailers from competing with Amazon on price. Economics and simple math show why. The Publisher Defendants each agreed to Amazon's 30% commissions. That commission was far above the amount necessary to distribute on the Amazon platform. Indeed, the Report and Recommendation acknowledges that "the Publishers lost eBook revenue under the agency model" with Amazon. (RR at 7; *see also* RR at 5 (explaining that "the Publishers stood to make less money on each sale under the agency model than they would under the wholesale model"); *Apple,* 952 F. Supp. 2d at 665, 699. Acting alone, none of the Publisher Defendants would have agreed to Amazon's 30% commission while also restricting every eBook retail platform (including its own platform) from offering better prices. The Publisher Defendant gives up the leverage it otherwise could use to bargain

for lower commissions, as well as the option of attracting consumers to its own platform (with no commission at all) by discounting its price. (CAC ¶ 81.) Such unilateral sacrifices would put the Publisher Defendant at a competitive disadvantage with respect to every other publisher. It would not be able to compete on price and would expect to lose market share. (*Id.* ¶ 162.)

But by acting collectively, the Publisher Defendants avoid such competitive disadvantage and, in fact, share the spoils of Amazon's market dominance. As the Report and Recommendation acknowledges, the restrictions on retail-price competition allowed Amazon to maintain its monopoly power in the eBook retail market (RR at 30), which "can facilitate anticompetitive horizontal coordination by reduc[ing] [a company's] incentive to deviate from a coordinated horizontal arrangement" (RR at 22). In short, while the competitive self-interests of the Publisher Defendants, acting alone, were at odds with Amazon's retail market dominance, it benefitted each of them as long as they acted collectively. This is more than a "plausible explanation for why the Publishers would have been motivated to participate in a conspiracy that further entrenched Amazon's dominance as an eBook retailer." (RR at 32.)

Second, it was not in any Publisher Defendant's competitive self-interest to unilaterally raise prices. As the Court explained in *Apple*, each Publisher Defendant "could also expect to lose substantial sales if they unilaterally raised the prices of their own e-books and none of their competitors followed suit." *Apple*, 952 F. Supp. 2d at 692. Plaintiffs likewise alleged the same here. (CAC ¶ 162.)

In sum, these components make the economic incentives of collusion straightforward and plausible. Previously, "Amazon was staunchly committed to its $9.99 price point and believed it would have long-term benefits for its consumers." *Apple*, 952 F. Supp. 2d at 649. Its competitors, like Barnes & Noble, also maintained similar, competitive prices. *See id.* at 557 (noting that the conspiratorial prices were "always several dollars higher than the then-existing e-book price at Amazon and Barnes &

Noble"). The Publisher Defendants wanted consumers to pay higher prices but could not unilaterally "change the public's perception of [an eBook's] value[.]" *Id* at 665. They had to act in concert—so together they agreed to pay high commissions to eBook retailers, to accept less revenue on eBooks they sold, and to raise consumer prices. After the *Apple* litigation, the collective action required yet another concession. The Publisher Defendants had to act collectively to insulate and perpetuate Amazon's dominance as an eBook retailer as the linchpin of their scheme.[6]

It is no answer that, by colluding, Publisher Defendants furthered their individual economic interests. This Court previously observed that "[i]t is not surprising that [a defendant] chose to further its own independent, economic interests" in this way, but "[s]uch a motivation … does not insulate a defendant from liability for illegal conduct." *Apple*, 952 F. Supp. 2d at 698.

C. Plaintiffs adequately plead circumstantial evidence of a horizontal conspiracy.

Plaintiffs also adequately allege circumstantial evidence of a horizontal conspiracy. As this Court explained in *Apple*, "[c]ircumstantial evidence is no less persuasive than direct evidence; indeed, '[c]ircumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence.'" 952 F. Supp. 2d at 689 (quoting *Desert Palace, Inc. v. Costa,* 539 U.S. 90, 100 (2003)).

In accordance with *Starr v. Sony BMG Music Ent.*, 592 F.3d 314 (2d Cir. 2010), Plaintiffs allege the following "plus factors" as circumstantial evidence of a horizontal agreement:

- The Publisher Defendants engaged in suspiciously similar conduct to increase eBook prices to consumers throughout the entire retail market (CAC ¶¶ 4, 65-73, 78-87, 156);

- The Publisher Defendants would have been unable to achieve this result without collective action because, acting alone and without assurance that each Publisher Defendant would abide by its agreement with Amazon, it would not have been in

[6] These facts satisfy the Report and Recommendation's admonishment to "plausibly infer that the Publishers would benefit from immunizing Amazon from competition." (RR at 33.)

the self-interest of any Publisher Defendant to unilaterally raise prices (CAC ¶¶ 52, 162);

- Defendants' conduct was facilitated by concentration in the market (CAC ¶¶ 1, 3, 92, 127, 131, 166, 187);
- Defendants were motivated to collude because the Publisher Defendants could raise consumer prices while Amazon maintained its retail dominance and share in the supracompetitive eBook revenue (CAC ¶¶ 104-10, 149, 157-59, 177, 190-91);
- Defendants were able to raise consumer prices at a time when the cost of producing and distributing eBook were not increasing (CAC ¶¶ 95, 98);
- The Defendants have a history of anticompetitive conduct (CAC ¶¶ 6-8, 43-61).

While acknowledging that Plaintiffs adequately plead these plus factors, the Magistrate Judge concluded that the plus factors were insufficient circumstantial evidence of a horizontal conspiracy—and instead credited Defendants' assertion that "it cannot plausibly be inferred that the economic incentives that led to collective action in *Apple* were similarly present at the time of the conspiracy alleged here." (RR at 28.) That conclusion is both legally and factually incorrect.

As a legal matter, the Second Circuit determined that the "plus factors" identified in *Starr* are the basis for plausibly inferring collective action. 592 F.3d at 327 (explaining that plus factors defeat arguments that "conduct alleged in the complaint would be entirely consistent with independent, though parallel, action"). In other words, under *Starr*, it is legal error to conclude that adequately pleaded plus factors are inadequate circumstantial evidence. At the pleading stage, Plaintiffs' burden is to allege a plausible basis for inferring collection action, not to rule out all contrary inferences. *Apple*, 952 F. Supp. 2d at 697 ("The Court of Appeals for the Second Circuit has warned that '[r]equiring a plaintiff to "exclude" or "dispel" the possibility of independent action places too heavy a burden on the plaintiff.'") (quoting *In re Publ'n Paper Antitrust Litig.,* 690 F.3d 51, 63 (2d. Cir. 2012)).

As a factual matter, the Report and Recommendation's dismissal of the adequately pleaded plus factors is based on Defendants' mischaracterizations of their economic incentives—which led the Magistrate Judge to incorrectly discount the import of each plus factor.

1. The Defendants would have been acting against their individual self-interests if they had acted unilaterally.

It was against the unilateral competitive self-interest of each Publisher Defendant to restrain its ability to compete and further entrench Amazon's dominance. (*See supra* Section II.B.) The Publisher Defendants had to act collectively to "effect an industry-wide shift" in prices, and thus "they moved together" to implement this goal. *Apple.*, 952 F. Supp. 2d at 665; CAC ¶¶ 44; 99 (historical pricing graphs for each Publisher Defendant from 2011–21, showing that competitive pricing existed outside the Apple and Amazon conspiracies). The Magistrate Judge erred in concluding that this factor favored Defendants.

2. Publisher Defendants had a common motive to collude.

A common motive to collude is a plus factor separately considered from actions against self-interest. *Apple*, 791 F.3d at 315. The Magistrate Judge acknowledged that Publisher Defendants had a common motive to "control[] trade eBook prices" (RR at 29), and thus erred in finding that this factor favored Defendants. (*Id.* at 31-33).

3. The Publisher Defendants' prior collusive conduct is relevant.

Courts have long recognized defendants' prior collusive conduct as circumstantial evidence of a horizontal conspiracy. *See, e.g., Apple*, 952 F. Supp. 2d at 689. But the Magistrate Judge disregarded the Publisher Defendants' participation in the *Apple* conspiracy—involving the same market and the same mechanism to fix prices, on the ground that it was "illegal behavior elsewhere in time or place." (RR at 33.) The Magistrate Judge cited Areeda & Hovenkamp, but that treatise supports the opposite conclusion: "[P]articipation in an illegal conspiracy elsewhere can affect a fact finder's view of a defendant's character and thus of the sincerity of an independent explanation of the conduct now challenged." Areeda & Hovenkamp ¶ 1421b2 (4th ed. 2017); *id.* ("Where a reasonable inference of conspiracy contends with the defendants' innocent explanation, evidence reflecting upon their character can undermine their credibility and tip the balance against them.") (citing *De Jong Packing Co.*

v. U.S. Dep't of Agriculture, 618 F.2d 1329 (9th Cir. 1980) (affirming conspiracy ruling and rejecting argument that conduct was independent because defendants similarly conspired two years earlier)).

Describing the *Apple* case, the Magistrate Judge explains that the very type of agreements with Amazon alleged here "was evidence showing that Apple and the Publishers had engaged in a 'conscious commitment' to use those 'business practices' to 'eliminate retail price competition in order to raise retail prices' that rendered the agreements unlawful." (RR at 23.) All the Court need to do is swap out "Apple" for "Amazon" in the Report and Recommendation's recitation of the *Apple* case to draw the connection. (*E.g.*, RR at 6 ("the very act of signing a Contract with ~~Apple~~ Amazon containing an MFN Clause, then each of the Publisher Defendants signaled a clear commitment against…the industry practice of retail discounting, thereby facilitating their collective action"); RR at 6 ("the MFN not only ensured that no eBook retailer could underprice ~~Apple~~ Amazon, but also enabled the Publishers' collective action"); RR at 23 ("use of otherwise lawful contract terms to incentivize and ensure collective action by the Publishers rendered the agency agreements between ~~Apple~~ Amazon and the Publishers in that case an unlawful restraint of trade").) The Magistrate Judge erred in concluding that this plus factor favors Defendants.

4. The Defendants' collusive conduct was facilitated by market concentration.

The Report and Recommendation acknowledges that "Amazon controls about 90% of the retail market for eBooks in the United States and the Publishers account for about 80% of the trade books sold in the United States," and that such market concentration is a plus factor. (RR at 34.) Empirical studies show that "'noncompetitive pricing … may be the result of price coordination … when the four leading firms account for some 50 to 80 percent of the market.'" *Starr*, 592 F.3d at 324

(brackets omitted) (quoting Areeda & Hovenkamp treatise). Plaintiffs have alleged this,[7] but the Magistrate Judge concluded that this was the only factor that supported the Plaintiffs and therefore was insufficient to support a conspiracy. (RR at 34-35.) This was error because, as discussed throughout this section, the Magistrate Judge failed to credit Plaintiffs' other plus factors.

5. The Defendants raise prices despite no rise in costs.

The Report and Recommendation acknowledges that Plaintiffs allege "the rise in eBook prices, without an attendant rise in costs," but nonetheless declined to credit that allegation as a plus factor. (RR at 35 ("[T]he fact that the Publishers each raised prices creates an inference just as consistent with rational business behavior as it is with concerted action.")) The Magistrate Judge relied on *Ashcroft v. Iqbal*, 556 U.S. 662, 668 (2009), for the principle that conduct consistent with a defendant's liability is insufficient, but in this case, that principle cuts the other way—because in a *competitive* market, it is not rational business behavior to raise price when costs are not increasing. That is why in *Starr* the Second Circuit expressly recognized allegations of "'[s]imultaneous price increases unexplained by any increases in cost'" as an established plus factor and "good evidence of the initiation of a price-fixing scheme." 592 F.3d at 324 (quoting Richard A. Posner, *Antitrust Law* 88 (2d ed. 2001)); *see also Apple*, 952 F. Supp. 2d at 692 ("Each of [the Publisher Defendants] could also expect to lose substantial sales if they unilaterally raised the prices of their own e-books and none of their competitors followed suit."). The Magistrate Judge erred in concluding that this plus factor favored Defendants.

6. The Defendants deliberately mislabeled the MFN provisions.

The Report and Recommendation acknowledges that Defendants faced heightened scrutiny from the government because they were barred from including MFNs in their agreements in 2014 and

[7] The four largest Publisher Defendants necessarily have a collective share of at least 64% (i.e., 4 x 16%); if any have less than the mean, then the four largest automatically exceeds 64%.

2015. (RR at 36.) A government investigation of Amazon by European regulators found that because the Publisher Defendants were prohibited by their judgments in *Apple* from entering into MFNs with an eBook retailer, Defendants here relied on a notice provision that functioned as an MFN and had the same effect of eliminating retail competition. (CAC ¶ 73.) Plaintiffs allege that, because of that heightened scrutiny, Defendants disguised their MFN provisions as notice provisions and were able to circumvent their final judgments with the government. (CAC ¶¶ 73, 78, 79.) This was a factor in *Starr*, where the defendants put their MFNs in a side agreement. 592 F.3d at 319. The Magistrate Judge erroneously concluded that Plaintiffs had failed to state a plus factor because they did not allege that Defendants put their MFNs in a side letter. (RR at 36.)

Such literal application of the *Starr* facts misses the point. Disguising provisions and calling them something different is exactly the type of conduct that *Starr* said is a plus factor: It goes to Defendants' knowledge that "they would attract antitrust scrutiny." *Starr*, 592 F.3d at 324. If Defendants had no worry that eliminating retail price competition would attract antitrust scrutiny, they would have called the MFN provisions by name and avoided the effort of disguise.[8]

7. All Publisher Defendants executed their pricing agreements within months.

As a digression from her analysis of *Starr* plus factors, the Magistrate Judge considered a separate factor, which she treated as negative. (RR at 36-40.) She concluded that because it took several months for all Publisher Defendants to execute their agreements, "the allegations in the CAC do not lead to a plausible inference that a Publisher acting alone to sign an agency agreement with Amazon

[8] *See, e.g., SD3, LLC v. Black & Decker (U.S.) Inc.*, 801 F.3d 412, 432 (4th Cir. 2015) ("attempts by the manufacturers to hide their actions could suggest that the defendants knew their actions 'would attract antitrust scrutiny'") (internal citations omitted); *In re Blood Reagents Antitrust Litig.*, 266 F. Supp. 3d 750, 777 (E.D. Pa. 2017) (recognizing concealment where defendant's document was deliberately written to obfuscate facts); *In re Ethylene Propylene Diene Monomer (EDPM) Antitrust Litig.*, 681 F. Supp. 2d 141, 176 (D. Conn. 2009) (attempted concealment "would permit a fact-finder to conclude that the defendants engaged in more than mere conscious parallelism or tacit collusion").

would have suffered any loss." (RR at 38-39.) That conclusion is misplaced for reasons already addressed. (*See supra* Section I.B.) And the premise contradicts precedent that an "unlawful conspiracy may be and often is formed without simultaneous action or agreement on the part of the conspirators." *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 227 (1939).

The Magistrate Judge also fails to credit Plaintiffs' allegations that most Publisher Defendants executed their agreements between October and December of 2014, and those agreements all *took effect* simultaneously at the start of the new year. (CAC ¶¶ 67-69, 98-99.) That is on par with the facts in *Apple*, where it took two months for five out of the six publishers Apple negotiated with to execute agreements, which also took effect at the same time. *Apple*, 952 F. Supp. 2d at 677; *see also id.* at 650-54 (recounting that for nearly a year *before* Apple's involvement, the Publisher Defendants colluded among themselves to control retail pricing).

8. Defendants had the opportunity to (and did) collude.

The Report and Recommendation acknowledges that, in *Apple,* the Publisher Defendants not only had the opportunity to collude, but also that they in fact did so. (RR at 41.) Yet the Magistrate Judge concluded that, because the Publisher Defendants became subject to government oversight, "it is not plausible to infer, absent more factual detail, that the Publishers even had an opportunity to discuss or coordinate taking collusive action concerning their agency agreements with Amazon." (RR at 42.) Government oversight does not negate this plus factor. Indeed, the Court in *Starr* applied the factor even when a government investigation resulted in no action against the defendants. *Starr*, 592 F.3d at 325 ("defendants cite no case to support the proposition that a civil antitrust complaint must be dismissed because an investigation undertaken by the Department of Justice found no evidence of conspiracy"). Discounting this plus factor is further unwarranted because, in this case, the Publisher Defendants had colluded before and agreed to the blueprint. They needed minimal opportunity to effectuate their conspiracy. That opportunity presented itself with their negotiations with Amazon and

statements to the press about these negotiations, which afforded the Publisher Defendants the means to again facilitate their conspiratorial goal to raise consumer prices across the entire eBook market.

* * *

Plaintiffs have adequately alleged a horizontal price-fixing conspiracy.

II. The vertical agreements between Amazon and the Publisher Defendants violate the rule of reason.

The Magistrate Judge erroneously concluded that Defendants' conduct was not a restraint of trade absent coordination between the Publisher Defendants. (RR at 22-23 and 43 ("Plaintiffs' failure to plead a collusive agreement [among the Publisher Defendants] moots the issue of whether such an agreement would amount to an unreasonable restraint of trade.").) On the contrary, in *Apple*, this Court held that while an agency agreement and an MFN may not be "*per se*" illegal, it was "breaking no new ground" in examining their potentially anticompetitive effect and in ruling that they were unlawful when used to "eliminate retail price competition in order to raise retail prices." 952 F. Supp. 2d at 698. Such an agreement "is illegal per se" if agreed to by horizontal competitors, as addressed above, and is also subject to scrutiny under the rule of reason, if carried out only by vertical agreements. *See*, *e.g.*, *U.S. v. Delta Dental*, 943 F. Supp. 172, 174 (D.R.I. 1996) (upholding the rule of reason claim as applied to dental insurer's anticompetitive use of MFNs in its vertical agreements with dentists).[9]

[9] *See also 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 defendant pool products distributor allegedly used MFNs in its contracts with pool product 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); *In re Elec. Books Antitrust Litig.*, 859 F. Supp. 2d at 691 (explaining that the "fundamental claim in the CAC … alleges that the defendants conspired to eliminate retail price competition and to raise the price of eBooks above [the price set through retail competition]," and ruling that "[t]his states a claim for violation of the law") (italics omitted).

Under the rule of reason, Plaintiffs must show that the challenged conduct adversely affected competition in the relevant market. (RR at 45.) An adverse effect on competition can be proved directly by evidence of "higher prices, reduced output, or lower quality" in the relevant market, or indirectly by proof of market power plus some evidence that the challenged conduct harms competition. (RR at 45.) Only one method of proof must be satisfied, but for purposes of their claims against Amazon, Plaintiffs adequately alleged a violation under both methods.

First, Plaintiffs allege that, through its agreements with the Publisher Defendants, Amazon caused eBook prices to rise to anticompetitive levels. (CAC ¶¶ 95-103.) This is the same adverse effect on competition found by the Court in *Apple*. 952 F. Supp. 2d at 694 (ruling that, even without a *per se* violation, the elimination of competitive pricing and increase in eBook prices violated the rule of reason). And Plaintiffs' allegations are adequate here. *See Todd v. Exxon Corp.*, 275 F.3d 191, 214 (2d Cir. 2001) (allegation that prices have been artificially increased or decreased is sufficient to allege adverse effect on competition).

Second, monopoly power may be inferred from a market share "between 50% and 70%," and a market share "over 70% is usually 'strong evidence' of monopoly power." *Tops Mkts., Inc. v. Quality Mkts., Inc.*, 142 F.3d 90, 99 (2d Cir. 1998).[10] And in this case, as Plaintiffs allege, more than 90% of all eBook sales occur on the Amazon platform, and the Publisher Defendants account for 80% of all trade books in the United States. (CAC ¶¶ 1, 3, 124-26, 131.) Those allegations, combined with the allegations that consumer prices increased to anticompetitive levels, are adequate under the indirect method of proof. *See, e.g.*, *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2287 (2018); *MacDermid Printing Sols.*

[10] Market power may be inferred from "shares less than 50%." *New York v. Actavis, PLC*, 2014 U.S. Dist. LEXIS 172918, at *102 (S.D.N.Y. Dec. 11, 2014); *U.S. v. Visa U.S.A., Inc.*, 344 F.3d 229, 240 (2d Cir. 2003) (market power inferred from market shares of 47% or as low as 26%).

LLC v. Cortron Corp., 833 F.3d 172, 182 (2d Cir. 2016) (Increased consumer prices are an "adverse effect on competition under the rule of reason.").

The Magistrate Judge's conclusion that Plaintiffs have not plausibly alleged an adverse effect on competition under either method of proof is premised on the belief that each agreement must be independently analyzed under the rule of reason—*i.e.*, that Plaintiffs must allege a single vertical agreement that "had a market-wide effect on trade eBook prices" and that the adverse effect of the agreements cannot be aggregated. (RR at 46-47.) But that premise is incorrect, as discussed below.

A. Aggregating adverse effects is proper against Amazon.

As a matter of law, the market effects of all vertical agreements should have been aggregated to determine whether Amazon restrained trade under the rule of reason. In *Standard Oil Co. v. U.S.*, 337 U.S. 293 (1949), the Supreme Court addressed a series of vertical exclusive-dealing agreements between Standard Oil and 5,937 independent gas stations. There was no allegation of a horizontal agreement among the gas stations, but the Supreme Court aggregated the effect of the separate vertical agreements, holding that the agreements collectively foreclosed competition in a substantial share of the market. *Id.* at 313. Two decades later, the Supreme Court decided *Fortner Enters. v. U.S. Steel Corp.*, 394 U.S. 495 (1969), another case involving a series of vertical agreements. The defendants argued that each vertical agreement had to be evaluated independently, but the Supreme Court disagreed—holding that "a narrow focus on the volume of commerce foreclosed by the particular contract or contracts in suit would not be appropriate" and that "the relevant figure is the total volume of sales tied by the sales policy under challenge." *Id.* at 502.

In short, where multiple agreements are alleged, "it would clearly be improper for the court to examine each agreement with the same defendant separately, conclude that the agreement standing alone is insufficient to establish illegality, and dismiss the complaint without considering the impact

of the aggregation." Areeda & Hovenkamp ¶ 310(c)(1) (4th ed. 2014) (quotation omitted).[11] As another district court recently explained, "the Supreme Court has rejected that approach." *Sitts*, 417 F. Supp. 3d at 470 (rejecting argument that court had to "examin[e] each [vertical] agreement with each alleged co-conspirator independently").[12] Because Plaintiffs allege a series of agreements between Amazon and the Publisher Defendants, the effects of those agreements should be considered in the aggregate.

To support her contrary conclusion, the Magistrate Judge relied on *Bookhouse of Stuyvesant Plaza v. Amazon, Inc.*, 985 F. Supp. 2d 612 (S.D.N.Y. 2013). But *Bookhouse* is not controlling. The Court in *Bookhouse* ruled that the plaintiff's allegations were deficient in numerous respects: The plaintiff did not plausibly allege any anticompetitive agreement; did not properly allege the relevant market; and did not plausibly allege market power because the aggregated vertical agreements would account for only 36% of the relevant eBook sales. *Id.* at 620, 622. In addition, the Court stated, as an aside, that aggregation was inappropriate. *Id.* at 622. Not only was that statement unnecessary to the decision and contrary to Supreme Court precedent, but it also relied solely on *Wellnx Life Scis., Inc. v. Iovate Health*

[11] *See also Twin City Sportservice, Inc. v. Charles O. Finley & Co.*, 676 F.2d 1291, 1302 (9th Cir. 1982) (ruling that courts are not "limited to looking at the market implications of the one contract" when a series of vertical contracts are alleged).

[12] Numerous courts agree. *See, e.g., U.S. v. Microsoft Corp.*, 253 F.3d 34, 70-71 (D.C. Cir. 2001) (aggregated effect of Microsoft's vertical agreements with "fourteen of the top fifteen [internet] access providers" found to have significant anticompetitive effect and "demonstrate[] a harm to competition"); *Twin City*, 676 F.2d at 1303 ("[I]t was proper for the district court to have aggregated [defendant's] contracts in the relevant market in order to assess the Sherman Act violations resulting from these contracts.") *Orchard Supply Hardware LLC v. Home Depot USA*, 967 F. Supp. 2d 1347, 1360-62 (N.D. Cal. 2013); *In re Keurig Green Mountain Single-Serve Coffee Antitrust Litig.*, 383 F. Supp. 3d 187, 245 (S.D.N.Y. 2019) (holding that series of vertical agreements with distributors could violate the rule of reason even though no distributor was alleged to have market power or a high market share). *See also Am. Express*, 138 S. Ct. at 2287 (holding that AmEx's 3.4 million vertical agreements with merchants would violate the rule of reason if the aggregated effects was to increase price, reduce output or otherwise restrain competition); *PepsiCo., Inc. v. Coca-Cola Co.*, 315 F.3d 101, 111 (2d Cir. 2002) (aggregating adverse effects of 377 vertical agreements but determining that aggregated effects were insufficient to show adverse effect on competition).

Scis. Rsch., Inc., 516 F. Supp. 2d 270, 293 (S.D.N.Y. 2007)—a case in which, contrary to *Bookhouse*'s citation, the Court assessed the aggregated effects of the alleged vertical agreements.[13]

B. Aggregating adverse effects is also proper against the Publisher Defendants.

While there is some authority to support the Report and Recommendation's separate assessment of the adverse effects with respect to Plaintiffs' claims against *just* the Publisher Defendants,[14] the better approach is to allow aggregation when, as the Magistrate Judge here concluded (RR at 29-30, 38), the individual spokes are aware of and acquiesce in the anticompetitive conduct.[15]

* * *

Plaintiffs adequately alleged that the vertical agreements between Amazon and the Publisher Defendants violate the rule of reason.

III. The Magistrate Judge rejected Plaintiffs' monopoly claim against Amazon after erroneously concluding that they failed to plead Amazon's monopoly power.

Defendants did not contest Plaintiffs' allegations that the retail sale of trade eBooks is the relevant market for their claims under Section 2 of the Sherman Act. (CAC ¶ 113.) The Magistrate Judge recommended dismissal of Plaintiff's monopolization claim against Amazon solely because of

[13] In *Wellnx*, the Court determined that the effects were insufficient because the "agreements only freeze out one competitor from 70% of the market" while "[a]ll other competitors compete unobstructed." 516 F. Supp. 2d 270, 293 (S.D.N.Y. 2007). The Second Circuit followed the same approach in *PepsiCo*, evaluating the aggregated effects of the vertical agreements but concluding those effects insufficient because they accounted for only 18% of the alleged market. 315 F.3d at 111.

[14] *See Bookhouse*, 985 F. Supp. 2d at 622; *Orchard Supply Hardware LLC*, 967 F. Supp. 2d at 1362-63. While the court in *Dickson v. Microsoft Corp.* did not allow aggregation against all conspirators with Microsoft, that decision was based on the plaintiff's express allegation that there were "two separate vertical conspiracies." 309 F.3d 193, 207, 210 (4th Cir. 2002).

[15] *See Sitts*, 417 F. Supp. 3d at 468 (holding that aggregation was permissible even without alleging a hub-and-spoke conspiracy); *Genico, Inc. v. Ethicon, Inc.*, 2006 U.S. Dist. LEXIS 96909, at *14 (E.D. Tex. Mar. 23, 2006) (holding that market share against alleged spokes to be adequately pleaded through aggregation of adverse effects); *Applied Med. Res. Corp. v. Johnson & Johnson*, 2004 U.S. Dist. LEXIS 29409, at *12-13 (C.D. Cal. Feb. 23, 2004) (same).

an alleged failure to "plead that Amazon possesses monopoly power." But Plaintiffs have plausibly alleged Amazon's monopoly power; the Magistrate Judge's recommendation was in error.

Monopoly power is "the power to control prices ***or*** exclude competition." (RR at 45 (emphasis added).) It may be inferred, under the indirect method of proof, from the defendant's dominant share of the relevant market, or alternatively, under the direct method of proof, by showing the defendant's ability to in fact control price or exclude competition. (RR at 47.) Only one method is required; Plaintiffs have adequately alleged monopoly power under both methods. As a matter of law, under the indirect method, "Amazon's 90 percent market share constituted a monopoly under the antitrust laws[.]" *Apple*, 791 F.3d at 342. And Plaintiffs also alleged high barriers to entry into the retail distribution of eBooks market. (CAC ¶¶ 3, 131-32.)

While acknowledging Plaintiffs' allegation that 90% of the trade eBook sales are made on Amazon's platform, the Magistrate Judge concluded that Plaintiffs' indirect method of proving market share was "contradicted" by their allegation that 80% of the trade eBooks sales were made by the Publisher Defendants. (RR at 51-52.) But that is not a contradiction. The Publisher Defendants sell eBooks *through sales agents*, including Amazon, that operate eBook platforms. The Magistrate Judge improperly discounted Plaintiffs' allegation that 90% of trade eBooks are sold *on the Amazon platform*—an allegation that is more than sufficient to allege Amazon's monopoly power under the indirect method—because the Publisher Defendants sell on Amazon.[16] The Magistrate Judge's recommendation of dismissal on that basis was error.

Moreover, Plaintiffs also plausibly allege Amazon's monopoly power by the direct method of proof. The ability of the defendant to protect itself from price competition demonstrates monopoly

[16] The fact that the Defendant Publishers sell 80% of trade eBooks on the Amazon platform is consistent with, not contradictory to, the allegation that Amazon has a 90% market share. Amazon could not plausibly achieve a 90% market share unless the Defendant Publishers sold their trade eBooks on its platform.

power. *See*, *e.g.*, *Toys "R" Us v. FTC*, 221 F.3d 928, 937 (7th Cir. 2000). And in addressing Plaintiffs' *per se* claim under Section 1, the Magistrate Judge concluded that "it can reasonably be inferred" that Amazon was able to use its "market dominance" to coerce the Publisher Defendants to accept the challenged MFN provisions: "[T]he Publishers were dealing with a crucial retailer who could have ostensibly exercised its considerable market power to demand for its own benefit, the inclusion of an MFN in the agreements." (RR at 30.) That, by definition, is monopoly power—*i.e.*, the power to control price and exclude price competition. The MFN agreements are direct evidence that Amazon controlled the price at which eBooks are distributed and excluded its competitors from competing on price against Amazon.

The Magistrate Judge's only basis for concluding that Plaintiffs failed to plead direct evidence of monopoly power was her assumption that Amazon cannot be a monopolist unless it determines the selling price of the Publisher Defendants' eBooks. The Magistrate Judge cited no precedent for this proposed rule, which the Supreme Court has long rejected in the context of price-fixing under Section 1.[17] And more recently, in *Apple v. Pepper*, the Supreme Court rejected just such a rule for purposes of Section 2 after identifying numerous problems with Apple's "who sets the price theory." 139 S. Ct. 1514, 1522-24 (2019) (internal quotes omitted) (concluding that consumers had standing to sue Apple for overcharges allegedly caused by its agreements with app developers as their platform sales agent, even though app developers set retail prices and sold directly to consumers).

The Magistrate Judge declined to follow *Pepper* because that decision addressed standing (RR at 52), but that cursory approach ignores the Supreme Court's rejection of the "who sets the price

[17] *United States v. Masonite Corp.*, 316 U.S. 265, 275-7 (1924) ("Nor can the fact that Masonite alone fixed the prices, and that the other appellees never consulted with Masonite concerning them, make the combination any the less illegal. Prices are fixed when they are agreed upon. The fixing of prices by one member of a group, pursuant to express delegation, acquiescence, or understanding, is just as illegal as the fixing of prices by direct, joint action."); *see also Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46, 48 (1990) (rejecting the premise that "price fixing required an explicit agreement on prices to be charged or that one party have the right to be consulted about the other's prices").

theory" as an "unprincipled line" that is "not persuasive economically or legally." *Pepper*, 139 S. Ct. at 1522. It also ignores the Supreme Court's holding that, "[i]f a retailer has engaged in unlawful monopolistic conduct that has caused consumers to pay higher-than-competitive prices, *it does not matter how the retailer structured its relationship with an upstream manufacturer or supplier*." *Id.* at 1523 (emphasis added). Nor does it matter that the defendant in *Pepper* held 100% market share rather than Amazon's 90% (RR at 52-53), because Section 2 applies equally in any context in which the defendant is held to have sufficient market power. *See Tops Mkts.*, 142 F.3d at 99.

Plaintiffs adequately allege that Amazon has monopoly power.

IV. Plaintiffs plausibly allege that each Defendant knowingly participated and took steps in furtherance of a conspiracy to retain Amazon's monopoly.

The Magistrate Judge disregarded Plaintiffs' well-pleaded conspiracy-to-monopolize claim based on the same erroneous analysis applied to Plaintiffs allegations of concerted action under Section 1.[18] (RR at 48-49.) As explained above, Plaintiffs adequately pleaded a horizontal agreement between the Publisher Defendants. Moreover, in contrast to the requirements for alleging *per se* violation under Section 1, there is no requirement to allege such an agreement for purposes of pleading a conspiracy-to-monopolize claim, and the Magistrate Judge erred in recommending one.

As a general rule, under the Sherman Act, "each member of a conspiracy is liable for all of the damages [directly] caused by the conspiracy[]." *Paper Sys., Inc. v. Nippon Paper Indus. Co.*, 281 F.3d 629, 632, 634 (7th Cir. 2002). A participant need only agree to the "conspiracy's 'general nature and extent;'" it "need not have full knowledge of all the details of a conspiracy or its scope to be a

[18] The Magistrate Judge did not rely on her finding that Amazon lacked monopoly power as grounds for recommending dismissal of Plaintiffs' conspiracy to monopolize claims. (*See supra* Section. III). Nor should the Court do so because "market power is not an element of a conspiracy to monopolize claim under Section 2." *Wagner v. Magellan Health Servs.*, 121 F. Supp. 2d 673, 680 (N.D. Ill. 2000). In fact, "a conspiracy to monopolize does not [even] require a dangerous probability of success" in acquiring monopoly power. *Rome Ambulatory Surgical Center v. Rome Mem. Hosp.*, 349 F. Supp. 2d 389, 420 (N.D.N.Y. 2004).

member." *In re Foreign Exch. Benchmark Rates Antitrust Litig.*, 2022 U.S. Dist. LEXIS 18083, at *54 (S.D.N.Y. Feb. 1, 2022) (quotation omitted).[19] Plaintiffs satisfied this requirement. As the Magistrate Judge concluded, Plaintiffs plausibly alleged that each Publisher Defendant "knew that the other Publishers were negotiating agreements with Amazon that used agency pricing and contained MFN clauses (or their equivalent)," and that the object of this conspiracy was to "entrench[] Amazon's dominance as an eBook retailer." (RR at 32, 38.) Defendants did not challenge the sufficiency of Plaintiffs' allegations that entering into the agreements, raising eBook prices, and preventing retail competition, were steps taken in furtherance of the conspiracy. (CAC ¶ 190.) The Magistrate Judge's recommendation to dismiss the conspiracy-to-monopolize claim was in error.

V. All Plaintiffs have antitrust standing under *Illinois Brick* because they purchased their eBooks at conspiratorial prices from the Publisher Defendants.

Finally, the Magistrate Judge erred by recommending dismissal of the thirteen Plaintiffs who purchased eBooks only on platforms that compete with Amazon based on the conclusion that "any eBook purchases made by Plaintiffs from a retail platform other than Amazon are indirect purchases that do not give Plaintiffs standing to assert a claim against Amazon." (RR at 17.)[20] Because every Plaintiff is a *direct purchaser*, the indirect-purchaser rule does not apply to any of them, and the Magistrate Judge's recommendation of dismissal contradicts Plaintiffs' well-pleaded allegations and the Magistrate Judge's own explanation of the eBook purchases.

As the Report and Recommendation acknowledges, all Plaintiffs purchase eBooks directly from the Publisher Defendants, regardless of the retail platform used to accomplish the sale: "[T]he

[19] *See also Masonite*, 316 U.S. at 275 (Even if it were "not clear at what precise point of time each [defendant] became aware of the fact that its contract was not an isolated transaction but part of a larger arrangement . . . it is clear that as the arrangement continued each became familiar with its purpose and scope.").

[20] The Publisher Defendants did not challenge the standing of these Plaintiffs and no Defendant challenged the standing of the two Plaintiffs who purchased eBooks at supercompetitive prices through Amazon. (RR 17.)

sales transaction is carried out directly between the publisher and the retail consumer (like each Plaintiff here) and the eBook retailer (like Amazon or its competitors) serves as the publisher's sales agent in the transaction." (RR at 3; *see also* RR at 52, 7, 27 (stating that Amazon "acts only as an agent collecting a commission on each transaction"; that "Amazon acts only as an agent to the seller"; and that the other retail platforms also have that relationship with publishers). When an eBook is sold on a retail platform, whether operated by Amazon or its competitors, the eBook retailer (like Amazon or its competitors)" serves as "the publisher's sales agent" and receives a commission for its services. (CAC ¶ 2.) Under this system, the eBook retailers do not purchase anything from the publisher—instead they facilitate the transactions on their platform and take a commission.

As demonstrated by *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), every Plaintiff has standing to sue all members of the antitrust conspiracy for their overcharge damages, including Amazon. The plaintiff there alleged that the defendant manufacturers had conspired to fix the price of concrete blocks, and that the overcharge paid by the direct purchasers allegedly flowed down the distribution chain to the plaintiff. *Id.* at 726. The Supreme Court held that only "the overcharged direct purchaser and not others in the chain of manufacture or distribution" can sue. *Id.* at 729. In this case, and unlike in *Illinois Brick*, the thirteen Plaintiffs who purchased eBooks on retail platforms operated by Amazon's competitors are "the overcharged direct purchaser[s]" because they purchase these eBooks directly from the Publisher Defendants without any intermediary purchase by the eBook retailer-sales agent. As the Court recently reiterated in *Pepper*, the "bright-line rule of *Illinois Brick*" is that "indirect purchasers who are two or more steps removed from the antitrust violation in a distribution chain may not sue." 139 S. Ct. at 1521. The rule does not apply to "direct purchasers"—like all Plaintiffs here—"who are the immediate buyers from the alleged antitrust violators." *Id.* (quotation omitted).

That Amazon does not receive a commission when the Publisher Defendants transact sales through other retail platforms does not change the analysis: the Publisher Defendants are directly

liable to the thirteen Plaintiffs for the overcharges the Publisher Defendants directly imposed by agreement with Amazon. Likewise, as the Publisher Defendants' co-conspirator, Amazon is also liable. Courts have long held that co-conspirators are jointly and severally liable to antitrust plaintiffs.[21] And "[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 [directly] caused by the conspiracy[]." *Paper Sys.*, 281 F.3d at 632, 634. The Courts of Appeal that have considered this issue uniformly hold that a plaintiff who purchases directly from one member of the conspiracy has standing to sue all co-conspirators, including those from whom it did not purchase.[22] Although some courts have treated direct purchases from a defendant's co-conspirators as an "exception" to the indirect purchaser rule, no circuit court has denied standing unless the purchaser failed to meet pleading or evidentiary standards necessary to establish that the intermediate purchaser, from whom it made the purchase, lacked standing in its own right to sue as a direct purchaser.[23] That is no concern here because, as the Magistrate Judge recognized, the Publisher Defendants did not make any intermediary sales to retailers and every Plaintiff purchased from a Publisher Defendant. Thus, under *Illinois Brick*, all Plaintiffs have antitrust standing to sue all violators—including the Publisher Defendants *and* their co-conspirator, Amazon.

While acknowledging that courts recognize the standing of a purchaser from a co-conspirator, the Report and Recommendation fails to analyze the relevant case law—stating only that, because the

[21] *See, e.g., Atlanta v. Chattanooga Foundry & Pipeworks*, 127 F. 23, 26 (6th Cir. 1903), *aff'd*, 203 U.S. 390 (1906) (allowing purchaser to sue co-conspirators and ruling that it was "of no importance" that the plaintiff had made "no purchase … direct from either one of them" because "each [was] responsible for the torts committed in the course of the [antitrust violation]"); *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 645-57 (1981) (antitrust co-conspirators are "jointly and severally liable"); *In re Foreign Exch. Benchmark Rates Antitrust Litig.*, 2016 U.S. Dist. LEXIS 128237, at *36 (S.D.N.Y. Sept. 20, 2016) (same).

[22] *See*, *e.g.*, *Marion Diagnostics v. Becton Dickenson & Co.*, 29 F.4th 337, 342 (7th Cir. 2022); *Insulate SB, Inc. v. Advanced Finishing Sys., Inc.*, 797 F.3d 438, 542 (8th Cir. 2015)); *Arizona v. Shamrock Foods Co.*, 729 F.2d 1208, 1211-13 (9th Cir 1984); *See also* Areeda & Hovenkamp, *Antitrust Law*, ¶ 330(d).

[23] *See, e.g., Howard Hess Dental Labs. Inc. v. Dentsply Int'l, Inc.*, 424 F.3d 363, 377 (3d Cir. 2005).

"Second Circuit has not addressed" the issue, "Plaintiffs cannot avail themselves of the co-conspirator exception." (RR at 17.) But the lack of direct guidance by the Second Circuit is no basis to deny standing. *See, e.g.*, *Core SWX, LLC v. Vitec Grp. US Holdings, Inc.*, 2022 U.S. Dist. LEXIS 125198, at *17 (E.D.N.Y. July 14, 2022) (report and recommendation; analyzing relevant case law to recommend decision on issue that Second Circuit had not yet addressed).[24] Several district courts in this Circuit have permitted standing under these circumstances, and Plaintiffs are unaware of any that have rejected it.[25] The Court should follow the overwhelming case law favoring standing.[26]

CONCLUSION

Respectfully, the Magistrate Judge's recommendation of dismissal should be rejected because Plaintiffs have adequately alleged antitrust claims under Section 1 and 2 of the Sherman Act. And further, the Magistrate Judge never addressed Plaintiffs' request for leave to amend. (ECF 123 at 47.) To the extent the Court adopts the Report and Recommendation, which does not recommend dismissing with prejudice, Plaintiffs respectfully request an opportunity to replead their claims.

[24] As an alternative basis, the Magistrate Judge concluded that the 13 Plaintiffs had no standing because she recommended dismissal of the horizontal conspiracy claim. (RR at 18.) That, too, is in error. Amazon entered into price-fixing agreements with each Publisher Defendant; it is jointly and severally liable for all eBooks that each Publisher Defendant sold at the conspiratorial price.

[25] *See Laumann*, 907 F. Supp. 2d at 482; *In re NASDAQ Market-Makers Antitrust Litig.*, 169 F.R.D. 493, 508 (S.D.N.Y. 1996); *Rios v. Marshall*, 100 F.R.D. 395, 404 (S.D.N.Y. 1983); *Precision Assocs. v. Panalpina World Transp., (Holding) Ltd.*, 2013 U.S. Dist. LEXIS 177023, at *56 (E.D.N.Y. Sep. 20, 2013).

[26] Also as this Court previously held in *Laumann*, "*Illinois Brick* bars only damages under Clayton Act § 4, not injunctive relief under § 16," so even if Plaintiffs' purchases could somehow be considered indirect, the indirect-purchaser rule has no application to Plaintiffs' claims for injunctive relief. 907 F. Supp. 2d at 480 n.80. *See also Pepper*, 139 S. Ct. at 1520, n.1 ("*Illinois Brick* did not address injunctive relief.").

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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 August 31, 2022, which will send notification of such filing to the e-mail addresses registered.

/s/ Steve W. Berman
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