UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

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

APPLE INC.'S MOTION FOR RECONSIDERATION OF THE COURT'S RULINGS EXCLUDING PORTIONS OF DR. MURPHY'S AND DR. BURTIS'S EXPERT TESTIMONY

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PRELIMINARY STATEMENT

Apple respectfully moves for reconsideration of the Court's rulings excluding certain testimony given by Drs. Kevin M. Murphy and Michelle Burtis. The Court's decision fundamentally misapprehends the significance and relevance of *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984), and denies Apple its due process right to present "every available defense," *Lindsey v. Normet*, 405 U.S. 56, 66 (1972). The Court may reconsider its ruling where it has overlooked or misapprehended a party's arguments. *Kingdom 5-KR-41, Ltd. v. Star Cruises PLC*, 2005 WL 110434, at *2 (S.D.N.Y. Jan. 20, 2005); *cf. Munafo v. Metro. Trans. Auth.*, 381 F.3d 99, 105 (2d Cir. 2004) ("[D]istrict courts may alter or amend a judgment to correct a clear error of law or to prevent manifest injustice."). It should do so here. Indeed, this Court explained that if it "ha[d] an incorrect understanding of the law," it would "give [Apple] an opportunity to correct [the Court's] error." Pre-Trial Conf. Tr. 44:18–20, May 23, 2013.

Plaintiffs ask this Court to infer from Apple's conduct in negotiating a series of vertical agreements with the publishers that Apple knowingly participated in, and facilitated, a horizontal conspiracy to increase e-book prices. Apple's position is clear: Apple's negotiation positions and contract terms, which are commonplace in vertical business negotiations, were driven by Apple's independent and unilateral business interests to enter a new business on terms attractive to Apple, and were not in any way designed to facilitate or organize a publisher cabal. Dr. Murphy's economic opinions support this position, and are critical to assessing whether Apple's conduct would have been in its economic interests in the absence of any claimed conspiracy.

Monsanto limits the inferences that the fact-finder may draw from ambiguous evidence in a section 1 case because permitting broad inferences "could deter or penalize perfectly legitimate

conduct." 465 U.S. at 763. Conduct that in isolation might support an inference of a conspiracy can, when "evaluated in its factual context," be entirely consistent with independent action. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). *Monsanto* expressly recognizes that a producer and its distributors are persons who are cooperating in the sale of a single product and who have ongoing commercial relationships. The unimpeded flow of information between these parties about "marketing strategy" and "the prices and the reception of their products in the market" is crucial to the operation of efficient distribution systems. 465 U.S. at 762. Section 1 liability cannot be imposed on these legitimate business activities, because to do so would "create an irrational dislocation in the market" and "inhibit management's exercise of independent business judgment." *Id.* at 764; *see also Comcast Cable Commc'ns, LLC v. FCC*, No. 12-1337, slip op. at 6 (D.C. Cir. May 28, 2013) (Kavanaugh, J., concurring) ("vertical contracts in a competitive market encourage product innovation, lower costs for businesses, and create efficiencies—and thus reduce prices and lead to better goods and services for consumers").[1]

This Court's decision to exclude Apple's expert testimony showing that Apple's conduct was consistent with its independent business interests based on the Court's tentative view that "Apple knowingly participated in and facilitated a conspiracy to raise prices of e-books" (Tr. 49:5–6), threatens to turn *Monsanto* on its head by drawing conspiratorial inferences from conduct the Supreme Court has approved and protected as essential to the operation of efficient markets. No Supreme Court or Second Circuit decision has upheld exclusion of evidence

[1] It is telling that plaintiffs are asking the Court to disregard this mainstream and fundamental principle of antitrust law that has been established for almost 30 years. Plaintiffs cannot establish a conspiracy under the *Monsanto* standard in the face of Apple's overwhelming showing that its negotiation approach and contract terms all served its legitimate and independent business interests absent a conspiracy.

supporting a defendant's independent business justification for its conduct, or held that *Monsanto* does not apply where a plaintiff puts forth "direct" evidence. Unless there is not only "direct" but *unambiguous* evidence *of the actual conspiracy alleged*, the independent business justification for the defendant's conduct is relevant and critical to the fact-finder's determination whether the defendant participated in a conspiracy.

The testimony of Dr. Murphy and Dr. Burtis is critical to Apple's ability to defend itself by proving that its actions were driven by its independent business interests—not a conspiracy to fix prices—and resulted in pro-competitive benefits to the market. Apple respectfully requests that the Court reconsider its decision to exclude key portions of that testimony.

ARGUMENT

I. *Monsanto* Requires the Court to Consider Economic Evidence of Apple's Independent Business Interests

At the pre-trial conference on May 23, 2013, as part of its ruling excluding portions of Dr. Murphy's testimony,[2] the Court stated:

> If the plaintiffs succeed in proving that Apple reached an agreement with the publishers to act together to raise eBook prices and took steps to further that scheme, then the fact that the scheme and those steps were in Apple's own independent economic interest is no defense.

Tr. 34:7–11.[3] Apple submits that the Court's statement misconceives Apple's arguments and the controlling legal standard.

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[2] Plaintiffs moved to exclude three of Professor Murphy's opinions, contained in his initial expert report, that addressed whether Apple's conduct was consistent with its economic self-interest absent a conspiracy. Tr. 32:10–12. The Court granted the motion as to only one of those opinions. Tr. 52:7–10 ("I struck one opinion. I asked you to go back and try to revisit it.") As directed, Apple has submitted revised direct testimony for Professor Murphy. The relevant economic question and analysis in the revised testimony is fully congruent with the *Monsanto* legal standard and should be accepted by the Court without further modification.

Apple agrees that *Monsanto* does not offer an immunity defense to a proven conspiracy; that is the teaching of *United States v. General Motors Corp.*, 384 U.S. 127 (1966). ***But that is not Apple's argument in this case and that was not the import of Dr. Murphy's testimony.*** Plaintiffs have repeatedly characterized Apple's argument this way (Pls.' Br. 32; Pls.' Opp. Br. 10–11; Pls.' Reply in Support of Murphy Mot. in Limine 3–5), but it is simply a straw man. Apple vigorously *denies* that it participated in a conspiracy. And it argues that none of plaintiffs' evidence tends to prove a conspiracy, because each piece of evidence is just as consistent (and in many cases is substantially *more* consistent) with Apple acting independently to further its own business goals.

Monsanto is the controlling standard for determining ***whether*** the evidence permits the Court to infer that Apple knowingly participated in, and facilitated, the alleged conspiracy with the publishers. The Court's statement on May 23 that "Apple's own independent economic interest is no defense" "[i]f the plaintiffs succeed in proving that Apple reached an agreement with the publishers to act together to raise eBook prices" (Tr. 34:7–11) thus misapprehends the centrality and relevance of Apple's independent economic interest. In order to determine ***whether*** "Apple reached [such] an agreement," the Court *must* consider "Apple's own

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[3] Apple appreciates that the Court acknowledged at the pre-trial conference that its "tentative view" (Tr. 49:1–2) was based on a limited record that did not include the testimony of fact witnesses or the cross examination of any witnesses. At trial, Apple will submit documentary and testimonial evidence establishing that it did not conspire, but acted to further its independent interests in opening its own e-bookstore. Of course, as the Court correctly recognized, it is plaintiffs who bear the burden of proof to show a conspiracy. *See, e.g.*, Tr. 44:22–23; *see also Capital Imaging Assocs., P.C. v. Mohawk Valley Med. Assocs., Inc.*, 996 F.2d 537, 542 (2d Cir. 1993). Apple submits that *Monsanto* commands that the Court cannot determine whether a conspiracy existed without reviewing *all* of the relevant evidence, including the largely unrebutted evidence that Apple's conduct was in its independent business interest.

independent economic interest" for engaging in the conduct that plaintiffs offer as evidence of a conspiracy.

The Sherman Act strictly limits the "range of permissible inferences from ambiguous evidence" (*Matsushita*, 475 U.S. at 588) because of the danger of mistaking legitimate conduct for a conspiracy. *Monsanto*, 465 U.S at 763–64 ("Permitting an agreement to be inferred" from ambiguous evidence "could deter or penalize perfectly legitimate conduct" and "create an irrational dislocation in the market"). Firms in a vertical business relationship *must* "constantly [] co-ordinate their activities" on many topics—including communications about price—to "assure an efficient distribution system" and "assure that their product will reach the consumer persuasively and efficiently." *Id.* Discussions about the appropriate level of prices in the market may involve "suggestions, persuasion, conversations, arguments, exposition, or pressure" without being taken as evidence of agreement. *See Acquaire v. Canada Dry Bottling Co. of N.Y., Inc.*, 24 F.3d 401, 410 (2d Cir. 1994). This is commonplace and perfectly lawful. *See Monsanto*, 465 U.S at 762 (vertical players "have legitimate reasons to exchange information about the prices and the reception of their products in the market"); *PSKS, Inc. v. Leegin Creative Leather Prods., Inc.*, 615 F.3d 412, 420 (5th Cir. 2010) ("A manufacturer's discussion of pricing policy with retailers and its subsequent decision to adjust pricing to enhance its competitive position do not create an antitrust violation or give rise to an antitrust claim"), on remand from 551 U.S. 877 (2007).

The Court ruled that Dr. Murphy's testimony about the need to protect unilateral, vertical business relationships is "quite irrelevant" here, because Apple "is not accused in this case of unilateral action." Tr. 33:14–16. But plaintiffs have attempted to prove that Apple joined the conspiracy with evidence of Apple's vertical contracts (especially the MFN) and

communications with its vertical partners (the publishers). *See* Pls.' Br. 26, 30; Pls.' Resp. Br. 5–7. Apple's central defense is that those contract terms and negotiating strategies were fully consistent with Apple acting unilaterally (*i.e.*, not in furtherance of a conspiracy) to set up its own e-bookstore, and thus do not allow the Court to infer a conspiracy.

Faced with these competing narratives, *Monsanto* directs the fact-finder to determine the answer to the following question: Does the evidence show that Apple acted to facilitate a conspiracy among the publishers to force Amazon onto agency and raise prices, or rather was its conduct just as consistent with independent, unilateral action? That is the meaning of the Supreme Court's instruction that the plaintiff's evidence *must* "tend[] to exclude the possibility that [the defendant] act[ed] independently." *Monsanto*, 465 U.S. at 764; *see also Matsushita*, 475 U.S. at 597 n.21 ("We do not imply that, if [defendants] had a plausible reason to conspire, ambiguous conduct could suffice to create a triable issue of conspiracy. Our decision in *Monsanto* [] establishes that conduct that is as consistent with permissible competition as with illegal conspiracy does not, without more, support even an inference of conspiracy."). To "[p]ermit[] an agreement to be inferred merely from" those contract provisions and e-mails—if in fact, as Apple has argued from the beginning, no conspiracy existed—would do exactly what the Supreme Court warned against in *Monsanto*: "deter or penalize perfectly legitimate conduct." 465 U.S. at 763; *see also id.* ("If an inference of such an agreement may be drawn from highly ambiguous evidence, there is a considerable danger than the doctrines [protecting vertical relationships] will be seriously eroded").

The Court must determine whether Apple "behav[ed] in a manner that would be rational (i.e., that would increase [its] profits or net worth) absent a collusive agreement[.]" ABA Section of Antitrust Law, *Proof of Conspiracy Under Federal Antitrust Laws* 224 (2010). If so,

then plaintiffs must prove "something more" (*Monsanto*, 465 U.S. at 764) to show that conspiracy is the more likely explanation under *Monsanto* and its progeny. *See Lovett v. Gen. Motors Corp.*, 998 F.2d 575, 579 (8th Cir. 1993) ("We believe the district court failed to recognize that Lovett's evidence is as consistent with permissible unilateral conduct on GM's part as it is with illegal conspiracy, and that *Monsanto* does not permit a jury to infer the existence of a conspiracy from ambiguous evidence"); *H.L. Hayden Co. v. Siemens Med. Sys., Inc.*, 879 F.2d 1005, 1014 (2d Cir. 1989). The Court stated that "[t]he government is not required to show that Apple acted in a way that was contradictory to its economic self-interest." Tr. 45:22–23. But that does not detract from the fact that plaintiffs "must show that the inference of conspiracy is reasonable in light of the competing inferences of independent action or collusive action." *Matsushita*, 475 U.S. at 588. Otherwise, plaintiffs' evidence is ambiguous, and does not "tend[] to exclude the possibility" that Apple acted independently. *Monsanto*, 465 U.S. at 764.

Dr. Murphy's economic assessment of Apple's contract terms and negotiating positions is directly relevant to the critical question whether those terms and strategies tend to exclude the possibility that Apple acted independently. Indeed, the Court stated that it was "obviously ... happy to receive at trial evidence from Apple that it acted consistently with its own independent economic interest." Tr. 59:6-8. Dr. Murphy opined that Apple's conduct in entering the e-books market was economically rational and in its independent interest, even if no conspiracy existed. This expert economic analysis will provide the Court with the proper economic context so that it can draw the correct inferences from the evidence in this case. Dr. Murphy's testimony—alongside Apple's extensive record of other evidence—will prove that only one inference is permissible: Apple did not join or facilitate a conspiracy among the

publishers, but rather acted independently and lawfully to set up its own e-bookstore. Excluding this expert testimony would gut Apple's defense and deprive Apple of a fair trial. *See, e.g.*, *Lindsey*, 405 U.S. at 66 (litigants have due process right to "present every available defense").

In re Publication Paper Antitrust Litigation, 690 F.3d 51 (2d Cir. 2012), makes clear that *Monsanto* controls and requires consideration of the defendant's independent business interests. The Second Circuit held that "broader inferences are permitted, and the 'tends to exclude' standard is more easily satisfied, when the conspiracy is economically sensible for the alleged conspirators to undertake and the challenged activities could not reasonably be perceived as procompetitive." *Id.* at 63 (quotations omitted). But when the alleged "conspiratorial" conduct is *also consistent with permissible competition—i.e.*, when the defendant's conduct would advance its own, independent interests even if no conspiracy existed—that conduct is necessarily "ambiguous" as to the existence of a conspiracy. *Id.* Such evidence alone therefore *cannot* serve as the basis for finding the alleged conspiracy, even if a plausible reason to conspire is attributed to the defendant. *See Matsushita*, 475 U.S. at 597 n.21 ("We do not imply that, if [defendants] had a plausible reason to conspire, ambiguous conduct could suffice to create a triable issue of conspiracy").

Courts following *Monsanto* and *Matsushita* have uniformly applied the independent-interest test to section 1 conspiracy cases. *See, e.g.*, *AD/SAT v. Associated Press*, 181 F.3d 216, 235 (2d Cir. 1999) ("the challenged conduct of each newspaper defendant is as consistent with the defendant's legitimate, independent business interests as with an illegal combination in restraint of trade"); *Hayden*, 879 F.2d at 1014 (approving the district court's ruling for the defendant based on "the evidence concerning [the defendant's] independent business reasons for terminating [the plaintiff]"); *Burlington Coat Factory Warehouse Corp. v. Esprit de Corp.*, 769

F.2d 919, 924 (2d Cir. 1985); *Euromodas, Inc. v. Zanella, Ltd.*, 368 F.3d 11, 20 (1st Cir. 2004) ("The most natural inference from the evidence—that the manufacturer took sides as between two dealers and chose the more lucrative of them—makes manifest a legitimate, independent reason for terminating the less desirable distribution relationship"); *Garment Dist., Inc. v. Belk Stores Servs., Inc.*, 799 F.2d 905, 910 (4th Cir. 1986) ("*Monsanto* holds that a manufacturer may have legitimate, independent reasons for terminating a discounter in response to dealer complaints").

No Supreme Court or Second Circuit decision has ever excluded evidence of a defendant's independent action, or otherwise refused to apply* Monsanto, *because the evidence was "direct."[4]

The Court thus committed *legal error* in holding that "Dr. Murphy's testimony"—"an economic evaluation of whether the evidence tends to exclude the possibility that Apple behaved independently"—"is premised on a faulty legal assumption and is irrelevant in this case." Tr. 32:16–19, 34:12–16.[5] Apple will prove that it acted at all times to further its independent

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[4] Plaintiffs' only challenge to this legal standard is to argue that it does not apply to vertical conspiracies that do not involve parallel conduct, relying on a single misconstrued footnote from *Fineman v. Armstrong World Industries*, 980 F.2d 171, 214 n.32 (3d Cir. 1992). *See* Pls.' Br. 27, 32; Pls.' Resp. Br. 9–10. But that is absolutely not the law. Many of the cases described above and in Apple's pre-trial briefs—including *Lovett*, *Hayden*, *Euromodas*, and *Garment District*—ruled for a vertical defendant that did not act in parallel to any other party, based on independent business justifications for that defendant's conduct.

[5] Perhaps the clearest indication of the Court's error is the Court's differing treatment of Dr. Murphy as compared to Dr. Gilbert, who offered virtually the same type of conclusions as Dr. Murphy in support of plaintiffs. *Compare* Tr. 38:12–16 (finding that Dr. Gilbert's opinion on "whether the publishers' adoption of the agreements could be economically rational as unilateral actions" "is appropriate expert opinion testimony") *with id.* at 34:17–20, 35:2–4 (concluding that "Dr. Murphy's testimony on the first issue identified by the plaintiffs," namely "whether Apple's conduct is consistent with its own independent business interests absent participation in a conspiracy," "is premised on a faulty legal assumption and is irrelevant in this case").

business goals. The question before the Court—whether Apple's conduct was consistent with its own interests even if no conspiracy existed—is susceptible to economic analysis, which courts routinely and necessarily accept in section 1 cases. *See, e.g.*, *FTC v. Abbott Labs.*, 853 F. Supp. 526, 534–35 (D.D.C. 1994) (crediting expert testimony that the challenged conduct was in the defendant's "unilateral and independent self interest" and concluding that the government "failed to show ... that [the defendant's] action was the result of collusion"); *Proof of Conspiracy Under Federal Antitrust Laws*, *supra*, at 211 ("economists can assess whether observed market outcomes are consistent with independent action"). The Court should admit Dr. Murphy's testimony.

II. Even "Direct" Evidence Does Not Eliminate the Need to Consider Apple's Independent Interests

To the extent the Court's decision to exclude Dr. Murphy is based on its view that "the government will be able to show at trial direct evidence that Apple knowingly participated in and facilitated a conspiracy to raise prices of e-books" (Tr. 49:3–6), Apple respectfully submits that the Court is incorrect. The Court stated its understanding that proof of "direct" evidence ends this Court's duty to apply *Monsanto* and examine evidence of Apple's independent business interests. Tr. 46:11–13. But this view "is seriously flawed": At the trial stage, a factfinder is "*not required*" to accept "direct evidence as sufficient and credible to demonstrate that [defendants] conspired to violate § 1 of the Sherman Act." *Toledo Mack Sales & Serv., Inc. v. Mack Trucks, Inc.*, 386 F. App'x 214, 223 (3d Cir. 2010) (emphasis added). Indeed, the fact-finder must consider both direct and circumstantial evidence through the lens of *Monsanto*. *See id.* at 222–23. The mere fact that a plaintiff proffers direct evidence of some kind is therefore *not* "the end of the story." Tr. 46:13.

Instead, for direct evidence to preclude a defendant from offering its independent business justifications for the challenged conduct under *Monsanto* and *Matsushita*, this Court must further conclude that such "direct" evidence (1) is *unambiguous*; and (2) evinces *the alleged conspiracy itself*—not just some fact or detail consistent with that alleged conspiracy.

A. "Direct" Evidence Must Be "Unambiguous" to Bar Consideration of Apple's Independent Business Interests

This Court ruled that the relevance of Apple's independent interests "depends on how ambiguous the circumstantial evidence is." Tr. 46:17–18. That is, respectfully, not a correct statement of law. *Any ambiguity* in the conduct at issue compels application of *Monsanto*'s stringent standards. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 554 (2007) ("proof of a § 1 conspiracy must include evidence tending to exclude the possibility of independent action, *see Monsanto* []; and at the summary judgment stage a § 1 plaintiff's offer of conspiracy evidence must tend to rule out the possibility that the defendants were acting independently, *see Matsushita* []"). Indeed, even in *Publication Paper*, where a co-conspirator provided iron-clad evidence of an agreement to "increase prices" and "conceal from the government the true nature of the[defendants'] communications,"[6] the Second Circuit nonetheless remanded for a jury to determine whether the evidence as a whole "tend[ed] to exclude" the possibility that the defendant acted independently. *Id.* at 65, 69. Only where there is "an admission by the

[6] In *Publication Paper*, the evidence was outright damning: (1) a co-conspirator that was granted conditional full immunity from criminal prosecution testified that he reached an "agreement" to follow the other conspirator's price increase "to the fullest extent possible"; (2) it was "undisputed" that in "private phones calls and meetings—for which no social or personal purpose ha[d] been persuasively identified" the co-conspirators shared pricing strategies and "disclosed to each other their companies' intentions to increase prices before those decisions had been publicly announced"; and (3) the co-conspirators "developed a 'joint story' to conceal from the government the true nature of their communications." 690 F.3d at 59, 65.

defendants that they agreed to fix their prices" can the evidence be viewed without resort to the defendant's independent business interests. *Id.* at 63.

The Second Circuit and other circuit courts have found evidence in a section 1 case to be "direct" only where there is "*explicit* reference to an agreement" "between the alleged conspirators." *Viazis v. Am. Ass'n of Orthodontists*, 314 F.3d 758, 762 (5th Cir. 2002) (emphasis added); *see also Mayor & City Council of Balt., Md. v. Citigroup, Inc.*, 709 F.3d 129, 136 (2d Cir. 2013); *United States v. Taubman*, 297 F.3d 161, 165 (2d Cir. 2002) (per curiam). The fact that evidence is "direct" does not mean it is "unambiguous" or does not require inference. The Second Circuit held in *Publication Paper* that "direct evidence[] can sometimes require a factfinder to draw inferences to reach a particular conclusion." 690 F.3d at 64. "Though factual doubts arise most often when the evidence is circumstantial," under "the *Matsushita* principle," "the whole record, *including direct and circumstantial* evidence," must be examined. P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 308i (3d ed. 2010) (emphasis added).

The applicability of *Monsanto* and *Matsushita*, and in particular, whether this Court must examine "the whole record," turns on whether evidence is "unambiguous" or "ambiguous"—*not* whether evidence is "direct" or "circumstantial." *Id.* ("*Matsushita* distinguishes not between 'direct' and 'circumstantial' evidence, but between ambiguous and relatively unambiguous evidence"). *Matsushita* held that "antitrust law limits the range of permissible inferences from *ambiguous* evidence in a § 1 case." 475 U.S. at 588 (emphasis added). The Court further observed that *Monsanto* does not suggest that "*ambiguous* conduct could suffice to create a triable issue of conspiracy," since *Monsanto* by its terms "establishes that conduct that is as consistent with permissible competition as with illegal conspiracy does not, without more,

support even an inference of conspiracy." *Id.* at 597 n.21 (citing *Monsanto*, 465 U.S. at 763-64) (emphasis added).

Similarly, *Monsanto*'s applicability of the independent-interest test does not hinge on whether evidence is "direct" or "circumstantial." The Supreme Court found "substantial *direct* evidence of agreements to maintain prices" in *Monsanto*, yet proceeded to examine both "arguably more ambiguous" and "circumstantial" evidence. 465 U.S. at 765 & n.10. Were "direct" evidence sufficient to "end ... the story" under *Monsanto* (Tr. 46:13), the Supreme Court would have declined to consider the "arguably more ambiguous" and "circumstantial" evidence.

The threshold for unambiguous evidence is exceptionally high. Even in *Publication Paper*, where there was an *admission* by one of the alleged co-conspirators that "he understood his numerous communications ... to reflect a price-fixing agreement," the Second Circuit did not purport to limit its examination of the record evidence. 690 F.3d at 64. The court considered evidence of circumstances and recognized that "despite the strength of plaintiffs' evidence of an agreement, the *totality of the evidence* admits of alternative interpretations," including "independent[]" (and thus non-conspiratorial) conduct. *Id.* at 65 (emphasis added). The court ultimately decided that a jury could reasonably find an agreement to fix prices based on the *strength*—not the "directness"—of the alleged co-conspirator's admission: "[T]he testimony is surely *strong* evidence of a collusive scheme between [the alleged co-conspirators]. That would be sufficient to satisfy *Matsushita*'s 'tends to exclude' standard even if plaintiffs' theory were implausible." *Id.* at 64 (emphasis added); *see also Champagne Metals v. Ken-Mac Metals, Inc.*, 458 F.3d 1073, 1084 (10th Cir. 2006) (holding that where "a plaintiff adduces only weak direct evidence ... additional circumstantial evidence is required to overcome a motion for summary judgment").

As a result, even if this Court believes that plaintiffs' evidence is somehow "direct," it cannot stop there: It must further consider whether that evidence is unambiguous. In this case, however, plaintiffs have no evidence even remotely approaching the strength of evidence present in *Publication Paper*. *See* Apple Opp. Br. 6–7; Pls.' Br. 24–26; Pls.' Resp. Br. 4–9. Apple therefore cannot be barred from relying on its independent business interest to disprove the alleged conspiracy.

B. Direct and Unambiguous Evidence Must Prove the Alleged Conspiracy Itself

Plaintiffs' allegation in this case is a conspiracy among Apple and the five publisher defendants to raise e-book prices. Pls.' Br. 1. Plaintiffs' "direct" evidence must unambiguously prove *this* alleged agreement to fix prices, not merely facts from which an inference of the alleged conspiracy could be drawn.

The Supreme Court made clear in *Matsushita* that no direct (let alone unambiguous) evidence of the alleged conspiracy exists where the "direct evidence" is merely of "*other* combinations," since such evidence has "little, if any, relevance to the *alleged* ... conspiracy." *Matsushita*, 475 U.S. at 595–96 (second emphasis added); *see also In re Brand Name Prescription Drugs Antitrust Litig.*, 186 F.3d 781, 785–86 (7th Cir. 1999) (no direct evidence of the alleged conspiracy where that evidence only shows an agreement that is "not among the unlawful acts charged"). Only where a plaintiff has direct and unambiguous evidence of the alleged conspiracy itself can the inquiry stop and thus bar Apple from relying on its independent business justifications for its conduct.

In *Monsanto*, the court found "substantial *direct* evidence of *agreements* to maintain prices" based on testimony from a Monsanto employee that distributors agreed to maintain resale prices in exchange for continuing to receive Monsanto's product. 465 U.S. at 765 (second

emphasis added). This evidence "plainly [was] relevant and persuasive as to *a meeting of the minds*," as compared to other, "arguably more ambiguous," evidence in that case. *Id.* (emphasis added). Similarly, in *Publication Paper*, the Second Circuit reasoned that "*unambiguous* evidence of *an agreement to fix prices*," such as "an admission by the defendants that *they agreed to fix their prices*," is "all the proof a plaintiff needs" and sufficient to override "the standards established in *Matsushita*." 690 F.3d at 63 (quotations omitted) (second and third emphases added). And in *Taubman*, where a CEO testified that "she was directed by [the Chairman of the Board] to meet with [the CEO of the firm's rival] and work out the specifics of the price-fixing agreement," the direct evidence unambiguously demonstrated an exchange of commitments between the alleged co-conspirators. 297 F.3d at 165.

Here, plaintiffs have no direct and unambiguous evidence *of the conspiracy they allege*. Instead, they argue that *Monsanto* does not apply because plaintiffs' evidence "***reflects*** an agreement or common understanding of the parties." Pls.' Resp. Br. 4 (emphasis added). But even if true, evidence that "reflects" an alleged conspiracy is a far cry from "an admission" of the conspiracy (*Publication Paper*, 690 F.3d at 63) that would remove the need for considering Apple's independent business interest. Plaintiffs are simply incorrect that their evidence absolves this Court of its duty to consider Apple's independent business interest when analyzing whether plaintiffs' evidence supports a conspiracy.

Plaintiffs' evidence must "tend to exclude the possibility of independent action" in order to support a conspiracy; Dr. Murphy's testimony establishing that plaintiffs' evidence cannot meet this standard should be admitted and considered by the Court.

III. This Court Erred in Excluding Dr. Burtis's Testimony Regarding Pro-Competitive Effects

Notwithstanding the recognition that "the data or summaries of data" that "Dr. Burtis compiled and categorized" is "an important contribution to the record of this trial" (Tr. 30:17–22), the Court concluded that "Dr. Burtis has not shown that her opinion regarding the extent to which the data does or does not show anti-competitive effect is sufficiently rooted in economic theory to be admissible." Tr. 31:2–5. Apple respectfully submits that the Court's exclusion of Dr. Burtis's conclusions based on her analysis of the empirical evidence in this case is contrary to law.[7] The "legality of arguably anticompetitive conduct should be judged primarily by its 'market impact.'" *Monsanto*, 465 U.S. at 762 (quoting *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 51 (1977)).

The crux of plaintiffs' case is that Apple's entry into the e-books market had an anticompetitive effect on the e-books market. Pls.' Br. 35–40. Dr. Burtis's testimony conclusively rebuts this assertion: (1) the average price of e-books in the alleged relevant market decreased in the post-agency period (with more than 75% of e-books priced at $9.99 *or less*); (2) output continued to grow significantly; and (3) the number of e-book retailers and available e-book titles expanded. Burtis Decl. ¶¶ 19, 30, 33, 44. Based on these indicators of unquestionable market health, which Dr. Burtis observed after assembly and analysis of a comprehensive database of e-books, Dr. Burtis concluded that the economic evidence in this case is inconsistent with plaintiffs' allegations of anticompetitive harm. *Id.* ¶ 3.

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[7] It is also in tension with the Court's ruling on the admissibility of Professor Baker's testimony. Professor Baker, who simply piggybacks on Professor Ashenfelter's flawed empirical work, has been permitted to offer "grandiose" opinions as to anticompetitive harm because "many of the objections to Dr. Baker's testimony go to its weight rather than its admissibility." Tr. 41:16–17. At worst, the same rule should be applied to Dr. Burtis.

Excluding this conclusion hinders Apple's ability to defend itself under the rule of reason.[8] Nothing about Professor Burtis's conclusion regarding competitive effects is improper. The Federal Rules of Evidence make clear that "[a]n opinion is not objectionable just because it embraces an ultimate issue." Fed. R. Evid. 704(a). Indeed, the Supreme Court's seminal decision in *Leegin* arose from an appeal of a district court's exclusion of the testimony of Leegin's economic expert regarding the "procompetitive justifications for Leegin's pricing policy." 551 U.S. at 885. Expert testimony on an ultimate issue is permitted so long as it is "otherwise admissible under the Rules of Evidence." *United States v. Barile*, 286 F.3d 749, 759 (4th Cir. 2002) (quotations omitted).

Likewise, Dr. Burtis's opinion on anticompetitive effects raises no admissibility problems. "[W]hether an actual adverse effect has occurred is determined by examining factors like reduced output, increased prices, and decreased quality" (*Virgin Atl. Airways Ltd. v. British Airways PLC*, 257 F.3d 256, 264 (2d Cir. 2001))—*precisely* the type of information Dr. Burtis considered in reaching her opinion that the data are inconsistent with, and do not support, plaintiffs' allegations of anticompetitive harm in the alleged relevant market. And where (as here) an expert properly relies on the appropriate factors to opine on whether a practice had any anticompetitive effects, courts have refused to exclude those opinions. *See, e.g., ZF Meritor, LLC v. Eaton Corp.*, 696 F.3d 254, 290 (3d Cir. 2012) (declining to exclude expert's opinion on harm to the market where expert properly relied on relevant factors); *cf. Cities of Anaheim v.*

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[8] Dr. Burtis's conclusions are also relevant in determining the correct legal framework for evaluating Apple's conduct. After all, the Supreme Court has held that the *per se* rule is reserved for practices that have "manifestly anticompetitive" effects and that "lack ... any redeeming virtue." *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 886 (2007). Dr. Burtis's analysis and opinions, which show the economic evidence in this case is inconsistent with plaintiffs' allegations of anticompetitive harm, demonstrate that there is no basis for applying the *per se* rule in this case.

FERC, 941 F.2d 1234, 1251 (D.C. Cir. 1991) (holding that expert's opinion that "no anticompetitive effects were reasonably probable" in the context of considering FERC's "price squeeze" doctrine was "substantial evidence to support of a finding" regarding same). And the courts do so for good reason: Whether or not a market has been harmed is something that falls within the expertise of an economic expert, and something that an ordinary fact-finder would likely be unable to deduce.

Dr. Burtis's testimony is properly rooted in what the Court has acknowledged to be "an important contribution to the record of this trial." Tr. 30:20. As described in Apple's opposition to plaintiffs' motion in limine, Dr. Burtis's testimony is reliable and highly relevant to the core issues in this case. This Court should therefore reinstate Dr. Burtis's conclusions regarding anticompetitive effect.

CONCLUSION

The Court should reconsider its decision to exclude portions of Murphy's and Burtis's testimony, and deny plaintiffs' motions.

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