

# Akin Gump

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September 13, 2012

## VIA EMAIL

The Honorable Denise L. Cote  
United States District Judge  
Daniel Patrick Moynihan United States Courthouse  
500 Pearl Street, Room 1610  
New York, NY 10007-1312

D2F  
9/13/12

Re: *United States v. Apple Inc., et al.*, 12-cv-02826 (DLC)

Dear Judge Cote:

I write to follow up regarding Exhibit A to Penguin's Observations with Respect to the Government's Response to Public Comments and Motion For Entry of Final Judgment (DE 103), which Penguin asked the Court to file "under seal" on August 15, 2012 because it was compiled using data provided by Amazon and designated by Amazon "Highly Confidential" pursuant to the Protective Order.<sup>1</sup> As I wrote in my August 15, 2012 letter, Penguin intended to ask Amazon to down designate its consumer pricing data (which after all was publically available) so this exhibit and its information need not remain secret.

After conferring with counsel for Amazon pursuant to Paragraph 14(a) of the Protective Order (DE 43), **Amazon now agrees that Exhibit A may be filed on the public docket.**

Although Your Honor has already granted the Government's motion and entered a final judgment with respect to the Settling Defendants (DE 113), Penguin believes it is in the public interest to make evidence like this public. Exhibit A to Penguin's filing contradicts the serious misconception that new release eBook prices simply went from \$9.99 under the wholesale model to \$12.99 or higher under the agency model. Exhibit A, compiled using historical pricing information from Amazon, shows that (1) the average Amazon price, on a title by title basis, for the majority of Penguin new release eBook titles was *higher* than \$9.99 prior to the agency model, and (2) many consumers, by implication, have paid less for certain Penguin new release eBook titles under the agency model than they would have under the wholesale model. We of course will revisit this issue in detail for purposes of class certification (and beyond), given it is

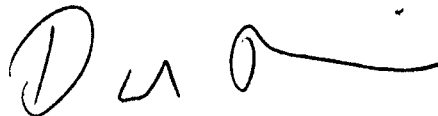
<sup>1</sup> The Court sealed the document on September 6, 2012. (DE 123.)

The Honorable Denise L. Cote  
September 13, 2012  
Page 2

hard to see how consumers who have paid less for eBooks under the agency model as opposed to under Amazon's prior pricing strategies ought to be included in a potential class of eBook purchasers claiming overpayment.

Enclosed is a revised version of Exhibit A without any confidentiality designations. Penguin respectfully requests that this be filed on the public docket as an Exhibit to DE 103.

Sincerely,

A handwritten signature in black ink, appearing to read "D. McInnis", with a long horizontal flourish extending to the right.

Daniel Ferrel McInnis

Enclosure

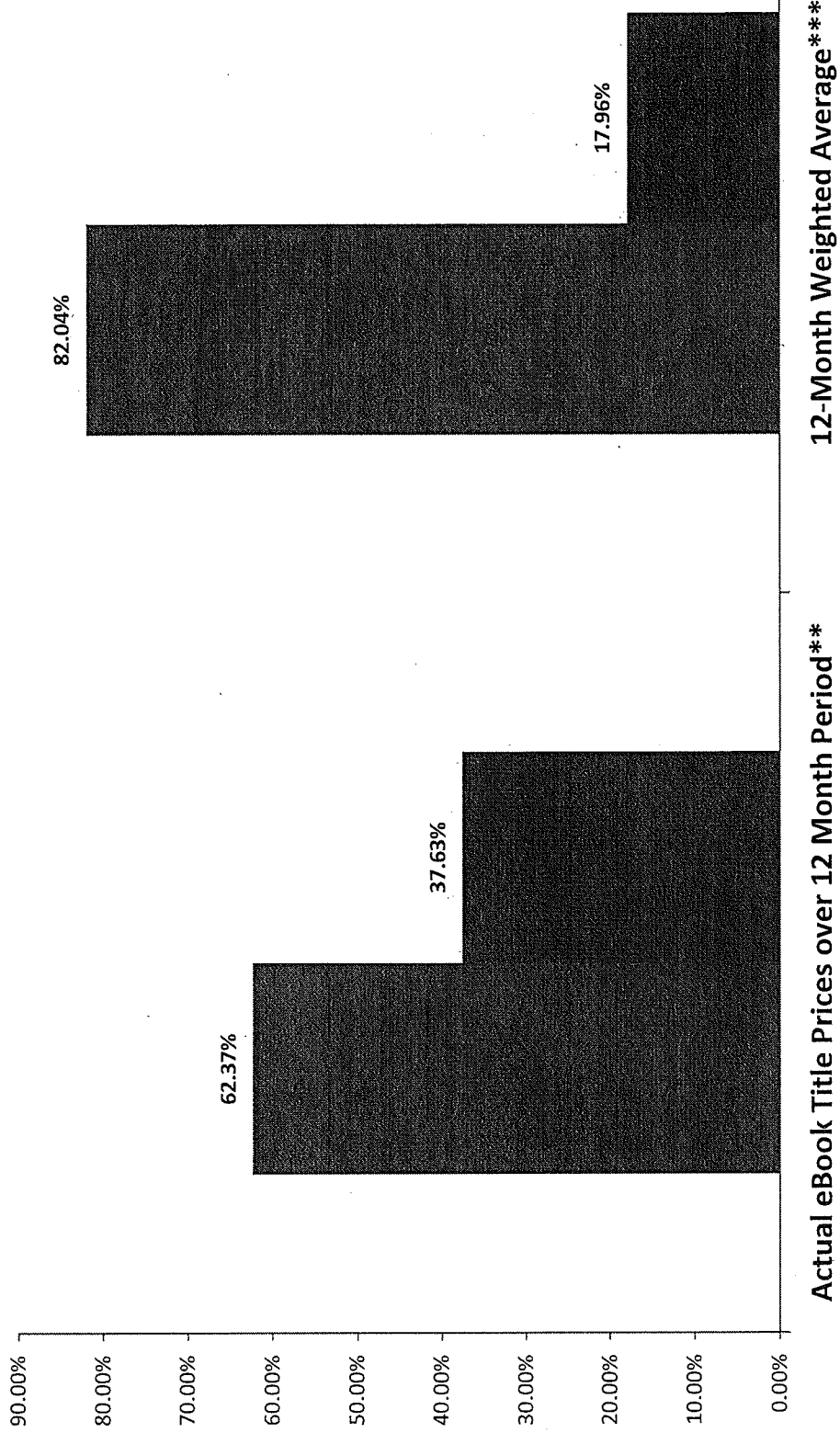
cc: All counsel of record by electronic mail

# Exhibit A

# Amazon Pre-Agency Price Dispersion

(April 2009 to March 2010)

New Release\* Penguin eBooks with Print List Price >= \$20.00

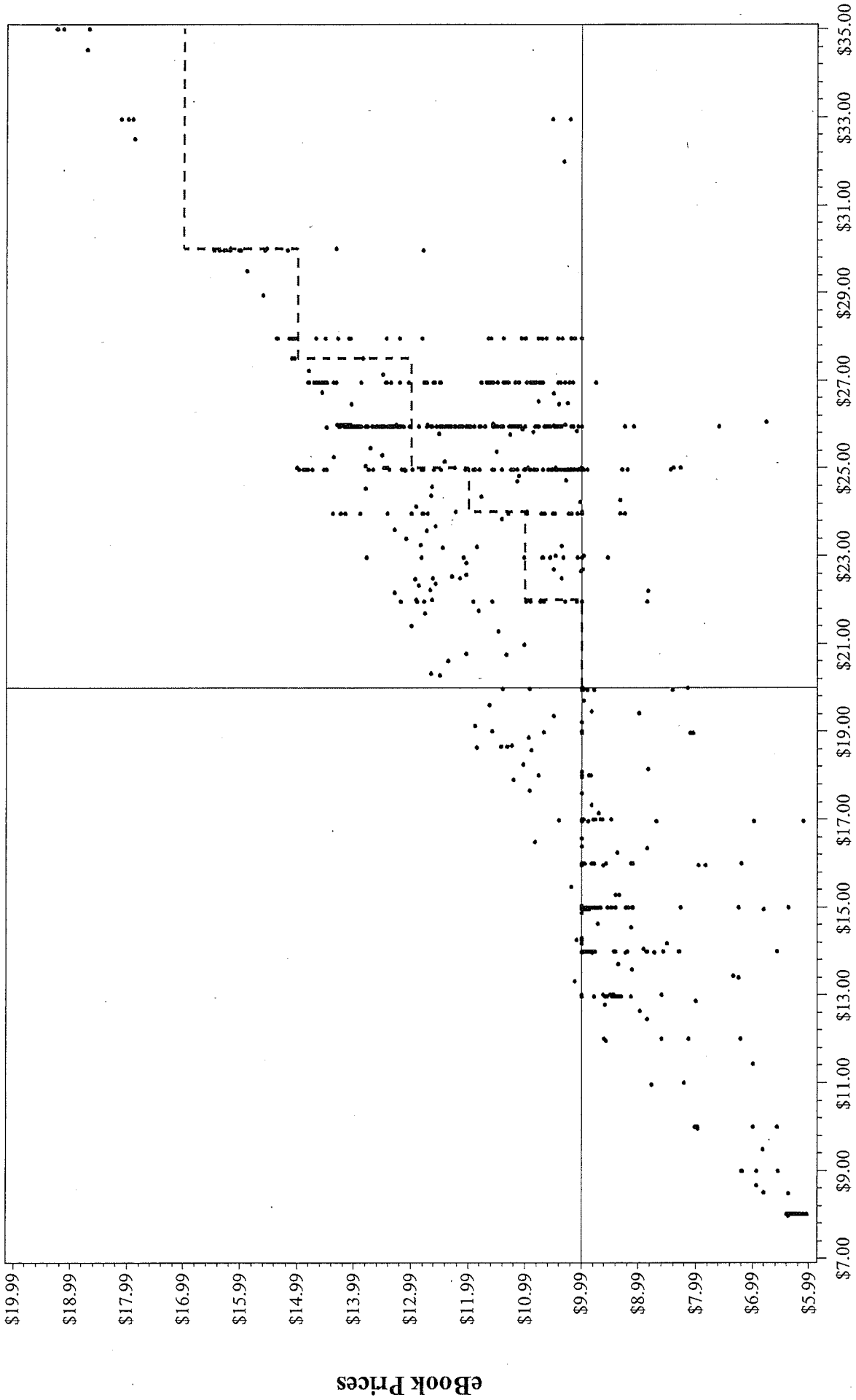


\*New Releases defined as 12 months from release date

\*\*Each title has up to 12 monthly prices

\*\*\*Yearly Price per title weighted by units sold

**eBook Title Prices - 12-Month Weighted Average\***  
 (April 2009 - March 2010)  
 Penguin New Release\*\* eBooks

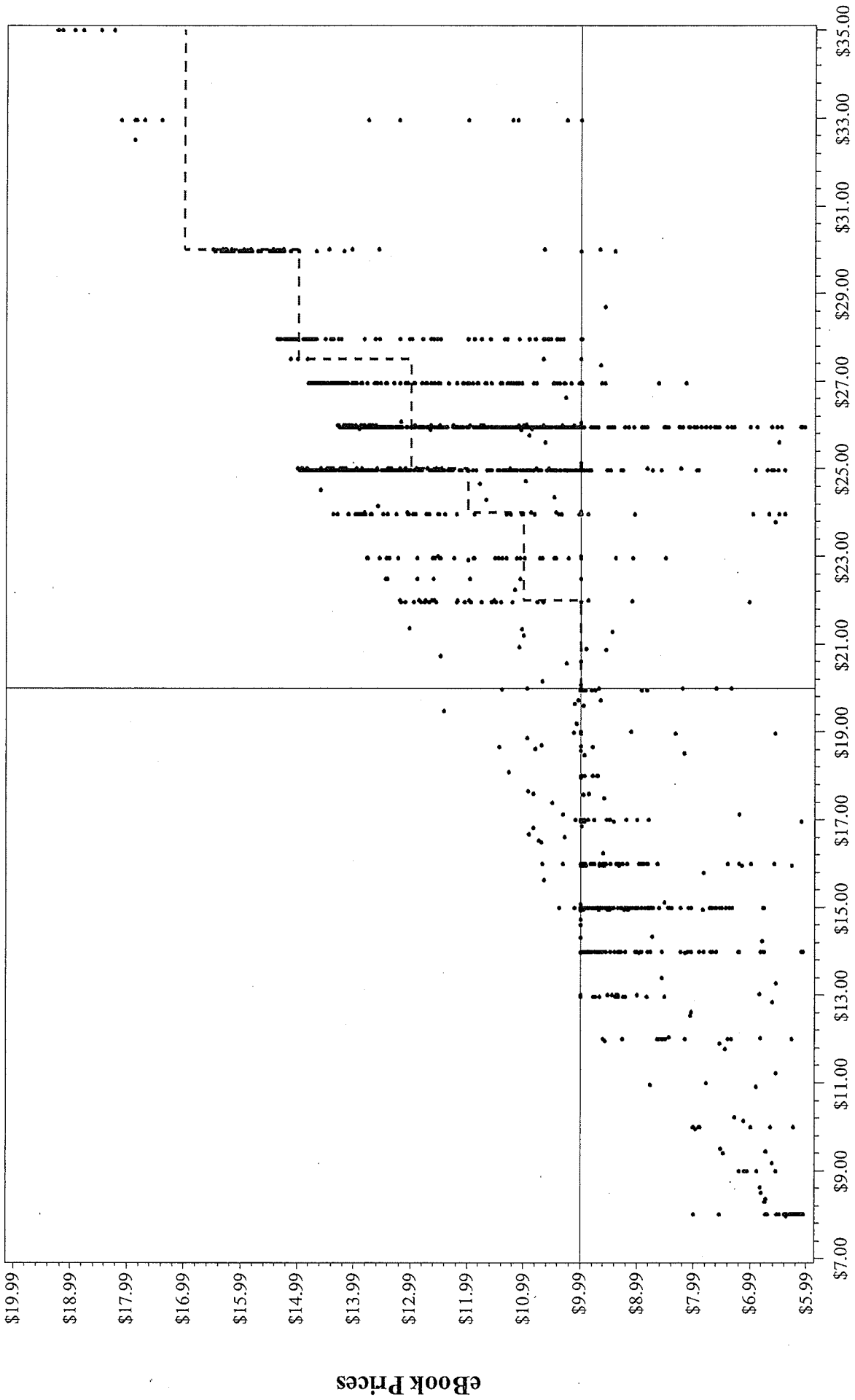


**Print Book List Prices**

● ● ● Average Weighted Price per Title  
 - - - Agency Price Ceilings

\*Yearly price per title weighted by units sold  
 \*\*New Releases defined as 12 months from release date

**Actual eBook Title Prices over 12 Month Period\***  
 (April 2009 - March 2010)  
 Penguin New Release\*\* eBooks



**Print Book List Prices**

\*Up to 12 monthly prices displayed  
 \*\*New Releases defined as 12 months from release date