Session 3: Market Power: Antitrust

We will discuss regulatory approaches to market power. In this session, we will look at the antitrust/competition policy approach to market power, while in our next session, we will consider the sort of regulations that we see of natural monopoly in areas such as telecommunications or electricity regulation. For today, we will read a classic case involving Apple, the iPad and the ebooks market. We then look at some of the back and forth between Apple and Epic Games—the makers of Fortnite—right before Epic filed an antitrust lawsuit against Apple. Apple would, in the main, win that lawsuit, even as Google would lose a parallel suit. Finally, we turn to two pending lawsuits by the United States against Google. There are now three important decisions in those cases, but they are very long, so we will read the government's initial press releases in the two cases and I will fill in more of the rest in class.

United States v. Apple, Inc.

791 F.3d 290 (2nd Cir. 2015)

DEBRA ANN LIVINGSTON, Circuit Judge: Since the invention of the printing press, the distribution of books has involved a fundamentally consistent process: compose a manuscript, print and bind it into physical volumes, and then ship and sell the volumes to the public. In late 2007, Amazon.com, Inc. ("Amazon") introduced the Kindle, a portable device that carries digital copies of books, known as "ebooks." This innovation had the potential to change the centuries-old process for producing books by eliminating the need to print, bind, ship, and store them. Amazon began to popularize the new way to read, and encouraged consumers to buy the Kindle by offering desirable books—new releases and *New York Times* bestsellers—for $9.99. Publishing companies, which have traditionally stood at the center of the multi-billion dollar book-producing industry, saw Amazon's ebooks, and particularly its $9.99 pricing, as a threat to their way of doing business.

By November 2009, Apple, Inc. ("Apple") had plans to release a new tablet computer, the iPad. Executives at the company saw an opportunity to sell ebooks on the iPad by creating a virtual marketplace on the device, which came to be known as the "iBookstore." Working within a tight timeframe, Apple went directly into negotiations with six of the major publishing companies in the United States. In two months, it announced that five of those companies—Hachette, Harpercollins, Macmillan, Penguin, and Simon & Schuster (collectively, the "Publisher Defendants")—had agreed to sell ebooks on the iPad under arrangements whereby the publishers had the authority to set prices, and could set the prices of new releases and *New York Times* bestsellers as high as $19.99 and $14.99, respectively. Each of these agreements, by virtue of its terms, resulted in each Publisher Defendant receiving *less* per ebook sold via Apple as opposed to Amazon, even given the higher consumer prices. Just a few months after the iBookstore opened, however, every one of the Publisher Defendants had taken control over pricing from Amazon and had raised the prices on many of their ebooks, most notably new releases and bestsellers.

The United States Department of Justice ("DOJ" or "Justice Department") and 33 states and territories (collectively, "Plaintiffs") filed suit in the United States District Court for the Southern District of New York, alleging that Apple, in launching the iBookstore, had conspired with the Publisher Defendants to raise prices across the nascent ebook market.

This agreement, they argued, violated § 1 of the Sherman Antitrust Act, 15 U.S.C. § 1 *et seq*. ("Sherman Act"), and state antitrust laws. All five Publisher Defendants settled and signed consent decrees, which prohibited them, for a period, from restricting ebook retailers' ability to set prices. Then, after a three-week bench trial, the district court (Cote, J.) concluded that, in order to induce the Publisher Defendants to participate in the iBookstore and to avoid the necessity of itself competing with Amazon over the retail price of ebooks, Apple orchestrated a conspiracy among the Publisher Defendants to raise the price of ebooks—particularly new releases and *New York Times* bestsellers. *United States v. Apple Inc.*, 952 F. Supp. 2d 638, 647 (S.D.N.Y. 2013). The district court found that the agreement constituted a *per se* violation of the Sherman Act and, in the alternative, unreasonably restrained trade under the rule of reason. On September 5, 2013, the district court entered final judgment on the liability finding and issued an injunctive order that, *inter alia*, prevents Apple from entering into agreements with the Publisher Defendants that restrict its ability to set, alter, or reduce the price of ebooks, and requires Apple to apply the same terms and conditions to ebook applications sold on its devices as it does to other applications.

On appeal, Apple contends that the district court's liability finding was erroneous and that the provisions of the injunction related to its pricing authority and ebook applications are not necessary to protect the public. *** Because we conclude that the district court did not err in deciding that Apple violated § 1 of the Sherman Act, and because we also conclude that the district court's injunction was lawful and consistent with preventing future anticompetitive harms, we affirm.

BACKGROUND

I. Factual Background

We begin not with Kindles and iPads, but with printed "trade books," which are "general interest fiction and non-fiction" books intended for a broad readership. *Apple*, 952 F. Supp. 2d at 648 n.4. In the United States, the six largest publishers of trade books, known in the publishing world as the "Big Six," are Hachette, HarperCollins, Macmillan, Penguin, Random House, and Simon & Schuster. Together, the Big Six publish many of the biggest names in fiction and non-fiction; during 2010, their titles accounted for over 90% of the *New York Times* bestsellers in the United States. *Id.* at 648 n.5.

For decades, trade book publishers operated under a fairly consistent business model. When a new book was ready for release to the public, the publisher would sell hardcover copies to retailers at a "wholesale" price and recommend resale to consumers at a markup, known as the "list" price. After the hardcover spent enough time on the shelves—often a year—publishers would release a paperback copy at lower "list" and "wholesale" prices. In theory, devoted readers would pay the higher hardcover price to read the book when it first came out, while more casual fans would wait for the paperback.

A. Amazon's Kindle

On November 19, 2007, Amazon released the Kindle: a portable electronic device that allows consumers to purchase, download, and read ebooks. At the time, there was only one other ereader available in the emerging ebook market, and Amazon's Kindle quickly gained traction. In 2007, ebook revenue in North America was only $70 million, a tiny amount relative to the approximately $30 billion market for physical trade books. *** Amazon followed a "wholesale" business model similar to the one used with print books: publishers recommended a digital list price and received a wholesale price for each ebook that Amazon sold. In exchange, Amazon could sell the publishers' ebooks on the Kindle and determine the retail price. At least early on, publishers tended to recommend a digital list price that was about 20% lower than the print list price to reflect the fact that, with an ebook, there is no cost for printing, storing, packaging, shipping, or returning the books.

Where Amazon departed from the publishers' traditional business model was in the sale of new releases and *New York Times* bestsellers. Rather than selling more expensive versions of these books upon initial release (as publishers encouraged by producing hardcover books before paperback copies), Amazon set the Kindle price at one, stable figure—$9.99. At this price, Amazon was selling "certain" new releases and bestsellers at a price that "roughly matched," or was slightly lower than, the wholesale price it paid to the publishers. *Apple*, 952 F. Supp. 2d at 649. ***

B. The Publishers' Reactions

Despite the small number of ebook sales compared to the overall market for trade books, top executives in the Big Six saw Amazon's $9.99 pricing strategy as a threat to their established way of doing business. *** In the short term, these members of the Big Six thought that Amazon's lower-priced ebooks would make it more difficult for them to sell hardcover copies of new releases, "which were often priced," as the district court noted, "at thirty dollars or more," *Apple*, 952 F. Supp. 2d at 649, as well as *New York Times* bestsellers. Further down the road, the publishers feared that consumers would become accustomed to the uniform $9.99 price point for these ebooks, permanently driving down the price they could charge for print versions of the books. Moreover, if Amazon became powerful enough, it could demand lower wholesale prices from the Big Six or allow authors to publish directly with Amazon, cutting out the publishers entirely. *** The executives of the Big Six also recognized that their problem was a collective one. ***

The most significant attack that the publishers considered and then undertook, however, was to withhold new and bestselling books from Amazon until the hardcover version had spent several months in stores, a practice known as "windowing." Members of the Big Six both kept one another abreast of their plans to window, and actively pushed others toward the strategy. *** Ultimately, however, the publishers viewed even this strategy to save their business model as self-destructive. Employees inside the publishing companies noted that windowing encouraged piracy, punished ebook consumers, and harmed long-term sales. ***

C. Apple's Entry into the ebook Market

Apple is one of the world's most innovative and successful technology companies. Its hardware sells worldwide and supports major software marketplaces like iTunes and the App Store. But in 2009, Apple lacked a dedicated marketplace for ebooks or a hardware device that could offer an outstanding reading experience. The pending release of the iPad, which Apple intended to announce on January 27, 2010, promised to solve that hardware deficiency.

Eddy Cue, Apple's Senior Vice President of Internet Software and Services and the director of Apple's digital content stores, saw the opportunity for an ebook marketplace on the iPad. *** Jobs approved Cue's plan for an ebook marketplace—which came to be known as the iBookstore—in November 2009. ***

D. Apple's Negotiations with the Publishers

1. Initial Meetings

Apple held its first meetings with each of the Big Six between December 15 and 16. The meetings quickly confirmed Cue's suspicions about the industry. As he wrote to Jobs after speaking with three of the publishers, "[c]learly, the biggest issue is new release pricing" and "Amazon is definitely not liked much because of selling below cost for NYT Best Sellers." J.A. 326-27. Many publishers also emphasized that they were searching for a strategy to regain control over pricing. Apple informed each of the Big Six that it was negotiating with the other major publishers, that it hoped to begin selling ebooks within the next 90 days, and that it was seeking a critical mass of participants in the iBookstore and would launch only if successful in reaching this goal. *** Most importantly for the publishers, however, Cue's team also expressed Apple's belief that Amazon's $9.99 price point was not ingrained in consumers' minds, and that Apple could sell new releases and *New York Times* bestsellers for somewhere between $12.99 and $14.99. In return, Apple requested that the publishers decrease their wholesale prices so that the company could make a small profit on each sale.

These meetings spurred a flurry of communications reporting on the "[t]errific news[,]" as Reidy put it in an email to Leslie Moonves, her superior at parent company CBS Corporation ("CBS"), that Apple "was not interested in a low price point for digital books" and didn't want "Amazon's $9.95 [sic] to continue." *Apple*, 952 F. Supp. 2d at 658 (first alteration in original) (internal quotation marks omitted). Significantly, these communications included numerous exchanges *between* executives at different Big Six publishers who, the district court found, "hashed over their meetings with Apple with one another." *Id.* The district court found that the frequent telephone calls among the Publisher Defendants during the period of their negotiations with Apple "represented a departure from the ordinary pattern of calls among them." *Id.* at 655 n.14.

2. The Agency Model

Meanwhile, Cue, Moerer, and Saul returned to Apple's headquarters to develop a business model for the iBookstore. *** It was at this point that Cue's team, recognizing its opportunity, abandoned the wholesale business model for a new, agency model. Unlike a wholesale model, in an agency relationship the *publisher* sets the price that consumers will pay for each ebook. Then, rather than the retailer paying the publisher for each ebook that it sells, the publisher pays the retailer a fixed percentage of each sale. In essence, the retailer receives a commission for distributing the publisher's ebooks. Under the system Apple devised, publishers would have the freedom to set ebook prices in the iBookstore, and would keep 70% of each sale. The remaining 30% would go to Apple as a commission.

This switch to an agency model obviated Apple's concerns about negotiating wholesale prices with the Big Six while ensuring that Apple profited on every sale. It did not, however, solve all of the company's problems. Because the agency model handed the publishers control over pricing, it created the risk that the Big Six would sell ebooks in the iBookstore at far higher prices than Kindle's $9.99 offering. If the prices were too high, Apple could be left with a brand new marketplace brimming with titles, but devoid of customers.

To solve this pricing problem, Cue's team initially devised two strategies. First, they realized that they could maintain "realistic prices" by establishing price caps for different types of books. J.A. 359. Of course, these caps would need to behigher than Amazon's $9.99 price point, or Apple would face the same difficult price negotiations that it sought to avoid by switching away from the wholesale model. But at this point Apple was not content to open its iBookstore offering prices higher than the competition. ***

Apple next concluded, then, as the district court found, that "[t]o ensure that the iBookstore would be competitive at higher prices, Apple . . . needed to eliminate all retail price competition." *Id.* at 659. Thus, rather than simply agreeing to price caps above Amazon's $9.99 price point, Apple created a second requirement: publishers must switch all of their other ebook retailers—including Amazon—to an agency pricing model. ***

On January 4 and 5, Apple sent essentially identical emails to each member of the Big Six to explain its agency model proposal. Each email described the commission split between Apple and the publishers and recommended three price caps: $14.99 for hardcover books with list prices above $35; $12.99 for hardcover books with list prices below $35; and $9.99 for all other trade books. The emails also explained that, "to sell ebooks at realistic prices . . . all [other] resellers of new titles need to be in [the] agency model" as well. J.A. 360. Or, as Cue told Reidy, "all publishers" would need to move "all retailers" to an agency model. J.A. 2060.

3. The "Most-Favored-Nation" Clause

Cue's thoughts on the agency model continued to evolve after the emails on January 4 and 5. Most significantly, Saul—Cue's in-house counsel—devised an alternative to explicitly requiring publishers to switch other retailers to agency. This alternative involved the use of a "most-favored nation" clause ("MFN Clause" or "MFN"). In general, an MFN Clause is a contractual provision that requires one party to give the other the best terms that it makes available to any competitor. In the context of Apple's negotiations, the MFN Clause mandated that, "[i]f, for any particular New Release in hardcover format, the . . . Customer Price [in the iBookstore] at any time is or becomes higher than a customer price offered by any other reseller . . ., then [the] Publisher shall designate a new, lower Customer Price [in the iBookstore] to meet such lower [customer price]." J.A. 559. Put differently, the MFN would require the publisher to offer any ebook in Apple's iBookstore for no more than what the same ebook was offered elsewhere, such as from Amazon.

On January 11, Apple sent each of the Big Six a proposed eBook Agency Distribution Agreement (the "Contracts"). As described in the January 4 and 5 emails, these Contracts would split the proceeds from each ebook sale between the publisher and Apple, with the publisher receiving 70%, and would set price caps on ebooks at $14.99, $12.99, and $9.99

depending on the book's hardcover price. But unlike the initial emails, the Contracts contained MFN Clauses in place of the requirement that publishers move all other retailers to an agency model. Apple then assured each member of the Big Six that it was being offered the same terms as the others.

The Big Six understood the economic incentives that the MFN Clause created. Suppose a new hardcover release sells at a list price of $25, and a wholesale price of $12.50. With Amazon, the publishers had been receiving the wholesale price (or a slightly lower digital wholesale price) for every ebook copy of the volume sold on Kindle, even if Amazon ultimately sold the ebook for less than that wholesale price. Under Apple's initial agency model—with price caps but no MFN Clause—the publishers already stood to make *less* money per ebook with Apple. Because Apple capped the ebook price of a $25 hardcover at $12.99 and took 30% of that price, publishers could only expect to make $8.75 per sale. But what the publishers sacrificed in short-term revenue, they hoped to gain in long-term stability by acquiring more control over pricing and, accordingly, the ability to protect their hardcover sales.

The MFN Clause changed the situation by making it imperative, not merely desirable, that the publishers wrest control over pricing from ebook retailers generally. Under the MFN, if Amazon stayed at a wholesale model and continued to sell ebooks at $9.99, the publishers would be forced to sell in the iBookstore, too, at that same $9.99 price point. The result would be the worst of both worlds: *lower* short-term revenue and *no* control over pricing. The publishers recognized that, as a practical matter, this meant that the MFN Clause would force them to move Amazon to an agency relationship. *** Apple understood this dynamic as well. *** Cue bluntly put it, "any decent MFN forces the model" away from wholesale and to agency. *Id.* (internal quotation marks omitted). ***

Thus, the terms of the negotiation between Apple and the publishers became clear: Apple wanted quick and successful entry into the ebook market and to eliminate retail price competition with Amazon. In exchange, it offered the publishers an opportunity "to confront Amazon as one of an organized group . . . united in an effort to eradicate the $9.99 price point." *Id.* at 664. Both sides needed a critical mass of publishers to achieve their goals. The MFN played a pivotal role in this *quid pro quo* by "stiffen[ing] the spines of the [publishers] to ensure that they would demand new terms from Amazon," and protecting Apple from retail price competition. *Id.* at 665.

4. Final Negotiations

The proposed Contracts sparked intense negotiations as Cue's team raced to assemble enough publishers to announce the iBookstore by January 27. *** In a set of meetings between January 13 and 14, the majority of the Big Six expressed a general willingness to adopt an agency model, but refused to do so with the price limits Apple demanded. Cue responded by asking Jobs for permission to create a more lenient price cap system. Under this new regime, *New York Times* bestsellers could sell for $14.99 if the hardcover was listed above $30, and for $12.99 if listed below that price. As for new releases, a $12.99 cap would apply to hardcovers priced between $25 and $27.50; a $14.99 cap would apply to hardcovers selling for up to $30; and, if the hardcover sold for over $30, publishers could sell the ebook for between $16.99 and $19.99. Jobs responded that he could "live with" the pricing "as long as [the publishers] move Amazon to the agen[cy] model too." J.A. 499.

Cue proposed this new pricing regime to the Big Six on January 16 and, with only 11 days remaining before the iPad launch, turned up the pressure. *** By January 22, two publishers—Simon & Schuster and Hachette—had verbally committed to join the iBookstore, while a third, Penguin, had agreed to Apple's terms in principle. *** To make matters worse, "[p]ress reports on January 18 and 19 alerted the publishing world and Amazon to the Publishers' negotiations with Apple," *Apple*, 952 F. Supp. 2d at 670-71, and Amazon learned from Random House that it was facing "pressure from other publishers . . . to move to [the] agency model because Apple had made it clear that unless all of the Big Six participated, they wouldn't bother with building a bookstore," J.A. 1520. Representatives from Amazon descended on New York for a set of long-scheduled meetings with the publishers. As the district court found, "[i]n separate conversations on January 20 and over the next few days, the Publisher Defendants all told Amazon that they wanted to change to an agency distribution model with Amazon." *Apple*, 952 F. Supp. 2d at 672. ***

HarperCollins was the fifth, and final, publisher to agree in principle to Apple's proposal. Murray, its CEO, "remained unhappy over the size of Apple's commission and the existence of price caps." *Id.* at 673 n.39. Unable to negotiate successfully with Murray, Cue asked Jobs to contact James Murdoch, the CEO of the publisher's parent company, and "tell him we have 3 signed so there is no leap of faith here." *Id.* at 675 (internal quotation marks omitted). After a series of emails, Jobs summarized Apple's position to Murdoch:

> [W]e simply don't think the ebook market can be successful with pricing higher than $12.99 or $14.99. Heck, Amazon is selling these books at $9.99, and who knows, maybe they are right and we will fail even at $12.99. But we're willing to try at the prices we've proposed. . . . As I see it, [HarperCollins] has the following choices: (1) Throw in with [A]pple and see if we can all make a go of this to create a real mainstream ebooks market at $12.99 and $14.99. (2) Keep going with Amazon at $9.99. You will make a bit more money in the short term, but in the medium term Amazon will tell you they will be paying you 70% of $9.99. They have shareholders too. (3) Hold back your books from Amazon. Without a way for customers to buy your ebooks, they will steal them.

Id. at 677. Cue also emailed Murray to inform him that four other publishers had signed their agreements. Murray then called executives at both Hachette and Macmillan before agreeing to Apple's terms.

As the district court found, during the period in January during which Apple concluded its agreements with the Publisher Defendants, "Apple kept the Publisher Defendants apprised about who was in and how many were on board." *Id.* at 673. The Publisher Defendants also kept in close communication. As the district court noted, "[i]n the critical negotiation period, over the three days between January 19 and 21, Murray, Reidy, Shanks, Young, and Sargeant called one another 34 times, with 27 calls exchanged on January 21 alone." *Id.* at 674.

By the January 27 iPad launch, five of the Big Six—Hachette, HarperCollins, Macmillan, Penguin, and Simon & Schuster—had agreed to participate in the iBookstore. The lone holdout, Random House, did not join because its executives believed it would fare better under a wholesale pricing model and were unwilling to make a complete switch to agency pricing. Steve Jobs announced the iBookstore as part of his presentation introducing the iPad. When asked after the presentation why someone should purchase an ebook from

Apple for $14.99 as opposed to $9.99 with Amazon or Barnes & Noble, Jobs confidently replied, "[t]hat won't be the case . . . the price will be the same. . . . [P]ublishers will actually withhold their [e]books from Amazon . . . because they are not happy with the price." A day later, Jobs told his biographer the publishers' position with Amazon: "[y]ou're going to sign an agency contract or we're not going to give you the books." J.A. 891 (internal quotation marks omitted).

E. Negotiations with Amazon

Jobs's boast proved to be prophetic. While the Publisher Defendants were signing Apple's Contracts, they were also informing Amazon that they planned on changing the terms of their agreements with it to an agency model. However, their move against Amazon began in earnest on January 28, the day after the iPad launch. That afternoon, John Sargent flew to Seattle to deliver an ultimatum on behalf of Macmillan: that Amazon would switch its ebook sales agreement with Macmillan to an agency model or suffer a seven-month delay in its receipt of Macmillan's new releases. Amazon responded by removing the option to purchase Macmillan's print and ebook titles from its website.

Sargent, as the district court found, had informed Cue of his intention to confront Amazon before ever leaving for Seattle. *Apple*, 952 F. Supp. 2d at 678. On his return, he emailed Cue to inform him about Amazon's decision to remove Macmillan ebooks from Kindle, adding a note to say that he wanted to "make sure you are in the loop." J.A. 640. Sargent also wrote a public letter to Macmillan's authors and agents, describing the Amazon negotiations. Hachette's Arnaud Nourry emailed the CEO of Macmillan's parent company to express his "personal support" for Macmillan's actions and to "ensure [him] that [he was] not going to find [his] company alone in the battle." J.A. 643. A Penguin executive wrote to express similar support for Macmillan's position.

The district court found that while Amazon was "opposed to adoption of the agency model and did not want to cede pricing authority to the Publishers," it knew that it could not prevail in this position against five of the Big Six. *Apple*, 952 F. Supp. 2d at 671, 680. When Amazon told Macmillan that it would be willing to negotiate agency terms, Sargent sent Cue an email titled "URGENT!!" that read: "Hi Eddy, I am gonna need to figure out our final agency terms of sale tonight. Can you call me please?" J.A. 642. Cue and Sargent spoke that night and, while Cue denied at trial that the conversation concerned Macmillan's negotiations with Amazon, the district court found that "his denial was not credible." *Apple*, 952 F. Supp. 2d at 681 n.52. By February 5, Amazon had agreed to agency terms with Macmillan.

The other publishers who had joined the iBookstore quickly followed Macmillan's lead. *** Once again, Apple closely monitored the negotiations with Amazon. The Publisher Defendants would inform Cue when they had completed agency agreements, and his team monitored price changes on the Kindle. ***

F. Effect on Ebook Prices

As Apple and the Publisher Defendants expected, the iBookstore price caps quickly became the benchmark for ebook versions of new releases and *New York Times* bestsellers. In the five months following the launch of the iBookstore, the publishers who joined the marketplace and switched Amazon to an agency model priced 85.7% of new releases on

Kindle and 92.1% of new releases on the iBookstore at, or just below, the price caps. *Apple*, 952 F. Supp. 2d at 682. Prices for *New York Times* bestsellers took a similar leap as publishers began to sell 96.8% of their bestsellers on Kindle and 99.4% of their bestsellers on the iBookstore at, or just below, the Apple price caps *Id.* During that same time period, Random House, which had not switched to an agency model, saw virtually no change in the prices for its new releases or *New York Times* bestsellers.

*** Based on data from February 2010—just before the Publisher Defendants switched Amazon to agency pricing—to February 2011, an expert retained by the Justice Department observed that the weighted average price of the Publisher Defendants' new releases increased by 24.2%, while bestsellers increased by 40.4%, and other ebooks increased by 27.5%, for a total weighted average ebook price increase of 23.9%. Indeed, even Apple's expert agreed, noting that, over a two-year period, the Publisher Defendants increased their average prices for hardcovers, new releases, and other ebooks. ***

II. Apple's Liability Under § 1

This appeal requires us to address the important distinction between "horizontal" agreements to set prices, which involve coordination "between competitors at the same level of [a] market structure," and "vertical" agreements on pricing, which are created between parties "at different levels of [a] market structure." *Anderson News, L.L.C. v. Am. Media, Inc.*, 680 F.3d 162, 182 (2d Cir. 2012) (internal quotation marks omitted). Under § 1 of the Sherman Act, the former are, with limited exceptions, per se unlawful, while the latter are unlawful only if an assessment of market effects, known as a rule-of-reason analysis, reveals that they unreasonably restrain trade. ***

Apple characterizes its Contracts with the Publisher Defendants as a series of parallel but independent vertical agreements, a characterization that forms the basis for its two primary arguments against the district court's decision. *** For the reasons set forth below, we reject these arguments. On this record, the district court did not err in determining that Apple orchestrated an agreement with and among the Publisher Defendants, in characterizing this agreement as a horizontal price fixing-conspiracy, or in holding that the conspiracy unreasonably restrained trade in violation of § 1 of the Sherman Act.

A. The Conspiracy with the Publisher Defendants

Section 1 of the Sherman Act bans restraints on trade "effected by a contract, combination, or conspiracy." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 553 (2007) (internal quotation marks omitted). The first "crucial question in a Section 1 case is therefore whether the challenged conduct 'stem[s] from independent decision or from an agreement, tacit or express.'" *Starr v. Sony BMG Music Entm't*, 592 F.3d 314, 321 (2d Cir. 2010) (alteration in original) (quoting *Theatre Enters., Inc. v. Paramount Film Distrib. Corp.*, 346 U.S. 537, 540 (1954)).

Identifying the existence and nature of a conspiracy requires determining whether the evidence "reasonably tends to prove that the [defendant] and others had a conscious commitment to a common scheme designed to achieve an unlawful objective." *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984) (internal quotation marks omitted). Parallel action is not, by itself, sufficient to prove the existence of a conspiracy; such behavior could be the result of "coincidence, independent responses to common stimuli, or mere interdependence unaided by an advance understanding among the parties." *Twombly*, 550

U.S. at 556 n.4 (internal quotation marks omitted). Indeed, parallel behavior that does not result from an agreement is not unlawful even if it is anticompetitive. Accordingly, to prove an antitrust conspiracy, "a plaintiff must show the existence of additional circumstances, often referred to as 'plus' factors, which, when viewed in conjunction with the parallel acts, can serve to allow a fact-finder to infer a conspiracy." *Apex Oil Co. v. DiMauro*, 822 F.2d 246, 253 (2d Cir. 1987).

*** Because of the risk of condemning parallel conduct that results from independent action and not from an actual unlawful agreement, the Supreme Court has cautioned against drawing an inference of conspiracy from evidence that is equally consistent with independent conduct as with illegal conspiracy—or, as the Court has called it, "ambiguous" evidence. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 597 n.21 (1986).

*** Apple's basic argument is that because its Contracts with the Publisher Defendants were fully consistent with its independent business interests, those agreements provide only "ambiguous" evidence of a § 1 conspiracy, and the district court therefore erred under *Matsushita* and *Monsanto* in inferring such a conspiracy.

We disagree. At the start, Apple's benign portrayal of its Contracts with the Publisher Defendants is not persuasive—not because those Contracts themselves were independently unlawful, but because, in context, they provide strong evidence that Apple consciously orchestrated a conspiracy among the Publisher Defendants. As explained below, and as the district court concluded, Apple understood that its proposed Contracts were attractive to the Publisher Defendants *only* if they collectively shifted their relationships with Amazon to an agency model—which Apple knew would result in higher consumer-facing ebook prices. In addition to these Contracts, moreover, ample additional evidence identified by the district court established both that the Publisher Defendants' shifting to an agency model with Amazon was the result of express collusion among them and that Apple consciously played a key role in organizing that collusion. The district court did not err in concluding that Apple was more than an innocent bystander.

Apple offered each Big Six publisher a proposed Contract that would be attractive only if the publishers acted collectively. Under Apple's proposed agency model, the publishers stood to make less money per sale than under their wholesale agreements with Amazon, but the Publisher Defendants were willing to stomach this loss because the model allowed them to sell new releases and bestsellers for more than $9.99. Because of the MFN Clause, however, each new release and bestseller sold in the iBookstore would cost only $9.99 as long as Amazon continued to sell ebooks at that price. So in order to receive the perceived benefit of Apple's proposed Contracts, the Publisher Defendants had to switch Amazon to an agency model as well—something no individual publisher had sufficient leverage to do on its own. Thus, each Publisher Defendant would be able to accomplish the shift to agency—and therefore have an incentive to sign Apple's proposed Contracts—only if it acted in tandem with its competitors. By the very act of signing a Contract with Apple containing an MFN Clause, then, each of the Publisher Defendants signaled a clear commitment to move against Amazon, thereby facilitating their collective action. ***

The Supreme Court has defined an agreement for Sherman Act § 1 purposes as "a conscious commitment to a common scheme designed to achieve an unlawful objective." *Monsanto*, 465 U.S. at 764 (internal quotation marks omitted). Plainly, this use of the promise of higher prices as a bargaining chip to induce the Publisher Defendants to participate in the iBookstore constituted a conscious commitment to the goal of raising ebook prices. *** Nor was the Publisher Defendants' joint action against Amazon a result of parallel decisionmaking. *** That the Publisher Defendants were in constant communication regarding their negotiations with both Apple and Amazon can hardly be disputed. Indeed, Apple never seriously argues that the Publisher Defendants were not acting in concert.

*** Apple's involvement in the conspiracy continued even past the signing of its agency agreements. Before Sargent flew to Seattle to meet with Amazon, he told Cue. Apple stayed abreast of the Publisher Defendants' progress as they set coordinated deadlines with Amazon and shared information with one another during negotiations. ***

Apple responds to this evidence—which the experienced judge who oversaw the trial characterized repeatedly as "overwhelming"—by explaining how each piece of evidence standing alone is "ambiguous" and therefore insufficient to support an inference of conspiracy. We are not persuaded. *** Combined with the unmistakable purpose of the Contracts that Apple proposed to the publishers, and with the collective move against Amazon that inevitably followed the signing of those Contracts, the emails and phone records demonstrate that Apple *agreed* with the Publisher Defendants, within the meaning of the Sherman Act, to raise consumer-facing ebook prices by eliminating retail price competition. The district court did not err in rejecting Apple's argument that the evidence of its orchestration of the Publisher Defendants' conspiracy was "ambiguous."

*** In short, we have no difficulty on this record rejecting Apple's argument that the district court erred in concluding that Apple "conspir[ed] with the Publisher Defendants to eliminate retail price competition and to raise e-book prices." *Apple*, 952 F. Supp. 2d at 691. Having concluded that the district court correctly identified an agreement between Apple and the Publisher Defendants to raise consumer-facing ebook prices, we turn to Apple's and the dissent's arguments that this agreement did not violate § 1 of the Sherman Act.

B. Unreasonable Restraint of Trade

"Although the Sherman Act, by its terms, prohibits every agreement 'in restraint of trade,' [the Supreme] Court has long recognized that Congress intended to outlaw only unreasonable restraints." *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997).***

In antitrust cases, "*[p]er se* and rule-of-reason analysis are . . . two methods of determining whether a restraint is 'unreasonable,' *i.e.*, whether its anticompetitive effects outweigh its procompetitive effects." *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 342 (1990). *** Horizontal price-fixing conspiracies traditionally have been, and remain, the "archetypal example" of a *per se* unlawful restraint on trade. *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 647 (1980). By contrast, the Supreme Court in recent years has clarified that vertical restraints—including those that restrict prices—should generally be subject to the rule of reason.

In this case, the district court held that the agreement between Apple and the Publisher Defendants was unlawful under the *per se* rule; in the alternative, even assuming that a rule-of-reason analysis was required, the district court concluded that the agreement was still unlawful.

1. Whether the *Per Se* Rule Applies

a. Horizontal Agreement

In light of our conclusion that the district court did not err in determining that Apple organized a price-fixing conspiracy among the Publisher Defendants, Apple and the dissent's initial argument against the *per se* rule—that Apple's conduct must be subject to rule-of-reason analysis because it involved merely multiple independent, vertical agreements with the Publisher Defendants—cannot succeed.

"The true test of legality" under § 1 of the Sherman Act "is whether the *restraint imposed* is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition." *Bd. of Trade of City of Chi. v. United States*, 246 U.S. 231, 238 (1918) (emphasis added). By agreeing to orchestrate a horizontal price-fixing conspiracy, Apple committed itself to "achiev[ing] [that] unlawful objective," *Monsanto*, 465 U.S. at 764 (internal quotation marks omitted): namely, collusion with and among the Publisher Defendants to set ebook prices. This type of agreement, moreover, is a restraint "that would always or almost always tend to restrict competition and decrease output." *Leegin*, 551 U.S. at 886 (internal quotation marks omitted).

The response, raised by Apple and our dissenting colleague, that Apple engaged in "vertical conduct" that is unfit for *per se* condemnation therefore misconstrues the Sherman Act analysis. It is the type of restraint Apple agreed to impose that determines whether the *per se* rule or the rule of reason is appropriate. These rules are means of evaluating "whether [a] *restraint* is unreasonable," not the reasonableness of a particular defendant's role in the scheme. *Atl. Richfield*, 495 U.S. at 342 (emphasis added) (internal quotation marks omitted).

Consistent with this principle, the Supreme Court and our Sister Circuits have held all participants in "hub-and-spoke" conspiracies liable when the objective of the conspiracy was a *per se* unreasonable restraint of trade. ***

Because the reasonableness of a restraint turns on its anticompetitive effects, and not the identity of each actor who participates in imposing it, Apple and the dissent's observation that the Supreme Court has refused to apply the *per se* rule to certain vertical agreements is inapposite. The rule of reason is unquestionably appropriate to analyze an agreement between a manufacturer and its distributors to, for instance, limit the price at which the distributors sell the manufacturer's goods or the locations at which they sell them. *See Leegin*, 551 U.S. at 881; *Cont'l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 57 (1977). These vertical restrictions "are widely used in our free market economy," can enhance interbrand competition, and do not inevitably have a "pernicious effect on competition." *Cont'l T.V.*, 433 U.S. at 57-58 (internal quotation marks omitted). But the relevant "agreement in restraint of trade" in this case is not Apple's vertical Contracts with the Publisher Defendants (which might well, if challenged, have to be evaluated under the rule of reason); it is the horizontal agreement that Apple organized among the Publisher Defendants to raise ebook prices. As explained below, horizontal agreements with the purpose and effect of raising prices are *per se* unreasonable because they pose a "threat to the central nervous system of the economy," *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224 n.59 (1940); that threat is just as significant when a vertical market participant organizes the conspiracy. Indeed, as the dissent notes, the Publisher Defendants' coordination to fix prices is uncontested on appeal. The competitive effects of that *same restraint* are no different merely because a different conspirator is the defendant.

Accordingly, when the Supreme Court has applied the rule of reason to vertical agreements, it has explicitly distinguished situations in which a vertical player organizes a horizontal cartel. ***

A horizontal conspiracy can use vertical agreements to facilitate coordination without the other parties to those agreements knowing about, or agreeing to, the horizontal conspiracy's goals. *** But there is no such possibility for confusion in the hub-and-spoke context, where the vertical organizer has not only committed to vertical agreements, but has also agreed to participate in the horizontal conspiracy. In that situation, the court need not consider whether the vertical agreements restrained trade because all participants agreed to the horizontal restraint, which is "and ought to be, *per se* unlawful." *Id.*

In short, the relevant "agreement in restraint of trade" in this case is the price-fixing conspiracy identified by the district court, not Apple's vertical contracts with the Publisher Defendants. How the law might treat Apple's vertical agreements in the absence of a finding that Apple agreed to create the horizontal restraint is irrelevant. Instead, the question is whether the vertical organizer of a horizontal conspiracy designed to raise prices has agreed to a restraint that is any less anticompetitive than its co-conspirators, and can therefore escape *per se* liability. We think not. Even in light of this conclusion, however, we must address two additional arguments that Apple raises against application of the *per se* rule.

b. "Enterprise and Productivity"

Apple seeks refuge from the *per se* rule by invoking a line of cases in which courts have permitted defendants to introduce procompetitive justifications for horizontal price-fixing arrangements that would ordinarily be condemned *per se* if those agreements "when adopted could reasonably have been believed to promote 'enterprise and productivity.'" Apple Br. at 50 (quoting *In re Sulfuric Acid Antitrust Litig.*, 703 F.3d 1004, 1011 (7th Cir. 2012)) (internal quotation mark omitted). ***

Put differently, a participant in a price-fixing agreement may invoke only certain, limited *kinds* of "enterprise and productivity" to receive the rule of reason's advantages. As the Supreme Court has explained—including in *BMI* itself, *see* 441 U.S. at 8 & n.11—the *per se* rule would lose all the benefits of being "*per se*" if conspirators could seek to justify their conduct on the basis of its purported competitive benefits in every case. Here, there was no joint venture or other similar productive relationship between any of the participants in the conspiracy that Apple joined. Apple also does not claim, nor could it, that creating an ebook retail market is possible only if the participating publishers coordinate with one another on price.

c. Price-Fixing Conspiracy

As noted, the Supreme Court has for nearly 100 years held that horizontal collusion to raise prices is the "archetypal example" of a *per se* unlawful restraint of trade. *Catalano*, 446 U.S. at 647. If successful, these conspiracies concentrate the power to set prices among the conspirators, including the "power to control the market and to fix arbitrary and unreasonable prices." *United States v. Trenton Potteries Co.*, 273 U.S. 392, 397 (1927). And even if unsuccessful or "not . . . aimed at complete elimination of price competition," the conspiracies pose a "threat to the central nervous system of the economy" by creating a dangerously attractive opportunity for competitors to enhance their power at the expense of others. *Socony-Vacuum Oil*, 310 U.S. at 224 n.59 (1940).***

Apple and its amici argue that the horizontal agreement among the publishers was not actually a "price-fixing" conspiracy that deserves *per se* treatment in the first place. But it is well established that *per se* condemnation is not limited to agreements that literally set or restrict prices. Instead, any conspiracy "formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity . . . is illegal per se," and the precise "machinery employed . . . is immaterial." *Socony-Vacuum Oil*, 310 U.S. at 223. The conspiracy among Apple and the Publisher Defendants comfortably qualifies as a horizontal price-fixing conspiracy.

As we have already explained, the Publisher Defendants' primary objective in expressly colluding to shift the entire ebook industry to an agency model (with Apple's help) was to eliminate Amazon's $9.99 pricing for new releases and bestsellers, which the publishers believed threatened their short-term ability to sell hardcovers at higher prices and the long-term consumer perception of the price of a new book. They had grown accustomed to a business in which they rarely competed with one another on price and could, at least partially, control the price of new releases and bestsellers by releasing hardcover copies before paperbacks. Amazon, and the ebook, upset that model, and reduced prices to consumers by eliminating the need to print, store, and ship physical volumes. Its $9.99 price point for new releases and bestsellers represented a small loss on a small percentage of its sales designed to encourage consumers to adopt the new technology.

Faced with downward pressure on prices but unconvinced that withholding books from Amazon was a viable strategy, the Publisher Defendants—their coordination orchestrated by Apple—combined forces to grab control over price. Collectively, the Publisher Defendants accounted for 48.8% of ebook sales in 2010. J.A. 1571. Once organized, they had sufficient clout to demand control over pricing, in the form of agency agreements, from Amazon and other ebook distributors. This control over pricing facilitated their ultimate goal of raising ebook prices to the price caps. In other words, the Publisher Defendants took by collusion what they could not win by competition. And Apple used the publishers' frustration with Amazon's $9.99 pricing as a bargaining chip in its negotiations and structured its Contracts to coordinate their push to raise prices throughout the industry. A coordinated effort to raise prices across the relevant market was present in every chapter of this story.

This conspiracy to raise prices also had its intended effect. Immediately after the Publisher Defendants switched Amazon to an agency model, they increased the Kindle prices of 85.7% of their new releases and 96.8% of their *New York Times* bestsellers to within 1% of the Apple price caps. They also increased the prices of their other ebook offerings. Within two weeks of the move to agency, the weighted average price of the Publisher Defendants' ebooks—which accounted for just under half of all ebook sales in 2010—had increased by 18.6%, while the prices for Random House and other publishers remained relatively stable.

This sudden increase in prices reduced ebook sales by the Publisher Defendants and proved to be durable. One analysis compared two-week periods before and after the Publisher Defendants took control over pricing and found that they sold 12.9% fewer ebooks after the switch. Another expert for Plaintiffs conducted a regression analysis, which showed that, over a six-month period following the switch, the Publisher Defendants sold 14.5% fewer ebooks than they would have had the price increases not occurred. Nonetheless, ebook prices for the Publisher Defendants over those six months, controlling for other factors, remained 16.8% higher than before the switch. And even Apple's expert produced a chart showing that the Publisher Defendants' prices for new releases, bestsellers, and other offerings remained elevated a full two years after they took control over pricing.

Apple points out that, in the two years following the conspiracy, prices across the ebook market as a whole fell slightly and total output increased. However, when the agreement at issue involves price fixing, the Supreme Court has consistently held that courts need not even conduct an extensive analysis of "market power" or a "detailed market analysis" to demonstrate its anticompetitive character. *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 460 (1986). The district court's assessment of Apple's and the Publisher Defendants' motives, coupled with the unambiguous increase in the prices of their ebooks, was sufficient to confirm that price fixing was the goal, and the result, of the conspiracy.

Moreover, Apple's evidence regarding long-term growth and prices in the ebook industry is not inconsistent with the conclusion that the price-fixing conspiracy succeeded in actually raising prices. *** No court can presume to know the proper price of an ebook, but the long judicial experience applying the Sherman Act has shown that "[a]ny combination which tampers with price structures . . . would be directly interfering with the free play of market forces." *Socony-Vacuum Oil*, 310 U.S. at 221. By setting new, durable prices through collusion rather than competition, Apple and the Publisher Defendants imposed their view of proper pricing, supplanting the market's free play. This evidence, viewed in conjunction with the district court's findings as to and analysis of the conspiracy's history and purpose, is sufficient to support the conclusion that the agreement to raise ebook prices was a *per se* unlawful price-fixing conspiracy.

2. Rule of Reason

As explained above, neither Apple nor the dissent has presented any particularly strong reason to think that the conspiracy we have identified should be spared *per se* condemnation. My concurring colleague would therefore affirm the district court's decision on that basis alone. I, too, believe that *per se* condemnation is appropriate in this case and view Apple's sloganeering references to "innovation" as a distraction from the straightforward nature of the conspiracy proven at trial. Nonetheless, I am mindful of Apple's argument that the nascent ebook industry has some new and unusual features and that the *per se* rule is not fit for "business relationships where the economic impact of certain practices is not immediately obvious." *Leegin*, 551 U.S. at 887 (internal quotation marks omitted). I therefore assume, for the sake of argument, that it is appropriate to apply the rule of reason and to analyze the competitive effects of Apple's horizontal agreement with the Publisher Defendants.

Notably, however, the ample evidence here concerning the purpose and effects of Apple's agreement with the Publisher Defendants affects the scope of the rule-of-reason analysis called for in this case. Under a prototypically robust rule-of-reason analysis, the plaintiff must demonstrate an "*actual* adverse effect" on competition in the relevant market before the "burden shifts to the defendants to offer evidence of the pro-competitive effects of their agreement." *Geneva Pharms. Tech. Corp. v. Barr Labs. Inc.*, 386 F.3d 485, 506-07 (2d Cir. 2004) (internal quotation marks omitted). The factfinder then weighs the competing evidence "to determine if the effects of the challenged restraint tend to promote or destroy competition."*Id.* at 507. ***

Apple's initial argument that its agreement with the Publisher Defendants was procompetitive (an argument presented principally in an amicus brief adopted wholeheartedly by the dissent) is that by eliminating Amazon's $9.99 price point, the agreement enabled Apple and other ebook retailers to enter the market and challenge Amazon's dominance. But this defense—that higher prices enable more competitors to enter a market—is no justification for a horizontal price-fixing conspiracy. ***

From this perspective, the dissent's contention that Apple could not have entered the ebook retail market without the price-fixing conspiracy, because it could not have profited either by charging more than Amazon or by following Amazon's pricing, is a complete non sequitur. The posited dilemma is the whole point of competition: if Apple could not turn a profit by selling new releases and bestsellers at $9.99, or if it could not make the iBookstore and iPad so attractive that consumers would pay more than $9.99 to buy and read those ebooks on its platform, then there was no place for its platform in the ebook retail market. Neither the district court nor Plaintiffs had an obligation to identify a "viable alternative" for Apple's profitable entry because Apple had no entitlement to enter the market on its preferred terms.

*** In actuality, the district court's fact-finding illustrates that Apple organized the Publisher Defendants' price-fixing conspiracy not because it was a necessary precondition to market entry, but because it was a convenient bargaining chip. Apple was operating under a looming deadline and recognized that, by aligning its interests with those of the Publisher Defendants and offering them a way to raise prices across the ebook market, it could gain quick entry into the market on extremely favorable terms, including the elimination of retail price competition from Amazon. But the offer to orchestrate a horizontal conspiracy to raise prices is not a legitimate way to sweeten a deal.

*** To summarize, the district court made no finding that a horizontal conspiracy to eliminate price competition in the ebook retail market was necessary to bring more retailers into the market to challenge Amazon, nor does the record evidence support this conclusion. More importantly, even if there *were* such evidence, the fact that a competitor's entry into the market is contingent on a horizontal conspiracy to raise prices only means (absent monopolistic conduct by the market's dominant firm, which cannot lawfully be challenged by collusion) that the competitor is inefficient, *i.e.*, that its entry will not enhance consumer welfare. For these reasons, I would reject the argument that Apple's entry into the market represented an important procompetitive benefit of the horizontal price-fixing conspiracy it orchestrated.

*** Accordingly, I agree with the district court's decision that, under the rule of reason, the horizontal agreement to raise consumer-facing ebook prices that Apple orchestrated unreasonably restrained trade. But given the clear applicability of the *per se* rule in this context, the analysis here is largely offered in response to the dissent. I also confidently join with my concurring colleague in affirming the district court's conclusion that Apple committed a *per se* violation of § 1 of the Sherman Act.

CONCLUSION

We have considered the appellants' remaining arguments and find them to be without merit. Because we conclude that Apple violated § 1 of the Sherman Act by orchestrating a horizontal conspiracy among the Publisher Defendants to raise ebook prices, and that the injunctive relief ordered by the district court is appropriately designed to guard against future anticompetitive conduct, the judgment of the district court is AFFIRMED.

LOHIER, Circuit Judge, Concurring in part and Concurring in the judgment: I join in the majority opinion except for part II.B.2 relating to the application of the rule of reason. In my view, Apple's appeal rises or falls based on the application of the *per se* rule. That rule clearly applies to the central agreement in this case (and the only agreement alleged to be unlawful): the publishers' horizontal agreement to fix ebook prices. ***

DENNIS JACOBS, Circuit Judge, Dissenting. I respectfully dissent. This appeal is taken by Apple Inc. from a judgment in the United States District Court for the Southern District of New York (Cote, J.), awarding an antitrust injunction in favor of the United States, 31 states, the District of Columbia, and the Commonwealth of Puerto Rico. The plaintiffs' claims are premised on Apple's conduct as a prospective retailer of e-books. I vote to reverse. *** In the course of this litigation, three theories have been offered for how Apple could have entered the e-book market on less restrictive terms. Each theory misapprehends the market or the law, or both. The absence of alternative means bespeaks the reasonableness of the measures Apple took.

Theory 1: Apple could have competed with Amazon on Amazon's terms, using wholesale contracts and below-cost pricing.

This was never an option. The district court found as fact that: a new entrant into the e-book retail market "would run the risk of losing money if it tried or was forced to match Amazon's pricing to remain competitive," *Apple I*, 952 F. Supp. 2d at 658; Apple was "not willing" to engage in below-cost pricing, *Id.* at 657; and Apple could have avoided this money-losing price structure simply by forgoing entry to the market, see *Id.* at 659. Even if Apple had been willing to adopt below-cost pricing, the result at best would have been duopoly, and the hardening of the existing barrier to entry. Antitrust law disfavors a durable duopoly nearly as much as monopoly itself.

Theory 2: Apple could have entered the e-book retail market using the wholesale model and charged higher prices than Amazon's.

The district court foreclosed this theory as well; it found that Apple refused to impair its brand by charging "what it considered unrealistically high prices." *Apple I*, 952 F. Supp. 2d at 659. Even if Apple had been willing to tarnish its brand by offering bad value for money, the notion that customers would actually have bought e-books from Apple at the higher price defies the law of demand. Higher prices may stimulate sales of certain wines and perfumes—not e-books.

Nor could Apple justify higher prices for the e-books by competing on the basis of its new hardware, the iPad, because there is inter-operability among platforms. And if Apple had attempted to pursue this hardware-based competition by programming its iPad to run the iBookstore but to reject Amazon's Kindle application, Apple might have been exposed to an entirely different antitrust peril. See *United States v. Microsoft Corp.*, 253 F.3d 34, 50-80 (D.C. Cir. 2001) (en banc); Google Android, No. 40099 (Eur. Comm'n Apr. 15, 2015) (antitrust proceedings brought by European Commissioner for Competition against Google for favoring Google's own applications on mobile devices that use Google's operating system).

Theory 3: Apple could have asked the Department of Justice to act against Amazon's monopoly.

Counsel for the United States actually proposed this at oral argument. At the same time, however, he conceded that the Department of Justice had already "noticed" Amazon's e-book pricing and had chosen not to challenge it because the government "regarded it as good for consumers." Any request from Apple would therefore have been futile. True, Apple could not have known that the Antitrust Division would have adopted the position that below-cost pricing is not a concern of antitrust policy: who could have guessed that the government would adopt a policy that is primitive as a matter of antitrust doctrine and illiterate as a matter of economics? Nevertheless, hindsight reveals that government antitrust enforcement against Amazon was not an option.

More fundamentally, litigation is not a *market* alternative. This observation has especial force in markets that are undergoing rapid technological advance, where the competitive half-life of a product is considerably more brief than the span of antitrust litigation. A requirement that potential market entrants litigate instead of enter the market on restrictive (but legal and reasonable) terms, would license monopoly for the duration.

Apple took steps to compete with a monopolist and open the market to more entrants, generating only minor competitive restraints in the process. Its conduct was eminently reasonable; no one has suggested a viable alternative. "What could be more perverse than an antitrust doctrine that discouraged new entry into highly concentrated markets?" *In re Text Messaging Antitrust Litig.*, 782 F.3d 867, 874 (7th Cir. 2015).

Application of the rule of reason easily absolves Apple of antitrust liability. That is why at oral argument the government analogized this case to a drug conspiracy, in which every player is a criminal—at every level, on every axis, whether big or small, whether new entrant or recidivist. The government found the analogy useful—and necessary—because in an all-criminal industry there is no justification or harbor under a rule of reason. ***

EXHIBIT
D

From: Tim Sweeney <tim.sweeney@epicgames.com>
Subject: Consumer Choice & Competition
Date: June 30, 2020 at 4:00:09 PM PDT
To: Tim Cook <tcook@apple.com>, Phil Schiller <schiller@apple.com>, Craig Federighi <federighi@apple.com>, Matt Fischer <matt.fischer@apple.com>

Dear Tim, Phil, Craig, Matt,

Because of restrictions imposed by Apple, Epic is unable to provide consumers with certain features in our iOS apps. We would like to offer consumers the following features:

1) Competing payment processing options other than Apple payments, without Apple's fees, in Fortnite and other Epic Games software distributed through the iOS App Store;

2) A competing Epic Games Store app available through the iOS App Store and through direct installation that has equal access to underlying operating system features for software installation and update as the iOS App Store itself has, including the ability to install and update software as seamlessly as the iOS App Store experience.

If Epic were allowed to provide these options to iOS device users, consumers would have an opportunity to pay less for digital products and developers would earn more from their sales. Epic is requesting that Apple agree in principle to permit Epic to roll out these options for the benefit of all iOS customers. We hope that Apple will also make these options equally available to all iOS developers in order to make software sales and distribution on the iOS platform as open and competitive as it is on personal computers.

As you know, Epic was required to accept your standard, non-negotiable contracts, like the Apple Developer Program License Agreement, in order to offer products on iOS devices through the iOS App Store. Epic is also required to comply with Apple's unilateral standards documents to obtain app approval, like Apple's App Store Review Guidelines. Apple's contracts and standards documents contain restrictive provisions that prohibit Epic from offering a competing app store and competing payment processing options to consumers. Apple would need to provide a side letter or alter its contracts and standards documents to remove such restrictions to allow Epic to provide a competing app store and competing payment processing option to iOS customers.

Please confirm within two weeks if Apple agrees in principle to allow Epic to provide a competing app store and competing payment processing, in which case we will meet with your team to work out the details including Epic's firm commitment to utilize any such features diligently to protect device security, customer privacy, and a high-quality user experience. If we do not receive your confirmation, we will understand that Apple is not willing to make the changes necessary to allow us to provide Android customers with the option of choosing their app store and payment processing system.

Best Regards,

Tim Sweeney
Founder & CEO
Epic Games

EXHIBIT
E

July 10, 2020

Via Email: canon.pence@epicgames.com

Canon Pence
General Counsel
Epic Games, Inc.
620 Crossroads Blvd
Cary, NC 27518

Dear Mr. Pence:

I am counsel in the Apple Legal Department and I am writing in response to Mr. Sweeney's email to Tim Cook, Phil Schiller, Craig Federighi, and Matt Fischer on June 30, 2020. The email was disappointing and requires a formal response.

The App Store is not simply a marketplace -- it is part of a larger bundle of tools, technologies and services that Apple makes available to developers to develop and create great applications for iPhone, iPad and other Apple products. We know Epic knows this. Epic has been a major beneficiary of this investment and support. Epic has made great use of Apple-provided tools, such as TestFlight, VOIP, Stickers, iCloud document storage, ARKit, Messages Extension, ReplayKit, and Push Notifications. To highlight one example, for years now, Epic has used Apple's groundbreaking graphics technology, Metal. When Apple launched Metal for Mac at WWDC in 2015, Mr. Sweeney's colleague Billy Bramer stood on stage and explained how Metal "revolutionized graphic design" and "enable[d] developers like us to create richer 3D worlds." *Apple – WWDC 2015*, Youtube (June 15, 2015), https://www.youtube.com/watch?v=_p8AsQhaVKI. Epic, like countless developers, continues to use Metal to make its games sharper, faster, and more responsive. Apple doesn't charge separately for the use of Metal or any of the other tools that Epic has used to develop great games on iOS.

Not only has Apple supplied tools and technologies for Epic to build its apps, but it also provided a marketplace—the App Store—to help make them a success. Because of the App Store, Epic has been able to get Fortnite and other apps into the hands of millions instantly and at no cost, as Apple charges nothing upfront to distribute apps that are free to download. This exposure has earned Epic hundreds of millions of dollars from sales of in-app content, and brought with it lucrative brand partnerships and paid product placement. *See Fortnite Emerges as a Social Media Platform for Gen Z, AdAge* (June 10, 2019), https://adage.com/article/digital/fortnite-emerges-social-media-platform-gen-z/2176301. Of course, Epic could not have achieved this success without great apps, but it nonetheless underscores the value Apple brings to developers like Epic.

Still, Epic has many ways to reach consumers, including through Android stores, PC-based platforms, consoles (Xbox, Nintendo, Play Station) and its very own app marketplace. Public reports indicate that Fortnite alone "generated $1.8 billion in revenue in 2019," *Fortnite Creator Epic Games Raising $750M at $17B Valuation: Report*, The Street (June 15, 2020), https://www.thestreet.com/investing/fortnite-creator-epic-games-raising-750m-at-17b-valuation, or over seven times the $245 million yielded by App Store receipts for all Epic apps. Epic made its own decision to utilize the App Store as another one of its channels and can hardly be surprised that this entails acceptance of a license agreement and related policies since Epic's own developers must do the same. *See* Epic Online Services Developer Agreement https://dev.epicgames.com/en-US/services/terms/agreements ("If you do not or cannot agree to the terms of this Agreement, do not download or use the SDK or access any Services.").
Apple has hundreds of thousands of developers distributing apps on the App Store, and Apple is proud that it offers them all, from the student in her living room to some of the largest companies in the world, the same terms and opportunities.

That brings us to the demands in Mr. Sweeney's email. Epic requests the right to offer a "competing Epic Games Store app" through the App Store that would seemingly allow iOS device users to install apps from Epic directly. And Epic wants to offer "competing payment processing options" in Fortnite and other Epic apps instead of using Apple's in-app purchase (IAP) system. As you know, Apple has never allowed this. Not when we launched the App Store in 2008. Not now. We understand this might be in Epic's financial interests, but Apple strongly believes these rules are vital to the health of the Apple platform and carry enormous benefits for both consumers and developers. The guiding principle of the App Store is to provide a safe, secure and reliable experience for users and a great opportunity for all developers to be successful but, to be clear, when it comes to striking the balance, Apple errs on the side of the consumer.

Epic Store Within The App Store. As for the first request, Apple designed the App Store to be a secure and trusted place for consumers to discover and download software. Central to this is Apple's requirement that every iOS app undergo rigorous, human-assisted review. Apple invests significant resources to ensure that apps meet high standards for privacy, security, content, and quality; we have reviewers located on three continents, representing 81 languages, and reviewing on average 100,000 submissions per week.

That investment has paid off not just for Apple, but also for app developers large and small, including Epic. Because of Apple's rules and efforts, iOS and the App Store are widely recognized as providing the most secure consumer technology on the planet. And as a result, consumers can download and pay for an app and in-app content without worrying that it might break their device, steal their information, or rip them off. This level of security benefits developers by providing them with an active and engaged marketplace for their apps.

One way Apple helps maintain the confidence of its users is by not approving apps that create "an interface for displaying third-party apps, extensions, or plug-ins similar to the App Store or as a general-interest collection." App Store Review Guideline § 3.2.2. Absent this guideline, Apple would have no reliable way of delivering on its commitment to consumers that *every* app available via the App Store meets Apple's exacting standards for security, privacy, and content. Consumers rightly rely on that commitment in buying Apple devices and in purchasing from the App Store. They will quite properly hold Apple to account for any shortfall in performance. The health of Apple's ecosystem and the strength of its reputation as a maker of high-quality hardware accordingly depend upon rules like Guideline § 3.2.2.

Although Mr. Sweeney represented that, if Epic offered its own iOS app store, Epic would "protect device security, consumer privacy, and a high-quality user experience," we cannot be confident that Epic or any developer would uphold the same rigorous standards of privacy, security, and content as Apple. Indeed, since Apple treats all developers according to the same terms, Epic is essentially asking Apple to outsource the safety and security of Apple's users to hundreds of thousands of iOS developers. Even if such a model were feasible (and it is not), we are simply unwilling to risk our users' trust in such a way. Incorporating third party app stores into iOS would undermine Apple's carefully constructed privacy and security safeguards, and seriously degrade the consumer experience and put Apple's reputation and business at risk.

Circumventing IAP. Epic also requests to offer payment processing options within Epic's apps other than via IAP. IAP is the App Store's centralized payment system. It lets users purchase digital goods and services within apps without the inconvenience and security risks of registering their payment information with each developer. As you note, Apple's App Review Guidelines require that apps use IAP to unlock additional features and functionalities. *See* App Store Review Guideline § 3.1.1.

Again, this rule is central to the App Store's business model and successes. IAP supports the seamless consumer experience and is the means by which Apple gets paid for the valuable services and consumer base that it provides. To take advantage of Apple's App Store, the bargain is simple: if you charge for software purchased through the App Store, Apple takes a percentage of the charge as commission. This business model has remained unchanged since the App Store launched.

Mr. Sweeney does not take issue with that model in his email—perhaps because Epic takes full advantage of it. Apple takes no cut from Epic's in-app advertising, nor from sales of items, like skins and currency, that iOS app users obtain outside of the App Store. And, as already discussed, Apple charges nothing for enabling millions of iOS users to play Fortnite for free. Without IAP, however, Apple would have no practical or reliable way of collecting its commission on in-app digital sales. Indeed, the IAP requirement applies equally for the very same reason to the Mac App Store, which you regard as "open and competitive."

* * *

Mr. Sweeney recently stated that "[i]t's up to the creator of a thing to decide whether and how to sell their creation." Tim Sweeney (@TimSweeneyEpic), Twitter (June 16, 2020, 11:53 PM), https://twitter.com/TimSweeneyEpic/status/1273101468875329537. We agree. It seems, however, that Epic wishes to make an exception for Apple and dictate the way that Apple designs *its* products, uses *its* property and serves *its* customers. Indeed, it appears that Mr. Sweeney wants to transform Apple's iOS devices and ecosystem into "an open platform… like the first Apple computers, where users had the freedom to write or install any software they wished." https://twitter.com/TimSweeneyEpic/status/1273090414476738567.

In the first place, this ignores the fundamental reality that the iPhone operates in an entirely different environment than a laptop or desktop computer and meets wholly different user expectations. As Steve Jobs explained in 2007, "[y]ou don't want your phone to be like a PC. The last thing you want is to have loaded three apps on your phone and then you go to make a call and it doesn't work anymore. These are more like iPods than they are like computers." Steve Jobs Walks the Tightrope Again, N.Y. Times (Jan. 12, 2007), https://www.nytimes.com/2007/01/12/technology/12apple.html.

The App Store is not a public utility. Epic appears to want a rent-free store within the trusted App Store that Apple has built. Epic wants "equal access" to Apple's operating system and "seamless" interaction between your store and iOS, without recognizing that the seamlessness of the Apple experience is built on Apple's ingenuity, innovation, and investment. Epic wants access to all of the Apple-provided tools like Metal, ARKit and other technologies and features. But you don't want to pay. In fact you want to take those technologies and then charge others for access. Apple has invested billions of dollars to develop technologies and features that developers like Epic can use to make great apps as well as a safe and secure place for users to download these apps. Apple designs its products and services to make developers successful through the use of custom chips, cameras, operating system features, APIs, libraries, compilers, development tools, testing, interface libraries, simulators, security features, developer services, cloud services, and payment systems. These innovations are properly protected by intellectual property laws and Epic has no right to use them without a license from Apple. As a signatory to the Apple Developer Agreement and the Apple Developer Program License Agreement, Epic has acknowledged these IP rights (just as Epic's developers do the same with respect to Epic's intellectual property). *See* Apple Developer Program License Agreement § 2.5.

Surely Epic must understand that Apple is entitled to a return on its investment and the use of its property. After all, Epic takes great pains to protect *its own* investments and intellectual property. Epic rightly demands royalties from games built using its development software. *See* Unreal Engine End User Agreement § 5, https://www.unrealengine.com/en-US/eula/publishing. And it tightly controls how its games, designs, and content may be used, because, in its own words: "we spend a lot of time, thought, and money creating our intellectual property and need to protect it." Fan Content Policy, https://www.epicgames.com/site/en-US/fan-art-policy. Plus, Mr. Sweeney recently suggested that it's reasonable for other industry players, such as console manufacturers, to charge for distributing software. Tim Sweeney (@TimSweeneyEpic), Twitter (June 17, 2020, 11:29 AM), https://twitter.com/TimSweeneyEpic/status/1273276548569841667. And Epic's major investor, China's Tencent, also charges developers to take advantage of its platform. *See Tencent opens up WeChat Mini-Games Platform to External Devs*, Pocket Gamer (Apr. 11, 2018), https://www.pocketgamer.biz/asia/news/67901/tencent-opens-up-wechat-mini-games-platform-to-external-devs/.

Yet somehow, you believe Apple has no right to do the same, and want all the benefits Apple and the App Store provide without having to pay a penny. Apple cannot bow to that unreasonable demand. We must therefore respectfully decline to make the changes you request.

Sincerely,

Douglas G. Vetter
Vice President & Associate General Counsel

EXHIBIT
F

From: Tim Sweeney <tim.sweeney@epicgames.com>
Date: July 17, 2020 at 1:49:23 PM PDT
To: Tim Cook <tcook@apple.com>, Phil Schiller <schiller@apple.com>, Craig Federighi <federighi@apple.com>, Matt Fischer <matt.fischer@apple.com>, Douglas Vetter <vetter@apple.com>
Cc: Canon Pence <canon.pence@epicgames.com>
Subject: Re: Response to June 30 Email

Hi Tim, Phil, Craig, Matt, Douglas,

It's a sad state of affairs that Apple's senior executives would hand Epic's sincere request off to Apple's legal team to respond with such a self-righteous and self-serving screed -- only lawyers could pretend that Apple is protecting consumers by denying choice in payments and stores to owners of iOS devices. However, I do thank you for the prompt response and clear answer to my two specific requests.

If Apple someday chooses to return to its roots building open platforms in which consumers have freedom to install software from sources of their choosing, and developers can reach consumers and do business directly without intermediation, then Epic will once again be an ardent supporter of Apple. Until then, Epic is in a state of substantial disagreement with Apple's policy and practices, and we will continue to pursue this, as we have done in the past to address other injustices in our industry.

Tim Sweeney

On Fri, Jul 10, 2020 at 5:02 PM Douglas Vetter <vetter@apple.com> wrote:

> Mr. Pence, please find attached Apple's response to Mr. Sweeney's email to Apple of June 30, 2020.

EXHIBIT G

From: Tim Sweeney <tim.sweeney@epicgames.com>
Date: August 13, 2020 at 2:08:53 AM PDT
To: Tim Cook <tcook@apple.com>, Phil Schiller <schiller@apple.com>, Craig Federighi <federighi@apple.com>, Matt Fischer <matt.fischer@apple.com>, Douglas <vetter@apple.com>
Subject: Fortnite payments

Dear Tim, Phil, Craig, Matt, Douglas,

I’m writing to tell you that Epic will no longer adhere to Apple’s payment processing restrictions.

Today, Epic is launching Epic direct payments in Fortnite on iOS, offering customers the choice of paying in-app through Epic direct payments or through Apple payments, and passing on the savings of Epic direct payments to customers in the form of lower prices.

We choose to follow this path in the firm belief that history and law are on our side. Smartphones are essential computing devices that people use to live their lives and conduct their business. Apple's position that its manufacture of a device gives it free rein to control, restrict, and tax commerce by consumers and creative expression by developers is repugnant to the principles of a free society.

Ending these restrictions will benefit consumers in the form of lower prices, increased product selection, and business model innovation.

Henceforth, all versions of Fortnite that Epic submits to the App Store will contain these two payment options, side by side, for customers to choose among.

We hope that Apple will reflect on its platform restrictions and begin to make historic changes that bring to the world’s billion iOS consumers the rights and freedoms enjoyed on the world's leading open computing platforms including Windows and macOS. In support of this path, Epic’s public explanation of our payment service will be neutral and factual to provide Apple with a chance to consider taking a supportive route and communicating it in a way of Apple’s choosing.

If Apple chooses instead to take punitive action by blocking consumer access to Fortnite or forthcoming updates, then Epic will, regrettably, be in conflict with Apple on a multitude of fronts - creative, technical, business, and legal - for so long as it takes to bring about change, if necessary for many years.

Tim Sweeney
Epic Games

Justice Department Sues Monopolist Google For Violating Antitrust Laws

Tuesday, October 20, 2020, Office of Public Affairs

Today, the Department of Justice—along with eleven state Attorneys General—filed a civil antitrust lawsuit in the U.S. District Court for the District of Columbia to stop Google from unlawfully maintaining monopolies through anticompetitive and exclusionary practices in the search and search advertising markets and to remedy the competitive harms. The participating state Attorneys General offices represent Arkansas, Florida, Georgia, Indiana, Kentucky, Louisiana, Mississippi, Missouri, Montana, South Carolina, and Texas.

"Today, millions of Americans rely on the Internet and online platforms for their daily lives. Competition in this industry is vitally important, which is why today's challenge against Google—the gatekeeper of the Internet—for violating antitrust laws is a monumental case both for the Department of Justice and for the American people," said Attorney General William Barr. "Since my confirmation, I have prioritized the Department's review of online market-leading platforms to ensure that our technology industries remain competitive. This lawsuit strikes at the heart of Google's grip over the internet for millions of American consumers, advertisers, small businesses and entrepreneurs beholden to an unlawful monopolist."

"As with its historic antitrust actions against AT&T in 1974 and Microsoft in 1998, the Department is again enforcing the Sherman Act to restore the role of competition and open the door to the next wave of innovation—this time in vital digital markets," said Deputy Attorney General Jeffrey A. Rosen.

As one of the wealthiest companies on the planet with a market value of $1 trillion, Google is the monopoly gatekeeper to the internet for billions of users and countless advertisers worldwide. For years, Google has accounted for almost 90 percent of all search queries in the United States and has used anticompetitive tactics to maintain and extend its monopolies in search and search advertising.

As alleged in the Complaint, Google has entered into a series of exclusionary agreements that collectively lock up the primary avenues through which users access search engines, and thus the internet, by requiring that Google be set as the preset default general search engine on billions of mobile devices and computers worldwide and, in many cases, prohibiting preinstallation of a competitor. In particular, the Complaint alleges that Google has unlawfully maintained monopolies in search and search advertising by:

- Entering into exclusivity agreements that forbid preinstallation of any competing search service.
- Entering into tying and other arrangements that force preinstallation of its search applications in prime locations on mobile devices and make them undeletable, regardless of consumer preference.
- Entering into long-term agreements with Apple that require Google to be the default—and de facto exclusive—general search engine on Apple's popular Safari browser and other Apple search tools.
- Generally using monopoly profits to buy preferential treatment for its search engine on devices, web browsers, and other search access points, creating a continuous and self-reinforcing cycle of monopolization.

These and other anticompetitive practices harm competition and consumers, reducing the ability of innovative new companies to develop, compete, and discipline Google's behavior.

The antitrust laws protect our free market economy and forbid monopolists from engaging in anticompetitive practices. They also empower the Department of Justice to bring cases like this one to remedy violations and restore competition, as it has done for over a century in notable cases involving monopolists over other critical industries undergirding the American economy like Standard Oil and the AT&T telephone monopoly. Decades ago the Department's case against Microsoft recognized that the antitrust laws forbid anticompetitive agreements by high-technology monopolists to require preinstalled default status, to shut off distribution channels to rivals, and to make software undeletable. The Complaint alleges that Google is using similar agreements itself to maintain and extend its own dominance.

The Complaint alleges that Google's anticompetitive practices have had harmful effects on competition and consumers. Google has foreclosed any meaningful search competitor from gaining vital distribution and scale, eliminating competition for a majority of search queries in the United States. By restricting competition in search, Google's conduct has harmed consumers by reducing the quality of search (including on dimensions such as privacy, data protection, and use of consumer data), lessening choice in search, and impeding innovation. By suppressing competition in advertising, Google has the power to charge advertisers more than it could in a competitive market and to reduce the quality of the services it provides them. Through filing the lawsuit, the Department seeks to stop Google's anticompetitive conduct and restore competition for American consumers, advertisers, and all companies now reliant on the internet economy.

Google is a limited liability company organized and existing under the laws of the State of Delaware, and is headquartered in Mountain View, California. Google is owned by Alphabet Inc., a publicly traded company incorporated and existing under the laws of the State of Delaware and headquartered in Mountain View, California.

Statement of the Attorney General on the Announcement Of Civil Antitrust Lawsuit Filed Against Google

Tuesday, October 20, 2020

Attorney General William P. Barr released the following statement:

"This morning the Department of Justice, along with eleven states, filed a civil lawsuit against Google for unlawfully maintaining a monopoly in general search services and search advertising in violation of the U.S. antitrust laws. This is a monumental case for the Department of Justice and, more importantly, for the American consumer.

Today, millions of Americans rely on the Internet and online platforms for their daily lives. For years, there have been broad, bipartisan concerns about business practices leading to massive concentrations of economic power in our digital economy. Hearing those concerns, I have made it a primary commitment of my tenure as Attorney General for the Department of Justice to examine whether technology markets have been deprived of free, fair, and open competition.

To that end, the Department of Justice formally opened a review of online market-leading platforms in July 2019. One part of this review is the Antitrust Division's investigation of Google. Over the course of the last 16 months, the Antitrust Division collected convincing evidence that Google no longer competes only on the merits but instead uses its monopoly power – and billions in monopoly profits – to lock up key pathways to search on mobile phones, browsers, and next generation devices, depriving rivals of distribution and scale. The end result is that no one can feasibly challenge Google's dominance in search and search advertising.

This lack of competition harms users, advertisers, and small businesses in the form of fewer choices, reduced quality (including on metrics like privacy), higher advertising prices, and less innovation.

The complaint filed today against Google is based on violations of the U.S. antitrust laws and is separate and distinct from concerns raised about content moderation and political censorship by online platforms. As part of the Department's broader review of market-leading online platforms, we listened to myriad public concerns about how online platforms fail their users. While many of the concerns we heard were competition-related, others were not – like online child exploitation, public safety, and censorship. Outside the Antitrust Division, the Department has considered these issues separately, including by advocating for Section 230 legislative reforms. Our antitrust investigation of Google, by contrast, is based solely on traditional antitrust principles and is aimed at promoting consumer welfare through robust competition.

Twenty-five years ago, the Department of Justice sued Microsoft, paving the way for a new wave of innovative tech companies – including Google. The increased competition following the Microsoft case enabled Google to grow from a small start-up to an Internet behemoth. Unfortunately, once Google itself gained dominance, it resorted to the same anticompetitive playbook. If we let Google continue its anticompetitive ways, we will lose the next wave of innovators and Americans may never get to benefit from the "next Google." The time has come to restore competition to this vital industry.

Today's challenge against Google—the monopoly gatekeeper of the Internet—shows the tremendous efforts of the Department, in particular the hardworking men and women of the Antitrust Division, and our state partners to restore competition in markets beholden to an unlawful monopolist. This is an important milestone, but not the end of our review of market-leading online platforms. The Department will continue to vigorously investigate and enforce the antitrust laws where appropriate to protect and promote competition in the digital economy for the benefit of the American consumer."

Justice Department Sues Google for Monopolizing Digital Advertising Technologies

Tuesday, January 24, 2023, Office of Public Affairs

Today, the Justice Department, along with the Attorneys General of California, Colorado, Connecticut, New Jersey, New York, Rhode Island, Tennessee, and Virginia, filed a civil antitrust suit against Google for monopolizing multiple digital advertising technology products in violation of Sections 1 and 2 of the Sherman Act.

Filed in the U.S. District Court for the Eastern District of Virginia, the complaint alleges that Google monopolizes key digital advertising technologies, collectively referred to as the "ad tech stack," that website publishers depend on to sell ads and that advertisers rely on to buy ads and reach potential customers. Website publishers use ad tech tools to generate advertising revenue that supports the creation and maintenance of a vibrant open web, providing the public with unprecedented access to ideas, artistic expression, information, goods, and services. Through this monopolization lawsuit, the Justice Department and state Attorneys General seek to restore competition in these important markets and obtain equitable and monetary relief on behalf of the American public.

As alleged in the complaint, over the past 15 years, Google has engaged in a course of anticompetitive and exclusionary conduct that consisted of neutralizing or eliminating ad tech competitors through acquisitions; wielding its dominance across digital advertising markets to force more publishers and advertisers to use its products; and thwarting the ability to use competing products. In doing so, Google cemented its dominance in tools relied on by website publishers and online advertisers, as well as the digital advertising exchange that runs ad auctions.

"Today's complaint alleges that Google has used anticompetitive, exclusionary, and unlawful conduct to eliminate or severely diminish any threat to its dominance over digital advertising technologies," said Attorney General Merrick B. Garland. "No matter the industry and no matter the company, the Justice Department will vigorously enforce our antitrust laws to protect consumers, safeguard competition, and ensure economic fairness and opportunity for all."

"The complaint filed today alleges a pervasive and systemic pattern of misconduct through which Google sought to consolidate market power and stave off free-market competition," said Deputy Attorney General Lisa O. Monaco. "In pursuit of outsized profits, Google has caused great harm to online publishers and advertisers and American consumers. This lawsuit marks an important milestone in the Department's efforts to hold big technology companies accountable for violations of the antitrust laws."

"The Department's landmark action against Google underscores our commitment to fighting the abuse of market power," said Associate Attorney General Vanita Gupta. "We allege that Google has captured publishers' revenue for its own profits and punished publishers who sought out alternatives. Those actions have weakened the free and open internet and increased advertising costs for businesses and for the United States government, including for our military."

"Today's lawsuit seeks to hold Google to account for its longstanding monopolies in digital advertising technologies that content creators use to sell ads and advertisers use to buy ads on the open internet," said Assistant Attorney General Jonathan Kanter of the Justice Department's Antitrust Division. "Our complaint sets forth detailed allegations explaining how Google engaged in 15 years of sustained conduct that had—and continues to have—the effect of driving out rivals, diminishing competition, inflating advertising costs, reducing revenues for news publishers and content creators, snuffing out innovation, and harming the exchange of information and ideas in the public sphere."

Google now controls the digital tool that nearly every major website publisher uses to sell ads on their websites (publisher ad server); it controls the dominant advertiser tool that helps millions of large and small advertisers buy ad inventory (advertiser ad network); and it controls the largest advertising exchange (ad exchange), a technology that runs real-time auctions to match buyers and sellers of online advertising.

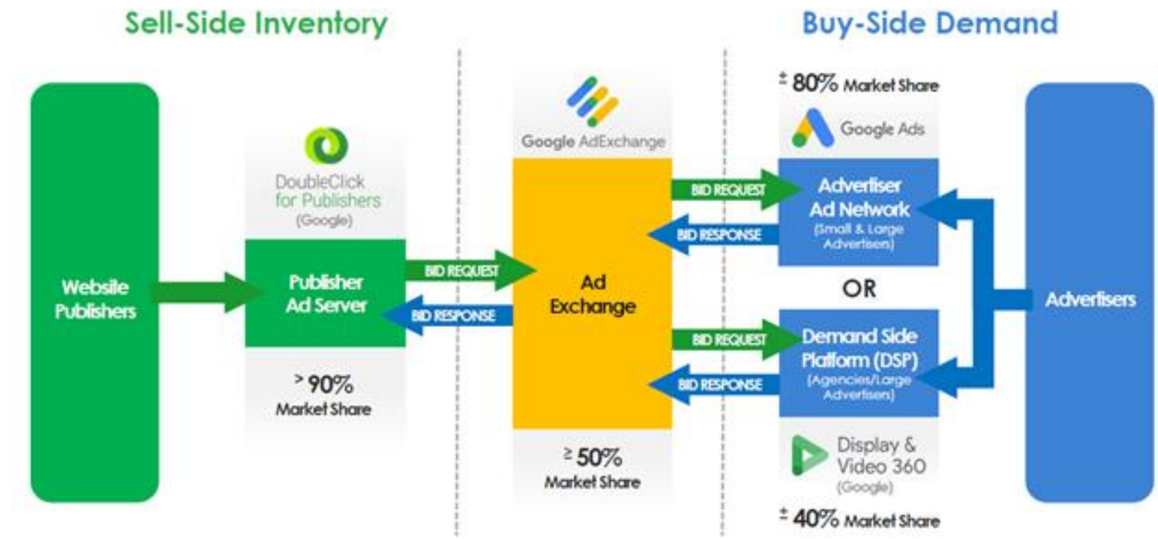

Image description: Graphic of digital advertising market. The digital advertising market is divided into three sections: sell-side inventory on the left, buy-side demand on the right, and an ad exchange in the middle. Sell-side inventory is made up of website publishers that that flow to Google's "DoubleClick for Publishers" Publisher Ad Server, which has >90% of market share. Google AdExchange, which is greater than or equal to 50% of the ad exchange market share, receives bid requests from the publisher ad server, sends them to the buy-side demand, receives bid responses from the buy side demand and sends them back to the publisher ad server. Buy-side demand is made up of advertisers that flow to either: "Google Ads" Advertiser Ad Network (Small and Large Advertisers) which has +/- 80% market share; or Google's "Display & Video 360" Demand Side Platform (DSP) Agencies/Large Advertisers which has +/-40% share.

Google's anticompetitive conduct has included:

- **Acquiring Competitors**: Engaging in a pattern of acquisitions to obtain control over key digital advertising tools used by website publishers to sell advertising space;
- **Forcing Adoption of Google's Tools**: Locking in website publishers to its newly-acquired tools by restricting its unique, must-have advertiser demand to its ad exchange, and in turn, conditioning effective real-time access to its ad exchange on the use of its publisher ad server;
- **Distorting Auction Competition**: Limiting real-time bidding on publisher inventory to its ad exchange, and impeding rival ad exchanges' ability to compete on the same terms as Google's ad exchange; and
- **Auction Manipulation**: Manipulating auction mechanics across several of its products to insulate Google from competition, deprive rivals of scale, and halt the rise of rival technologies.

As a result of its illegal monopoly, and by its own estimates, Google pockets on average more than 30% of the advertising dollars that flow through its digital advertising technology products; for some transactions and for certain publishers and advertisers, it takes far more. Google's anticompetitive conduct has suppressed alternative technologies, hindering their adoption by publishers, advertisers, and rivals.

The Sherman Act embodies America's enduring commitment to the competitive process and economic liberty. For over a century, the Department has enforced the antitrust laws against unlawful monopolists to unfetter markets and restore competition. To redress Google's anticompetitive conduct, the Department seeks both equitable relief on behalf of the American public as well as treble damages for losses sustained by federal government agencies that overpaid for web display advertising. This enforcement action marks the first monopolization case in approximately half a century in which the Department has sought damages for a civil antitrust violation.

In 2020, the Justice Department filed a civil antitrust suit against Google for monopolizing search and search advertising, which are different markets from the digital advertising technology markets at issue in the lawsuit filed today. The Google search litigation is scheduled for trial in September 2023.

Google is a limited liability company organized and existing under the laws of the State of Delaware, with a headquarters in Mountain View, California. Google's global network business generated approximately $31.7 billion in revenues in 2021. Google is owned by Alphabet Inc., a publicly traded company incorporated and existing under the laws of the State of Delaware and headquartered in Mountain View, California.