selling e-books. The Apple Agency Agreements took effect simultaneously on April 3, 2010 with the release of Apple's new iPad.

70. The final version of the pricing tiers in the Apple Agency Agreements contained the $12.99 and $14.99 price points for bestsellers, discussed earlier, and also established prices for all other newly released titles based on the hardcover list price of the same title. Although couched as maximum retail prices, the price tiers in fact established the retail e-book prices to be charged by Publisher Defendants.

71. By entering the Apple Agency Agreements, each Publisher Defendant effectively agreed to require all of their e-book retailers to accept the agency model. Both Apple and the Publisher Defendants understood the Agreements would compel the Publisher Defendants to take pricing authority from all non-Apple e-book retailers. A February 10, 2010 presentation by one Publisher Defendant applauded this result (emphasis in original): "The Apple agency model deal means that we will have to **shift to an agency model with Amazon which [will] strengthen our control over pricing.**"

72. Apple understood that the final Apple Agency Agreements ensured that the Publisher Defendants would raise their retail e-book prices to the ostensible limits set by the Apple price tiers not only in Apple's forthcoming iBookstore, but on Amazon.com and all other consumer sites as well. When asked by a *Wall Street Journal* reporter at the January 27, 2010 iPad unveiling event, "Why should she buy a book for . . . $14.99 from your device when she could buy one for $9.99 from Amazon on the Kindle or from Barnes & Noble on the Nook?" Apple CEO Steve Jobs responded, "that won't be the case . . . . the prices will be the same."

73. Apple understood that the retail price MFN was the key commitment mechanism to keep the Publisher Defendants advancing their conspiracy in lockstep. Regarding the effect of

the MFN, Apple executive Pete Alcorn remarked in the context of the European roll-out of the agency model in the spring of 2010:

> I told [Apple executive Keith Moerer] that I think he and Eddy [Cue] made it at least halfway to changing the industry permanently, and we should keep the pads on and keep fighting for it. I might regret that later, but right now I feel like it's a giant win to keep pushing the MFN and forcing people off the [A]mazon model and onto ours. If anything, the place to give is the pricing – long run, the mfn is more important. The interesting insight in the meeting was Eddy's explanation that it doesn't have to be that broad – any decent MFN forces the model

74. Within the four months following the signing of the Apple Agency Agreements, and over Amazon's objection, each Publisher Defendant had transformed its business relationship with all of the major e-book retailers from a wholesale model to an agency model and imposed flat prohibition against e-book discounting or other price competition on all non-Apple e-book retailers.

75. For example, after it signed its Apple Agency Agreement, Macmillan presented Amazon a choice: adopt the agency model or lose the ability to sell e-book versions of new hardcover titles for the first seven months of their release. Amazon rejected Macmillan's ultimatum and sought to preserve its ability to sell e-book versions of newly released hardcover titles for $9.99. To resist Macmillan's efforts to force it to accept either the agency model or delayed electronic availability, Amazon effectively stopped selling Macmillan's print books and e-books.

76. When Amazon stopped selling Macmillan titles, other Publisher Defendants did not view the situation as an opportunity to gain market share from a weakened competitor. Instead, they rallied to support Macmillan. For example, the CEO of one Publisher Defendant's parent company instructed the Publisher Defendant's CEO that "[Macmillan CEO] John Sargent needs our help!" The parent company CEO explained, "M[acm]illan have been brave, but they

are small. We need to move the lines. And I am thrilled to know how A[mazon] will react against 3 or 4 of the big guys."

77. The CEO of one Publisher Defendant's parent company assured Macmillan CEO John Sargent of his company's support in a January 31, 2010 email: "I can ensure you that you are not going to find your company alone in the battle." The same parent company CEO also assured the head of Macmillan's corporate parent in a February 1 email that "others will enter the battle field!" Overall, Macmillan received "hugely supportive" correspondence from the publishing industry during Macmillan's effort to force Amazon to accept the agency model.

78. As its battle with Amazon continued, Macmillan knew that, because the other Publisher Defendant, via the Apple Agency Agreements, had locked themselves into forcing agency on Amazon to advance their conspiratorial goals, Amazon soon would face similar edicts from a united front of Publisher Defendants. And Amazon could not delist the books of all five Publisher Defendants because they together accounted for nearly half of Amazon's e-book business. Macmillan CEO John Sargent explained the company's reasoning: "we believed whatever was happening, whatever Amazon was doing here, they were going to face – they're going to have more of the same in the future one way or another." Another Publisher Defendant similarly recognized that Macmillan was not acting unilaterally but rather was "leading the charge on moving Amazon to the agency model."

79. Amazon quickly came to fully appreciate that not just Macmillan but all five Publisher Defendants had irrevocably committed themselves to the agency model across all retailers, including taking control of retail pricing and thereby stripping away any opportunity for e-book retailers to compete on price. Just two days after it stopped selling Macmillan titles,

Amazon capitulated and publicly announced that it had no choice but to accept the agency model, and it soon resumed selling Macmillan's e-books and print book titles.

4. Defendants Further the Conspiracy by Pressuring Another Publisher To Adopt the Agency Model

80. When a company takes a pro-competitive action by introducing a new product, lowering its prices, or even adopting a new business model that helps it sell more product at better prices, it typically does not want its competitors to copy its action, but prefers to maintain a first-mover or competitive advantage. In contrast, when companies jointly take collusive action, such as instituting a coordinated price increase, they typically want the rest of their competitors to join them in that action. Because collusive actions are not pro-competitive or consumer friendly, any competitor that does not go along with the conspirators can take more consumer friendly actions and see its market share rise at the expense of the conspirators. Here, the Defendants acted consistently with a collusive arrangement, and inconsistently with a pro-competitive arrangement, as they sought to pressure another publisher (whose market share was growing at the Publisher Defendants' expense after the Apple Agency Contracts became effective) to join them.

81. Penguin appears to have taken the lead in these efforts. Its U.S. CEO, David Shanks, twice directly told the executives of the holdout major publisher about his displeasure with their decision to continue selling e-books on the wholesale model. Mr. Shanks tried to justify the actions of the conspiracy as an effort to save brick-and-mortar bookstores and criticized the other publishers for "not helping" the group. The executives of the other publishers responded to Mr. Shanks's complaints by explaining their objections to the agency model.

82. Mr. Shanks also encouraged a large print book and e-book retailer to punish the other publishers for not joining Defendants' conspiracy. In March 2010, Mr. Shanks sent an e-

mail message to an executive of the retailer complaining that the publisher "has chosen to stay on their current model and will allow retailers to sell at whatever price they wish." Mr. Shanks argued that "[s]ince Penguin is looking out for [your] welfare at what appears to be great costs to us, I would hope that [you] would be equally brutal to Publishers who have thrown in with your competition with obvious disdain for your welfare. . . . I hope you make [the publisher] hurt like Amazon is doing to [the Publisher Defendants]."

83. When the third-party retailer continued to promote the non-defendant publisher's books, Mr. Shanks applied more pressure. In a June 22, 2010 email to the retailer's CEO, Mr. Shanks claimed to be "baffled" as to why the retailer would promote that publisher's books instead of just those published by "people who stood up for you."

84. Throughout the summer of 2010, Apple also cajoled the holdout publisher to adopt agency terms in line with those of the Publisher Defendants, including on a phone call between Apple CEO Steve Jobs and the holdout publisher's CEO. Apple flatly refused to sell the holdout publisher's e-books unless and until it agreed to an agency relationship substantially similar to the arrangement between Apple and the Publisher Defendants defined by Apple Agency Agreements.

5. Conspiracy Succeeds at Raising and Stabilizing Consumer E-book Prices

85. The ostensible maximum prices included in the Apple Agency Agreements' price schedule represent, in practice, actual e-book prices. Indeed, at the time the Publisher Defendants snatched retail pricing authority away from Amazon and other e-book retailers, not one of them had built an internal retail pricing apparatus sufficient to do anything other than set retail prices at the Apple Agency Agreements' ostensible caps. Once their agency agreements took effect, the Publisher Defendants raised e-book prices at all retail outlets to the maximum

price level within each tier. Prior to the Publisher Defendants entering into settlement agreements, for two years they continued setting e-book retail prices according to the Apple price tiers and set the retail prices for the electronic versions of all or nearly all of their bestselling hardcover titles at the ostensible maximum price allowed by those price tiers.

86. The Publisher Defendants' collective adoption of the Apple Agency Agreements allowed them (facilitated by Apple) to raise, fix, and stabilize retail e-book prices in three steps: (a) they took away retail pricing authority from retailers; (b) they then set retail e-book prices according to the Apple price tiers; and (c) they then exported the agency model and higher retail prices to the rest of the industry, in part to comply with the retail price MFN included in each Apple Agency Agreement.

87. Defendants' conspiracy and agreement to raise and stabilize retail e-book prices by collectively adopting the agency model and Apple price tiers led to an increase in the retail prices of newly released and bestselling e-books. Prior to the Defendants' conspiracy, consumers benefitted from price competition that led to $9.99 prices for newly released and bestselling e-books. Almost immediately after Apple launched its iBookstore in April 2010 and the Publisher Defendants imposed agency model pricing on all retailers, the Publisher Defendants' e-book prices for the most newly released and bestselling e-books rose to either $12.99 or $14.99.

88. Defendants' conspiracy and agreement to raise and stabilize retail e-book prices by collectively adopting the agency model and Apple price tiers for their newly released and bestselling e-books also led to an increase in average retail prices of the balance of Publisher Defendants' e-book catalogs, their so-called "backlists." Now that the Publisher Defendants control the retail prices of e-books—but Amazon maintains control of its print book retail

prices—Publisher Defendants' e-book prices sometimes are higher than Amazon's prices for print versions of the same titles.

II. DIESEL IS CRIPPLED BY DEFENDANTS' PRICE-FIXING CONSPIRACY

A. Diesel's Business

89. The Diesel e-book store was founded in 2005 by Scott Redford. In founding Diesel, Mr. Redford aimed to fill a perceived void in the e-book market—that is, provide consumers with a niche retailer to purchase e-books from. In 2005, the market for e-books was still budding and was ripe for entry and expansion from new retail competitors. From early on, Diesel cultivated relationships with the "Big Six" publishers and recruited key personnel with e-book industry expertise that resided in the New York metro area where the publishers were based.

90. While Diesel operated as a normal e-book store—offering over 3 million titles in its e-book store—the cornerstone of its business model was discounted bundling. Diesel invested in and developed proprietary software that would allow its e-bookstore to "shrink wrap" up to six digital e-books and sell them as a bundle to the consumer. Diesel would discount the cost of each book sold in the bundle and would sometimes partially defer its profit from the bundle by depositing reward points in customers' accounts. Books could be bundled according to book series, theme, character, time period, or author—among other things. Notably, unlike bundles that were previously offered by publishers—where content from multiple e-books was aggregated and converted into one digital file for sale—Diesel developed software technology that would assemble multiple covers and book descriptions from different publishers into a single presentation for the customer (essentially "shrink wrapping"). Customers could then add this bundle to the cart with a single click, but the books would be downloaded as separate e-books. Additionally, to facilitate consumer involvement in the process, Diesel encouraged

consumers to propose single- or multi-author bundles with customer-created bundle titles and descriptions. If Diesel approved the bundle, it deposited $1.50 or $3.00 in rewards money in the consumer's account and recognized the bundle's creator by name and geography on the e-book display page. Several of the most popular bundles came from consumer ideas. In addition to increased revenue from bundle sales, Diesel's bundles introduced customers to new titles they may otherwise not have considered. Even if customers did not purchase the bundle, they would often navigate from the bundle page to purchase individual titles.

91. To encourage customer loyalty and repeat business, Diesel also offered a desirable rewards program for its customers enabling them to collect and redeem points on future e-book purchases. Under Diesel's program, consumers received on average $.035 cents for every $1.00 spent on over 100,000 titles and $.15 for every approved e-book review. When coupled with its bundling discounts, Diesel's prices were highly competitive; its e-book prices were around or below the prevailing rate. Diesel's bundles provided intangible benefits to consumers as well—namely, introducing them to new authors.

92. Once it entered the market in 2005, Diesel enjoyed steady growth every single year. Within six months, Diesel posted modest profits, and revenue continued to increase. Diesel offered over 3 million titles and had over 200,000 customers in its database. Given its growth pattern for several years and increasing popularity with consumers, Diesel planned a large expansion in 2011. Diesel's business model, which was predicated on its discounting, bundling, and its rewards program, proved to be working because it was desirable and in consumers' interest. Despite not having a dedicated e-reader, Diesel had apps for the iOS and Android platforms, and in addition, consumers could read Diesel e-books on their Barnes & Noble Nook, Kobo eReader, Sony eReader, Google Reader, and Adobe desktop software.

93. In the months leading up to April 2010—before agency was imposed—in exchange for an equity stake in Diesel, an interested software company proposed a multimillion dollar investment into the construction of the industry's first ever social e-book reader, which would have been Diesel branded. The software company began investing time and money into design and planning for the venture. But when the Defendants forced the industry to change to agency and Diesel's business model was decimated, Diesel's potential suitor quickly cancelled its plans. Additionally, before agency, Diesel had begun constructing a self-publishing platform known as "PubDesk" that would have enabled small publishers and authors to directly upload their content to Diesel's e-book store.

94. In short, Diesel was formed and launched in the nascent period of the e-book industry when competition was vibrant and businesses were not yet entrenched. Capitalizing on these conditions, Diesel offered low prices and unique retail features that enabled it to successfully capture significant business and grow steadily. If Defendants' conspiracy did not turn the industry on its head, Diesel fully expected to continue growing by competing vigorously.

B. Defendants Force Agency Agreements On Diesel Precluding It From Competing In The Market

95. The Defendants had twin aims in carrying out the conspiracy: in addition to raising the price for e-books, Apple and the Publisher Defendants hoped to destroy retail price competition. As Judge Cote found, "Apple did not want to compete with Amazon (or any other e-book retailer) on price." *Apple*, 952 F. Supp. 2d at 547. The Department of Justice proved that the agreements "destroyed" competition by "removing the ability of retailers to set the prices of their e-books and compete with each other on price" and "reliev[ing] Apple of the need to compete on price," among other things. *Id.* at 694. Diesel's harm, described below, flows directly from the destruction of retail price competition, not from raised e-book prices.

96. After the Defendants hatched their conspiracy, Diesel was required to remove all of the Publisher Defendants' titles from its websites because it did not yet have an agency agreement with them. Because Diesel had forged close relationships with the Publisher Defendants, it signed agency agreements with Macmillan, HarperCollins, and Random House. Before Diesel went out of business, it was in the process of negotiating with Hachette and Penguin. Although Diesel did not want to agree to the agency agreements, it had virtually no choice but to sign them or the Publisher Defendants would no longer permit Diesel to sell their e-books; even Amazon, with its more considerable market power, could not sway the Publisher Defendants. Even if Diesel could have somehow convinced one of the Publisher Defendants to allow it to drop below the tiered prices that Defendants set, the series of MFN clauses would still have insulated Apple from any price competition. Accordingly, just as Amazon was forced to raise prices as a result of Defendants' price-fixing agreement, Diesel was forced to stop discounting its prices, stop including any of the Publisher Defendants' titles in any bundle, and stop allowing customers to earn rewards for agency e-books. If there was a single agency title in a six-book bundle, the bundle had to be removed from Diesel's offerings. These forced changes completely derailed Diesel's successful business.

97. Unlike Amazon or Barnes & Noble, Diesel did not have widespread international brand recognition. The primary incentive to purchase an e-book from Diesel over Amazon, Apple, or Barnes & Noble was Diesel's favorable pricing, bundling, and rewards program. When Defendants eliminated Diesel's ability to offer consumers these perks, Diesel's ability to compete was crippled. As the Department of Justice already proved, the effect of Defendants' conspiracy was to not only deprive consumers of favorable e-book pricing but to also preclude

retailers from establishing a foothold in the market through competition based on price and innovation.

98. Lastly, Diesel had developed and launched an app for users to read Diesel e-books on iOS devices. Diesel envisioned vast cross-platform support for its e-books, where consumers could read their e-books on an array of devices. But in an effort to eradicate retail competition and price transparency, in 2011, Apple specifically modified its policy to prohibit other e-book sellers from linking to their websites to allow consumers to purchase e-books. So if an e-book seller wanted to sell an e-book through its app, it had to pay Apple a 30 percent fee *on top* of what it was already paying the Publisher. Of course, the practical effect of such a policy was to make the iBookstore the only practical app to purchase books from (or send consumers through hoops to get e-books through their computers, which they could then download and import). Other nascent competitors, such as iFlow were foreclosed from selling as soon as Apple implemented its new policy.

99. As a direct result of the conspiracy and Apple's effective prohibition of using the iOS platform, Diesel's years of steady growth abruptly ceased and its revenue and profit both plunged. Without an ability to compete based on price and innovative retail methods—upon which it predicated its business model—Diesel has not recovered. Diesel presently does a fraction of the business it once conducted before agency and is currently negotiating to sell its assets for pennies on the dollar.

100. In sum, Defendants' industry-wide conspiracy forced Diesel in line with everyone else. It became unable to compete by distinguishing itself through offering attractive prices, bundling, rewards programs, or offering attractive cross-platform support. Without the ability to distinguish itself in any meaningful way, Diesel had no chance of competing with several large

international conglomerates offering the same items at the same prices that were prescribed by an industry-wide conspiracy.

CLAIMS FOR RELIEF

COUNT ONE

(Against All Defendants for Violations of 15 U.S.C. § 1)

101. Beginning no later than 2009, and continuing to at least late 2012 when a few of the Publisher Defendants settled with the DOJ, Defendants and their co-conspirators have combined and conspired to unreasonably restrain interstate trade and commerce, constituting a violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.

102. Defendants conspired and agreed to raise, fix, and stabilize retail e-book prices in order to end price competition among e-book retailers and to limit retail price competition among the Publisher Defendants. Defendants accomplished this by collectively agreeing to adopt and adhere to functionally identical methods of selling e-books and by setting price schedules.

103. In reaching their unlawful agreement in restraint of trade, some or all of the Defendants:

a. Shared their business information, plans, and strategies in order to formulate ways to raise retail e-book prices;

b. Assured each other of support in attempting to raise retail e-book prices;

c. Employed ostensible joint venture meetings to disguise their attempts to raise retail e-book prices;

d. Fixed the method of and formulas for setting retail e-book prices;

e. Fixed tiers for retail e-book prices;

f. Eliminated the ability of e-book retailers to fund retail e-book price decreases out of their own margins; and

g. Raised the retail prices of their newly released and bestselling e-books to the agreed prices – the ostensible price caps – contained in the pricing schedule of their Apple Agency Agreements.

104. Defendants' agreement and conspiracy constitutes a per se violation of Section 1 of the Sherman Act because it is an anticompetitive agreement to raise, fix, and stabilize prices in the e-book industry. The agreement or conspiracy was meant to eliminate price competition among e-book retailers, including Diesel.

105. Defendants' agreement and conspiracy has resulted in anticompetitive effects on consumers in the e-books market by depriving consumers of the benefits of price competition and innovation among e-book retailers such as Diesel. Because of Defendants' unlawful restraint of trade, Diesel is no longer able to offer, and consumers are no longer able to purchase e-books at discounted prices, in bundles, or with rewards from Diesel's rewards program. Moreover, retail innovation has also been suppressed. For example, the conspiracy precludes Diesel from offering e-books in bundles or maintaining its rewards program. Defendants' agreement or conspiracy constitutes an unreasonable restraint of trade in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.

106. Where, as here, Defendants have engaged in a per se violation of Section 1 of the Sherman Act, no allegations with respect to the relevant product market, geographic market, or market power are required. To the extent such allegations may otherwise be necessary, the relevant product market for the purposes of this action is trade e-books. The anticompetitive acts at issue in this case directly affect the sale of trade e-books to consumers. No reasonable substitute exists for e-books. There are no technological alternatives to e-books, thousands of which can be stored on a single small device. E-books can be stored and read on electronic

devices, while print books cannot. E-books can be located, purchased, and downloaded anywhere a customer has an internet connection, while print books cannot. Industry firms and the public also view e-books as a separate market segment from print books, and the Publisher Defendants were able to impose and sustain a significant retail price increase for their trade e-books.

107. The relevant geographic market is the United States. The rights to license e-books are granted on territorial bases, with the United States typically forming its own territory. E-book retailers typically present a unique storefront to U.S. consumers, often with e-books bearing different retail prices than the same titles would command on the same retailer's foreign websites.

108. The Publisher Defendants possess market power in the market for trade e-books. The Publisher Defendants successfully imposed and sustained a significant retail price increase for their trade e-books. Collectively, they create and distribute a wide variety of popular e-books, regularly comprising over half of the *New York Times* fiction and non-fiction bestseller lists. Collectively, they provide a critical input to any firm selling trade e-books to consumers. Any retailer selling trade e-books to consumers would not be able to forgo profitably the sale of the Publisher Defendants' e-books.

109. Defendants' agreement and conspiracy has had and will continue to have anticompetitive effects, including:

a. Increasing the retail prices of trade e-books;

b. Eliminating competition on price among e-book retailers;

c. Restraining competition on retail price among the Publisher Defendants;

d. Restraining competition among the Publisher Defendants for favorable relationships with e-book retailers;

e. Constraining innovation among e-book retailers as more particularly alleged in paragraphs 93 and 98;

f. Entrenching incumbent publishers' favorable position in the sale and distribution of print books by slowing the migration from print books to e-books;

g. Making more likely express or tacit collusion among publishers; and

h. Reducing competitive pressure on print book prices.

110. Defendants' agreement and conspiracy is not reasonably necessary to accomplish any procompetitive objective, or, alternatively, its scope is broader than necessary to accomplish any such objective.

111. Diesel, as well as consumers, have suffered antitrust injury from Defendants' conduct and have antitrust standing to pursue this action. Competition was diminished because independent retailers were no longer able to compete with large international conglomerates by offering attractive prices or unique retail innovations. This resulted in less consumer choice. Because each of the Publisher Defendants forced a functionally identical agency agreement on Diesel both interbrand and intrabrand competition were reduced or eliminated. Because of this demonstrable harm to competition, Diesel was crippled and effectively put out of business.

112. Diesel's injury flows directly from Defendants' anticompetitive agreement in the market for e-books because it precluded Diesel from being able to compete by offering lower prices or retail innovations to consumers. Without the incentive of lower prices or retail innovations, Diesel lacked the goodwill and recognition to expand in the market.

113. Because this case is based in material part on matters complained of in *United States of America v. Apple, Inc.*, Case No. 12-CV-2826 in the United States District Court for the Southern District of New York, filed on April 11, 2012, the running of the statute of limitations has been suspended since that filing date by reason of Section 5 of the Clayton Act (15 U.S.C. 16(i)).

114. The trial judgment in the aforementioned case, which was entered on September 5, 2013, constitutes prima facie evidence that Apple violated the antitrust laws in the ways and means described by Judge Cote's Opinion of July 10, 2013. 15 U.S.C. § 16(a).

COUNT TWO

(Against All Defendants for Violations of N.Y. Gen. Bus. Law § 340)

115. Beginning no later than 2009, and continuing to at least late 2012 when a few of the Publisher Defendants settled with the DOJ, Defendants and their co-conspirators have combined and conspired to unreasonably restrain interstate trade and commerce, constituting a violation of New York General Business Law section 340, otherwise known as the Donnelly Act.

116. Defendants conspired and agreed to raise, fix, and stabilize retail e-book prices in order to end price competition among e-book retailers and to limit retail price competition among the Publisher Defendants. Defendants accomplished this by collectively agreeing to adopt and adhere to functionally identical methods of selling e-books and by setting price schedules.

117. In reaching their unlawful agreement in restraint of trade, some or all of the Defendants:

a. Shared their business information, plans, and strategies in order to formulate ways to raise retail e-book prices;

b. Assured each other of support in attempting to raise retail e-book prices;

c. Employed ostensible joint venture meetings to disguise their attempts to raise retail e-book prices;

d. Fixed the method of and formulas for setting retail e-book prices;

e. Fixed tiers for retail e-book prices;

f. Eliminated the ability of e-book retailers to fund retail e-book price decreases out of their own margins; and

g. Raised the retail prices of their newly released and bestselling e-books to the agreed prices – the ostensible price caps – contained in the pricing schedule of their Apple Agency Agreements.

118. Defendants' agreement and conspiracy constitutes a per se violation of the Donnelly Act because it is an anticompetitive agreement to raise, fix, and stabilize prices in the e-book industry. The agreement or conspiracy was meant to eliminate price competition among e-book retailers, including Diesel.

119. Defendants' agreement and conspiracy has resulted in anticompetitive effects on consumers in the e-books market by depriving consumers of the benefits of price competition and innovation among e-book retailers such as Diesel. Because of Defendants' unlawful restraint of trade, Diesel is no longer able to offer, and consumers are no longer able to purchase e-books at discounted prices, in bundles, or with rewards from Diesel's rewards program. Moreover, retail innovation has also been suppressed. For example, the conspiracy precludes Diesel from offering e-books in bundles or maintaining its rewards program. Defendants' agreement or conspiracy constitutes an unreasonable restraint of trade in violation of the Donnelly Act.

120. Where, as here, Defendants have engaged in a per se violation of the Donnelly Act, no allegations with respect to the relevant product market, geographic market, or market power are required. To the extent such allegations may otherwise be necessary, the relevant product market for the purposes of this action is trade e-books. The anticompetitive acts at issue in this case directly affect the sale of trade e-books to consumers. No reasonable substitute exists for e-books. There are no technological alternatives to e-books, thousands of which can be stored on a single small device. E-books can be stored and read on electronic devices, while print books cannot. E-books can be located, purchased, and downloaded anywhere a customer has an internet connection, while print books cannot. Industry firms and the public also view e-books as a separate market segment from print books, and the Publisher Defendants were able to impose and sustain a significant retail price increase for their trade e-books.

121. The relevant geographic market is the United States. The rights to license e-books are granted on territorial bases, with the United States typically forming its own territory. E-book retailers typically present a unique storefront to U.S. consumers, often with e-books bearing different retail prices than the same titles would command on the same retailer's foreign websites.

122. In addition to the conspiracy's impact on interstate commerce, Defendants' conduct had a demonstrable impact on intrastate commerce in New York. All five of the Publisher Defendants have their principal place of business in New York, and much of the conspiracy between the Publisher Defendants and Apple was hatched and implemented in New York. For example, the Publisher Defendants met regularly in New York, and Apple's Eddy Cue traveled to New York to negotiate with the Publisher Defendants. The Publisher Defendants each conduct significant business in New York because they sell e-books to end users in New

York. Apple also conducts significant business in New York through the sale of its products on which consumers read e-books. Finally, consumers read e-books in New York. In short, the conspiracy had a direct and substantial impact on intrastate commerce in New York.

123. The Publisher Defendants possess market power in the market for trade e-books. The Publisher Defendants successfully imposed and sustained a significant retail price increase for their trade e-books. Collectively, they create and distribute a wide variety of popular e-books, regularly comprising over half of the *New York Times* fiction and non-fiction bestseller lists. Collectively, they provide a critical input to any firm selling trade e-books to consumers. Any retailer selling trade e-books to consumers would not be able to forgo profitably the sale of the Publisher Defendants' e-books.

124. Defendants' agreement and conspiracy has had and will continue to have anticompetitive effects, including:

a. Increasing the retail prices of trade e-books;

b. Eliminating competition on price among e-book retailers;

c. Restraining competition on retail price among the Publisher Defendants;

d. Restraining competition among the Publisher Defendants for favorable relationships with e-book retailers;

e. Constraining innovation among e-book retailers as more particularly alleged in paragraphs 93 and 98;

f. Entrenching incumbent publishers' favorable position in the sale and distribution of print books by slowing the migration from print books to e-books;

g. Making more likely express or tacit collusion among publishers; and

h. Reducing competitive pressure on print book prices.

125. Defendants' agreement and conspiracy is not reasonably necessary to accomplish any procompetitive objective, or, alternatively, its scope is broader than necessary to accomplish any such objective.

126. Diesel, as well as consumers, have suffered antitrust injury from Defendants' conduct and have antitrust standing to pursue this action. Competition was diminished because independent retailers were no longer able to compete with large international conglomerates by offering attractive prices or unique retail innovations. This resulted in less consumer choice. Because each of the Publisher Defendants forced a functionally identical agency agreement on Diesel both interbrand and intrabrand competition were reduced or eliminated. Because of this demonstrable harm to competition, Diesel was crippled and effectively put out of business.

127. Diesel's injury flows directly from Defendants' anticompetitive agreement in the market for e-books because it precluded Diesel from being able to compete by offering lower prices or retail innovations to consumers. Without the incentive of lower prices or retail innovations, Diesel lacked the goodwill and recognition to expand in the market.

128. Because this case is based in material part on matters complained of in *United States of America v. Apple, Inc.*, Case No. 12-CV-2826 in the United States District Court for the Southern District of New York, filed on April 11, 2012, the running of the statute of limitations has been suspended since that filing date by reason of Section 342-c of the New York General Business Laws.

PRAYER FOR RELIEF

WHEREFORE, LAVOHO, LLC, successor in interest to DIESEL EBOOKS, LLC, prays for relief against Defendants, and each of them, that the Court find that:

a. Defendants violated Section 1 of the Sherman Act by engaging in conduct including, but not limited to, raising, fixing, and stabilizing the price for electronic books and eliminating retail price competition;

b. As a direct and proximate result Defendants' conspiracy, Diesel has suffered actual damages, that are trebled in accordance with Section 4 of the Clayton Act (15 U.S.C. § 15);

c. Diesel be awarded its reasonable attorney's fees and costs of litigation in accordance with Section 4 of the Clayton Act (15 U.S.C. § 15);

d. Defendants violated Section 340 of the New York General Business Laws by engaging in conduct including, but not limited to, raising, fixing, and stabilizing the price for electronic books and eliminating retail price competition;

e. As a direct and proximate result Defendants' conspiracy, Diesel has suffered actual damages, that are trebled in accordance with Section 340(5) of the New York General Business Laws;

f. Diesel be awarded its reasonable attorney's fees and costs of litigation under Section 340(5) of the New York General Business Laws;

g. Diesel be awarded any and all fair and equitable damages.

DEMAND FOR JURY TRIAL

Plaintiff demands trial by jury in this action under Federal Rule of Civil Procedure 38.

Dated: March 13, 2014

Respectfully submitted,

BLECHER COLLINS PEPPERMAN & JOYE, P.C.

By: _____

Maxwell M. Blecher (pro hac vice pending)
Jordan L. Ludwig (pro hac vice pending)
515 S. Figueroa St., Suite 1750
Los Angeles, CA 90071
Tel: (213) 622-4222
Fax: (213) 622-1656
Email: mblecher@blechercollins.com
jludwig@blechercollins.com

Lead Counsel for Plaintiffs

and

CREIZMAN PLLC

Eric M. Creizman
565 Fifth Avenue, Fl. 7
New York, New York 10017
Tel.: (212) 972-0200
Fax: (646) 200-5022
Email: ecreiz@creizmanllc.com

Local Counsel for Plaintiffs

58695.1