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I. INTRODUCTION

Under competition, sellers independently set their prices and often engage in price discrimination by charging different buyers different prices for the same item. However, under a variety of price-protection programs, sellers commit to prices that may limit their pricing freedom by linking prices to some buyers to those charged to other buyers. While such price provisions are known by acronyms such as most-favored-nation provisions (“MFNs”), most-favored-customer clauses (“MFCs”), and meeting-competition clauses (“MCCs”), they all have “price protection” or “price-matching” as a common feature.²

For example, a typical MFN provides that a seller will give a buyer the lowest price the seller offers. This can be a promise to protect a buyer against the seller from lowering prices to other buyers or reducing prices in the future, or an assurance to match another seller’s lower price. For example, a “retroactive” policy might state that the seller will offer a buyer a refund if future buyers receive a lower price, the reduction being equal to the difference between the present and future prices. A “contemporaneous” policy might stipulate that the seller will offer a buyer the same low price offered to other buyers, effectively committing the seller not to price discriminate. While such provisions seem to epitomize price competition, promise lower prices, and have recognized pro-competitive aspects, they nonetheless have been the focus of antitrust scrutiny for their anticompetitive potential.

This article focuses on the potential anticompetitive aspects of MFNs. A standard price-setting duopoly model is presented to illustrate these concerns and to show that the introduction of an MFN leads to higher prices, reduced output, and increased profitability for all firms—even as they select their actions independently and without explicit coordination. Several antitrust cases are discussed where anticompetitive effects of MFNs were alleged to show that this aspect of MFNs is carefully considered by antitrust enforcers.

II. THE ANTICOMPETITIVE POTENTIAL OF MFNS

A. What Does the Literature Say?

There is a large literature pertaining to MFNs (and similar provisions) and their potential competitive effects. While this literature characterizes under what conditions MFNs can be pro-competitive and efficiency-enhancing (e.g., by reducing various transactions and negotiating

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² MFCs and MFNs are guarantees by a seller to give a rebate to a customer if the seller offers lower prices to other customers. An MCC offers to match a lower price that a customer is given by another seller. These (and other) vertical contractual provisions have been termed “contracts that reference rivals” (“CRRs”) and can be a source of potential antitrust concern when used by dominant firms. See e.g., Jonathan M. Jacobson & Daniel P. Weick, *Contracts That Reference Rivals as an Antitrust Category*, Program on Debating the Competitive Benefits and Costs of MFNs, ABA Section of Antitrust Law (2012).

costs by properly aligning incentives), it also has been shown that such practices can be anticompetitive and used as facilitating devices to sustain higher prices.³ One concern is that such a contractual obligation may dampen price competition because it raises the seller's cost of cutting prices to buyers not party to the MFN due to the "rebate" owed to protected buyer(s). Another is that MFNs facilitate tacit collusion by generating increased industry profits without formal coordination since enactment of an MFN by one firm induces other firms to raise their price.⁴

In general, there are two types of potential anticompetitive effects related to MFNs (and related provisions) that cut against lower prices.⁵ First, MFNs might facilitate higher prices or collusion by giving *sellers* a disincentive to offer price discounts. Such policies can reduce buyers' ability to negotiate for lower prices because the seller finds it expensive to offer selective discounts. This can apply to a single seller that commits to not lowering its future prices because otherwise it must retroactively reimburse buyers subject to the MFN for any price difference. Or, where a seller agrees to charge a price to its protected customers that is no higher than its other customers' prices, an MFN imposes a "punishment" on the seller for decreasing prices due to the requirement to lower all protected customers' prices as a result.

With respect to oligopoly behavior, the inherent rebate mechanism in an MFN creates a penalty for "cheating" on a collusive agreement (tacit or explicit). As a result, coordinated pricing has been shown to be more stable than if no MFN were used. Moreover, if a major seller offers a price-protection policy to its buyers by promising to match competitors' price cuts, competitor discounts become less profitable as they no longer expand sales to the extent they would absent the price-match guarantee. In other words, a firm offering a price-matching commitment to its customers is signaling to its competitors that any lower price from them would be matched and diminish any gains from the price cut. The concern is that these types of agreements offered by sellers raise the cost to them of giving selective price discounts, which result in higher prices or increased price rigidity but-for the MFN.⁶

³ For a recent summary of the competitive aspects of MFNs and their treatment under U.S. antitrust law, see Jonathan B. Baker & Judith A. Chevalier, *The Competitive Consequences of Most-Favored-Nation Provisions*, 27(2) ANTITRUST, 20-26 (Spring 2013); and Steven C. Salop & Fiona Scott Morton, *Developing an Administrable MFN Enforcement Policy*, 27(2) ANTITRUST, 15-19 (Spring 2013). A detailed study of MFNs, MFCs, and MCCs can be found in *Can 'Fair' Prices Be Unfair? A Review of Price Relationship Agreements*, Office of Fair Trading (OFT), (September 2012). This OFT document contains a listing of the literature pertaining to MFNs and similar provisions (pp. 124-134). In September 2012, the DOJ's Antitrust Division and the FTC held a public workshop on the effects of MFNs and the implications for antitrust policy and enforcement. See <http://www.justice.gov/atr/public/workshops/mfn/>.

⁴ See, e.g., Thomas E. Cooper, *Most-Favored-Customer Pricing and Tacit Collusion*, 17(3) RAND J. ECON. 377-388 (1986); and Aaron S. Edlin, *Do Guaranteed-Low-Price Policies Guarantee High Prices, and Can Antitrust Rise to the Challenge?* 111 HARV. L. REV. 528-575 (1997).

⁵ While prominent in the literature, these are not the only anticompetitive theories related to MFNs. A seminal paper is Steven C. Salop, *Practices that (Credibly) Facilitate Oligopoly Co-ordination*, NEW DEVELOPMENTS IN THE ANALYSIS OF MARKET STRUCTURE 265-290 (J. Stiglitz & F. Mathewson, eds. 1986).

⁶ A recognized difficulty with enforcing the provisions of an MFN is whether or not price discounts (or other competitive concessions) are readily discernible to all interested parties.

Second, MFNs might be used by a dominant *buyer* to gain market power at the expense of rival buyers through exclusion or, more generally, by raising their rival buyers' costs. The concern is that such an MFN might disadvantage rivals to the dominant buyer who might otherwise negotiate lower prices than those of the dominant buyer. This is because it raises the cost to the seller(s) of giving lower prices to other buyers as the seller(s) must rebate any price difference to the dominant buyer. Because MFNs typically mandate that lower prices to one customer be made available to all parties to the MFN, price discounting may not occur to the extent it would absent the price protection. Moreover, if a dominant buyer has an MFN with many sellers in a given market that "penalizes" sellers from giving more favorable rates to other buyers, entry (or expansion) by rivals to a dominant buyer may be deterred.

The literature also describes possible strategic uses of MFNs to achieve higher prices. For example, Cooper & Fries present a bargaining model to assess the effect of an MFN on equilibrium prices where a single seller negotiates sequentially with two buyers.⁷ In their model, the dominant seller negotiates over price first with "Buyer 1" and then with "Buyer 2." It is shown that the seller can use an MFN with Buyer 1 to leverage more favorable terms such as higher prices from Buyer 2. This is because the seller can credibly claim with an MFN that it cannot give Buyer 2 a "low price" because doing so would force the seller to also lower Buyer 1's price. Absent an MFN, the seller would not be able to make such a claim. Consequently, the seller's incentive to discount its price to Buyer 2 is diminished and the seller is able to negotiate a higher price with the second buyer than without the MFN.

B. An Illustrative Example of the Anticompetitive Potential of MFNs

A simple model of a retroactive MFN is presented—using a numerical example—to illustrate the potential anticompetitive aspect of such a policy found in the literature.⁸ Assume two firms—Firm M and Firm N—comprise a market and engage in Bertrand competition with differentiated products for two periods. For simplicity, assume that both firms have identical marginal costs (equal to zero), demand is linear in each period where $q^M = (a - bp^M + dp^N)$ and $q^N = (a - bp^N + dp^M)$, and there is no possibility of entry or exit.⁹ Firm M offers the MFN policy to its customers whereas Firm N does not. Specifically, Firm M agrees that if its Period 2 price is less than its Period 1 price (i.e., $p_2^M < p_1^M$), it must rebate its customers in Period 1 this price difference multiplied by Period 1 output (or purchases), q_1^M .¹⁰ Given this setup, Firm M's Period 2 profits are:

$$(1) \quad \pi_2^M = p_2^M (a - bp_2^M + dp_2^N) - ((p_1^M - p_2^M)(a - bp_1^M + dp_1^N))$$

The last term in (1) represents the MFN "penalty" incurred by Firm M should $p_1^M > p_2^M$. Firm M's Period 1 profits are:

⁷ Thomas E. Cooper & Timothy L. Fries, *The Most-Favored-Nation Pricing Policy and Negotiated Prices*, 9 INT'L J. INDUS. ORG. 209-223 (1991).

⁸ More detailed models with these findings can be found in William S. Neilsen & Harold Winter, *Bilateral Most-Favored-Customer Pricing and Collusion*, 24(1) RAND J. ECON, 147-155 (Spring 1993); and Kazuhiro Ohnishi *An Oligopoly Model with Donative Most-Favored-Nation Pricing*, 2(3) INT'L J. ECON. MGMT. ENGIN. 104-107 (2012).

⁹ Standard assumptions are assumed to hold for the parameters in the demand function (i.e., $a > 0$, $b > d > 0$).

¹⁰ Superscripts refer to either Firm M or Firm N and subscripts refer to either Period 1 or Period 2.

$$(2) \quad \pi_1^M = p_1^M(a - bp_1^M + dp_1^N)$$

Firm N's Period 1 and Period 2 profits are, respectively:

$$(3) \quad \pi_1^N = p_1^N(a - bp_1^N + dp_1^M)$$

$$(4) \quad \pi_2^N = p_2^N(a - bp_2^N + dp_2^M)$$

The four equilibrium prices (i.e., $p_1^M, p_2^M, p_1^N, p_2^N$) are obtained by simultaneously solving the “first-order conditions” for profit maximization from expressions (1)-(4).¹¹ These prices are then used to solve for the corresponding optimal outputs (i.e., $q_1^M, q_2^M, q_1^N, q_2^N$) and maximal profits (i.e., $\pi_1^M, \pi_2^M, \pi_1^N, \pi_2^N$). These prices, outputs, and profits are then compared to those resulting from the differentiated products Bertrand model where neither firm offers the MFN to its customers.¹²

Since the equilibrium values for prices, outputs, and profits are a function only of the demand parameters a , b , and d , a numerical example helps to illustrate the concern regarding the potential anticompetitive effect of MFNs. As illustrated in Table 1 and assuming $a = 50$, $b = 3$, and $d = 1$, the prices, outputs, and profits in each period (for both firms) without Firm M's MFN are \$10, 30, and \$300, respectively.¹³ Without the MFN in place, because there is no “link” of prices between Period 1 and Period 2, these equilibrium values for prices, outputs, and profits represent the non-cooperative, single-period Bertrand outcome. These are the benchmarks for the comparison of the market outcome with Firm M's MFN in place. As seen in Table 1, with the MFN in place, while Period 1's market outcome is identical to that absent the MFN, Period 2's outcome is not.

Several key results emerge from the comparison of market outcomes with and without Firm M's MFN in place.

- Firm M's Period 2 price is higher than its Period 1 price, and also higher than its Period 2 price without the MFN (\$15.14 > \$10).
- Firm N's Period 2 price is higher than its Period 1 price, and also higher than its Period 2 price without the MFN (\$10.86 > \$10).
- Because the increase in Firm N's Period 2 price (\$0.86) is less than Firm M's Period 2 price increase (\$5.14), Firm N's Period 2 prices are relatively lower than Firm M's. As a result, Firm N's Period 2 output is higher than in Period 1 (32.57 > 30). However, Firm

¹¹ The software *Mathematica 9* was used to generate all solutions discussed in this paper (results are available from the author upon request). In optimization problems such as profit maximization, a “first-order condition” is the first derivative of the objective function (here, each firm's profit function) with respect to the choice variable (here, each firm's price). First-order conditions equal to zero are necessary (but not sufficient) for the optimal value of the choice variable.

¹² For the non-MFN model, the only difference is that Firm M's Period 2 profit function in (1) does not contain the MFN “penalty” term.

¹³ For example, without the MFN, $p_1^M = p_1^N = p_2^M = p_2^N = \frac{a}{2b-d} = \10 (assuming $a = 50$, $b = 3$, and $d = 1$). The results discussed in this Bertrand model are independent of the values of a , b , and d .

M's Period 2 output is lower than it would be without the MFN ($15.43 < 30$). Because the decrease in Firm M's output (-14.57) exceeds the increase in Firm N's output (2.57), total output is lower in Period 2 than in Period 1, and also lower than Period 2's output without the MFN ($48 < 60$). As a result, total output over both periods is lower with the MFN than without it ($108 < 120$).

- Firm M's profits are higher with the MFN than without it ($\$688 > \600), as are Firm N's profits ($\$654 > \600).

Table 1: Comparison of Output, Prices, and Profits

$$(a = 50; b = 3; d = 1)$$

	Firm M	Firm N	Total	Firm M	Firm N	Firm M	Firm N	Total
MFN	Output	Output	Output	Prices	Prices	Profits	Profits	Profits
Period 1	30	30	60	\$10	\$10	\$300	\$300	\$600
Period 2	15.43	32.57	48	\$15.14	\$10.86	\$388	\$354	\$742
Total	45.43	62.57	108			\$688	\$654	\$1,342
No MFN								
Period 1	30	30	60	\$10	\$10	\$300	\$300	\$600
Period 2	30	30	60	\$10	\$10	\$300	\$300	\$600
Total	60	60	120			\$600	\$600	\$1,200

A variant in the literature to the above price-setting duopoly with differentiated products is presented by Cooper.¹⁴ He illustrates that if a firm offers an MFN (or similar price protection policy), then charging a price slightly above the Period 1 equilibrium price (without the MFN) commits the firm to maintaining that price into the future. The firm is incentivized to not lower its future price (in Period 2) because the rebates required by the MFN outweigh the gains from the price decrease. Moreover, the MFN induces the other firm to raise its price, and both firms can earn greater profits if only one offers the policy. Therefore, a firm has an incentive to adopt the MFN unilaterally. In the context of his model, Cooper shows that in equilibrium at least one firm offers price protection and both firms earn greater profits, all without explicit coordination.

III. ANTITRUST CHALLENGES INVOLVING MFNS

MFNs and similar contractual price-matching guarantees are not new to antitrust scrutiny. Thirty years ago the FTC in the 1984 *Ethyl* case challenged the use of such clauses (among other things) involving four manufacturers of lead-based antiknock compounds.¹⁵ The FTC's allegation was that the price-protection policy created an incentive for the firms with it to

¹⁴ Thomas E. Cooper, *supra* note 4 at 377-388.

¹⁵ *In the Matter of Ethyl Corporation, et al.*, 101 F.T.C. 425. A detailed discussion of the *Ethyl* case can be found in G.A. Hay, *Practices that Facilitate Cooperation: The Ethyl Case*, THE ANTITRUST REVOLUTION: THE ROLE OF ECONOMICS, 2ND ED., 189-213 (J. E. Kwoka, Jr. & L. J. White eds. 1984.). See also, JEFFREY CHURCH & ROGER WARE, INDUSTRIAL ORGANIZATION: A STRATEGIC APPROACH, 525-526 (2000).

be less aggressive price cutters, leading to higher overall prices. The claim was that these firms increased the cost to themselves of discounting because a price concession to one customer would have to be matched by price cuts to all protected customers.

There is a track record of antitrust scrutiny of MFNs in the healthcare industry where their use is prominent.¹⁶ Health insurers frequently require healthcare providers to guarantee that insurers receive the lowest rates from their providers. These MFNs often stipulate that a provider offer the insurer the lowest cost for services that it makes available to any other insurers. For example, in 1996, the DOJ challenged the MFN clause contained in contracts between Delta Dental of Rhode Island and the vast majority of Rhode Island dentists. Under that MFN, contracting dentists agreed to let Delta limit payments to them to the lowest price that the dentists charged to any other customer. The DOJ alleged that Delta's MFN discouraged Rhode Island dentists from discounting their fees to rival dental plans below levels paid by Delta as doing so would force the dentists to also cut their fees to Delta.¹⁷

The concern about the anticompetitive effect of the MFN in *Delta Dental* was in contrast to *Ocean State* where the court found that the MFN (called the "Prudent Buyer" policy) did not run afoul of antitrust laws, and should be viewed as "legitimate business activity."¹⁸ A more recent example related to healthcare is the 2010 commission appointed by the Ohio General Assembly to examine the competitive effects of MFNs in health insurance contracts which recommended they be prohibited in all Ohio contracts between health insurers and healthcare providers.¹⁹

Recently, several high-profile cases have focused on antitrust issues related to MFNs. For example, MFNs have been in the news regarding various DOJ investigations of Blue Cross Blue Shield's ("BCBS") contracts with healthcare providers and in the Apple e-book matter.²⁰ In Michigan, for example, BCBS is a significant buyer of hospital services supplied by health care providers. The challenged conduct was that BCBS entered into MFNs (and variants thereof) with

¹⁶ See, e.g., Joseph A. Martin, *Antitrust Analysis of 'Most Favored Nation' Clauses in Health Care Contracts*, Private Antitrust Litigation News, ABA Antitrust Section (2000); and William Lynk, *Some Basics About Most Favored Nation Contracts in Health Care Markets*, 45 ANTITRUST BULL. 491-530 (2000).

¹⁷ See <http://www.justice.gov/atr/cases/f0800/0841.htm>. This case was settled by Consent Decree where Delta agreed to drop the MFN.

¹⁸ *Ocean State Physicians Health Plan, Inc. v. Blue Cross and Blue Shield of Rhode Island*, 883 F.2d 1101 (1st Cir. 1989). See <http://law.justia.com/cases/federal/appellate-courts/F2/883/1101/350683/>. The district court granted Blue Cross' motion for judgment notwithstanding the jury verdict (upheld on appeal). While determining that the MFN tended to "further competition on the merits," the district court enumerated several factors that might make an otherwise pro-competitive MFN into an anticompetitive, exclusionary practice. See, e.g., Kate A. Ball & Charles S. Wright, *Most Favored Nations Clauses Reexamined in Light of DOJ Challenge in Michigan*, Members Briefing, American Health Lawyers Association (2011).

¹⁹ James M. Burns, Joseph R. Pope, & Williams Mullen, *Most-Favored Nation' Clauses and Health Insurers*, LAW360, (April 23, 2010). The report is entitled *House Bill 125 Joint Legislative Commission on Most Favored Nation Clauses in Healthcare Contracts Report*, 2010, Ohio Department of Insurance. See <http://www.insurance.ohio.gov/Legal/Reports/Documents/MFN%20Report-%202010.pdf>.

²⁰ See, e.g., Leo A. Caseria, *In Case You Missed It...MFNs and RPMs: The Antitrust Spotlight is on Price Relationship Agreements*, 10(2) ABA ANTITRUST SECTION JOINT CONDUCT COMMITTEE E-BULLETIN, 16-20 (Summer 2013); Joe Palazzolo, *Apple Ruling Heaps Doubt on 'MFN' Clauses*, WALL ST. J., (July 14, 2013); and Thomas Catan & Avery Johnson, *Justice Widens Blue Cross Probe Across Several States*, WALL ST. J., (March 26, 2011).

a large number of hospitals to raise rival insurers' costs, thereby reducing their ability to compete with BCBS in offering health insurance, which caused higher prices. As the DOJ complained, "Blue Cross' use of MFNs has reduced competition in the sale of health insurance in markets throughout Michigan by inhibiting hospitals from negotiating competitive contracts with Blue Cross' competitors."²¹ The DOJ further alleged, "Blue Cross sought to insulate itself from competition in health insurance markets throughout Michigan by entering into 'most favored nation' agreements ('MFNs') with more than 70 hospitals" with "dramatically higher prices resulting from the MFNs."²² The DOJ claim is consistent with concerns that a dominant buyer (BCBS) may impose an MFN to disadvantage its rivals (competing health insurers). As stated by DOJ:

A hospital that would otherwise contract with a competing insurer at lower prices than it charges Blue Cross would have to lower its prices to Blue Cross pursuant to the MFN if it sought to maintain or offer lower prices in contracts with other commercial insurers. The resulting financial penalty discourages a hospital with a Blue Cross MFN from lowering prices to health insurers competing with Blue Cross.²³

The court in *Apple*, which examined Apple's agreements with e-book publishers containing MFN provisions (in addition to examining other issues such as the agency model for distributing e-books), found that the MFN reduced retail price competition. The court characterized the challenged pricing practice as follows, "The MFN guaranteed that the e-books in Apple's e-bookstore would be sold for the lowest retail price available in the marketplace," and that it "required publishers to match in Apple's iBookstore any lower retail price of a New Release offered by any other retailer."²⁴ The court ultimately found, "the MFN protected Apple from retail price competition as it punished a Publisher if it failed to impose agency terms on other e-tailers."²⁵

Such a finding is consistent with the view that an MFN can be a facilitating device used by sellers to credibly commit to imposing a penalty on themselves for offering a lower price to some customers, thereby discouraging price competition. While the court did not explicitly address the legality of MFNs under antitrust law, it did determine that the circumstances surrounding them in Apple—notably Apple's participation in a horizontal price-fixing scheme—made for an unreasonable restraint of trade, and that Apple violated Section 1 of the Sherman Act by enabling a horizontal conspiracy among e-book publishers.²⁶

²¹ DOJ *Complaint* in the BCBS Michigan matter (joined by the Michigan AG's office), p. 1 (October 18, 2010). See <http://www.justice.gov/atr/cases/f263200/263235.pdf>. On March 25, 2013, DOJ filed a motion to dismiss its antitrust lawsuit BCBS because Michigan passed a law that prohibits health insurers from using MFNs in contracts with health care providers. See <http://www.justice.gov/opa/pr/2013/March/13-at-345.html>.

²² *Plaintiff United States Of America's Memorandum In Opposition To Defendant Blue Cross Blue Shield Of Michigan's Motion To Dismiss The Complaint With Prejudice*, 11, 29 (January 20, 2011). See <http://www.justice.gov/atr/cases/f266300/266327.pdf>.

²³ DOJ *Complaint* in the BCBS Michigan matter (joined by the Michigan AG's office), 21 (October 18, 2010).

²⁴ *Opinion and Order, United States of America v. Apple, Inc. et. al*, 45, 52 (July 10, 2013).

²⁵ *Id.*, p. 55.

²⁶ The court stated, "While vertical restraints are subject to review under the rule of reason, Leegin, 551 U.S. at 907, Apple directly participated in a horizontal price-fixing conspiracy. As a result, its conduct is per se unlawful.

The 2014 decision in the *Online Travel (OTC) Hotel Booking Antitrust Litigation* dismissed a federal antitrust lawsuit (whose claims included an MFN) that alleged a conspiracy to fix online prices of hotel rooms by hotel companies and online travel agencies (“OTAs”).²⁷ Here, the MFN provision involved a clause in a resale price agreement (“RPM”) “that prevent[ed] the Hotel Defendants from offering lower published prices on any other website, including the websites of other online travel agencies, and their own websites... [and] provides the hotel will not offer a lower price to a competitor of the online travel agency.”²⁸ While not explicitly ruling on the permissibility of the RPM and MFN clause, the court did conclude that such a policy “made perfect economic sense.”²⁹ The court stated:

Having given up the right to discount prices below each Hotel Defendant’s published rate, each OTA Defendant would naturally want an assurance that competitors will also be prohibited from offering a lower price than the published rate. That is precisely what each OTA Defendant got in return according to the Complaint—an MFN clause assuring the OTA Defendant that the minimum rate it must publish will not be undercut by the hotel itself or an OTA competitor.³⁰

Ultimately, the court ruled that since only intra-brand competition among a given hotel’s online distribution channels was at issue (and not inter-brand competition between competing hotel brands), the challenged conduct was not anticompetitive.

IV. CONCLUSION

While U.S. antitrust agencies recognize that MFNs may be pro-competitive or anticompetitive depending on circumstances,³¹ the literature has shown—and antitrust cases have emphasized—that such provisions may have anticompetitive effects. However, general conclusions about whether MFNs are pro-competitive or anticompetitive are of little assistance in analyzing whether a particular MFN (or its variants) runs afoul of antitrust laws. Therefore, like any commercial practice analyzed under a “rule-of-reason” approach, there needs to be a careful balancing of the efficiency versus anticompetitive effects, with the outcome for any particular MFN dependent on the specific facts of the challenged conduct.³²

The agreement between Apple and the Publisher Defendants is, ‘at root, a horizontal price restraint’ subject to per se analysis.” Opinion and Order, *United States of America v. Apple, Inc. et. al*, 153 (July 10, 2013). For a discussion of several unique aspects related to Apple’s MFN, see Adam Scott Kunz, *The Ringmaster’s Whip: The Role of Apple’s MFN Under Toys “R” Us in the E-books Case*, 13(1) THE PRICE POINT, 7-10 (Winter 2014).

²⁷ See, e.g., Lindsay C. Harrison & Kelly M. Morrison, *Major Victory for Hospitality Cos. In Antitrust Suit*, LAW 360, (February 21, 2014).

²⁸ Consolidated Amended Complaint, *Online Travel (OTC) Hotel Booking Antitrust Litigation*, 6, 29 (May 1, 2013).

²⁹ Memorandum and Opinion Order, *Online Travel (OTC) Hotel Booking Antitrust Litigation*, 16 (February 14, 2014).

³⁰ *Id.* p. 17.

³¹ *Improving Health Care: A Dose of Competition*, A Report by the Federal Trade Commission and the Department of Justice, Ch. 6, p. 20 (July 2004).

³² As stated by Lynk (2000), *supra* note 17 at 502, “[t]heory can tell us what effects to expect and to look for ... but only factual investigation can determine whether in any actual market the balance of consumer benefits from MFNs is positive or negative.”