

8/31/09 Burtis Report:  
Exhibit B

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

STACIE SOMERS, ) C-07-06507-JW  
)  
PLAINTIFF, ) JUNE 30, 2009  
)  
V. )  
)  
APPLE, INC., ) PAGES 1 - 94  
)  
DEFENDANT. )  
----- )

THE PROCEEDINGS WERE HELD BEFORE  
THE HONORABLE UNITED STATES DISTRICT  
JUDGE JAMES WARE

A P P E A R A N C E S:

FOR THE PLAINTIFF: MEHRI & SKALET  
BY: CRAIG BRISKIN  
STEVEN SKALET  
1250 CONNECTICUT AVENUE  
SUITE 300  
WASHINGTON, DC 20036  
  
ZELDES & HAEGGQUIST  
BY: HELEN I. ZELDES  
ALREEN HAEGGQUIST  
625 BROADWAY  
SUITE 906  
SAN DIEGO, CALIFORNIA 92101

(APPEARANCES CONTINUED ON THE NEXT PAGE.)

OFFICIAL COURT REPORTER: IRENE RODRIGUEZ, CSR, CRR  
CERTIFICATE NUMBER 8074

1           A P P E A R A N C E S:    (CONT'D)

2           FOR THE DEFENDANT:    JONES DAY  
3                                    BY:    ROBERT A. MITTELSTAEDT  
4    CRAIG E. STEWART  
5                                    555 CALIFORNIA STREET  
6                                    26TH FLOOR  
7                                    SAN FRANCISCO, CALIFORNIA 94104

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1 SAN JOSE, CALIFORNIA

JUNE 30, 2009

2 P R O C E E D I N G S

3 (WHEREUPON, COURT CONVENEED AND THE  
4 FOLLOWING PROCEEDINGS WERE HELD:)

5 THE CLERK: CALLING CASE NUMBER 07-6507,  
6 STACIE SOMERS V. APPLE, INC.

7 ON FOR EVIDENTIARY HEARING ON PLAINTIFF'S  
8 MOTION FOR CLASS CERTIFICATION.

9 FORTY-FIVE MINUTES EACH SIDE.

10 COUNSEL, PLEASE COME FORWARD AND STATE YOUR  
11 APPEARANCES.

12 MR. BRISKIN: CRAIG BRISKIN FOR MEHRI &  
13 SKALET.

14 MS. HAEGGQUIST: GOOD MORNING. ALREEN  
15 HAEGGQUIST FROM ZELDES & HAEGGQUIST FOR PLAINTIFF.

16 MR. SKALET: GOOD MORNING, YOUR HONOR.  
17 STEVE SKALET FROM MEHRI & SKALET FOR PLAINTIFFS.

18 MS. ZELDES: HELEN ZELDES FROM ZELDES &  
19 HAEGGQUIST FOR PLAINTIFFS.

20 MR. MITTELSTAEDT: GOOD MORNING, YOUR  
21 HONOR. BOB MITTELSTAEDT AND CRAIG STEWART FOR  
22 DEFENDANT.

23 THE COURT: VERY WELL. CALL YOUR  
24 WITNESS.

25 MR. BRISKIN: YOUR HONOR, CAN WE JUST ASK

1 A LITTLE GUIDANCE ON HOW YOU WANT TO STRUCTURE  
2 THIS. DO YOU WANT US TO CALL A WITNESS FIRST?

3 OKAY.

4 MR. MITTELSTAEDT: AND, YOUR HONOR, IS  
5 THE 45 MINUTES A SIDE BOTH FOR DIRECT AND CROSS OF  
6 THE OTHER SIDE'S WITNESS?

7 THE COURT: YES.

8 THE CLERK: WOULD YOU PLEASE RAISE YOUR  
9 RIGHT HAND.

10 **GARY L. FRENCH,**

11 BEING CALLED AS A WITNESS ON BEHALF OF THE  
12 PLAINTIFF, HAVING BEEN FIRST DULY SWORN, WAS EXAMINED  
13 AND TESTIFIED AS FOLLOWS:

14 THE WITNESS: I DO.

15 THE CLERK: PLEASE BE SEATED. WOULD YOU  
16 PLEASE STATE YOUR FULL NAME AND SPELL YOUR LAST  
17 NAME FOR THE RECORD.

18 THE WITNESS: GARY LESLIE FRENCH.  
19 F-R-E-N-C-H.

20 **DIRECT EXAMINATION**

21 BY MR. BRISKIN:

22 Q GOOD MORNING, DR. FRENCH. COULD YOU TELL US  
23 YOUR CURRENT PLACE OF EMPLOYMENT?

24 A NATHAN & ASSOCIATES, INCORPORATED, IN  
25 WASHINGTON, D.C. AREA.

1 Q AND HOW LONG HAVE YOU WORKED THERE?

2 A ALMOST 30 YEARS.

3 Q AND WHAT IS YOUR POSITION?

4 A I'M A SENIOR VICE-PRESIDENT.

5 Q AND DO YOU HAVE ANY ADVANCED DEGREES?

6 A YES.

7 THE COURT: ACTUALLY I HAD THE BENEFIT OF  
8 HIS DECLARATION SO SOME OF THAT YOU CAN SAVE BUT --

9 MR. BRISKIN: OKAY.

10 THE COURT: -- OTHER PARTS OF IT PERHAPS  
11 YOU WOULD WISH TO GO THROUGH.

12 BY MR. BRISKIN:

13 Q DO YOU HAVE EXPERIENCE IN PROVIDING TESTIMONY  
14 AND ANALYSIS IN ANTITRUST CASES?

15 A YES, I'VE BEEN INVOLVED IN ANTITRUST CASES  
16 MOST OF THOSE 30 YEARS.

17 Q AND WHAT WAS YOUR ASSIGNMENT IN THIS CASE?

18 A TO LOOK INTO THE QUESTIONS OF THE IMPACT ON  
19 THE CLASS AND THE AGGREGATE DAMAGES TO THE CLASS  
20 AND WHETHER BOTH COULD BE ADDRESSED USING COMMON  
21 EVIDENCE AND PROOF IN AN ECONOMIC ANALYSIS.

22 Q AND WHAT DID YOU DO TO CARRY OUT THIS  
23 ASSIGNMENT?

24 A WELL, I STUDIED VARIOUS DOCUMENTS IN THE CASE  
25 AND I STUDIED THE MARKETS FOR ON-LINE MUSIC AND



1 VIDEO SERVICES AND THE MARKET FOR DIGITAL PLAYERS .

2 AND AFTER DOING THAT THEN I LOOKED AT THE  
3 QUESTIONS OF WHETHER OR NOT A MODEL COULD BE  
4 CONSTRUCTED OR MODELS COULD BE CONSTRUCTED IN ORDER  
5 TO ADDRESS THE QUESTIONS OF IMPACT AND DAMAGES, AND  
6 I CAME UP WITH SEVERAL POSSIBLE MODELS.

7 Q AND DID YOU COME TO ANY CONCLUSIONS AS A  
8 RESULT OF YOUR ANALYSIS?

9 A YES. THESE MODELS ARE FEASIBLE AND WORKABLE  
10 AND THEY DO RELY ON DATA AND INFORMATION THAT IS  
11 COMMON TO ALL MEMBERS OF THE CLASS.

12 Q COULD YOU GIVE US A GENERAL DESCRIPTION OF  
13 WHAT REGRESSION ANALYSIS IS?

14 A YES. REGRESSION ANALYSIS IS A STATISTICAL  
15 TECHNIQUE IN WHICH YOU SPECIFY AND EQUATE AN  
16 EQUATION IN WHAT IS USUALLY KNOWN AS A REDUCED FORM  
17 EQUATION AND IN WHICH YOU HAVE A DEPENDENT VARIABLE  
18 OR THE VARIABLE OF INTEREST THAT YOU'RE TRYING TO  
19 EXPLAIN AS A FUNCTION OF SEVERAL INDEPENDENT OR  
20 EXPLANATORY VARIABLES.

21 THOSE EXPLANATORY VARIABLES ARE DEMAND  
22 SIDE VARIABLES, APPLY SIDE VARIABLES AND PERHAPS  
23 PRODUCT FEATURES AND OTHER VARIABLES THAT MIGHT  
24 INFLUENCE THE VARIABLE IN QUESTION.

25 IN THIS CASE THE VARIABLE IN QUESTION IS

1 THE PRICE OF IPODS. AND SO THAT'S A DEPENDENT  
2 VARIABLE.

3 SO WHAT THE REGRESSION ANALYSIS DOES IS  
4 THAT AFTER YOU SPECIFY THE EQUATION, YOU COLLECT  
5 DATA ON ALL OF THE VARIABLES, BOTH THE DEPENDENT  
6 VARIABLES AND THE INDEPENDENT VARIABLES, AND YOU  
7 PLUG THE DATA INTO THE COMPUTER AND THEN THE  
8 REGRESSION RESULTS OR THE REGRESSION ANALYSIS  
9 QUANTIFIES THE RELATIONSHIP BETWEEN EACH OF THE  
10 EXPLANATORY VARIABLES AND THE DEPENDENT VARIABLES  
11 AND IN THIS CASE PRICE.

12 SO, FOR EXAMPLE, IF THERE'S A COEFFICIENT  
13 THAT IS .4, IT MEANS THAT IF THE EXPLANATORY  
14 VARIABLE GOES UP BY ONE, THEN THE PRICE WILL GO UP  
15 BY POINT FOUR AND SO, THEREFORE, THAT'S HOW IT'S  
16 DONE.

17 AND IF YOU GET STATISTICALLY SIGNIFICANT  
18 RESULTS, THAT IS, THE .4 IS NOT .4 BY CHANCE OR  
19 LUCK OR SAMPLING ERA BUT RATHER IT'S STATISTICALLY  
20 SIGNIFICANT, THAT IS, IT IS DEFINITELY NOT ZERO.  
21 IT IS A POSITIVE NUMBER OR A NEGATIVE NUMBER  
22 DEPENDING ON WHAT EXPLANATORY VARIABLE IT IS.

23 AND THEN YOU CAN RELY ON THAT COEFFICIENT  
24 TO DO THINGS LIKE ASSESS THE IMPACT OF THE VARIABLE  
25 ON THE PRICE.

1 Q AND IS THIS METHOD USED IN ANTITRUST CASES?

2 A YES, IT'S FREQUENTLY USED IN ANTITRUST CASES  
3 BECAUSE IN ANTITRUST CASES, REGARDLESS OF WHAT THE  
4 WRONGDOING, WHETHER IT'S PRICE FIXING, GROUP  
5 BOYCOTT, OR A TYING CASE, WHATEVER THE ALLEGED  
6 WRONGDOING IS, IT HASN'T -- IT PRESUMABLY HAS AN  
7 IMPACT ON PRICE, THAT IS, IT CAUSES THE PRICE TO BE  
8 HIGH, HIGHER THAN IT OTHERWISE WOULD BE. AND SO  
9 YOU CAN USE THIS.

10 NOW, IN ANTITRUST CASES NORMALLY THERE'S  
11 AN INDICATOR VARIABLE USED TO MEASURE THE ALLEGED  
12 WRONGDOING.

13 AN INDICATOR, SOMETIMES CALLED A DUMMY  
14 VARIABLE, IS A BINARY VARIABLE. IT TAKES ON THE  
15 VALUE OF ONE IF THE WRONGDOING IS PRESENT AND A  
16 VALUE OF ZERO IF IT IS NOT.

17 SO, FOR EXAMPLE, IF YOU HAD A PERIOD OF  
18 TIME WHEN THE WRONGDOING WAS GOING ON, THEN DURING  
19 THAT PERIOD OF TIME OR DURING THE PERIOD AS IT'S  
20 SOMETIMES REFERRED TO THE INDICATOR VARIABLE WOULD  
21 ASSUME A VALUE OF ONE.

22 BUT IN PERIODS BEFORE OR AFTER THAT WHEN  
23 THE ALLEGED WRONGDOING IS SUPPOSEDLY NOT HAPPENING,  
24 THEN THE INDICATOR VARIABLE WOULD HAVE ZERO,  
25 MEANING IT DOESN'T AFFECT PRICE IN THOSE PERIODS.

1 Q NOW, YOU'VE PROPOSED SEVERAL MODELS TO MEASURE  
2 IMPACT AND DAMAGES IN THIS CASE. COULD YOU  
3 DESCRIBE ONE OF THEM?

4 A YES. ONE APPROACH I DECIDED THAT WE COULD USE  
5 WOULD BE TO JUST FIRST LOOK AT THE WHOLESALE PRICES  
6 OF IPODS, WHERE THE DEPENDENT VARIABLE WOULD BE THE  
7 WHOLESALE PRICES OF IPODS.

8 AND THE INDEPENDENT OR EXPLANATORY  
9 VARIABLES WOULD BE DEMAND SIDE VARIABLES LIKE A  
10 MEASURE OF THE CONSUMERS INCOME, THE NUMBER OF  
11 SONGS IN THE ITUNES LIBRARY AND PERHAPS OTHER  
12 VARIABLES AND THE SUPPLY SIDE VARIABLE LIKE THE  
13 COST OF EACH IPOD MODEL, THE COST OF APPLE TO EACH  
14 IPOD MODEL AND PERHAPS VARIOUS PRODUCT FEATURES.

15 PRODUCT FEATURES COULD INCLUDE ITS  
16 DEMAND, GIVEN FEATURES WHEN THEY'RE ADDED TO THE  
17 PRODUCT MIGHT MAKE THE PRODUCT MORE DESIRABLE AND  
18 IT MIGHT STIMULATE THE DEMAND OF THE PRODUCT AND  
19 THEY CAN ALSO INCREASE THE SUPPLY. IT COULD  
20 INCREASE THE COST. YOU ADD A FEATURE AND THE COST  
21 OF THE PRODUCT MAY GO UP.

22 AND SO YOU HAVE THIS FEATURE VARIABLES  
23 AND YOU HAVE DEMAND SIDE VARIABLES AND YOU HAVE  
24 SUPPLY SIDE VARIABLES AS ALL OF THIS EXPLANATORY  
25 VARIABLES THAT TOGETHER DETERMINE WHAT THE PRICE OF

1 THE PRODUCT WOULD BE.

2 AND YOU WOULD HAVE AN INDICATOR VARIABLE  
3 AND WHEN I'M LOOKING AT THE WHOLESALE PRICE THAT  
4 INDICATOR VARIABLE WOULD BE WHETHER THE ALLEGED  
5 WRONGDOING IS PRESENT.

6 SO IF I USE A TEMPORAL BENCHMARK AND IN  
7 THIS CASE THE ALLEGATION IS THAT THE IPODS WERE  
8 TIED TO ITUNES. AND SO THAT COULDN'T HAPPEN UNTIL  
9 ITUNES EXISTED, THAT IS, THE ITUNES MUSIC STORE  
10 EXISTED WHICH DIDN'T EXIST BEFORE APRIL OF 2003.

11 SO SOME TIME AROUND APRIL OF 2003 TO  
12 MAYBE WITHIN A YEAR OR SO OF THAT DATE THE MUSIC  
13 STORE STARTED HAVING AN EFFECT IN THE MARKETPLACE  
14 AND FROM THAT POINT FORWARD THE TIE THAT WAS  
15 CREATED BY THE -- ALLEGEDLY CREATED BY THE FAIR  
16 PLAY DRM WOULD THEN CAUSE THE DEMAND FOR IPODS TO  
17 BE GREATER AND THE PRICE FOR IPODS TO BE GREATER  
18 THAN IT OTHERWISE WOULD HAVE BEEN.

19 AND IT WOULD TEND TO FORECLOSE OTHER  
20 MANUFACTURERS OF DIGITAL MUSIC PLAYERS FROM A  
21 SIGNIFICANT PORTION OF THE MARKET THAT THE PORTION  
22 OF CONSUMERS THAT IT WAS IMPORTANT TO BE ABLE TO  
23 DIRECTLY DOWNLOAD MUSIC FROM THE ITUNES MUSIC  
24 STORE.

25 AND SO YOU PUT IN THAT VARIABLE. AND

1 THEN YOU RUN THE MODEL. IF THAT VARIABLE IS  
2 STATISTICALLY SIGNIFICANT AND A POSITIVE NUMBER, IT  
3 SHOWS THEN THAT THERE WAS A PREMIUM AND THE PRICES  
4 OF IPODS CAUSED BY THE TIE OR THE ALLEGED  
5 WRONGDOING IN THE CASE.

6 AND SO IF WE DID THAT AT THE WHOLESALE  
7 LEVEL WE WOULD SEE TO WHAT EXTENT THE WHOLESALE  
8 PRICES CHARGED BY APPLE TO ITS CUSTOMERS WERE  
9 HIGHER THAN THEY OTHERWISE WOULD HAVE BEEN ABSENT  
10 THE WRONGDOING. THEN THAT WOULD BE THE FIRST STAGE  
11 OF THE MODEL.

12 THEN THE SECOND STAGE OF THE MODEL WOULD  
13 BE A SECOND REGRESSION AND WHERE THE MOST IMPORTANT  
14 EXPLANATORY VARIABLE WOULD BE THE PRICE THAT APPLE  
15 CHARGES OR THE WHOLESALE PRICES OF IPODS AND IT  
16 WOULD HELP TO EXPLAIN THE RETAIL PRICES OF IPODS.

17 AND SO TO THE EXTENT THAT THAT VARIABLE  
18 IS STATISTICALLY SIGNIFICANT AND POSITIVE, IT WOULD  
19 SAY SOME PORTION OF THAT OVERCHARGE PREMIUM AT THE  
20 WHOLESALE LEVEL IS BEING PASSED ON TO THE RETAIL  
21 LEVEL AS WELL.

22 AND IT'S THE RETAIL PRICES, OF COURSE,  
23 THAT THE INDIRECT PURCHASERS IN THIS CASE PAY AND  
24 SO WE WOULD HAVE TO GET TO THE RETAIL OVERCHARGE,  
25 IF YOU WILL, AND WE CAN DO THAT WITH THAT TWO STAGE

1 MODEL I JUST DESCRIBED.

2           HOWEVER, WE COULD HAVE A ONE STAGE MODEL  
3 WHERE INSTEAD OF USING WHOLESALE PRICES AS THE  
4 DEPENDENT VARIABLE WE USE RETAIL PRICES, THAT IS,  
5 THE PRICES THAT APPLE AND ITS OWN STORES CHARGES  
6 RETAILERS AND THE PRICES THAT ALL OF THE OTHER  
7 RETAILERS THAT SELL APPLE IPODS CHARGE CONSUMERS.

8           THOSE WOULD BE -- THOSE RETAIL PRICES  
9 WOULD BE THE VARIABLE OF INTEREST, THE ONE WE'RE  
10 TRYING TO EXPLAIN. AND THEN YOU WOULD HAVE THE  
11 SUPPLY AND DEMAND SIDE VARIABLES AS WELL AS THE  
12 INDICATOR VARIABLE FOR THE ALLEGED WRONGDOING.

13           AGAIN, IT COULD BE A BEFORE AND DURING  
14 BENCHMARK IN THE SENSE THAT WE COULD HAVE THE  
15 INDICATOR VARIABLE TAKE ON THE VALUE OF ONE FROM  
16 SOME TIME IN 2003 TO THE PRESENT OR TO AT LEAST  
17 SOME TIME IN 2009 WHEN APPLE REMOVED THE FAIR PLAY  
18 DRM SOFTWARE FROM -- AT LEAST PARTIALLY REMOVED IT  
19 FROM ITS PRODUCTS.

20           OR IT COULD, IT COULD BE A PRODUCT  
21 BENCHMARK. INSTEAD OF USING TIME AS A BENCHMARK  
22 WHERE YOU HAVE A BEFORE PERIOD WHERE THE ALLEGED  
23 WRONGDOING DIDN'T COME INTO PLAY, DIDN'T EXIST, YOU  
24 COULD HAVE A BENCHMARK THAT IS A PRODUCT BENCHMARK,  
25 THAT IS, YOU COULD USE THE PRICES OF OTHER DIGITAL

1 MUSIC PLAYERS AS THE BENCHMARK.

2 IF YOU'RE DOING THAT, THEN YOUR  
3 OBSERVATIONS, THE DATA OBSERVATIONS THAT YOU'RE  
4 PLUGGING INTO THE REGRESSION ARE THE PRICE FOR A  
5 GIVEN PRODUCT OF A GIVEN MANUFACTURER SOLD AT  
6 RETAIL BY A GIVEN RETAILER AND A GIVEN MODEL OF  
7 THAT PRODUCT WOULD BE THE DATA INPUT OR AN  
8 OBSERVATION IN THE DATA THAT'S GOING INTO THE  
9 REGRESSION MODEL.

10 AND THEN YOUR INDICATOR VARIABLE NOW, ON  
11 THE RIGHT-HAND SIDE OF THE EQUATION WOULD BE AN  
12 INDICATOR VARIABLE FOR WHETHER THE PRODUCT IS AN  
13 APPLE IPOD AS OPPOSED TO MICROSOFT ZOOM OR SOME  
14 OTHER DIGITAL MUSIC PLAYER.

15 AND SO WHEN IT IS AN APPLE IPOD, THEN YOU  
16 PUT IN ONE. AND WHEN IT ISN'T, THEN IT WOULD BE  
17 ZERO.

18 AND IF THAT IS STATISTICALLY SIGNIFICANT,  
19 IT WOULD INDICATE THAT THERE IS A PREMIUM FOR BEING  
20 APPLE, PRESUMABLY CAUSED BY THE ALLEGED WRONGDOING  
21 IN THIS CASE.

22 AND SO YOU COULD HAVE THAT PRODUCT  
23 BENCHMARK AS WELL.

24 AND SO IF YOU HAVE THAT, THEN YOU ONLY  
25 HAVE A ONE STAGE MODEL. YOU'RE DIRECTLY EXPLAINING



1 THE RETAIL PRICES AND IN EXAMINING THE IMPACT OF  
2 THE ALLEGED WRONGDOING ON THOSE PRICES DIRECTLY AS  
3 OPPOSED TO FIRST DETERMINED ON WHOLESALE AND THEN  
4 SEEING IF IT'S PASSED THROUGH TO RETAIL AND IF IT'S  
5 LIKE WE HAD IN THE TWO STAGE MODEL.

6 SO THOSE ARE VARIOUS MODELS, ECONOMETRIC  
7 MODELS THAT I COULD YOU USE. AND IN EITHER OF THEM  
8 YOU COULD USE THE TEMPORAL BENCHMARK OR THE PRODUCT  
9 BENCHMARK TO ATTEMPT TO ASSESS THE WRONGDOING.

10 SO THERE'S A TOTAL OF FOUR ECONOMETRIC  
11 MODELS TO BE USED OR TO EXAMINE THE QUESTIONS AT  
12 ISSUE OR THE ONES THAT I WAS ASKED TO EXAMINE  
13 ANYWAY.

14 Q ARE THESE MODELS ANY DIFFERENT FROM WHAT YOU  
15 WOULD USE TO MEASURE MONOPOLIZATION OR ATTEMPTED  
16 MONOPOLIZATION IN THE PORTABLE MEDIA PLAYER MARKET?

17 A NO. WHETHER YOU CALL IT A TIE OR WHETHER YOU  
18 CALL IT JUST EXCLUSIONARY CONDUCT IN SOME PORTION  
19 IT MEASURES THE EFFECT ON PRICE OF THAT CONDUCT.

20 Q NOW, HAVE YOU USED A PROPOSED SIMILAR METHOD  
21 IN THE PAST?

22 A I DID A COUPLE OF CASES, ONE CASE A LONG TIME  
23 AGO INVOLVING CARBON BLACK -- I'M SORRY, NOT CARBON  
24 BLACK -- CARBON DIOXIDE IN WHICH I USED AN  
25 INDICATOR VARIABLE FOR PRICE FIXING CONSPIRACY.

1 THAT WAS WAY BACK IN THE '80S. AND THEN MORE  
2 RECENTLY I DID A SETTLEMENT STUDY INVOLVING  
3 DIAMONDS AND ALLEGED WRONGDOING IN THE DIAMOND  
4 INDUSTRY, PARTICULARLY IN MONOPOLIZATION OF ROUGH  
5 DIAMONDS.

6 AND MY FIRM HAS DONE NUMEROUS STUDIES AND  
7 IN NUMEROUS CASES USING THESE KINDS OF MODELS AND  
8 INDICATOR VARIABLES.

9 Q DO ANY COME TO MIND?

10 A WELL, THERE'S BEEN A NUMBER OF THEM. THERE  
11 WAS THE OSB ANTITRUST LITIGATION, EDPM ANTITRUST  
12 LITIGATION, LINER BOARD. LET'S SEE. WHAT ELSE? I  
13 HAD A LIST OF THEM HERE.

14 POLYESTER STAPLES ANTITRUST LITIGATION,  
15 MONOSODIUM GRANULATE ANTITRUST LITIGATION, CARBON  
16 BLACK LITIGATION, FLAT GLASS ANTITRUST LITIGATION.

17 A LOT OF CASES IN WHICH THERE WAS SOME  
18 ALLEGED WRONGDOING, AND WE USED AN ECONOMETRIC  
19 MODEL WITH AN INDICATOR VARIABLE TO ASSESS IMPACT  
20 AND DAMAGES IN THOSE CASES.

21 AND IN MOST OF THE CASES THERE WERE  
22 INDICATOR VARIABLES FOR MOST OF THE PRODUCT OR  
23 CUSTOMER FEATURES AS WELL.

24 Q IS IT UNUSUAL TO HAVE MULTIPLE INDICATOR  
25 VARIABLES IN A MODEL?

1 A NO. SOME OF THE MODELS THAT OUR FIRM HAS HAD  
2 HAS HAD HUNDREDS OR EVEN THOUSANDS OF INDICATOR  
3 MODEL, OR VARIABLES IN THE MODELS.

4 Q IN THE FIELD OF STATISTICS AND ECONOMICS IS  
5 REGRESSION ANALYSIS A WELL ACCEPTED METHOD OF  
6 COMPUTING THE EFFECT OF SOME VARIABLE ON ANOTHER  
7 VARIABLE SUCH AS PRICE?

8 A YES. IN FACT, IN THIS DAY AND AGE IT'S PRETTY  
9 MUCH AN INDISPENSABLE TOOL OF AN ECONOMIST. IT'S  
10 THE MOST COMMON TOOL THAT WE USE BEYOND THE  
11 ECONOMIC THEORY, OF COURSE.

12 Q HOW, HOW DO THE REGRESSION ANALYSIS TELL YOU  
13 THAT THERE IS OR IS NOT IMPACT IN THE ALLEGED  
14 WRONGDOING IN THIS CASE?

15 A WELL, THE THEORY THE PLAINTIFFS HAVE IN THE  
16 CASE IS THAT THERE WAS THIS TIE OR FORECLOSURE WITH  
17 THE DRM SOFTWARE THAT HAD THE EFFECT OF INCREASING  
18 THE DEMAND FOR APPLE IPODS OR LOWERING THE DEMAND  
19 FOR OTHER PRODUCTS. SO THEREFORE THERE WAS AN  
20 INCREASE IN DEMAND WHICH WOULD THEN -- OTHER THINGS  
21 THE SAME WOULD INCREASE THE PRICE OF IPODS AND THAT  
22 INCREASE IN PRICE WAS PAID BY ALL PURCHASERS OF  
23 IPODS, ALL MODELS OF IPODS.

24 AND SO, THEREFORE, THAT'S HOW THERE WAS  
25 IMPACT ON ALL CLASS MEMBERS.

1                   SO IF THE ECONOMETRIC MODEL SHOWS THAT  
2                   INDEED THERE WAS A PREMIUM FOR THE ALLEGED  
3                   WRONGDOING, THEN ALL MEMBERS OF THE CLASS WERE  
4                   IMPACTED BY THAT WRONGDOING.

5                   Q       DOES THE MODEL THAT YOU'RE USING HAVE TO  
6                   ACCOUNT FOR 100 PERCENT OF THE VARIATIONS OF THE  
7                   PRICES?

8                   A       NO. I'VE NEVER SEEN AN ECONOMETRIC MODEL  
9                   WORKS THAT WELL WHERE 100 PERCENT OF THE DEPENDENT  
10                  VARIABLE IS EXPLAINED BY THE MODEL. IF YOU CAN GET  
11                  50 OR 60 PERCENT OF THE VARIATION, THAT'S  
12                  CONSIDERED TO BE GENERALLY VERY GOOD. ANYTHING  
13                  MORE THAN THAT IS REALLY GOOD. AND SO YOU WOULDN'T  
14                  EXPECT TO GET 100 PERCENT.

15                  WHAT IS IMPORTANT IS THAT YOU HAVE SOME  
16                  SUBSTANTIAL SHARE OF THE VARIATION EXPLAINED AND  
17                  THAT THE PARAMETERS OR THE COEFFICIENTS OF THE  
18                  DIFFERENT EXPLANATORY VARIABLES ARE STATISTICALLY  
19                  SIGNIFICANT, ESPECIALLY THE ONE YOU'RE MOST  
20                  INTERESTED IN, IN THIS CASE THE INDICATOR VARIABLE  
21                  FOR THE ALLEGED WRONGDOING.

22                  IF THAT ONE IS NOT SIGNIFICANT, THEN I  
23                  WOULD THINK YOU WOULD FAIL TO SHOW AN EFFECT OF THE  
24                  WRONGDOING.

25                  Q       NOW, CAN YOU EXPLAIN HOW THE ALLEGED TYING IN

1 THIS CASE COULD BE ANTICOMPETITIVE OR RESULT IN  
2 SUPER COMPETITIVE PRICES?

3 A I'M SORRY? SAY THAT AGAIN.

4 Q COULD YOU EXPLAIN HOW THE ALLEGED TYING IN  
5 THIS CASE OR ALLEGED MONOPOLIZATION IN THIS CASE  
6 COULD BE ANTICOMPETITIVE AND COULD CAUSE INCREASE  
7 IN PRICES?

8 A WELL, I THINK I BRIEFLY SAID IT A MINUTE AGO.  
9 PRESUMABLY WHEN THERE'S A DESIRABLE PRODUCT IN  
10 WHICH MONOPOLY POWER IS BEING EXERCISED LIKE THE  
11 ITUNES MUSIC STORE, THE SHARE OF IT -- APPLE'S  
12 SHARE OF THE DIGITAL DOWNLOAD MUSIC MARKET IS, I  
13 DON'T KNOW, 70, 80 PERCENT, IT'S A VERY HIGH  
14 PERCENTAGE. SO THEY HAVE THE DOMINANT SHARE OF  
15 THAT MARKET AND IT'S A DESIRABLE PRODUCT. PEOPLE  
16 WANT TO DOWNLOAD MUSIC FROM THE MUSIC STORE.

17 IF YOU HAVE THAT SITUATION AND THEN YOU  
18 CREATE THIS SOFTWARE, THE FAIR PLAY DRM, WHERE THE  
19 ONLY WAY THAT THAT MUSIC CAN BE DIRECTLY DOWNLOADED  
20 INTO THE COMPUTERS OF THE CONSUMERS IS IF THEY HAVE  
21 AN APPLE IPOD BECAUSE ONLY THE IPOD CAN DECODE THE  
22 DRM SOFTWARE, THEN IT BOOSTS THE DEMAND FOR IPODS  
23 TO THE EXTENT THAT PEOPLE WANT TO USE THE MUSIC  
24 STORE, THAT IS, THEY WANT TO PURCHASE MUSIC ON LINE  
25 FROM THE MUSIC STORE.

1                   AND THAT --

2                   THE COURT: I WANT TO INTERRUPT JUST TO  
3 CLARIFY ONE MATTER.

4                   THE WITNESS: SURELY.

5                   THE COURT: IT IS MY UNDERSTANDING  
6 THAT -- BECAUSE I THINK THAT I FOLLOW YOUR  
7 ANALYSIS, BUT THERE'S A FACTUAL QUESTION THAT IS --  
8 NEEDS TO BE CORRECTED OR MAYBE YOU NEED TO EXPLAIN  
9 HOW YOU SEE IT.

10                   MY UNDERSTANDING IS THAT THE ITUNES MUSIC  
11 CAN BE DOWNLOADED TO A COMPUTER WITHOUT THE USE OF  
12 AN IPOD AND IT'S REALLY THE DOWNLOADING FROM THE  
13 COMPUTER INTO THE IPOD THAT IS OF CONCERN HERE THAT  
14 THE DRM SOFTWARE IS IMBEDDED SOMEHOW IN THE  
15 DOWNLOAD TO THE COMPUTER AS WELL AS TO THE IPOD,  
16 BUT YOU'RE SOUNDING AS THOUGH YOU SEE THE  
17 CONNECTION AS BEING DIRECT; THAT IS, THAT THE MUSIC  
18 IS DOWNLOADED FROM THE STORE INTO THE IPOD BUT  
19 THERE IS AN INTERMEDIARY STEP.

20                   THE WITNESS: YEAH, IT HAS TO GO THROUGH  
21 THE COMPUTER. IT'S DOWNLOADED INTO THE COMPUTER  
22 AND THEN INTO THE IPOD.

23                   THE COURT: BUT YOUR ANALYSIS MAY BE THE  
24 SAME, I'M JUST TRYING TO MAKE SURE THAT I  
25 UNDERSTAND IT FACTUALLY THAT PEOPLE DESIRE TO USE

1 THIS STORE OF 70 OR 80 PERCENT OF MUSIC, BUT YOU  
2 SAID ARE PREVENTED FROM DOWNLOADING IT BY THE DRM  
3 SOFTWARE.

4 THE WITNESS: RIGHT. DOWNLOADING IT INTO  
5 A MUSIC PLAYER.

6 THE COURT: INTO A PLAYER. BUT THEY'RE  
7 ABLE TO DOWNLOAD IT INTO THE COMPUTER.

8 THE WITNESS: THEY'RE ABLE TO DOWNLOAD IT  
9 ONTO A COMPUTER AND THEY CAN LISTEN TO IT DIRECTLY  
10 ON THEIR COMPUTER IF THEY WANTED TO BUT THEY  
11 COULDN'T LISTEN TO IT ON AN IPOD OR ANY OTHER MUSIC  
12 PLAYER UNLESS IT HAS DRM SOFTWARE.

13 THE COURT: YOU WERE ASKED HOW THIS  
14 RESULTED IN ANTICOMPETITIVE PRICING. ALL RIGHT.  
15 SO START OVER.

16 THE WITNESS: ALL RIGHT. WELL, SINCE  
17 PEOPLE ULTIMATELY WANT IT INTO THEIR PLAYER AND  
18 THEY WANT TO USE IT IN THEIR PLAYER AND IT HAS VERY  
19 GOOD SPEAKER AND SOUND QUALITY AND OTHER FEATURES.

20 SO THEY WANT TO GET IT INTO THEIR PLAYER  
21 FROM THE MUSIC STORE, AND YOU CAN'T DOWNLOAD IT  
22 FROM YOUR COMPUTER ONTO ANY PLAYER BUT AN IPOD  
23 BECAUSE DIRECTLY THERE IS ONE OTHER WAY TO TRY TO  
24 DO IT. THAT YOU HAVE TO DO THAT IF YOU HAVE THE  
25 DRM SOFTWARE.

1           AND THE DRM SOFTWARE, THE FAIR PLAY  
2           SOFTWARE IS IMBEDDED IN THE IPOD AND IT'S SOMEHOW  
3           IMBEDDED IN THE MUSIC ITSELF SO THAT YOU HAVE TO  
4           PLAY IT ON AN MP3 PLAYER AND SO YOU HAVE TO DO --  
5           YOU HAVE TO HAVE AN IPOD TO PLAY IT ON THAT.

6           SO NOW ONCE YOU DO THAT AND IF IT'S  
7           DESIRABLE TO HAVE IT ON THE PLAYERS, AND THESE  
8           PLAYERS HAVE BECOME VERY POPULAR NOW, THEY'RE VERY  
9           MASS SOLD, MASS PRODUCT AND IN THE CONSUMER SPHERE,  
10          AND SO THEY -- THE FACT THAT IT CAN BE DOWNLOADED  
11          ONTO AN IPOD ULTIMATELY FROM THE MUSIC STORE THEN  
12          ALLOWS AND CAUSES THE DEMAND FOR IPODS TO GO UP TO  
13          THE EXTENT THAT ITUNES MUSIC STORE OR HAVING ACCESS  
14          TO MUSIC TO ULTIMATELY BE DOWNLOADED TO YOUR PLAYER  
15          IS DESIRABLE TO CONSUMERS.

16          WELL, WE KNOW THAT THE ITUNES MUSIC STORE  
17          HAS VERY LARGE POPULARITY. IT HAS A DOMINANT SHARE  
18          OF THE MARKET. SO IT'S CLEAR THAT PEOPLE WANT TO  
19          USE THE MUSIC STORE.

20          AND THE QUESTION IS WHAT PLAYER ARE THEY  
21          GOING TO PUT IT ON? WELL, THE SOFTWARE SAYS IF  
22          THEY WANT TO DOWNLOAD IT IN THE SIMPLEST AND  
23          EASIEST WAY, THEY HAVE TO HAVE AN IPOD THAT DECODES  
24          THE FAIR PLAYER SOFTWARE WHEN IT'S DOWNLOADED TO  
25          THE PLAYER. SO THAT INCREASES THE DEMAND FOR THE



1           PLAYER.

2                           IF THE DEMAND FOR THE PLAYER GOES UP,  
3           THEN THAT ALLOWS THE HIGHER PRICE TO BE PAID FOR  
4           THE PLAYER.  AND IF THE ECONOMETRIC MODEL SHOWS  
5           THAT INDEED THERE IS A HIGHER PRICE, THEN THAT  
6           HIGHER PRICE IS PAID BY ALL PURCHASERS OF ALL IPOD  
7           MODELS AND SO THERE IS IMPACT ON ALL CONSUMERS FROM  
8           THIS CONDUCT.

9                           MR. BRISKIN:  I HAVE NOTHING FURTHER.  
10           I'LL RESERVE THE REST OF MY TIME.

11                          THE COURT:  VERY WELL.  YOU MAY  
12           CROSS-EXAMINE.

13   **CROSS-EXAMINATION**

14           BY MR. MITTELSTAEDT:

15           Q       GOOD MORNING, DR. FRENCH.

16           A       HI.  HOW ARE YOU?

17           Q       GOOD.

18                          WHAT YOU WERE JUST TALKING ABOUT JUST NOW  
19           WAS A THEORY OF IMPACT; CORRECT?

20           A       THAT'S THE PLAINTIFF'S THEORY OF IMPACT, YES.

21           Q       AND THERE ARE A LOT OF REASONS THAT IPODS ARE  
22           IN DEMAND; CORRECT?

23           A       YES, THAT'S WHY YOU HAVE TO HAVE ALL OF THE  
24           OTHER EXPLANATORY VARIABLES IN THE MODEL.

25           Q       AND A LOT OF FACTORS THAT CREATE DEMANDS FOR

1 IPODS; CORRECT?

2 A YES, AND THERE WOULD BE A LARGE NUMBER OF THEM  
3 IN THE ECONOMETRIC MODELS.

4 Q I'M NOT TALKING ABOUT YOUR MODEL RIGHT NOW.  
5 I'M JUST ASKING A BASIC QUESTION.

6 HAVE YOU DONE ANY STUDY OF WHETHER THE  
7 AVAILABILITY OF ITUNES MUSIC STORE INCREASES DEMAND  
8 FOR IPOD OR WHAT PERCENT OF THE IPOD DEMAND IS  
9 CREATED BY THE MUSIC STORE?

10 A THAT'S WHAT THE ECONOMETRIC MODELS ARE  
11 DESIGNED TO DO, BUT WE HAVE NOT YET RUN THEM.

12 Q SO THE ANSWER IS NO YOU HAVEN'T?

13 A NO. I PROPOSED HOW YOU WOULD DO IT AND THAT  
14 IT WOULD RELY ON COMMON EVIDENCE AND PROOF. BUT WE  
15 HAVEN'T DONE IT YET. THAT WOULD BE DONE AT THE  
16 MERIT STAGE.

17 Q NOW, AT THE DEPOSITION YOU TOLD ME THAT THE  
18 THEORY OF LIABILITY YOU HAD IN MIND WAS NOT THAT  
19 THERE WAS ANYTHING WRONG WITH APPLE USING FAIR PLAY  
20 DRM WHEN IT OPENED THE MUSIC STORE.

21 YOUR UNDERSTANDING OF THE THEORY WAS THAT  
22 THE ALLEGED VIOLATION WAS THAT AT SOME TIME LATER  
23 APPLE DECIDED NOT TO LICENSE FAIR PLAY TO  
24 COMPETITORS; IS THAT CORRECT?

25 A RIGHT. IF, IF OTHER MANUFACTURERS OF DIGITAL

1 MUSIC PLAYERS COULD LICENSE THE FAIR PLAY SOFTWARE  
2 FROM APPLE FOR A FAIR PRICE, A REASONABLE PRICE,  
3 THEN THEY COULD, THEY COULD HAVE THEIR PLAYERS BE  
4 ABLE TO DIRECTLY ACCEPT MUSIC FROM THE ITUNES MUSIC  
5 STORE AS WELL AND THAT WOULD REMOVE THE ADVANTAGE  
6 THAT APPLE HAS.

7 Q UM --

8 A AND YET THEY WOULD BE COMPENSATED THROUGH  
9 ROYALTIES PRESUMABLY FROM THE OTHER MANUFACTURERS.

10 Q APPLE WOULD BE ENTITLED TO A ROYALTY FOR THE  
11 LICENSE; CORRECT?

12 A OH, SURELY.

13 Q EXCUSE ME?

14 A SURELY.

15 Q YOU TALKED ABOUT IPODS. NOW, DO YOU KNOW WHAT  
16 THIS IS?

17 A I CAN'T SEE IT FROM HERE.

18 Q TOO SMALL TO SEE?

19 A WELL, YEAH, FOR ME. I DON'T HAVE MY DISTANCE  
20 GLASSES WITH ME.

21 Q MAY I APPROACH?

22 THE COURT: SURE.

23 BY MR. MITTELSTAEDT:

24 Q HAVE YOU EVER SEEN THAT BEFORE?

25 A NO, I HAVEN'T. BUT IT LOOKS LIKE EARPHONES.

1 IT LOOKS LIKE YOU'RE CONNECTING EARPHONES TO  
2 SOMETHING.

3 Q HAVE YOU EVER SEEN THIS BEFORE?

4 A IS THAT A FLASH MEMORY CARTRIDGE?

5 Q MAY I APPROACH?

6 A OH, NO. THIS IS AN ATTACHMENT TO THE PART OF  
7 THE IPOD, BUT I HAVEN'T SEEN IT BEFORE.

8 Q ATTACHMENT TO AN IPOD?

9 A IT LOOKS LIKE IT. IT HAS IPOD WRITTEN ON IT.

10 Q AND DO YOU KNOW WHAT THIS IS, THIS --

11 A THAT'S ONE OF THE IPOD MODELS.

12 Q WHAT MODEL?

13 A I DON'T REMEMBER THE NAME OF IT. I DON'T KNOW  
14 IF IT'S THE NANO OR THE MINI.

15 Q IN YOUR BEFORE PERIOD, AND YOU SAY THAT THE  
16 BEFORE PERIOD ENDS SOME TIME BETWEEN APRIL OF 2003  
17 AND A YEAR OR SO LATER?

18 A SOME TIME IN THAT PERIOD. PROBABLY NOT QUITE  
19 AS LONG AS A YEAR THE ALLEGED WRONGDOING WOULD  
20 START HAVING AN IMPACT. IT WOULDN'T NECESSARILY  
21 HAVE AN IMPACT ON DAY ONE.

22 Q DO YOU KNOW IF THIS MODEL OF AN IPOD WAS  
23 INTRODUCED BEFORE WHATEVER DATE?

24 A I WOULD HAVE TO GO BACK AND LOOK BUT THERE  
25 WERE ONLY I THINK THREE OR FOUR MODELS INTRODUCED

1 PRIOR TO THAT DATE AND THE REST WERE INTRODUCED  
2 AFTERWARDS.

3 Q DO YOU KNOW WHAT THIS ONE IS?

4 A IT'S ONE OF THE OTHER MODELS IT LOOKS LIKE.

5 Q DO YOU KNOW WHEN IT WAS INTRODUCED?

6 A NO, I HAVEN'T LOOKED TO SEE WHEN EACH ONE WAS  
7 INTRODUCED.

8 Q TO BE CLEAR, YOU HAVE NOT DONE A REGRESSION  
9 MODEL IN THIS CASE; CORRECT?

10 A NO, I HAVE ONLY PROPOSED DOING IT. I HAVEN'T  
11 DONE THEM YET.

12 Q AND YOU YOURSELF HAVE NOT SUBMITTED A  
13 REGRESSION ANALYSIS IN ANY INDIRECT PURCHASER CASE;  
14 IS THAT CORRECT?

15 A ONLY FOR SETTLEMENT PURPOSES IN THE DIAMOND  
16 CASES.

17 Q AND YOU SUBMITTED ONE REGRESSION ANALYSIS IN A  
18 DIRECT PURCHASER CASE AND THAT WAS 15 YEARS AGO;  
19 CORRECT?

20 A FOR THIS PURPOSE, FOR WHAT WE'RE MEASURING  
21 HERE, YES.

22 Q AND YOU DON'T HAVE A COPY OF THAT ONE?

23 A DO I HAVE A COPY OF IT? I WOULD HAVE TO GO  
24 BACK AND LOOK. I PROBABLY DON'T. IT'S A LONG TIME  
25 AGO.

1 Q REMEMBER AT YOUR DEPOSITION I ASKED YOU IF YOU  
2 HAD A COPY AND YOU SAID YOU WOULD LOOK?

3 A I'M AFRAID I DIDN'T AND I SHOULD HAVE, BUT I  
4 HAVEN'T.

5 Q AND -- BUT YOU HAVEN'T PRODUCED A COPY OF?

6 A NO, I HAVEN'T.

7 Q IN FACT, YOU HAVEN'T PRODUCED A COPY OF ANY  
8 REGRESSION YOU HAVE EVER DONE; IS THAT RIGHT? IN  
9 THIS CASE YOU HAVEN'T PRODUCED A COPY?

10 A I DON'T THINK SO.

11 Q IN CLASS CERTIFICATION MATTERS, YOU TESTIFY  
12 FOR PLAINTIFFS; CORRECT?

13 A GENERALLY IN CLASS ACTION CASES MY FIRM AND I  
14 ARE HIRED BY PLAINTIFFS, YES.

15 Q A REGRESSION MODEL CANNOT ISOLATE THE EFFECTS  
16 OF TWO THINGS THAT HAPPEN AT THE SAME TIME AND LAST  
17 FOR THE SAME PERIOD OF TIME; CORRECT?

18 A NOT NECESSARILY.

19 Q AND AT YOUR DEPOSITION YOU DID NOT KNOW HOW TO  
20 ISOLATE THE EFFECT OF A NEW IPOD WITH A USB  
21 CONNECTION FROM THE LAUNCH OF THE ITUNES MUSIC  
22 STORE, ASSUMING THEY HAPPENED AT THE SAME TIME;  
23 CORRECT?

24 A WELL, AT MY DEPOSITION I HADN'T THOUGHT ABOUT  
25 IT BEFORE. SINCE THEN I HAVE SOME AND I THINK

1           THERE MAY BE A WAY TO EXPLORE THAT.

2           Q       AND IN ANY EVENT, AT YOUR DEPOSITION, YOU  
3           HADN'T THOUGHT ABOUT IT OR YOU COULDN'T COME UP  
4           WITH A WAY; CORRECT?

5           A       YEAH, I THINK I HAVE A WAY OF ISOLATING IT NOW  
6           OR DETERMINING IF IT NEEDS TO BE ISOLATED.

7           Q       NOW, IN YOUR REPORT -- AT YOUR DEPOSITION, YOU  
8           TOLD ME -- WELL, STRIKE THAT.

9                        A KEY ELEMENT IN ANY BEFORE AND DURING  
10           REGRESSION ANALYSIS IS TO KNOW THE DATE OF THE  
11           DIVIDING LINE BEFORE THE -- BETWEEN THE BEFORE AND  
12           DURING THE DURING PERIOD; CORRECT?

13           A       WELL, YOU'RE GOING TO HAVE TO ASSIGN A VALUE  
14           OF ONE TO THE INDICATOR VARIABLE IN THE DURING  
15           PERIOD AND A VALUE OF ZERO BEFORE THE PERIOD.

16                        SO YES, YOU HAVE TO KNOW WHEN THE PERIOD  
17           BEGINS, BUT YOU MIGHT NOT KNOW INITIALLY  
18           THEORETICALLY AND YOU MAY HAVE TO RUN THE  
19           REGRESSION MODEL WITH SEVERAL ALTERNATIVE BEGINNING  
20           PERIODS AND LET THE RESULTS TELL YOU WHEN IT WAS  
21           EFFECTIVE VERSUS WHEN IT WASN'T.

22           Q       AT YOUR DEPOSITION YOU SAID THAT THE DIVIDING  
23           DATE COULDN'T POSSIBLY BE BEFORE OCTOBER OF 2003  
24           WHEN ITUNES FOR WINDOWS WAS INTRODUCED; CORRECT?

25           A       I DON'T THINK I SAID POSSIBLY. I SAID IT

1 LIKELY ISN'T BEFORE ITUNES FOR WINDOWS WAS  
2 INTRODUCED, BUT I WOULDN'T RULE THAT OUT. IT'S  
3 POSSIBLE THAT IT BECAME EFFECTIVE WHEN IT WAS JUST  
4 AVAILABLE FOR MACINTOSH COMPUTERS.

5 Q AS YOU SIT HERE TODAY, THOUGH, YOU CAN'T TELL  
6 US WHAT THE START OF THAT PERIOD IS, CAN YOU?

7 A WELL, I THINK IT'S IN THIS WINDOW OF SOME TIME  
8 BETWEEN APRIL OF '03 AND MAYBE AS LONG AS A YEAR  
9 AFTERWARDS AND I WOULD RUN THE MODEL WITH DIFFERENT  
10 ASSUMED STARTING DATES AND SEE WHICH ONE WAS --  
11 REVEALS WHEN IT ACTUALLY HAD AN EFFECT, WHEN IT  
12 STARTED HAVING AN EFFECT.

13 MR. MITTELSTAEDT: NO FURTHER QUESTIONS.

14 THE COURT: ANY REDIRECT?

15 MR. BRISKIN: NO, YOUR HONOR.

16 THE COURT: VERY WELL. THANK YOU VERY  
17 MUCH.

18 DO YOU HAVE FURTHER WITNESSES?

19 MR. BRISKIN: NO, YOUR HONOR.

20 THE COURT: ALL RIGHT. DO YOU HAVE  
21 WITNESSES?

22 MR. MITTELSTAEDT: YES, YOUR HONOR.

23 THE COURT: CALL YOUR WITNESS.

24 MR. MITTELSTAEDT: THE DEFENDANT CALL  
25 DR. BURTIS.



1 THE CLERK: PLEASE RAISE YOUR RIGHT HAND.

2 DR. MICHELLE BURTIS,

3 BEING CALLED AS A WITNESS ON BEHALF OF THE

4 DEFENDANT, HAVING BEEN FIRST DULY SWORN, WAS EXAMINED

5 AND TESTIFIED AS FOLLOWS:

6 THE WITNESS: YES, I DO.

7 THE CLERK: PLEASE BE SEATED.

8 MR. MITTELSTAEDT: YOUR HONOR, I'M GOING

9 TO USE A COUPLE OF CHARTS WITH THE WITNESS AND ASK

10 THE WITNESS TO DRAW ON THE EASEL.

11 WHERE WOULD BE THE BEST PLACE TO DO THAT?

12 THE COURT: PROBABLY UP AGAINST THAT BACK  
13 WALL SO WE CAN ALL SEE IT.

14 THE CLERK: WOULD YOU PLEASE STATE YOUR  
15 NAME AND SPELL YOUR LAST NAME FOR THE RECORD.

16 THE WITNESS: MICHELLE BURTIS,  
17 B-U-R-T-I-S.

18 DIRECT EXAMINATION

19 BY MR. MITTELSTAEDT:

20 Q IF YOU WOULD STATE YOUR OCCUPATION, PLEASE?

21 A I'M AN ECONOMIST.

22 Q AND BY WHOM ARE YOU EMPLOYED?

23 A CORNERSTONE RESEARCH IN WASHINGTON, D.C.

24 Q AND HOW LONG HAVE YOU BEEN AN ECONOMIST?

25 A ABOUT 20 YEARS.

1 Q AND WHAT IS YOUR EDUCATION?

2 A I HAVE A BACHELOR'S DEGREE IN ECONOMICS AND  
3 POLITICAL SCIENCE FROM THE UNIVERSITY OF COLORADO  
4 IN BOULDER AND A PH.D. IN ECONOMICS FROM THE  
5 UNIVERSITY OF TEXAS IN AUSTIN.

6 Q AND DO YOU HAVE EXPERIENCE IN USING AND  
7 EVALUATING REGRESSION ANALYSES?

8 A YES, I DO. I'VE USED REGRESSION AND EVALUATED  
9 REGRESSIONS SINCE I WAS AN UNDERGRADUATE THROUGH MY  
10 EDUCATION AND IN MY WORK AS AN ECONOMIST. I HAVE  
11 EVALUATED THE MODELS THAT PLAINTIFF'S EXPERTS HAVE  
12 PUT FORWARD IN CLASS CERTIFICATION PROCEEDINGS AS  
13 WELL.

14 Q AND HAVE YOU PARTICIPATED IN ANY LAWSUITS  
15 WHERE AT THE CLASS CERTIFICATION STAGE THE  
16 PLAINTIFF'S ECONOMIST ACTUALLY PRODUCED A  
17 REGRESSION MODEL RATHER THAN JUST PROPOSING HOW HE  
18 WOULD GO ABOUT DOING IT?

19 A YES. I WORKED FOR THE DEFENDANTS IN THE GPU  
20 ANTITRUST LITIGATION AND BOTH A DIRECT PURCHASER  
21 AND INDIRECT PURCHASER CASE THE PLAINTIFF'S EXPERTS  
22 ACTUALLY ESTIMATED OR RAN -- THEY COLLECTED THE  
23 DATA AND OBTAINED RESULTS IN THEIR REGRESSION  
24 ANALYSIS.

25 THE COURT: NOW, ALTHOUGH I DIDN'T HAVE

1 DR. BURTIS'S BACKGROUND MATERIAL BEFORE THIS, I  
2 QUICKLY READ THROUGH HER RESUME. I'M SATISFIED  
3 THAT YOU CAN MOVE DIRECTLY TO HER OPINIONS AND THE  
4 REASONS FOR IT.

5 MR. MITTELSTAEDT: OKAY.

6 Q LET'S STEP BACK AT THE START FROM THE ECONOMIC  
7 AND ECONOMETRIC JARGON AND LOOK AT THE BIG PICTURE.  
8 SO I WANT TO ASK YOU A COUPLE OF PRELIMINARY  
9 QUESTIONS.

10 AT HIS DEPOSITION, HOW DID DR. FRENCH  
11 DESCRIBE THE CONDUCT, THE EFFECT OF WHICH HE WAS  
12 TRYING TO MEASURE?

13 A DR. FRENCH -- THE CONDUCT THAT DR. FRENCH WAS  
14 TRYING TO EVALUATE WAS APPLE'S DECISION NOT TO  
15 LICENSE FAIR PLAY FOR THE DRM.

16 Q AND IN BASIC TERMS, HOW IS HE PROPOSING TO DO  
17 THAT?

18 A THE BASIC FRAMEWORK THAT DR. FRENCH IS  
19 PROPOSING HERE WITH HIS REGRESSION ANALYSIS IS A  
20 BEFORE VERSUS DURING COMPARISON.

21 SO WHAT HE'S, HE'S -- WHAT HE'S PROPOSING  
22 TO DO IS TO USE THE PRICES OF IPOD PRODUCTS THAT  
23 WERE SOLD PRIOR TO THE ALLEGED CONDUCT AS A  
24 BENCHMARK FOR THE PRICES OF THE PRODUCTS THAT WERE  
25 SOLD DURING THE ALLEGED CONDUCT.

1                   AND I HAVE SOME EXAMPLES OF PRODUCTS HERE  
2                   AND I CAN SORT OF SHOW YOU WHAT --

3                   Q       SHOW US A COUPLE EXAMPLES OF WHAT HE'S TRYING  
4                   TO DO?

5                   A       SO THIS IS AN IPOD CLASSIC. IT WAS SOLD IN  
6                   2001.

7                               IT'S THE FIRST IPOD. IT HOLDS ABOUT A  
8                   THOUSAND SONGS. IT HAS -- IT'S, YOU KNOW, THE SIZE  
9                   IS KIND OF HEAVY BY TODAY'S STANDARDS. IT HAS A  
10                   LITTLE CLICK WHEEL.

11                               SO THIS SOLD -- APPLE SOLD THIS FOR \$399  
12                   IN 2001. SO THIS IS A PRODUCT THAT HE WOULD USE AS  
13                   A BENCHMARK PRODUCT TO PREDICT THE PRICES OF  
14                   PRODUCTS LIKE THIS.

15                               THIS IS A SHUFFLE THAT WAS RECENTLY  
16                   INTRODUCED IN 2009. IT SELLS FOR \$79 BY APPLE. IT  
17                   HOLDS ABOUT 800 SONGS. YOU CAN WEAR IT. IT TALKS  
18                   TO YOU SINCE IT DOESN'T HAVE A SCREEN. AND YOU CAN  
19                   PRESS A BUTTON AND A VOICE WILL TELL YOU THE SONG  
20                   AND THE PERSON WHO IS PLAYING THE SONG.

21                               UM, AND YOU KNOW, IT'S JUST DIFFERENT  
22                   OBVIOUSLY.

23                               SO THIS IS ANOTHER PRODUCT THAT IS SOLD  
24                   ONLY DURING THE "DURING PERIOD." THIS IS A TOUCH,  
25                   AN ITOUCH. IT HAS A WAY BIGGER SCREEN. AND IT HAS

1 THE ABILITY TO CONNECT TO THE INTERNET. IT HAS  
2 PHOTOS. IT -- THE SCREEN IS, IS, FRANKLY, QUITE  
3 UNUSUAL. YOU CAN FLIP IT AND IT, IT WILL -- LIKE  
4 THIS. AND YOU CAN JUST FLIP IT AND -- SO ANYWAY,  
5 IT HAS FEATURES THAT THIS PRODUCT DOES NOT.

6 BUT THE BASIC IDEA OF DR. FRENCH'S  
7 REGRESSION IS TO TAKE THESE PRODUCTS WITH THESE  
8 FEATURES AND THEIR PRICES AND USE THOSE AS A  
9 BENCHMARK TO PREDICT WHAT THE PRICES OF THESE  
10 PRODUCTS WOULD HAVE BEEN ABSENT THE CONDUCT.

11 Q IF APPLE HAD LICENSED FAIR PLAY?

12 A THAT'S CORRECT.

13 Q AND WHAT WAS THE PRICE OF THE SHUFFLE IN --  
14 WHEN IT WAS INTRODUCED IN 2009?

15 A \$79.

16 Q SO THE PRICE CAME DOWN FROM THE 399 PRICE?

17 A WELL, IT'S A DIFFERENT PRODUCT.

18 Q OKAY.

19 A BUT IT IS A LOWER PRICE, YES.

20 Q OKAY. DO YOU HAVE AN OPINION ON WHETHER  
21 DR. FRENCH'S PROPOSED MODELS FOR PREDICTING WHAT  
22 THE PRICE OF THESE NEW DIFFERENT MODELS DURING THE  
23 "DURING PERIOD" WOULD HAVE BEEN ABSENT THE ALLEGED  
24 CONDUCT?

25 A YES, I DO NOT BELIEVE THAT THE MODEL THAT

1 DR. FRENCH HAS PROPOSED, THE ONE HE HAS DESCRIBED  
2 CAN BE USED TO DETERMINE THE PRICES OF THESE  
3 PRODUCTS THAT WERE INTRODUCED IN THE "DURING  
4 PERIOD."

5 Q OKAY. DID YOU DO A REGRESSION ANALYSIS IN A  
6 PAPER THAT WAS PUBLISHED DEALING WITH THE KATRINA  
7 HURRICANE?

8 A YES.

9 Q IN YOUR REPORT YOU WALK THROUGH EXAMPLES OF  
10 HOW REGRESSION ANALYSES WORK.

11 I'D LIKE TO ASK YOU TO USE YOUR  
12 REGRESSION ANALYSIS FOR THE KATRINA HURRICANE TO  
13 EXPLAIN BASICALLY HOW REGRESSIONS WORK AND THEN USE  
14 THAT AS THE BASIS FOR EXPLAINING YOUR OPINION THAT  
15 DR. FRENCH'S PROPOSED MODELS WILL NOT WORK.

16 A OKAY.

17 Q FIRST OF ALL, WHAT WAS -- WHAT WERE THE EVENTS  
18 THAT YOU WERE TRYING TO ANALYZE IN THE REGRESSION  
19 MODEL FOR THE HURRICANE KATRINA?

20 AND, YOUR HONOR, WOULD IT BE OKAY FOR THE  
21 WITNESS TO GO TO THE EASEL AND DRAW THIS?

22 THE COURT: SURE.

23 LIZ, WE HAVE A LAPEL MIKE. I DON'T KNOW  
24 IF WE'RE DOWN TO ONE.

25 THE CLERK: WE DO NOT.

1 THE COURT: WE DON'T. THERE'S A MIKE  
2 SITTING ON THE FLOOR DOWN BY MY -- THE THING THAT  
3 JACKSON TOOK OUT.

4 THE CLERK: THOSE WERE TO ANOTHER  
5 COURTROOM. THEY WERE SITTING RIGHT HERE  
6 (INDICATING)?

7 THE COURT: NO, NO.

8 (DISCUSSION OFF THE RECORD.)

9 THE COURT: GO AHEAD. WE'LL TRY AND GET  
10 YOU A MIKE.

11 THE WITNESS: OKAY. SO I WROTE A PAPER  
12 ABOUT THE EFFECT OF THE HURRICANE KATRINA ON CRACK  
13 SPREADS. AND A CRACK SPREAD IS LIKE A REFINER'S  
14 MARGIN. IT'S THE DIFFERENCE BETWEEN THE PRICE, THE  
15 SPOT PRICE OF THE PETROLEUM PRODUCT AND THE CRUDE  
16 PRICE.

17 SO WHAT HAPPENED IS DURING -- WELL, CRACK  
18 SPREADS BECAUSE THEY'RE BASED ON SPOT PRICES ARE  
19 QUITE VOLATILE. THEY MOVE AROUND DAY-TO-DAY,  
20 WEEK-TO-WEEK.

21 AND WHAT HAPPENED WHEN KATRINA OCCURRED  
22 IS THAT THERE WAS A TREMENDOUS INCREASE IN THE  
23 PRICE OF PETROLEUM PRODUCTS IN THE GULF AND OTHER  
24 PLACES IN THE UNITED STATES AS WELL WHICH CAUSED A  
25 REALLY LARGE INCREASE IN THE REFINER'S MARGINS,

1 THESE CRACK SPREADS .

2 IN FACT, YOU KNOW, IF YOU REMEMBER THERE  
3 WAS RITA THAT CAME ABOUT A MONTH AFTERWARD. AND IT  
4 HAD A SIMILAR EFFECT. AND SO THE MODEL, I DID A  
5 REGRESSION MODEL TO TRY TO PREDICT WHAT THE CRACK  
6 SPREADS WOULD HAVE BEEN HAD THERE BEEN NO KATRINA.  
7 BY MR. MITTELSTAEDT:

8 Q WHEN YOU'VE DRAWN THE SQUIGGLY LINE BEFORE THE  
9 EFFECT OF THE HURRICANE, FOR HOW LONG OF A TIME  
10 PERIOD DID YOU HAVE DATA?

11 A YEAH, THIS WAS NOT REALLY DRAWN TO SCALE.  
12 THIS IS ABOUT A FIVE-YEAR PERIOD. THIS IS -- THIS  
13 REALLY WAS ABOUT A TWO-WEEK PERIOD.

14 Q OKAY.

15 A AND BASICALLY WHAT I DID IS I TRIED TO  
16 UNDERSTAND THE FACTORS THAT DETERMINED CRACK  
17 SPREADS. I IDENTIFIED THOSE FACTORS, COLLECTED  
18 DATA ON EACH OF THEM, AND THEN RAN A REGRESSION  
19 MODEL OVER THIS PERIOD OF TIME WITH THOSE FACTORS.

20 SO, FOR EXAMPLE, THE CRACK SPREAD ITSELF  
21 IS WHAT I'M TRYING TO EXPLAIN. AND THE EXPLANATORY  
22 VARIABLES THAT I USED WERE THE CRACK SPREAD IN THE  
23 PRIOR WEEK WHICH IS IT TURNS OUT TO BE A VERY  
24 IMPORTANT VARIABLE, CRUDE PRICES, INVENTORY LEVELS,  
25 AND SOME SEASONAL VARIABLES.



1           SO I COLLECTED DATA ON ALL OF THESE  
2 FACTORS OVER THIS FIVE-YEAR PERIOD. I USED THAT  
3 DATA IN THE REGRESSION. OUT OF THAT DATA I GOT  
4 RESULTS FOR EACH ONE OF THESE VARIABLES  
5 (INDICATING).

6           AND THEN WITH THE ACTUAL DATA, FOR  
7 EXAMPLE, FOR CRUDE PRICES IN THIS PERIOD I PLUGGED  
8 THE RESULTS OF THE REGRESSION IN WITH THIS DATA TO  
9 GET A PREDICTION OF WHAT THE CRACK SPREADS WOULD BE  
10 DURING THIS PERIOD OF TIME.

11 Q       OKAY. NOW, IF YOU WERE ABLE TO DO THAT WITH  
12 THAT DATA, I WANT TO TALK TO YOU ABOUT WHY  
13 DR. FRENCH'S PROPOSED MODEL WON'T WORK HERE.

14           AND LET'S GO THROUGH THE VARIOUS REASONS.  
15 IF YOU WOULD START WITH THE FIRST REASON WHY  
16 DR. FRENCH'S MODEL WILL NOT WORK.

17 A       OKAY. WELL, WHAT I WAS DOING HERE WAS IN THIS  
18 FIVE-YEAR PERIOD AND MY BEFORE PERIOD IS I WAS  
19 USING CRACK SPREADS. I WAS PREDICTING CRACK  
20 SPREADS.

21           WHAT DR. FRENCH IS DOING IS THAT HE IS  
22 USING CERTAIN PRODUCTS IN HIS BEFORE PERIOD TO  
23 PREDICT THE PRICES OF COMPLETELY DIFFERENT  
24 PRODUCTS.

25           IT WOULD BE AS THOUGH IN MY REGRESSION I

1 WAS USING THIS FIVE YEARS WORTH OF DATA TO PREDICT  
2 THE PRICES OF CRACK SPREADS IN MY REGRESSION BUT  
3 THEN I WANTED TO USE THAT -- THOSE REGRESSION  
4 RESULTS TO PREDICT THE PRICE OF SOME NEW ETHANOL  
5 PRODUCT THAT WAS INTRODUCED AFTER THE HURRICANE.

6 I COULDN'T DO THAT. MY MODEL WOULD NOT  
7 DO THAT AND SO THAT'S A FUNDAMENTAL DIFFERENCE  
8 BETWEEN WHAT DR. FRENCH IS PROPOSING TO DO HERE AND  
9 WHAT I DID IN THIS REGRESSION.

10 Q OKAY. LET'S TALK ABOUT THE DIFFERENT FEATURES  
11 OR DIFFERENT DEMAND FEATURES OR FACTORS THAT CAME  
12 INTO PLAY ONLY IN THE "DURING PERIOD" IN THIS CASE.

13 AND LET ME PUT THIS CHART UP. IF YOU  
14 WOULD LOOK AT IT ON YOUR SCREEN.

15 A OKAY.

16 Q WHAT DOES THIS CHART DEPICT?

17 A THESE ARE FACTORS THAT AFFECTED THE DEMAND FOR  
18 IPOD, AT LEAST POTENTIALLY, THAT EXISTED ONLY  
19 DURING THE DURING PERIOD.

20 SO, FOR EXAMPLE, UM, WELL, I'LL TAKE ONE  
21 OF THESE, THE VIDEO PLAYBACK. THAT'S A FEATURE  
22 THAT DID NOT EXIST IN THE PRIOR PERIOD, IN THE  
23 BEFORE PERIOD.

24 WHAT DR. FRENCH'S MODEL CAN'T DO IS THAT  
25 IT CANNOT -- THERE'S NO BENCHMARK FOR THE VALUE OF

1 THE VIDEO PLAY BACK.

2 SO HE -- HIS MODEL CANNOT DISTINGUISH THE  
3 VALUE OF VIDEO PLAYBACK FROM ANY OVERCHARGE THAT HE  
4 MIGHT MEASURE.

5 Q AND ANY OVERCHARGE THAT HE WOULD ATTRIBUTE TO  
6 THE NONLICENSING OF FAIR PLAY?

7 A THAT'S CORRECT. AGAIN, REMEMBER, HIS APPROACH  
8 IS AS HE DESCRIBED IT JUST NOW, A DUMMY VARIABLE  
9 APPROACH, WHICH MEANS THAT IT'S JUST A ZERO ONE.  
10 IT DOESN'T SAY, OH, HERE'S, HERE'S -- I'M ACTUALLY  
11 MEASURING THE EFFECT OF THIS CONDUCT.

12 THE DUMMY VARIABLE IS JUST PICKING UP  
13 WHAT IS DIFFERENT ABOUT THE TWO PERIODS.

14 AND VIDEO PLAY BACK IS SOMETHING THAT IS  
15 DIFFERENT IN THE TWO PERIODS.

16 Q OKAY. SO, FOR EXAMPLE, IF VIDEO PLAYBACK HAD  
17 X PERCENT EFFECT ON THE PRICE OF AN IPOD, AND  
18 DR. FRENCH DIDN'T INCLUDE THAT AND JUST PUT IN HIS  
19 DUMMY VARIABLE, WHAT WOULD THE DUMMY VARIABLE SHOW?

20 A IT WOULD BE X PERCENT OR IT WOULD BE THE X  
21 PERCENT WOULD GET SOAKED UP, IF YOU WILL, IN THE  
22 DUMMY VARIABLE COEFFICIENT.

23 Q OKAY. LET'S GO TO THE SECOND DEFECT IN WHAT  
24 DR. FRENCH HAS PROPOSED COMPARED TO WHAT YOU DID  
25 WITH KATRINA.

1 A WELL, THE SECOND PROBLEM OR THE DIFFERENCE  
2 BETWEEN WHAT I WAS DOING AND WHAT DR. FRENCH  
3 PROPOSES TO DO IS THAT I WAS NOT TRYING TO PICK UP  
4 THE EFFECT OF HURRICANE KATRINA. I KNEW THERE WAS  
5 AN EFFECT. I COULD SEE IT IN THE DATA. THERE WAS  
6 A HUGE SPIKE. EVERYBODY KNEW THERE WAS A  
7 HURRICANE. I KNEW THE DATE OF THE HURRICANE.

8 DR. FRENCH IS DOING SOMETHING DIFFERENT.  
9 HE'S LOOKING TO SEE WHETHER OR NOT THERE IS AN  
10 IMPACT OF SOME CONTACT. AND THAT'S VERY -- THOSE  
11 ARE VERY DIFFERENT THINGS.

12 Q OKAY. A THIRD DIFFERENCE HAVING TO DO WITH  
13 DATA?

14 A YES. OKAY. SO, AS I SAID, THIS WAS FIVE  
15 YEARS OF DATA THAT I HAD IN MY REGRESSION. IT WAS  
16 WEEKLY DATA. SO I HAD QUITE A BIT OF DATA.

17 BUT THE OTHER NICE THING THAT I HAD WAS  
18 THAT MY DATA MOVED AROUND A LOT. AND SO THE WAY  
19 THAT A REGRESSION WORKS, ANY REGRESSION, IT WORKS  
20 BY SORT OF CORRELATING THE MOVEMENTS IN THESE  
21 VARIABLES WITH THE MOVEMENT IN THIS VARIABLE.

22 SO IF YOU HAVE A LOT OF MOVEMENT IN YOUR  
23 DATA, A LOT OF CHANGES, THAT'S A LOT OF INFORMATION  
24 FOR THE REGRESSION. IT HELPS THE REGRESSION, YOU  
25 KNOW, PROVIDE A RELIABLE RESULT.

1 IF YOU DON'T, IF YOU JUST HAVE PERIODS OF  
2 TIME WHERE THERE'S NO CHANGES, THEN THERE'S NOT  
3 INFORMATION FOR THE REGRESSION TO PRODUCE RELIABLE  
4 RESULTS.

5 SO HERE I HAD A FAIRLY GOOD AMOUNT OF  
6 DATA, AND IT WAS QUITE VARIABLE BECAUSE THESE  
7 THINGS CHANGE. THESE THINGS CHANGE EVERY SINGLE  
8 DAY.

9 BY CONTRAST, DR. FRENCH'S BEFORE PERIOD  
10 HAS FEW PRODUCTS AND FEW PRICES.

11 Q DO YOU HAVE A CHART THAT REFLECTS THAT?

12 A YES.

13 Q IT'S ACTUALLY ON THE BACK OF THAT ONE. CAN  
14 YOU TURN THAT ONE AROUND?

15 A YES.

16 Q LET ME HELP YOU. OKAY. IF YOU WOULD DESCRIBE  
17 THIS CHART, PLEASE.

18 A THESE ARE THE PRICES OF IPODS, THESE ARE THE  
19 RETAIL PRICES THAT APPLE SOLD IN IPODS FROM OCTOBER  
20 OF 2001 THROUGH JANUARY OF 2004, WHICH, YOU KNOW,  
21 BASED ON WHAT DR. FRENCH HAD DESCRIBED EARLIER, I  
22 THINK WOULD ENCOMPASS THE DATES HE WOULD SELECT  
23 POSSIBLY AS THE BEFORE PERIOD.

24 WHAT THIS CHART SHOWS IS DIFFERENT  
25 GENERATIONS OF IPODS. THESE ARE THE GREEN ONES ARE

1 ALL ONE GENERATION. THEY ARE ALSO LABELLED IN  
2 TERMS OF THE CAPACITY. SO 5 GIGABYTE IS A 1000  
3 SONGS, 10 GIGABYTES IS 2000 SONGS.

4 AND SO A FEW THINGS ABOUT THE CHART.  
5 FIRST THERE AREN'T VERY MANY PRICES. TWO IS THAT  
6 THE PRICES TEND TO GO DOWN.

7 YOU CAN SEE HERE'S THE 10 GIGABYTE GOING  
8 DOWN, 5 GIGABYTE GOING DOWN, BUT THERE'S NOT A LOT  
9 OF CHANGES. IT'S NOT LIKE IT'S HAPPENING EVERY  
10 WEEK.

11 THIS IS OCTOBER OF 2001, AND THE NEXT  
12 PRICE CHANGE IS JULY OF 2002. SO THERE'S, YOU  
13 KNOW, A FAIR AMOUNT OF TIME WHERE THE PRICES ARE  
14 JUST, YOU KNOW, STEADY.

15 Q AND, DR. BURTIS, THE JULY 2002 LINE, THE TOP  
16 TWO ENTRIES THERE, THOSE DIAMONDS, THAT REFLECTS  
17 WHAT?

18 A YEAH. SO THIS IS THE NEW GENERATION OF THE  
19 PRODUCT AND WHAT YOU TEND TO SEE IS THAT THE PRICE  
20 REDUCTIONS IN THE PRIOR GENERATION OCCUR WHEN THE  
21 NEXT GENERATION GETS INTRODUCED.

22 SO, YOU KNOW, THE NEW 10 GIGABYTE CAME  
23 OUT AND THE OLD 10 GIGABYTE PRICE FALLS. THAT IS  
24 THE, THE -- A VERY TYPICAL PATTERN.

25 Q AND THEN IT'S REPEATED WITH THE APRIL 2003

1 THIRD GENERATION?

2 A RIGHT. THESE ARE THE RED ONES.

3 Q OKAY.

4 A YES.

5 Q SO JUST TO GO ACROSS THE TOP LINE AT 499, THE  
6 10 GIGABYTE FIRST GENERATION IS INTRODUCED IN MARCH  
7 OF 2002; AND THEN IN JULY OF 2002 THE SECOND  
8 GENERATION WITH TWICE THE CAPACITY FOR THE SAME  
9 PRICE; AND THEN IN APRIL OF 2003 THE THIRD  
10 GENERATION AT AN ADDITIONAL 10 GIGABYTE AND THE  
11 PRICE STAYS THE SAME FOR THE GREATER CAPACITY AND  
12 ADDITIONAL FEATURES OF THE THIRD GENERATION?

13 A RIGHT.

14 Q OKAY. NOW, THERE IS NO SPIKE IN PRICES  
15 FORMING THE DIVIDING LINE BETWEEN THE BEFORE AND  
16 DURING PERIOD ON THE IPOD CHART COMPARED WITH YOUR  
17 KATRINA CHART. WHAT IS THE SIGNIFICANCE OF THAT?

18 A WELL, IT, AS I SAID BEFORE, THERE'S NO  
19 OBVIOUS -- IT'S NOT OBVIOUS WHAT WE'RE LOOKING FOR  
20 HERE.

21 IT'S WHAT DR. FRENCH'S PROPOSED MODEL IS  
22 SUPPOSED TO DO IS TO, IS, YOU KNOW, DETECT THIS  
23 SOMEHOW.

24 AND IN MY KATRINA EXAMPLE IT WAS EASY,  
25 YOU DIDN'T HAVE TO LOOK TOO HARD TO PREDICT IT. IT

1 WAS OBVIOUS. HERE IT IS NOT SO OBVIOUS AND THAT  
2 MAKES IT MORE DIFFICULT. IT MAKES IT MORE  
3 DIFFICULT TO SEE WHAT THE EFFECT OF SOMETHING IS.

4 Q OKAY. AND IF YOU WOULD TAKE YOUR SEAT AND  
5 LET'S TURN TO YOUR REVIEW OF PRICES IN THE LATER  
6 PERIOD IN THE "DURING PAPER" AND LET ME PUT THIS  
7 CHART UP.

8 CAN YOU BRIEFLY EXPLAIN WHAT THIS CHART  
9 IS AND THE SIGNIFICANCE OF IT?

10 A YEAH, THIS IS A CHART THAT SHOWS THE DATES OF  
11 INTRODUCTION OF DIFFERENT PRODUCTS.

12 MINE IS PRETTY BLURRY.

13 MS. HAEGGQUIST: YEAH, SO IS MINE. I WAS  
14 JUST GOING TO INTERRUPT.

15 MR. MITTELSTAEDT: OKAY, LET'S FOCUS IT.

16 THE COURT: YES, AND YOU ALSO HAVE THE  
17 BOTTOM LIGHT ON WHICH IS THE X-RAY LIGHT INSTEAD OF  
18 THE TOP LIGHT.

19 MR. MITTELSTAEDT: IS THAT BETTER?

20 THE WITNESS: A LITTLE BIT. IT APPEARS  
21 TO BE.

22 THE COURT: YOU CAN ZOOM IN A LITTLE BIT  
23 SO WE CAN SEE THE -- I TAUGHT THIS CLASS ON  
24 ELECTRONIC EVIDENCE AND WE HAD A WHOLE SESSION ON  
25 ELMO USE.



1 MR. MITTELSTAEDT: I'LL TELL YOU, I'M OLD  
2 FASHIONED ENOUGH. CAN I JUST USE A HARD COPY?

3 THE COURT: SURE. YOU CAN GIVE THAT TO  
4 THE WITNESS, BUT IT HELPS US TO SEE IT AS WELL.  
5 THE MONITOR I NOTICE IS NOT ON FOR MY JURY OVER  
6 THERE.

7 SO WE GET OUR ORIENTATION ON IT, CAN YOU  
8 ZOOM IN ON IT SO WE CAN JUST KIND OF SEE IT.

9 THERE YOU GO. JUST SLIDE IT OVER SO WE  
10 CAN SEE THE DATA LINE. COME IN EVEN CLOSER.

11 AND THERE'S AN AUTOFOCUS BUTTON THAT WILL  
12 HELP YOU THERE.

13 THERE YOU GO.

14 BY MR. MITTELSTAEDT:

15 Q I THINK YOU CAN COME IN EVEN CLOSER. LIKE  
16 THAT?

17 OKAY. IF YOU WOULD JUST WALK US THROUGH  
18 THAT BRIEFLY.

19 A OKAY. SO THIS IS A CHART THAT SHOWS THE DATES  
20 THAT DIFFERENT PRODUCTS WERE AVAILABLE.

21 AND THE RED AND BLUE ARE JUST -- WERE  
22 JUST ALTERNATING COLORS THERE SO THAT IT'S EASIER  
23 TO SEE THE DIFFERENT PRODUCTS.

24 BUT BASICALLY WHAT THIS SHOWS, AND THE  
25 LINE IS DRAWN SEPARATING THE LAST -- REALLY, THE

1 LINE IS DRAWN FOR JANUARY OF 2004. AND SO WHAT  
2 THIS SHOWS IS A FEW THINGS.

3 ONE IS THAT THERE ARE ONLY A FEW PRODUCTS  
4 THAT ARE SOLD IN BOTH THE BEFORE PERIOD AND THE  
5 DURING PERIOD.

6 AND THOSE ARE THE PRODUCTS REALLY THAT  
7 ARE GOING TO BE USED, YOU KNOW, BECAUSE YOU CAN  
8 ACTUALLY COMPARE THEM IN THE TWO -- THEIR PRICES IN  
9 THE TWO PERIODS, THOSE ARE GOING TO BE THE ONES  
10 THAT, THAT -- THOSE ARE THE BENCHMARK PRODUCTS  
11 REALLY.

12 THE SECOND THING IS THAT THERE ARE, YOU  
13 KNOW, ALMOST -- WELL, THERE ARE HOWEVER MANY THERE  
14 ARE, NUMEROUS PRODUCTS THAT ARE SOLD ONLY DURING  
15 THE DURING PERIOD.

16 Q AND WHEN YOU LOOKED AT THE PRICES, WHAT  
17 PATTERN DID YOU SEE IN THE DURING PRICES?

18 A WELL, IT'S A VERY SIMILAR PATTERN. THE PRICES  
19 TEND TO BE STABLE FOR FAIRLY LONG PERIODS OF TIME.  
20 THEY'RE NOT MOVING AROUND WEEK-TO-WEEK OR ANYTHING.

21 THEY TEND TO GO DOWN. AND THEY GO DOWN  
22 WHEN THE NEXT GENERATION OF PRODUCT IS INTRODUCED.

23 Q SO WE'RE DEALING WITH PRICE DECREASES DURING  
24 THE DURING PERIOD?

25 A YES.

1 Q OKAY. LET'S GO TO THE FOURTH REASON. WAS  
2 THERE ANY DIFFERENCE IN THE TYPES OF VARIABLES THAT  
3 YOU USED AND THAT DR. FRENCH IS PROPOSING TO USE?

4 A THERE IS A DIFFERENCE BECAUSE THE VARIABLES  
5 THAT I HAVE USED IN THE KATRINA PAPER WERE -- I WAS  
6 FAIRLY COMFORTABLE THAT THOSE WERE THE IMPORTANT  
7 VARIABLES THAT WERE -- THAT I COULD USE TO PREDICT  
8 CRACK SPREADS AND IMPORTANTLY I COULD COLLECT DATA  
9 ON ALL OF THOSE VARIABLES.

10 I COULD ACTUALLY INCLUDE THEM IN MY  
11 MODEL.

12 IN THIS CASE -- SHOULD I TAKE ONE OF  
13 THESE OFF? DOES IT SOUND GOOD?

14 THE COURT: NO, IT SOUNDS FINE. BUT  
15 MS. GARCIA CAN ADJUST IT. IS IT TOO LOUD TO YOU?

16 MR. MITTELSTAEDT: YOU'RE DOUBLE MIKED  
17 NOW.

18 THE WITNESS: EVERY ONCE IN A WHILE IT  
19 SEEMS LIKE I WAS BOOMING, BUT IF IT'S OKAY.

20 THE COURT: BOOMING IS GOOD.

21 THE WITNESS: OH, OKAY.

22 SO IN THIS CASE FOR IPODS THERE ARE  
23 FACTORS THAT MAY AFFECT THE PRICE OF IPODS THAT ARE  
24 NOT MEASURABLE.

25 IN MY REPORT I TALK ABOUT COOLNESS, THAT

1 PEOPLE BUY THIS PRODUCT, THE DEMAND FOR THIS  
2 PRODUCT IS AFFECTED BY THE PERCEPTION THAT IT'S  
3 COOL.

4 THERE'S NO DATA ON COOLNESS. AND SO WHAT  
5 THAT MEANS IS YOU CAN'T PUT THAT VARIABLE IN THE  
6 EQUATION. YOU CAN'T PUT IT IN THE REGRESSION.

7 AND IF THERE IS AN IMPORTANT VARIABLE  
8 THAT YOU CANNOT PUT IN THE REGRESSION, THEN THE  
9 RESULTS THAT YOU GET OUT OF THE REGRESSION THAT YOU  
10 ACTUALLY RUN WILL BE WRONG.

11 YOU KNOW, IN KATRINA CRACK SPREADS  
12 WEREN'T COOL. I DIDN'T HAVE THAT PROBLEM.

13 ANOTHER EXAMPLE IS APPLE'S PRICING  
14 STRATEGY. YOU SEE THEIR PRICES ARE CONSTANT OVER A  
15 FAIRLY LONG PERIOD OF TIME. THAT MEANS THAT THESE,  
16 YOU KNOW, THESE PRODUCTS HAVE HUNDREDS OF  
17 COMPONENTS. AND IT'S VERY, IT'S VERY LIKELY THAT,  
18 THAT THE PRODUCT -- THE COST OF SOME OF THOSE  
19 COMPONENTS ARE MOVING AROUND OVER THE SIX-MONTH  
20 PERIOD OR YEAR PERIOD THAT THE PRICE IS CONSTANT.

21 SO APPLE HAS DECIDED, FOR WHATEVER  
22 REASON, THAT IT WANTS TO KEEP ITS PRICES AT A  
23 CERTAIN LEVEL.

24 SO THAT'S ANOTHER PRICING STRATEGY, YOU  
25 KNOW, IT'S A VARIABLE THAT IS VERY DIFFICULT TO

1 MEASURE AND TO INCLUDE IN A REGRESSION.

2 YOU MAY NOT BE ABLE TO MEASURE IT AND PUT  
3 IT IN THE REGRESSION.

4 BY MR. MITTELSTAEDT:

5 Q OKAY. LET'S GO TO THE FIFTH AND FOR THIS  
6 MORNING THE FINAL DIFFERENCE BETWEEN WHAT YOU DID  
7 AND WHAT DR. FRENCH IS PROPOSING, SIMULTANEITY, CAN  
8 YOU DISCUSS THAT?

9 A YES. WHAT I MEAN BY THAT IS THAT THERE ARE  
10 EVENTS THAT OCCUR AT THE SAME TIME AS THE DUMMY  
11 VARIABLE THAT DR. FRENCH WANTS TO USE TO MEASURE  
12 IMPACT.

13 SO I'M JUST GOING TO GO OVER HERE ONE  
14 MORE TIME. SO WE DON'T KNOW WHEN THE BEGINNING OF  
15 THE IMPACT PERIOD IS.

16 AND -- BUT AT VARIOUS TIMES I THINK MAYBE  
17 EVEN TODAY DR. FRENCH SUGGESTED THAT APRIL OF 2003  
18 COULD BE A POSSIBLE DATE THAT HE WOULD USE AS THE  
19 BEGINNING OF THE IMPACT PERIOD.

20 AND REMEMBER THE WAY THAT THIS WORKS IS  
21 IF THAT'S THE DATE, THEN HIS DUMMY VARIABLE IS  
22 SIMPLY ZERO BEFORE THAT DATE AND THEN ONE AFTER  
23 THAT DATE.

24 AND THAT VARIABLE, WHICH HE CALLS THE  
25 MISCONDUCT INDICATOR VARIABLE, IS GOING TO PICK UP

1           WHATEVER DIFFERENCES THERE ARE BETWEEN THAT PERIOD  
2           AND THAT PERIOD.

3                       SO IF APRIL 2003 IS THE DATE THAT HE  
4           SELECTS, THERE WERE OTHER -- THERE WERE THINGS THAT  
5           HAPPENED IN APRIL OF 2003.  THERE WAS THE  
6           INTRODUCTION OF THE MUSIC STORE.

7                       THERE WERE -- THERE WAS THE INTRODUCTION  
8           OF NEW PRODUCTS.

9                       AND SO TO THE EXTENT THAT THOSE THINGS  
10          CAUSED AN INCREASE IN A DEMAND FOR IPODS AND LED TO  
11          IPOD PRICES BEING HIGHER, HIS MISCONDUCT VARIABLE  
12          WILL PICK THAT UP.

13                      BUT HE WILL ATTRIBUTE THAT TO MISCONDUCT  
14          WHEN, IN FACT, ALL THAT MAY BE HAPPENING IS IPOD  
15          DEMAND WENT UP BECAUSE THERE ARE MORE PRODUCTS OR  
16          IPOD DEMAND WENT UP BECAUSE THERE WAS THE ITUNES  
17          MUSIC STORE WHICH IS, YOU KNOW, THAT'S NOT THE  
18          ALLEGED CONDUCT HERE.

19                      SIMILARLY HE TALKS ABOUT OCTOBER 2003  
20          BEING A POSSIBLE DATE.  AROUND OCTOBER OF 2003  
21          THERE WAS THE INTRODUCTION OF NEW PRODUCTS.

22                      IN OCTOBER OF 2003, ITUNES BECAME  
23          AVAILABLE FOR WINDOWS.

24                      AND WHAT THAT MEANT IS THAT THE -- YOU  
25          KNOW, YOU COULDN'T REALLY USE AN IPOD IF YOU HAD A

1 WINDOWS COMPUTER UNTIL OCTOBER OF 2003.

2 AND AT THAT TIME I DON'T KNOW WHAT THE  
3 PERCENTAGE WAS ABOUT 90, 95 PERCENT OF THE  
4 COMPUTERS WERE WINDOWS COMPUTERS.

5 SO THAT EVENT IN OCTOBER OF 2003  
6 CERTAINLY COULD HAVE INCREASED THE DEMAND FOR  
7 IPODS.

8 SO IF THE MISCONDUCT VARIABLE IS OCTOBER  
9 2003 THEN, THEN -- AND YOU GET A NUMBER, IF YOU GET  
10 10, THEN MAYBE YOU'RE JUST PICKING UP THE FACT THAT  
11 ITUNES FOR WINDOWS WAS NOW AVAILABLE.

12 ANOTHER TIME IN HIS DEPOSITION DR. FRENCH  
13 SUGGESTED THAT A COUPLE MONTHS AFTER ITUNES FOR  
14 WINDOWS BECAME AVAILABLE SHOULD BE THE DATE.  
15 AGAIN, THAT COULD BE THE INTRODUCTION OF NEW  
16 PRODUCTS.

17 OR IT COULD JUST BE THAT, YOU KNOW, A  
18 COUPLE OF MONTHS -- IT TOOK A COUPLE MONTHS FOR  
19 PEOPLE WITH WINDOWS COMPUTERS TO START BUYING  
20 IPODS.

21 SO THE PROBLEM HERE IS THAT WHEN YOU USE  
22 A DUMMY VARIABLE, IF YOU WANT TO USE A DUMMY  
23 VARIABLE, YOU HAVE TO BE SURE THAT THERE ARE NO  
24 OTHER EVENTS THAT ARE OCCURRING, THAT ARE OCCURRING  
25 AT THAT TIME BECAUSE IF THERE ARE, THE COEFFICIENT

1 THAT YOU GET OUT OF THAT REGRESSION IS -- IT CANNOT  
2 TELL YOU HOW MUCH IS MISCONDUCT AND HOW MUCH IS THE  
3 INTRODUCTION OF ITUNES. IT CAN'T. THERE'S ONLY  
4 ONE COEFFICIENT, AND THERE'S ONLY ONE NUMBER AND  
5 IT'S NOT GOING TO TELL YOU HOW MUCH IS, YOU KNOW,  
6 WHICH OF THOSE EFFECTS.

7 Q OKAY. THANK YOU. NOW, AS A RESULT -- YOU CAN  
8 TAKE YOUR SEAT, IF YOU WOULD.

9 AS A RESULT OF ALL OF THOSE DIFFERENCES,  
10 THE FIVE DIFFERENCES BETWEEN WHAT YOU DID AND WHAT  
11 DR. FRENCH PROPOSES TO DO, HOW DOES THAT AFFECT HIS  
12 ABILITY TO COME UP WITH A REGRESSION THAT ACTUALLY  
13 WORKS?

14 A WELL, YOU KNOW, I DO NOT BELIEVE HIS MODEL. I  
15 DON'T BELIEVE THAT THE ANSWER THAT HE WOULD GET OUT  
16 OF THE MODEL WOULD RELIABLY SHOW OR MEASURE IMPACT.

17 Q LET'S TALK BRIEFLY ABOUT THIS START DATE FOR  
18 THE ALLEGED IMPACT PERIOD IF THERE WAS ANY IMPACT.

19 AT HIS DEPOSITION, NOT TODAY, BUT AT HIS  
20 DEPOSITION HE SAID THAT HE WOULD DETERMINE THE  
21 START DATE BY LOOKING AT MUSIC SALES AND LOOKING TO  
22 SEE WHEN THERE WAS A QUANTUM LEAP IN MUSIC SALES.

23 DO YOU REMEMBER THAT?

24 A YES.

25 Q AND WHY DOESN'T THAT WORK?



1           A        BECAUSE -- SO WHAT HE'S TRYING TO FIGURE OUT  
2           IS AT WHAT POINT IN TIME WERE PEOPLE BUYING IPODS  
3           BECAUSE EVEN THOUGH THEY WANTED TO BUY SOME OTHER  
4           MP3 PLAYER, THAT'S WHAT HE WANTS TO FIND THERE'S NO  
5           REALLY CONNECTION BETWEEN THAT, BETWEEN WHAT HE'S  
6           TRYING TO FIND, AND JUST LOOKING AT MUSIC SALES.

7                    IN ORDER TO DETERMINE WHAT HE WANTS TO  
8           DETERMINE, HE WOULD HAVE TO UNDERSTAND WHY PEOPLE  
9           WERE BUYING IPODS AND WHETHER OR NOT THEY WERE  
10          BUYING IPODS BECAUSE THEY LIKED IPODS OR THEY  
11          HAD -- THEY FELT THAT THEY HAD TO BUY IPODS, YOU  
12          KNOW, THAT'S THE ISSUE.

13          Q        OKAY. YOU HEARD DR. FRENCH SAY THAT THE  
14          THEORY WAS THAT APPLE SHOULD HAVE LICENSED FAIR  
15          PLAY AT SOME POINT AND HE ACKNOWLEDGED THAT APPLE  
16          COULD CHARGE A REASONABLE ROYALTY FOR THAT.

17                   DOES HIS MODEL TAKE INTO ACCOUNT THAT  
18          APPLE COULD CHARGE A REASONABLE ROYALTY IN THE  
19          BUT-FOR WORLD UNDER THE PLAINTIFF'S THEORY?

20          A        NO. AT LEAST AS HE HAS DESCRIBED IT, HE DOES  
21          NOT -- IT DOES NOT TAKE THAT INTO ACCOUNT.

22                   AND, OF COURSE, THE ISSUE THERE IS THAT  
23          IF THESE COMPETITORS WERE PAYING APPLE A ROYALTY,  
24          THE, THE -- THEY WOULD BE AT A COMPETITIVE  
25          DISADVANTAGE FOR THAT REASON BECAUSE THEIR COSTS

1           WOULD BE HIGHER.

2                         SO THAT WOULD HAVE THE -- THAT WOULD TEND  
3           TO HAVE THE OPPOSITE EFFECT MAKING IPOD PRICES  
4           HIGHER.

5           Q        OKAY.  SO IS IT POSSIBLE THAT GIVEN THE  
6           ROYALTIES THAT WOULD BE PAID BY CUSTOMERS BY  
7           COMPETITORS THAT THERE WOULD BE NO CHANGE IN THE  
8           IPOD PRICE?

9           A        IT'S CERTAINLY POSSIBLE.

10          Q        LET'S SAY THAT THERE IS SOME IMPACT, BUT IT'S  
11          SMALL.  DOES THE SIZE OF THE IMPACT AFFECT WHETHER  
12          HIS MODEL WOULD WORK IN DETECTING THAT IMPACT, IF  
13          ANY?

14          A        YES.  SO ANY REGRESSION, THE RESULTS OF ANY  
15          REGRESSION ARE STATISTICS.

16                         AND AROUND THOSE, YOU KNOW, YOU GET A  
17          NUMBER OF TEN, BUT AROUND THAT NUMBER IS LIKE A  
18          CONFIDENCE INTERVAL.

19                         LIKE IN MY KATRINA REGRESSION I FOUND  
20          THAT PREDICTED CRACK SPREAD OF 10, BUT I WAS 95  
21          PERCENT CERTAIN THAT THE CRACK SPREAD WAS BETWEEN  
22          15 AND 5, WHICH IS A PRETTY BIG, YOU KNOW, BIG  
23          INTERVAL.

24                         NOW, THAT WAS FINE FOR ME BECAUSE KATRINA  
25          HAD A HUGE IMPACT ON THE CRACK SPREADS.

1           BUT IF IT HAD BEEN A SMALL IMPACT, THEN I  
2           COULDN'T HAVE -- I WOULDN'T HAVE BEEN COMFORTABLE  
3           CONCLUDING THAT THERE WAS ACTUALLY -- IT WOULD HAVE  
4           GOTTEN LOST IN THAT BAND ESSENTIALLY.

5           Q       TWO LAST QUESTIONS.

6                     DR. FRENCH MENTIONED TODAY THAT HE MIGHT  
7           ALSO USE COMPETITORS' PRODUCTS AS A YARDSTICK.  
8           THAT'S NOT REALLY SPELLED OUT IN HIS REPORT, BUT  
9           WHAT IS YOUR REACTION TO WHETHER THAT WOULD WORK?

10          A       WELL, IT'S A VERY SIMILAR PROBLEM. YOU WOULD  
11          HAVE TO FIND A PRODUCT THAT HAD IDENTICAL  
12          CHARACTERISTICS.

13                    AND TO THE EXTENT THAT THEY WERE NOT  
14          IDENTICAL, YOU WOULD NEVER BE ABLE TO KNOW IF THEY  
15          WERE DIFFERENT IN PRICE IF THAT DIFFERENCE IN PRICE  
16          WAS ATTRIBUTABLE TO THE CONDUCT OR WHATEVER WAS  
17          DIFFERENT ABOUT THEM.

18                    AND, YOU KNOW, THESE PRODUCTS ARE, YOU  
19          KNOW, VERY DIFFERENTIATED PRODUCTS SO THAT'S GOING  
20          TO BE VERY DIFFICULT TO DO.

21          Q       DR. FRENCH SAID THAT IF HE WOULD FIND A  
22          PREMIUM, A DIFFERENCE BETWEEN AN APPLE PRODUCT AND  
23          A COMPETITOR'S PRODUCT, PRESUMABLY THAT WAS CAUSED  
24          BY FAILURE TO LICENSE.

25                    DO YOU KNOW ANY BASIS FOR PRESUMING THE

1 ANSWER IN THIS CASE?

2 A NO.

3 Q AND THEN FINALLY, DR. FRENCH TALKED ONLY ABOUT  
4 PRICES OF IPOD. UNDER THEIR THEORY WHERE MUSIC  
5 CAN'T BE PLAYED ON ALL COMPETING PRODUCTS, MUSIC  
6 FROM ITUNES MUSIC STORE CAN'T BE PLAYED ON ALL  
7 COMPETING PRODUCTS AT LEAST NOT WITHOUT BURNING AND  
8 RIPPING, WHAT WOULD YOU EXPECT TO BE THE EFFECT ON  
9 THE PRICE OF MUSIC AS COMPARED TO THE PRICE OF  
10 IPOD?

11 A WELL, THE ISSUE IS THAT WE WOULD HAVE TO  
12 ANALYZE THAT, BUT WITHIN THEIR THEORY GIVEN THAT  
13 THESE TWO PRODUCTS THAT THE MUSIC AND THE PLAYERS  
14 ARE VERY CONNECTED, IF THERE WERE PEOPLE WHO  
15 DECIDED THAT THEY DIDN'T WANT TO BUY ITUNES BECAUSE  
16 THEY DIDN'T WANT THE IPOD, THEN IN THE BUT-FOR  
17 WORLD WHERE THEY COULD HAVE ACCESS TO ITUNES WITH  
18 ANY PLAYER, THEY WOULD GO OUT, THEY WOULD BUY THE  
19 PLAYER, THAT WOULD INCREASE THE DEMAND FOR THE  
20 MUSIC.

21 UNDER DR. FRENCH'S THEORY THAT INCREASE  
22 IN THE DEMAND OF THE MUSIC WOULD LEAD TO AN  
23 INCREASE IN PRICE.

24 Q YOU'RE TALKING ABOUT THE BUT-FOR WORLD BUT  
25 UNDER THEIR THEORY THE PRICE OF MUSIC WOULD HAVE AN

1 UNDERCHARGE AND THE IPOD WOULD HAVE AN OVERCHARGE?

2 A THAT'S CORRECT, DEPENDING ON THE CONSUMER OR  
3 HOW MUCH MUSIC THEY BUY THEY WOULD BE BETTER OFF OR  
4 WORSE OFF IN THE BUT-FOR WORLD DEPENDING ON THE  
5 SIZE OF THOSE TWO EFFECTS.

6 Q THANK YOU. THAT'S ALL OF THE QUESTIONS,  
7 DR. BURTIS.

8 THE COURT: YOU MAY CROSS-EXAMINE.

9 **CROSS-EXAMINATION**

10 BY MR. BRISKIN:

11 Q WOULD YOU CHARACTERIZE THE PORTABLE MUSIC  
12 PLAYER AS COMPETITIVE DURING THE 2001 TO 2003  
13 PERIOD?

14 A I REALLY -- I DON'T KNOW. I HAVE NOT REALLY  
15 EVALUATED THAT.

16 Q HOW ABOUT DURING THE 2003 TO 2009 PERIOD?

17 A AGAIN, IT CERTAINLY HAS SOME CHARACTERISTICS  
18 OF THAT, BUT IT'S NOT SOMETHING THAT I WAS ASKED TO  
19 DO.

20 Q NOW, THOSE PRICES UP THERE, ARE THOSE PRICES  
21 TO INDIRECT PURCHASERS?

22 A NOW THOSE ARE THE PRICES THAT APPLE SOLD IPODS  
23 TO AND AT ITS RETAIL STORES.

24 Q OKAY. SO YOU'RE AWARE THAT THIS IS THE  
25 INDIRECT PURCHASER CASE?

1 A THAT'S CORRECT.

2 Q SO I'M A LITTLE CONFUSED, IF THIS IS A  
3 COMPETITIVE MARKET, WOULDN'T YOU TEND NOT TO RELY  
4 ON THE DIRECT PURCHASER PRICES IN ANALYZING  
5 PURCHASING IN THIS CASE?

6 A WELL, THESE PRICES -- THE INDIRECT PURCHASER  
7 PRICES TO THE EXTENT THAT THEY ARE DIFFERENT WOULD  
8 BE I THINK SCATTERED AROUND THESE PRICES.

9 Q HOW DO YOU KNOW THAT?

10 A WELL, THERE'S SOME DATA THAT DR. FRENCH  
11 PRODUCED THAT SUGGESTS THAT.

12 Q HAVE YOU ANALYZED ANY OTHER PRICING DATA OTHER  
13 THAN WHAT DR. FRENCH PROVIDED IN HIS REPORT?

14 A JUST THESE AND DR. FRENCH'S DATA.

15 Q WAS APPLE RESTRICTING THE PRICES THAT  
16 RETAILERS COULD CHARGE FOR IPODS AT ANY TIME?

17 A I DON'T BELIEVE SO.

18 Q DO YOU KNOW?

19 A BASED ON WHAT I KNOW THEY DID NOT RESTRICT THE  
20 PRICES.

21 Q SO CAN YOU REACH ANY CONCLUSIONS ABOUT WHETHER  
22 PRICES ARE ACCURATELY REFLECTED HERE THAT HAVE  
23 NOTHING TO DO WITH THE INDIRECT PURCHASES IN CASE?

24 A YES. I THINK THAT THESE ARE INFORMATIVE AND  
25 REMEMBER ONE OF DR. FRENCH'S MODELS RELATES TO --

1 THE WHOLESALE PRICES THAT APPLE CHARGED TO THE  
2 DEMAND AND SUPPLY FACTORS OF IPODS AND THESE  
3 PRODUCTS -- THESE PRICES WOULD BE RELATED CERTAINLY  
4 TO THOSE PRICES.

5 Q SO YOU CAN SEE THAT THE -- THE PATH WOULD JUST  
6 MEASURE SOME AMOUNT OF THE OVERCHARGE THAT IS IN  
7 THESE PRICES?

8 A I'M SORRY. I DIDN'T UNDERSTAND.

9 Q YOU HAVEN'T OPINED AT ALL ON THE TYING  
10 ALLEGATIONS IN THIS CASE; CORRECT?

11 A I'VE OPINED -- I'VE JUST OPINED WITH WHAT I  
12 JUST TALKED ABOUT SO I'M NOT SURE WHAT YOU MEAN.

13 Q WELL, YOU HAVEN'T OPINED ON WHETHER THE  
14 ALLEGATIONS OF TYING IN THIS CASE COULD PRODUCE AN  
15 OVERCHARGE?

16 A NO, I HAVE NOT BEEN ASKED TO DO THAT.

17 Q AND, IN FACT, YOU TESTIFIED THAT IT'S POSSIBLE  
18 THAT THE TYING ALLEGATIONS IN THIS CASE COULD HAVE  
19 PRODUCED AN OVERCHARGE?

20 A I DON'T KNOW EXACTLY WHAT YOU'RE REFERRING TO  
21 BUT IT WAS NOT SOMETHING THAT I --

22 MR. BRISKIN: MAY I APPROACH THE WITNESS?

23 THE COURT: CERTAINLY.

24 MR. MITTELSTAEDT: COUNSEL, WHAT PAGE?

25 MR. BRISKIN: 150 AND 151.

1 THE WITNESS: YES, I'VE --

2 (PAUSE IN PROCEEDINGS.)

3 THE WITNESS: YES, I'VE READ IT.

4 THE COURT: JUST WAIT FOR A QUESTION.

5 THE WITNESS: I'M SORRY.

6 BY MR. BRISKIN:

7 Q WAS IT YOUR TESTIMONY THAT IT'S POSSIBLE THAT  
8 THERE COULD HAVE BEEN AN OVERCHARGE RESULTING FROM  
9 THE ALLEGATIONS IN THIS CASE?

10 A CAN I READ WHAT THE TESTIMONY SAYS OR --

11 THE COURT: NO, NO. YOU'VE BEEN ASKED  
12 THAT QUESTION. YOU HAVE TO ANSWER THAT QUESTION  
13 AND IT COULD BE YES OR NO OR I DON'T KNOW.

14 BUT IF THE QUESTION IS UNDERSTOOD THEN  
15 YOU HAVE TO ANSWER THE QUESTION.

16 THE WITNESS: OKAY. ASK AGAIN. DID I  
17 TESTIFY?

18 BY MR. BRISKIN:

19 Q YOU TESTIFIED THAT IT'S POSSIBLE THAT THE  
20 TYING ALLEGATIONS CASE COULD PRODUCE AN OVERCHARGE?

21 A YES.

22 Q HAVE YOU PERFORMED ANY STATISTICAL ANALYSIS OF  
23 ANY OF THE PRICING INFORMATION FOR INDIRECT  
24 PURCHASERS IN THIS CASE?

25 A NO.



1 Q HOW ABOUT DIRECT PURCHASERS?

2 A NO.

3 Q HAVE YOU MEASURED HOW MUCH CHANGE THERE WAS IN  
4 IPOD PRICES IN ANY STATISTICAL WAY?

5 A I'M SORRY, THE CHANGE IN IPOD?

6 Q PRICES?

7 A PRICES?

8 Q IN ANY WAY?

9 A WELL, I MEAN, LIKE YOU CAN SEE THEM HERE.

10 Q RIGHT.

11 A AND SO I CAN COMPARE THEM AND MEASURE THEM BY  
12 SUBTRACTING THEM IF THAT'S WHAT YOU MEAN.

13 Q RIGHT. HAVE YOU DONE ANYTHING OTHER THAN --  
14 HAVE YOU DONE ANY STATISTICAL -- USED ANY  
15 STATISTICAL METHODS TO ANALYZE PRICES?

16 A NO.

17 Q HAVE YOU EXAMINED THE PRICES OF ANY COMPETITOR  
18 PRODUCTS AT VIZIO?

19 A NO.

20 Q HAVE YOU ENGAGED -- HAVE YOU DONE ANY  
21 STATISTICAL ANALYSIS OF ANY COMPETITOR PRODUCTS?

22 A NO.

23 Q HAVE YOU EVER SEEN REGRESSION ANALYSIS USED TO  
24 ANALYZE THE PRICES OF SOMETHING THAT YOU WOULD  
25 CONSIDER COOL?

1 A I CAN'T THINK OF ANY AS I SIT HERE, NO.

2 Q IS THE COOLNESS FACTOR SOMETHING THAT YOU  
3 WOULD FIND IN AN ECONOMIC TEXTBOOK?

4 A NO, I DON'T THINK SO.

5 Q WHEN IS -- DO YOU KNOW WHEN THE FIRST TIME WAS  
6 THAT YOU HEARD THE COOLNESS FACTOR MENTIONED?

7 A I DON'T KNOW.

8 Q IS IT POSSIBLE IT WAS IN THIS CASE?

9 A WELL, THE NOTION OF COOLNESS I PROBABLY HEARD  
10 WHEN I WAS IN FIFTH GRADE SO.

11 Q HOW ABOUT THE TERM "COOLNESS FACTOR"?

12 A YOU KNOW, THE USE OF THE WORD "FACTOR" FOR ME  
13 IS I PROBABLY USE IT A HUNDRED TIMES A DAY SO I  
14 DON'T KNOW.

15 Q HOW ABOUT THE TERM "COOLNESS FACTOR"?

16 A I DON'T KNOW WHEN I FIRST HEARD THAT OR USED  
17 IT.

18 Q ARE YOU FAMILIAR WITH THE STATE MICROSOFT  
19 CASES INVOLVING MICROSOFT OFFICE AND EXPLORER?

20 A NOT REALLY.

21 Q DO YOU KNOW HOW MANY DIFFERENT KINDS OF  
22 LAPTOPS AND COMPUTERS AND BRANDS OF COMPUTERS WERE  
23 AT ISSUE IN THAT CASE IN THOSE CONSUMERS CASES?

24 A I DO NOT.

25 Q AND DO YOU KNOW IF THERE WAS A BEFORE OR

1 DURING PERIOD IN THOSE CASES?

2 A I DO NOT KNOW WHAT WAS GOING ON IN THOSE  
3 CASES.

4 Q DO YOU KNOW WHETHER IF AT THE CLASS  
5 CERTIFICATE STAGE THE EXPERT KNEW OF THE DIVIDING  
6 LINE BEFORE AND DURING THE PERIODS WERE IN THOSE  
7 ANALYSES?

8 A NO.

9 Q YOU HAVEN'T PROPOSED YOUR OWN MODEL TO  
10 DETERMINE WHETHER THERE IS IMPACT AND DAMAGE IN  
11 THIS CASE; IS THAT CORRECT?

12 A THAT'S CORRECT.

13 Q AND IN RESPONSE TO MY QUESTION ABOUT WHETHER  
14 YOU COULD DO IT, YOU SAID YOU WOULD HAVE TO THINK  
15 ABOUT IT; IS THAT CORRECT?

16 A AT MY DEPOSITION? I BELIEVE THAT'S CORRECT,  
17 YES.

18 Q I HAVE NOTHING FURTHER.

19 THE COURT: ANY REDIRECT?

20 MR. MITTELSTAEDT: JUST ONE QUESTION,  
21 YOUR HONOR, JUST TO CLARIFY.

22 **REDIRECT EXAMINATION**

23 BY MR. MITTELSTAEDT:

24 Q DO YOU STILL HAVE THE DEPOSITION UP THERE?

25 A YES.

1 Q AND LET ME JUST READ IT. YOU WERE ASKED THE  
2 QUESTION: "DO YOU HAVE AN OPINION ON WHETHER GIVEN  
3 THOSE ALLEGATIONS THE PRICE OF IPODS COULD HAVE  
4 BEEN HIGHER THAN THEY OTHERWISE WOULD HAVE BEEN, ET  
5 CETERA?"

6 AND YOU SAY, "I WOULD JUST REPEAT WHAT I  
7 WAS SAYING BEFORE, IT'S A COMPLICATED QUESTION.  
8 IT'S NOT SOMETHING THAT I HAVE STUDIED OR ANALYZED,  
9 AND I'M NOT GOING TO SPECULATE ON WHETHER IT DID OR  
10 DIDN'T."

11 QUESTION BY MR. BRISKIN, "BUT IS IT  
12 POSSIBLE THAT IT COULD HAVE?"

13 AND YOUR ANSWER WAS, "WHEN I SAY  
14 SOMETHING IS POSSIBLE I MEAN MAYBE GRAVITY WOULD BE  
15 SUSPENDED TODAY, THAT'S POSSIBLE. SO IS IT  
16 POSSIBLE? ANYTHING IS POSSIBLE."

17 WAS THAT THE ANSWER YOU GAVE?

18 A YES.

19 Q OKAY. THANK YOU.

20 THE COURT: FURTHER QUESTIONS?

21 MR. BRISKIN: WE WOULD LIKE TO OFFER  
22 DR. FRENCH ON REBUTTAL IF THAT'S --

23 THE COURT: CERTAINLY. YOU MAY STEP  
24 DOWN, DOCTOR.

25 / / / /

1 / / / /

2 **FURTHER DIRECT EXAMINATION**

3 BY MR. BRISKIN:

4 Q AS AN ECONOMIST HAVE YOU EVER HEARD OF THE  
5 TERM "COOLNESS FACTOR"?

6 A NOT BEFORE THIS CASE.

7 Q CAN YOU MEASURE COOLNESS?

8 A UM, IT WOULD, IT WOULD -- IT DEPENDS. I  
9 THOUGHT ABOUT A WAY OF MEASURING IT IN THIS CASE.  
10 I COULD GO TO THE BEFORE PERIOD AND PUT IN A DUMMY  
11 FOR APPLE AGAINST THE OTHER PRODUCTS USED IN THE  
12 OTHER PRODUCTS AS THE BENCHMARK BUT NOT BEFORE THE  
13 MUSIC STORE WAS INTRODUCED AND SEE IF THERE'S A  
14 PREMIUM IN THE BEFORE PERIOD.

15 IF THERE IS, THAT MIGHT BE ATTRIBUTABLE  
16 TO SOMETHING WE MIGHT CALL THE COOLNESS FACTOR OR  
17 THE BRAND FACTOR OR THE FACT THAT FOR WHATEVER  
18 REASONS APPLES ARE DIFFERENTIATED AND PEOPLE LIKE  
19 THEM, APPLE IPODS.

20 AND SO YOU COULD DO THAT, PERHAPS, UNLESS  
21 SUPPOSE YOU HAVE A STATISTICALLY SIGNIFICANT  
22 POSITIVE RESULT.

23 WELL, THEN WHEN YOU RUN THE OTHER MODELS  
24 WHERE YOU PUT THE INDICATOR MODEL ONLY IN THE  
25 DURING PERIOD THAT IS LATER, THEN IF YOU GET A

1 STATISTICALLY SIGNIFICANT RESULT THERE, YOU MIGHT  
2 SUBTRACT THE ONE YOU GOT THERE FROM THE COOLNESS  
3 FACTOR FROM THAT IF YOU INDEED BELIEVE THAT THE  
4 INDICATOR VARIABLE I PROPOSE IS PICKING UP BOTH THE  
5 ALLEGED WRONGDOING AND SOMETHING CALLED THE  
6 COOLNESS FACTOR.

7 BUT I MEAN, IF THERE IS A COOLNESS  
8 FACTOR, IT'S IN EVERY INDUSTRY, EVERY PRODUCT,  
9 EVERY CASE IN WHICH THERE'S A BRAND IN WHICH  
10 THERE'S SOME PRODUCT DIFFERENTIATING FROM ONE  
11 SELLER TO THE OTHER. I'VE NEVER SEEN ANYONE REALLY  
12 TRY TO TAKE THAT INTO ACCOUNT IN ANY OF THESE  
13 REGRESSION MODELS IN ANY OF THESE OTHER CASES SO  
14 I'M NOT SURE IT'S NECESSARY.

15 BUT THERE MIGHT BE A WAY TO LOOK INTO IT.  
16 AND AS I JUST DESCRIBED AND I MAY WELL DO THAT AT  
17 THE MERIT STAGE OF THE CASE.

18 Q AND CAN A PRODUCT BE BOTH COOL AND OVERPRICED?

19 A YES, IT COULD BE.

20 Q AND COULD YOUR REGRESSION MEASURE THAT?

21 A WELL, IN THE WAY I JUST DESCRIBED IT, IF I  
22 FIND THAT I MIGHT BE ABLE TO ADJUST, IF YOU WILL,  
23 WHAT OTHERWISE WOULD BE THE OVERCHARGE TO SUBTRACT  
24 OUT THE COOLNESS FACTOR FROM THAT.

25 Q AND IF THERE IS AN EVENT OCCURRING AT THE SAME

1 TIME AS THE INDICATOR VARIABLE FOR MISCONDUCT, HOW  
2 WOULD YOU SEPARATE IT OUT OR ACCOUNT FOR THAT?

3 A WELL, FIRST OF ALL, I'M NOT CONVINCED THAT  
4 SUCH EXISTS.

5 I MEAN, IT WOULD HAVE TO BE A  
6 STATISTICALLY SIGNIFICANT EFFECT.

7 AGAIN, ANOTHER THING I MIGHT DO IS LOOK  
8 AT THE -- RUN THE MODEL WITHOUT THE INDICATOR,  
9 WITHOUT THE INDICATOR FOR THE ALLEGED WRONGDOING AT  
10 ALL AND JUST PUT IN INDICATORS FOR ALL OF THE OTHER  
11 VARIABLES AND SEE WHICH ONES ARE STATISTICALLY  
12 SIGNIFICANT AND WHICH ONES AREN'T.

13 AND IT REMAINS TO BE SEEN IF THERE IS ONE  
14 WHOSE TIME PERIOD EXACTLY COINCIDES WITH THE  
15 ALLEGED -- WITH THE INDICATOR VARIABLE FOR THE  
16 ALLEGED WRONGDOING.

17 I'M NOT EVEN SURE THAT WILL BE TRUE, BUT  
18 IF THERE IS, IT WOULD ONLY BE A PROBLEM IF IT'S  
19 STATISTICALLY SIGNIFICANT OTHERWISE YOU COULD DROP  
20 IT FROM THE MODEL BECAUSE IT DOESN'T HAVE A  
21 SIGNIFICANCE ON PRICE.

22 A LOT OF THE VARIABLES AND OTHER THINGS  
23 WE TALK ABOUT MAY WELL EFFECT PRICE AND THAT'S WHY  
24 WE WOULD PUT THEM IN THE INITIAL SPECIFICATION OF  
25 THE MODEL WHEN WE RUN THE MODEL, BUT A LOT OF THEM

1 MAY TURN OUT NOT TO BE STATISTICALLY SIGNIFICANT,  
2 MEANING THAT THERE'S NO REAL EFFECT ON PRICE OF  
3 THEM OR IT'S NEGLIGIBLE AND SO WE WOULD DO THAT ALL  
4 ALONG THE WAY AS WE RUN DIFFERENT ALTERNATIVE  
5 SPECIFICATIONS AND IN HER PETROLEUM TRACK STUDY  
6 MICHELLE BURTIS I THINK RAN 30 SPECIFICATIONS ALONG  
7 THE WAY.

8 WE WOULD DO THINGS LIKE THAT, TOO. WE  
9 WOULD RUN A NUMBER OF SPECIFICATIONS AND DEAL WITH  
10 ANY STATISTICAL PROBLEMS OR SPECIFICATION PROBLEMS  
11 THAT WE CAME UP WITH ALONG THE WAY AND THEN GET A  
12 FINAL BEST MODEL, AND NO DOUBT THE DEFENDANTS WILL  
13 CRITICIZE THAT MODEL, TOO, AT THE MERITS STAGE.  
14 THAT'S PART OF WHAT HAPPENS AT ADVERSARIAL  
15 PROCEEDINGS BUT THAT'S HOW WE WOULD PROCEED WITH  
16 IT.

17 MR. BRISKIN: I HAVE NOTHING FURTHER.

18 THE COURT: ANY CROSS?

19 **FURTHER CROSS-EXAMINATION**

20 BY MR. MITTELSTAEDT:

21 Q DR. FRENCH, I ASKED YOU AT YOUR DEPOSITION  
22 WHETHER YOU KNEW ANY WAY TO MEASURE IN YOUR  
23 REGRESSION ANALYSIS A COOLNESS FACTOR. DO YOU  
24 REMEMBER THAT?

25 A YEAH, I COULDN'T THINK OF ANY DURING MY



1 REGRESSION BUT IT'S BEEN ON MY MIND SINCE AND SO I  
2 THOUGHT ABOUT IT SINCE.

3 Q I CAN IMAGINE. WHEN YOU LOOK IN THE BEFORE  
4 PERIOD AND YOU SEE THAT APPLE'S IPOD HAS A PREMIUM  
5 OVER A COMPETITOR --

6 A UH-HUH.

7 Q -- THAT COULD REFLECT THAT APPLE'S PRODUCT WAS  
8 DIFFERENT FROM A COMPETITORS. IT COULD HAVE BEEN  
9 THAT IT WAS SMALLER, FOR EXAMPLE. IT COULD HAVE  
10 BEEN ANY NUMBER OF THINGS?

11 A WHAT YOU'RE REALLY TALKING ABOUT WHEN YOU SAY  
12 COOLNESS FACTOR IS THAT APPLE IS DIFFERENTIATING IN  
13 SOME FASHION. IT'S A BRAND AND A DIFFERENT BRAND  
14 THAN THE OTHERS. IT'S NOT EXACTLY THE SAME AS THE  
15 OTHERS OR AT LEAST IT'S NOT PERCEIVED TO BE THE  
16 SAME IN THE MINDS OF CONSUMERS AND IT MAY BE MORE  
17 DESIRABLE, THAT'S WHAT I WOULD CALL THE COOLNESS  
18 FACTORS ALL OF THE OTHER WAYS IT'S DIFFERENTIATED  
19 FROM OTHERS.

20 Q THERE ARE A LOT OF BRANDS THAT DON'T HAVE A  
21 COOLNESS FACTOR ASSOCIATED WITH IT; CORRECT?  
22 CHEVRON GASOLINE, FOR EXAMPLE, THAT DOESN'T -- THAT  
23 HAS A BRAND BUT NOT A COOLNESS FACTOR; CORRECT?

24 A PROBABLY NOT BECAUSE IT'S A HOMOGENEOUS  
25 PRODUCT AND THERE'S NO REAL DISTINCTION BETWEEN IT

1 AND EXXON AND SHELL OR WHAT HAVE YOU.

2 BUT IT'S CONCEIVABLE THAT THERE'S A BRAND  
3 EFFECT EVEN ON SUCH A HOMOGENOUS PRODUCT.

4 Q AND THERE ARE DIFFERENCES BETWEEN APPLE'S  
5 IPODS, THE VARIOUS MODELS, AND COMPETITOR'S  
6 PRODUCTS; CORRECT?

7 A YES, THAT'S WHY I WOULD USE ALL OF THESE  
8 PRODUCT CHARACTERISTICS FOR BOTH THE IPOD MODELS  
9 AND THE OTHER MODELS AND THE MODELS IN THE  
10 OBSERVATIONS THAT I'M LOOKING AT.

11 IT'S EXACTLY THEY'RE ALL INCLUDED EXACTLY  
12 TO SEPARATE OUT THEIR INFLUENCE FROM THE ALLEGED  
13 WRONGDOING INFLUENCE.

14 Q DO YOU KNOW WHEN THE COOLNESS FACTOR KICKED  
15 IN, WHEN THAT BECAME A FACTOR AFFECTING THE DEMAND  
16 FOR IPODS? DO YOU THINK IT KICKED IN ON OCTOBER OF  
17 2001 WITH THE FIRST INTRODUCTION?

18 A I DON'T KNOW.

19 Q MAY I APPROACH THE CHART, YOUR HONOR?

20 ON THIS DUMMY VARIABLE IDEA, IF YOU THINK  
21 THE START OF THIS PERIOD WAS APRIL 2003, YOU WOULD  
22 PUT IN A DUMMY VARIABLE HERE; RIGHT?

23 A YOU MEAN FOR THE ALLEGED WRONGDOING?

24 Q WHEN --

25 A WHENEVER YOU THINK IT STARTED, THAT'S WHEN IT

1           WOULD BECOME ONE.

2           Q       OKAY.  SO LET'S SAY YOU THOUGHT IT WAS APRIL  
3           OF 2003 SO YOU PUT IN A ONE HERE?

4           A       YES.

5           Q       AND WHAT THAT VARIABLE WOULD PICK UP WOULD BE  
6           EVERYTHING THAT AFFECTED THE DEMAND OR THE PRICE  
7           FOR THE IPOD THAT OCCURRED AT THIS TIME; RIGHT?

8           A       WELL, NO.  I WOULD HAVE OTHER INDICATOR  
9           VARIABLES FOR ALL OF THOSE PRODUCTS AND ALL OF  
10          THOSE MODELS.

11          Q       AND YOU WOULD HAVE AN INDICATOR FOR THE  
12          INTRODUCTION OF THE ITUNES MUSIC STORE; RIGHT?

13          A       NO.  I WOULDN'T HAVE AN INDICATOR FOR IT.  THE  
14          WAY I WOULD TRY TO ATTRACT THAT IS WHAT I SAID  
15          EARLIER.

16                   I WOULD MEASURE THE NUMBER OF THE SONGS  
17          IN THE LIBRARY OF THE ITUNES MUSIC STORE OVER TIME.

18          Q       BUT IF YOU HAVE A DUMMY VARIABLE HERE THAT  
19          PICKS UP THE THINGS THAT YOU HAVEN'T ACCOUNTED FOR  
20          WITH OTHER VARIABLES THAT OCCURRED IN APRIL OF  
21          2003, YOU WOULD HAVE A PROBLEM TO THE EXTENT THAT  
22          THE MUSIC STORE INCREASED DEMAND FOR IPODS IN A WAY  
23          THAT IS NOT CHALLENGED IN THIS CASE; CORRECT?

24          A       WELL, THAT'S WHY I'M GOING TO PUT IN THE  
25          NUMBER OF SONGS.  THE MORE SONGS IT HAS, THE MORE

1 IT WOULD INCREASE THE DEMAND FOR REASONS OTHER THAN  
2 FAIR PLAY SOFTWARE.

3 Q OKAY. DIDN'T YOU TELL ME AT THE DEPOSITION  
4 THAT IF YOU HAVE TWO THINGS OCCURRING AT THE SAME  
5 TIME AND YOU PUT IN DUMMY VARIABLES FOR BOTH OF  
6 THEM, YOU CAN'T TELL WHAT, WHAT -- WHICH VARIABLE  
7 IS GETTING THE MISCONDUCT ATTRIBUTED TO IT -- LET  
8 ME PUT IT DIFFERENTLY.

9 IF YOU HAVE TWO DUMMY VARIABLES AT THE  
10 SAME TIME, FIRST OF ALL, YOU CAN'T DO THAT, CAN  
11 YOU? YOU CAN'T USE TWO DUMMY VARIABLES AT THE SAME  
12 TIME?

13 A WELL, YOU PROBABLY SHOULDN'T NECESSARILY, BUT  
14 YOU CAN UNDER CERTAIN CIRCUMSTANCES AND YOU HAVE TO  
15 FIRST CHECK, AS I SAID I WOULD, WHETHER THEY'RE  
16 STATISTICALLY SIGNIFICANT.

17 IF SOME OF THEM DON'T HAVE ANY NEGLIGIBLE  
18 EFFECT WHEN YOU TEST THEM SEPARATELY ON THE PRICE,  
19 THEN YOU WOULDN'T INCLUDE THEM IN THE MODEL AT ALL  
20 BECAUSE THEY HAVE NO EFFECT ON PRICE.

21 Q IN ANY EVENT, DR. FRENCH, YOU HAVE NOT  
22 ACTUALLY RUN A MODEL FOR THIS CASE, HAVE YOU?

23 A NO, BUT WE HAVE AND IN ALL OF THESE OTHER  
24 CASES THAT I MENTIONED AND SOME OF THEM HAVE AS  
25 MANY AS A COUPLE OF THOUSAND DUMMY VARIABLES WHICH

1 ALL HAVE DIFFERENT TIME PERIODS AND ALL OF THE SAME  
2 ISSUES THAT DR. BURTIS AND YOU WERE TALKING ABOUT  
3 IN THIS CASE.

4 Q DO YOU HAVE A COPY THAT YOU CAN GIVE US OF ANY  
5 REGRESSION THAT YOU YOURSELF HAVE RUN THAT YOU HAVE  
6 SUBMITTED IN THE LITIGATION?

7 A WELL, I COULD GO BACK AND LOOK AND SEE IF I  
8 HAVE IT. I TOLD YOU I HAD THE DIAMOND CASE ONE.

9 Q OKAY. THAT'S WHAT I ASKED YOU TO LOOK FOR;  
10 RIGHT?

11 A NO, THE DIAMOND CASE.

12 Q THANK YOU. NO FURTHER QUESTIONS.

13 THE COURT: FURTHER QUESTIONS?

14 MR. BRISKIN: YOUR HONOR, DR. FRENCH WAS  
15 REFERRING TO A LIST OF CASES AND IF THE COURT PERMITS  
16 WE CAN SUBMIT IT AS ADDITIONAL MATERIAL.

17 THE COURT: IT'S NOT INFORMATIVE.

18 MR. BRISKIN: VERY WELL. NOTHING  
19 FURTHER.

20 THE COURT: VERY WELL. THE WITNESS IS  
21 EXCUSED. THANK YOU.

22 (PAUSE IN PROCEEDINGS.)

23 THE COURT: VERY WELL. I WAS JUST  
24 CHECKING TO REMIND MYSELF THERE IS A CASE  
25 MANAGEMENT CONFERENCE THAT WE HAVE IN ANOTHER PART

1 OF THIS CASE, BUT I WANTED TO GIVE YOU AN  
2 OPPORTUNITY AT LEAST TO HAVE ABOUT FIVE MINUTES  
3 EACH TO COMMENT ON WHAT YOU THINK THE COURT SHOULD  
4 DRAW FROM THE EVIDENCE, AND THEN I'LL TAKE THIS  
5 PART UNDER SUBMISSION WITH RESPECT TO THE MOTION.

6 MR. BRISKIN: THANK YOU, YOUR HONOR.

7 APPLE HAS GIVEN A NICE PREVIEW OF WHAT  
8 KIND OF CASE IT MIGHT PRESENT AT TRIAL, BUT AT THE  
9 CLASS CERT STAGE THE STANDARD IS PRETTY DIFFERENT.

10 DR. FRENCH HAS SET OUT THE KIND OF  
11 REGRESSION ANALYSIS THAT HE WOULD DO BASED ON A  
12 MARKET ANALYSIS TO DETERMINE ANTITRUST IMPACT AND  
13 DAMAGES.

14 AND IT'S NOT HIS BURDEN TO SHOW THAT THE  
15 MODEL WILL WORK. HE HAS TO SHOW THAT HE CAN  
16 SPECIFY A MODEL THAT HE CAN USE THAT CAN SHOW  
17 IMPACT AND DAMAGES ON A CLASS WIDE BASIS.

18 THERE ARE MANY CASES THAT ARE INSTRUCTIVE  
19 HERE THAT WE CITE IN OUR CASE, BUT ONE I WANT TO  
20 HIGHLIGHT IS THE EDPM CASE WHICH WAS RECENTLY  
21 ISSUED.

22 IN THAT CASE MERIT DISCOVERY WAS ALMOST  
23 COMPLETE AT THE TIME THE COURT TOOK UP THE CLASS  
24 CERT MOTION AND PLAINTIFF'S EXPERT PROPOSED TO  
25 REDUCE FORM MULTIPLE REGRESSION EQUATION, A SINGLE

1 EQUATION THAT TAKES INTO CONSIDERATION THE FACT OF  
2 BOTH SUPPLY AND DEMAND AS WELL AS THE IMPACT OF THE  
3 ALLEGED CONSPIRACY.

4 THAT'S THE SAME TYPE OF REGRESSION  
5 ANALYSIS THAT DR. FRENCH HAS PROPOSED HERE.

6 THE TIME PERIOD IN THAT CASE WASN'T  
7 CERTAIN AND SIMILAR TO HERE YOU CAN'T ALWAYS KNOW  
8 EXACTLY HOW AN ANTITRUST IMPACT IS GOING TO REVEAL  
9 ITSELF OVER TIME BUT YOU TEST YOUR HYPOTHESIS BY  
10 RUNNING DIFFERENT RUNS OF THE REGRESSION.

11 NOW, THE DEFENSE ARGUED JUST LIKE THE  
12 DEFENDANT HERE THAT THE CONSPIRACY DUMMY VARIABLE  
13 IS TOO INDEFINITE TO CAPTURE ANYTHING AND KEY  
14 VARIABLES WERE MISSING.

15 SO THE DEFENDANTS ARE ASKING THE COURT TO  
16 DETERMINE WHICH REGRESSION MODEL IS THE MOST  
17 ACCURATE THE COURT SAID, WHICH IS ULTIMATELY A  
18 MERITS DECISION.

19 A LESSON FROM EDPM IS THAT THE INQUIRY  
20 HERE IS WHETHER THE PLAINTIFFS HAVE OFFERED A  
21 METHOD OF PROOF THAT IS COMMON.

22 BY THIS STANDARD IT'S CLEAR THAT THE  
23 DEFENDANT IS NIBBLING ON THE EDGES BY USING  
24 ANECDOTAL DATA ABOUT PRICES IT LIKES AND DID WE USE  
25 A VARIABLE FOR USB OR DID WE USE THE RIGHT VARIABLE

1 FOR VIDEO PLAYBACK.

2 NOW, OUR THEORY OF THE CASE IS THAT WHEN  
3 THE IPOD WAS FIRST INTRODUCED IT WAS WELL RECEIVED,  
4 BUT IT WASN'T ACTUALLY THAT POPULAR. SALES DID NOT  
5 ACTUALLY TAKE OFF UNTIL THE ITUNES MUSIC STORE WAS  
6 RELEASED IN 2003 AND IT LOOKS LIKE SPECIFICALLY THE  
7 IPOD SALES TOOK OFF AFTER IPOD -- ITUNES WAS  
8 RELEASED FOR WINDOWS AS THIS CHART SHOWS.

9 IS THIS THE RIGHT WAY?

10 THE COURT: YEAH, YOU HAVE A MONITOR  
11 THERE SO YOU CAN ALWAYS SEE IT.

12 MR. BRISKIN: IN OTHER WORDS, ITUNES  
13 DROVE IPOD SALES, JUST AS APPLE INTENDED.

14 DURING THIS PERIOD THERE WERE A GROWING  
15 NUMBER OF IPOD PURCHASERS WITH A GROWING NUMBER OF  
16 DRM PROTECTED SONGS IN THEIR LIBRARIES.

17 WHAT DROVE THE SUDDEN SPIKE IN IPOD SALES  
18 WASN'T SUDDENLY NEW TO IPOD. THERE WERE ALREADY  
19 THREE GENERATIONS IN THE MARKET. WHAT WAS DRIVING  
20 THIS WAS ITUNES. THAT'S WHAT WE ALLEGE IN THIS  
21 CASE.

22 AND WHAT DR. FRENCH'S MODEL WILL DO WILL  
23 SHOW HOW DRM ON ITUNES DOWNLOADS CONTINUES TO DRIVE  
24 IPOD SALES.

25 NOW, COMPARED TO OTHER MARKET -- CASES



1 WHERE CLASSES HAVE BEEN CERTIFIED, THE FEATURES OF  
2 THIS MARKET MAKE IT ESPECIALLY CONDUCTIVE TO CLASS  
3 WIDE ANALYSIS.

4 THERE'S ONE DEFENDANT. PLAINTIFFS ARE  
5 CONSUMERS, NOT BUSINESSES. THEY HAVE NO BARGAINING  
6 POWER AND THIS IS A CASE ABOUT AN OVERCHARGE, NOT  
7 LOST PROFITS.

8 THERE'S A VERY CONCENTRATED RESELLING  
9 MARKET MAKING IT EASY TO CAPTURE THE UNIVERSE OF  
10 PRICES.

11 THE DISTRIBUTION CHAIN IS EXTRAORDINARILY  
12 SIMPLE. THERE'S ONE FINISHED PRODUCT. IT DOESN'T  
13 CHANGE AT ALL GOING FROM APPLE TO THE CONSUMER.  
14 PRICING REALLY ISN'T THAT COMPLICATED AS DEFENDANTS  
15 CONCEDE IN ITS APPLE RETAIL STORE.

16 AND COMPARE THIS WITH OTHER CASES LIKE  
17 THE MICROSOFT CASES IN WHICH EXPERTS WERE TRACKING  
18 DIFFUSE OVERCHARGES THAT WERE MAKING THEIR WAY  
19 THROUGH COMPLICATED PURCHASING CHAINS LIKE LAPTOPS  
20 AND HOME COMPUTERS WHERE SOMETHING WAS IMBEDDED IN  
21 A PRODUCT THAT HAD VALUE ADDED.

22 THAT'S A MUCH MORE COMPLICATED MODEL.  
23 AND THE GORDON V. MICROSOFT CASE IN THE ADVANCED  
24 STAGES OF THE LITIGATION RIGHT BEFORE TRIAL AND THE  
25 COURT DECIDED TO DECERTIFY THE CLASS AND BASICALLY

1 USED A MUCH LESS STRINGENT METHOD OF PENNY FOR  
2 PENNY DAMAGES THAN DEFENDANT ARGUES HERE THAT WE  
3 ADOPT AT THE CLASS CERT STAGE.

4 NOW, THE DEFENDANTS ARE ARGUING THAT  
5 SHOWING CLASS WIDE IMPACT ISN'T EVEN ENOUGH. AS  
6 THEY PUT IN THE OPPOSITION BRIEF, AND I'M QUOTING  
7 FROM PAGE 12, "SUPPOSE ONE CUSTOMER PAID A \$10  
8 OVERCHARGE AND ANOTHER PAID NONE. ONLY THE  
9 OVERCHARGE CUSTOMER HAS BEEN INJURED AND HAS ANY  
10 RIGHT TO SUE." THAT'S A GREAT WAY OF IMMUNIZING  
11 YOURSELF FROM ANTITRUST LIABILITY, BUT THE CASE LAW  
12 IS MORE SOPHISTICATED THAN THAT.

13 FOR IMPACT ALL YOU NEED IS SOME PROOF OF  
14 DAMAGES FLOWING FROM THE ANTICOMPETITIVE BEHAVIOR.

15 AND WE HAVE DONE THAT. WE HAVE BOTH --  
16 WE HAVE SHOWN THAT THE TYING MONOPOLIZATION  
17 PLAINTIFF IS ALLEGED BY THEIR NATURE PRODUCES A  
18 CLASS WIDE IMPACT BUT WE ALSO DID IT THROUGH MARKET  
19 ANALYSIS.

20 NOW, THESE AREN'T REALLY IMPACT ISSUES.  
21 THEY'RE DAMAGES ISSUES BY SHOWING THAT THESE  
22 DIFFERENT PRICES AND HOW MUCH THEY MIGHT VARY  
23 BETWEEN AMAZON AND BEST BUY. THOSE AREN'T IMPACT  
24 ISSUES. THERE'S DISCOUNTING IN THE BUT-FOR WORLD,  
25 TOO. THERE ARE COUPONS IN THE BUT-FOR WORLD, TOO.

1                   ONE COURT IN THE NASDAQ MARKET MAKERS  
2                   CASE A 1996 SOUTHERN DISTRICT OF NEW YORK CASE  
3                   STATED THAT "EVEN IF IT COULD BE SHOWN SOME  
4                   INDIVIDUAL CLASS MEMBERS WERE NOT INJURED, CLASS  
5                   CERTIFICATION NEVERTHELESS IS APPROPRIATE WHERE THE  
6                   ANTITRUST VIOLATION HAS CAUSED WIDESPREAD INJURY TO  
7                   THE CLASS."

8                   THE COURT: BOTH THIS NASDAQ CASE AND THE  
9                   GORDON CASE YOU'RE CITING TO ME WERE INDIRECT  
10                  PURCHASER CASES?

11                  MR. BRISKIN: I BELIEVE THE NASDAQ WAS A  
12                  SECURITIES CASE. THE GORDON V. MICROSOFT CASE WAS  
13                  AN ANTITRUST CASE AND THE CLASS WAS CONSUMERS OF  
14                  WHOM BOUGHT LAPTOP COMPUTERS AND DESKTOP COMPUTERS  
15                  THAT HAD MICROSOFT OFFICE AND MICROSOFT WINDOWS  
16                  IMBEDDED IN THEM AND THE TASK WAS TO TRACE THE  
17                  AMOUNT OF THE OVERCHARGE THAT WAS IMBEDDED IN A  
18                  PRODUCT THAT HAD THIS SOFTWARE IN IT.

19                  AND SO THERE'S A VALUE ADDED PRODUCT  
20                  MOVING THROUGH THE SUPPLY CHAIN. THERE ARE  
21                  MULTIPLE PRICE INCREASES AT ISSUE AND THERE WAS  
22                  EVIDENCE IN THE RECORD THAT THE RESALERS WEREN'T  
23                  PASSING ON THE PRICES IMMEDIATELY AND THERE WAS  
24                  DELAY IN THE PASS ON AND THERE WERE A LOT OF  
25                  INDEFINITE FACTORS IN THAT CASE.

1           AND THE COURT SAID WE DON'T NEED THAT  
2           LEVEL OF GRANULARITY WHERE WE CAN PROVE IMPACT, THE  
3           DAMAGES THRESHOLD IS LOWER THAN PROVING THE EXACT  
4           PENNY OF DAMAGES TO EACH INDIVIDUAL CLASS MEMBER.

5           UNLESS THE COURT HAS ANY OTHER QUESTIONS,  
6           I HAVE NOTHING FURTHER.

7           THE COURT:   VERY WELL.   ANY COMMENT?

8           MR. MITTELSTAEDT:   LET ME START OFF, IF I  
9           MAY, YOUR HONOR, WITH THEIR BRIEF ARGUMENT ON THE  
10          MERITS BECAUSE I THINK THAT THIS EXPLAINS A KEY  
11          PROBLEM THAT DR. FRENCH HAS.

12          THE MUSIC STORE IS INTRODUCED IN APRIL OF  
13          '03.

14          AND THEY SAY IPOD SALES TOOK OFF STARTING  
15          AROUND OCTOBER 2003 WHEN ITUNES FOR WINDOWS WAS  
16          LAUNCHED.

17          THEY ARE CONFUSING ITUNES, THE SOFTWARE  
18          APPLICATION, THE JUKEBOX APPLICATION THAT IS ON  
19          YOUR COMPUTER AND IT HELPS YOU LOAD CD'S AND SO  
20          FORTH WITH ONE PART OF ITUNES SOFTWARE WHICH IS THE  
21          MUSIC STORE.

22          THE REASON IPOD SALES TOOK OFF WHEN  
23          ITUNES FOR WINDOWS WAS LAUNCHED, MADE AVAILABLE IN  
24          OCTOBER OF 2003, WAS THAT WAS BEFORE -- THAT WAS  
25          THE FIRST TIME A PC OWNER COULD USE AN IPOD.

1           BEFORE THAT, IPODS COULD BE USED ONLY  
2 WITH MACINTOSH COMPUTERS.

3           WHEN THIS SOFTWARE, ITUNES FOR WINDOWS  
4 WAS MADE AVAILABLE, THAT MEANT THAT YOU COULD LOAD  
5 ITUNES, THE SOFTWARE APPLICATION, ONTO A PC AND  
6 LOAD YOUR IPOD THROUGH YOUR PC.

7           BEFORE OCTOBER OF 2003 IPODS COULD ONLY  
8 BE USED WITH 5 PERCENT OF THE COMPUTERS IN THE  
9 UNITED STATES, MACINTOSH COMPUTERS.

10           LAUNCHING ITUNES FOR WINDOWS IN OCTOBER  
11 OF 2003 OPENED UP THE IPOD MARKET TO THE 95 PERCENT  
12 OF OTHER COMPUTER OWNERS, THE PC OWNERS THAT USED  
13 WINDOWS.

14           THAT HAS NOTHING TO DO WITH THE  
15 AVAILABILITY OF MUSIC FROM ITUNES MUSIC STORE.

16           EVEN IF THERE HAD NEVER BEEN ITUNES MUSIC  
17 STORE, THE AVAILABILITY OF ITUNES FOR WINDOWS, THE  
18 JUKEBOX APPLICATION, MAKING IT POSSIBLE FOR IPOD  
19 USERS TO USE PC'S IS WHAT WOULD HAVE DRIVEN THE  
20 INCREASE IN DEMAND.

21           IN OTHER WORDS, IF YOU WANTED TO BUY AN  
22 IPOD BEFORE OCTOBER OF 2003, YOU HAD TO HAVE A MAC.  
23 AFTER OCTOBER OF 2003, YOU COULD LOAD IT FROM A PC.

24           THAT HAS NOTHING TO DO WITH THE MUSIC  
25 STORE, BUT IT POINTS OUT A MAJOR PROBLEM THAT

1 DR. FRENCH HAS.

2 HE'S GOING TO SAY, LOOK, YOUR HONOR, AND  
3 LADIES AND GENTLEMEN OF THE JURY, IPOD SALES TOOK  
4 OFF, BUT HE CAN'T TELL YOU HOW MUCH OF THAT  
5 INCREASE IN IPOD SALES AFTER OCTOBER OF 2003 WAS  
6 THE RESULT OF ITUNES FOR WINDOWS HAVING NOTHING TO  
7 DO WITH THE MUSIC STORE.

8 HE CAN'T TELL YOU HOW MUCH OF THAT  
9 INCREASE IN DEMAND HAD TO DO WITH THE AVAILABILITY  
10 OF MUSIC ON THE MUSIC STORE. THEY'RE NOT ALLEGING  
11 THAT THE MUSIC STORE WAS ILLEGAL. THEY'RE ONLY  
12 ALLEGING THAT THE NONLICENSING WHICH CAME SOME TIME  
13 LATER AFTER THEY SAY APPLE GOT MARKET SHARE WAS  
14 ILLEGAL.

15 SO THEY SAY THE ILLEGALITY STARTED SOME  
16 TIME LATER.

17 SO WHAT HE CAN'T DO, HE CAN'T EVEN TELL  
18 US WHEN IT STARTED. AND IF YOU CAN'T TELL US WHEN  
19 IT STARTED, YOU CAN'T SHOW THE BEFORE AND THE  
20 DURING. YOU HAVE TO KNOW THE DIVIDING POINT AND HE  
21 DOESN'T KNOW THE DIVIDING POINT.

22 IF HE KNEW THE DIVIDING POINT, HE CAN'T  
23 SEPARATE THE VARIOUS THINGS THAT AFFECT THE IPOD  
24 DEMAND, THE AVAILABILITY OF THE MUSIC STORE, THE  
25 AVAILABILITY OF IPODS ON PC'S, OR THEIR THEORY

1 ABOUT THE NONLICENSING.

2 THE POINT THERE, YOUR HONOR, IS THAT WHAT  
3 THEY ARE SEARCHING FOR IS A NEEDLE IN A HAYSTACK,  
4 THE EFFECT OF APPLE'S NONLICENSING. AND IT'S A  
5 NEEDLE, IT'S EVEN WORSE BECAUSE THE NEEDLE PROBABLY  
6 DOESN'T EXIST.

7 DR. BURTIS'S TESTIMONY IS UNREBUTTED THAT  
8 UNDER THEIR THEORY OF NONLICENSING, THE PRICE OF  
9 THE IPOD MAY WELL HAVE BEEN A WASH. IT MAY HAVE  
10 BEEN A NEUTRAL EFFECT.

11 THEIR THEORY IS THAT MORE COMPETITION  
12 FROM MP3 PLAYERS WOULD HAVE DRIVEN THE PRICE DOWN  
13 BUT THEY ADMIT THAT APPLE COULD HAVE DRIVEN A  
14 ROYALTY WHICH WOULD HAVE DRIVEN THE PRICE UP. IF  
15 THAT'S A WASH, THERE'S NO IMPACT AND YOU CAN'T FIND  
16 AN IMPACT.

17 IF THERE IS AN IMPACT, IT COULD BE VERY  
18 SMALL AND IT'S THE NEEDLE IN THE HAYSTACK AND HIS  
19 REGRESSION MODEL IS NOT PRECISE ENOUGH TO IDENTIFY  
20 THAT.

21 THE TWO MOST INSTRUCTIVE CASES, I THINK,  
22 ARE JUDGE ALSUP'S RECENT DECISION IN GPU AND IN THE  
23 FREELAND CASE, BOTH OF WHICH WE CITED.

24 IN BOTH OF THOSE CASES DR. FRENCH'S  
25 COUNTERPART SUBMITTED A REGRESSION ANALYSIS. HE

1 DIDN'T JUST COME IN WITH, WITH -- WHERE IS IT? --  
2 FIVE PAGES OF A REPORT THAT WERE SO GENERIC THEY  
3 COULD HAVE BEEN SUBMITTED IN ANY CASE. I COULD DO  
4 THIS, I COULD DO THAT, I NEED TO LOOK AT THE DATA,  
5 I NEED TO LOOK AT THE DATA. I DON'T HAVE THE DATA.  
6 IT'S GENERIC. THAT WOULDN'T HAVE GOTTEN TO FIRST  
7 BASE IN THOSE CASES. IN THE OTHER CASES THE  
8 PLAINTIFF'S EXPERT ACTUALLY DID A REGRESSION AND  
9 THE COURT STILL THREW THEM OUT.

10 IN FREELAND THE COURT SAID THAT IN THIS  
11 CASE THE REGRESSION PERFORMED BY THE ECONOMIST IS  
12 SO INCOMPLETE AS TO BE INADMISSIBLE AS IRRELEVANT.

13 WE DON'T HAVE A CHANCE TO MAKE THAT  
14 SHOWING BECAUSE HE HASN'T EVEN COME UP WITH THE  
15 REGRESSION.

16 BUT WE HAVE POINTED OUT ALL OF THE  
17 DEFECTS AND HE DOESN'T HAVE AN ANSWER AND IF HE HAD  
18 AN ANSWER, HE WOULD HAVE RUN THE REGRESSION.

19 WHY HAVEN'T THEY RUN THE REGRESSION?  
20 IT'S NOT FOR THE UNAVAILABILITY OF DATA. THIS CASE  
21 HAS BEEN PENDING FOR ABOUT 18 MONTHS. CLASS  
22 DISCOVERY HAS BEEN OPEN THE WHOLE TIME, AND THEY  
23 HAVE NO ONE TO BLAME EXCEPT THEMSELVES FOR NOT  
24 HAVING DONE A REGRESSION.

25 DR. BURTIS HAS WALKED THROUGH THE



1 PROBLEMS, THE DEFECTS, THE REASONS THAT DR. FRENCH  
2 CANNOT DO WHAT HE SAYS. AND IT'S NOT BECAUSE SHE  
3 DOESN'T BELIEVE IN REGRESSION ANALYSES. SHE SHOWED  
4 YOUR HONOR AN APPROPRIATE USE OF A REGRESSION.

5 HIS BASIC PROBLEM, DR. FRENCH'S BASIC  
6 PROBLEM IS THAT HE'S TAKING AN IPOD, THE ORIGINAL  
7 GENERATIONS ONE, TWO, AND THREE THAT WERE SOLD  
8 SEVEN TO NINE YEARS AGO, AND HE'S TRYING TO TELL  
9 YOUR HONOR THAT BASED ON SUPPLY, DEMAND, AND COST  
10 VARIABLES RELATED TO THIS 399 OR 499 PRICE OF THE  
11 FIRST IPOD HE CAN PREDICT WHAT THE PRICE OF THIS  
12 SHUFFLE SHOULD HAVE BEEN IN 2009.

13 SO THE PRICE GOES FROM \$399 IN 2001 TO  
14 \$79 FOR A MUCH SMALLER, MUCH MORE ADVANCED PRODUCT  
15 AND HE'S SAYING, WELL, THAT'S NOT GOOD ENOUGH.  
16 HE'S GOING TO BE ABLE TO SHOW YOUR HONOR THAT THE  
17 PRICE SHOULD HAVE BEEN EVEN LOWER.

18 AND AT HIS DEPOSITION I ASKED HIM ARE YOU  
19 GOING TO MODEL HOW MUCH THE PRICE SHOULD HAVE  
20 DECLINED MORE THAN IT DECLINED?

21 I THINK AT THE DEPOSITION HE WAS THINKING  
22 THE PRICES STEADILY INCREASED, AND HE WAS GOING TO  
23 BE ABLE TO FIND AN OVERCHARGE IN THE PRICE  
24 INCREASE.

25 WHEN I ASKED HIM ARE YOU GOING TO MODEL

1 PRICE DECLINES AND HE SAID HEAVENS NO AND THAT'S AT  
2 PAGE 76 OF HIS DEPOSITION. THAT'S AN UNDERTAKING  
3 TO TRY TO MODEL HOW MUCH PRICES SHOULD HAVE FALLEN  
4 BEYOND WHERE THEY FELL.

5 SO, YOUR HONOR, HE'S TAKING PRICES SEVEN  
6 TO NINE YEARS AGO ON ONE PRODUCT AND TRYING TO  
7 PREDICT WHAT PRICES WOULD BE ON ALL OF THESE  
8 DIFFERENT MODELS ARE JUST TO THE EYE ARE MUCH  
9 DIFFERENT. THEIR FEATURES ARE DIFFERENT. THE WAY  
10 THEY CAN BE USED IS DIFFERENT.

11 I MEAN, THIS ONE NANO YOU CAN PUT ON  
12 YOURSELF AND RUN WITH IT. YOU COULDN'T DO THAT  
13 WITH THIS BIG ONE. THE WAY THEY CAN BE USED ARE  
14 DIFFERENT. THE CAPACITIES ARE DIFFERENT. YOU  
15 KNOW, ALMOST EVERYTHING IS DIFFERENT ABOUT THEM.

16 THIS TOUCH CAN DO THINGS THAT THE  
17 ORIGINAL IPOD COULDN'T DO IT. IT HAS VIDEO AND  
18 PHOTO. IT CAN CONNECT TO THE INTERNET. IT HAS  
19 WIRELESS. YOU CAN SEND E-MAILS AND IT'S LIKE A PDA  
20 AND WITH A CALENDAR AND SO FORTH.

21 THERE'S NO WAY TO PREDICT FROM THE PRICE  
22 OF THIS ONE, WHAT THE PRICE OF THIS ONE WOULD HAVE  
23 BEEN SEVEN YEARS LATER. AND HE CERTAINLY HASN'T  
24 TRIED TO DO IT.

25 THE COURT'S AND JUDGE ALSUP WENT THROUGH

1 THIS IN GREAT DETAIL, ARE INCREASINGLY SKEPTICAL OF  
2 PLAINTIFF'S EXPERTS WHO OFFER ONLY A PROMISE OF A  
3 METHOD FOR PROVING CLASS WIDE IMPACT.

4 AND WHAT JUDGE ALSUP SAID WAS, HE QUOTED  
5 A SCHOLAR WHO SAID "WE'RE INCREASINGLY SKEPTICAL OF  
6 PLAINTIFF'S EXPERTS WHO OFFER ONLY GENERALIZED AND  
7 THEORETICAL OPINIONS THAT A METHODOLOGY MAY SERVE  
8 THIS PURPOSE WITHOUT ALSO SUBMITTING A FUNCTIONING  
9 MODEL THAT IS TAILORED TO MARKET FACTS IN THE CASE  
10 AT HAND."

11 DR. FRENCH HAS NOT DONE THAT. BUT THAT'S  
12 NOT THE ONLY REASON FOR DENYING THIS MOTION.

13 DR. FRENCH ALSO ADMITS THAT IF HE COULD  
14 DO WHAT HE PURPORTS TO BE ABLE TO DO ALL HE WOULD  
15 END UP WITH IS AN AVERAGE OVERCHARGE.

16 AND IT'S AT PAGE 20 OF HIS DEPOSITION.  
17 "I'M NOT GOING TO DO THE PASS THROUGH ANALYSIS ON  
18 AN INDIVIDUAL TRANSACTION BASIS."

19 PAGE 21, "I'M NOT GOING TO BE CONCERNED  
20 WITH WHETHER SOME PRICES HAVE NO PASS THROUGH AND  
21 OTHERS DO."

22 HE'S GOING TO COME UP WITH ONE  
23 OVERCHARGE, MAYBE JUST ONE OVERCHARGE FOR ALL IPODS  
24 LUMPED TOGETHER. AND SO THAT WOULD RUN THE  
25 POSSIBILITY THAT, YOU KNOW, THIS LITTLE ONE WAS

1 UNDERPRICED BY A CERTAIN AMOUNT. THE TOUCH WAS  
2 OVERPRICED BY A CERTAIN AMOUNT. THE SHUFFLE WAS  
3 EXACTLY RIGHT. HE'S GOING TO AVERAGE THOSE ALL  
4 TOGETHER, AND HE MIGHT COME UP WITH AN OVERCHARGE  
5 THAT HE WOULD THEN APPLY TO EVERYONE, TO ALL IPODS.

6 OR EVEN IF HE DOES IT IPOD MODEL BY IPOD  
7 MODEL, HE'S STILL ONLY GOING TO COME UP WITH AN  
8 AVERAGE OVERCHARGE FOR ALL PURCHASERS. HE'S  
9 AVOIDING INDIVIDUAL ISSUES BY IGNORING THE  
10 INDIVIDUAL ISSUES.

11 AND WHEN I SAY HE MIGHT COME UP WITH AN  
12 OVERCHARGE ON THIS NANO, THERE'S NO WAY HE CAN DO  
13 THAT BECAUSE THE NANO WASN'T OFFERED FOR SALE IN  
14 HIS BEFORE PERIOD, SO HE HAS NO BASE LINE.

15 THE COURT: BRING YOUR ARGUMENT TO A  
16 CLOSE.

17 MR. MITTELSTAEDT: TWO LAST POINTS.  
18 DR. BURTIS'S TESTIMONY IS UNREBUTTED THAT UNDER THE  
19 PLAINTIFF'S THEORY IF THERE'S AN OVERCHARGE ON AN  
20 IPOD, THERE MIGHT BE AN UNDERCHARGE ON THE MUSIC  
21 FOR REASONS SHE DESCRIBED.

22 AND IF YOU THINK ABOUT AN UNDERCHARGE ON  
23 THE MUSIC FOR OF SAY TEN CENTS AND AN OVERCHARGE ON  
24 THE IPOD OF FIVE DOLLARS, AS SOON AS -- IF YOU HAVE  
25 A CONSUMER THAT BOUGHT 50 SONGS, YOU KNOW, IT'S A

1 WASH. HE'S SAVED FIVE DOLLARS ON SONGS. HE'S PAID  
2 FIVE DOLLARS ON OVERCHARGE ON IPOD. HE'S NOT  
3 INJURED.

4 NOW, THEY SAY, WELL, THAT IMMUNIZE APPLE.  
5 THAT'S NOT WHAT THIS IS ABOUT. THE NINTH CIRCUIT  
6 IN THE SIEGLE CASE SAID THAT IN A CASE LIKE THIS,  
7 THAT THE PLAINTIFF HAS TO SHOW A NET OVERCHARGE  
8 TAKING INTO ACCOUNT BOTH PRODUCTS FOR OBVIOUS  
9 REASONS.

10 THEY DEFAULT COMPLETELY ON TRYING TO SHOW  
11 A NET OVERCHARGE. THEY ONLY FOCUS ON ONE PRODUCT.

12 AND WHY DO THEY DO THAT? WHY DO THEY  
13 IGNORE THE NET OVERCHARGE ISSUE? I THINK THE  
14 REASON IS OBVIOUS. THE ONLY WAY TO DETERMINE  
15 WHETHER AN INDIVIDUAL PAID A NET OVERCHARGE IS TO  
16 COMPARE HIS PURCHASES OF MUSIC AGAINST HIS  
17 PURCHASES OF IPODS, THE RELATIVE NUMBER OF  
18 PURCHASES TAKEN TOGETHER WITH THE RELATIVE  
19 UNDERCHARGE ON ONE AND OVERCHARGE ON ANOTHER  
20 DETERMINES WHETHER THERE'S A NET OVERCHARGE FOR  
21 THAT INDIVIDUAL. AND YOU CAN ONLY DO THAT  
22 INDIVIDUAL BY INDIVIDUAL WHICH IS WHY THEY IGNORE  
23 IT.

24 THEY CAN READ THE CASE. THEY CAN READ  
25 SIEGLE AND SEE THAT, YOU KNOW, SEE THAT YOU NEED TO

1 DO A NET OVERCHARGE BUT THEY FAILED TO DO THAT.

2 AND I THINK THAT'S IT, YOUR HONOR.

3 THE COURT: THANK YOU.

4 MR. MITTELSTAEDT: THANK YOU.

5 THE COURT: WELL, I CERTAINLY WANT TO  
6 REFLECT ON WHAT I HAVE HEARD.

7 MY IMMEDIATE REACTION TO THIS IS THAT THE  
8 CONCERNS THAT PROMPTED THIS HEARING REMAIN AND THAT  
9 IS TRYING TO DETERMINE WHETHER OR NOT INDIRECT  
10 PURCHASERS IS A MODEL OR A METHOD FOR DETERMINING  
11 WHETHER OR NOT ANY ALLEGED OVERCHARGE IS PASSED  
12 THROUGH TO THE CLASS HERE.

13 THE -- THERE ARE MANY ASPECTS OF THIS  
14 THAT I WANT TO THINK ABOUT, ONE OF THEM BEING THE  
15 IMPACT OF BIG BOX DIRECT PURCHASERS WHO WOULD BE A  
16 MEMBER OF THE DIRECT PURCHASER CLASS. ON THAT CASE  
17 THIS WOULD EXPAND THE CLASS TO ALLOW INDIRECT  
18 PURCHASERS AS A SEPARATE CLASS FROM THOSE DIRECT  
19 PURCHASERS.

20 I AM CONCERNED WITH PLAINTIFF'S ARGUMENT  
21 THAT IT'S NOT ITS BURDEN TO PROVE THAT THE MODEL  
22 WILL WORK.

23 IT SEEMS TO ME THE RELIABILITY OF THE  
24 METHOD IS EXACTLY WHAT I WAS LISTENING FOR TO SEE  
25 WHETHER OR NOT IT CAN FACTOR OUT.

1 I HAVE THE WITNESS'S OPINION THAT THEY  
2 CAN FACTOR OUT THE MANY FACTORS, BUT HAVING NOT  
3 DEMONSTRATED IT TO MY SATISFACTION, IT LEAVES THE  
4 COURTS WITH CONCERNS.

5 AND IT COULD BE THAT THE COURT WOULD DENY  
6 THE MOTION AT THIS POINT SUBJECT TO WHAT  
7 PLAINTIFF'S COUNSEL INDICATED WERE SITUATIONS WHERE  
8 THE COURT ALLOWED THE METHOD AFTER IT WAS CLEARLY  
9 DEMONSTRATED LATER IN THE CASE, BUT THAT'S MY  
10 PREDISPOSITION.

11 I'LL CERTAINLY GIVE THIS FURTHER  
12 CONSIDERATION. SO THE MOTION FOR CERTIFICATION  
13 BASED ON THE PREVIOUSLY SUBMITTED PAPERS AS WELL AS  
14 THE EVIDENTIARY MATTER WITH RESPECT TO THE INDIRECT  
15 PURCHASER ANTITRUST CLASS IS UNDER SUBMISSION TO  
16 THE COURT.

17 FOR PURPOSES OF OUR CASE MANAGEMENT  
18 CONFERENCE ON THE OTHER PART OF THE CASE, I PROPOSE  
19 TO GO OFF THE RECORD AND CONDUCT IT INFORMALLY,  
20 UNLESS THERE'S SOME MATTER THAT THE PARTIES WISH TO  
21 HAVE ON THE RECORD. LET ME KNOW NOW BEFORE I LET  
22 MY COURT REPORTER GO.

23 MR. MITTELSTAEDT: THAT'S FINE, YOUR  
24 HONOR.

25 MR. BRISKIN: THAT'S FINE, YOUR HONOR.

1 MR. SKALET: THAT'S FINE, YOUR HONOR.

2 THE COURT: MS. RODRIGUEZ, YOU MAY BE  
3 EXCUSED FOR THAT PURPOSE.

4 COME FORWARD THE REST OF YOU.

5 (WHEREUPON, THE PROCEEDINGS IN THIS  
6 MATTER WERE CONCLUDED.)

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