

Exhibit 1

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STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

STACIE SOMERS, on Behalf of)
Herself and All Others)
Similarly Situated,)
)
Plaintiff,) Case No.: CV 07 6507
) HRL
-vs-)
)
APPLE, INC., a California)
Corporation,)
)
Defendant.)
_____)

DEPOSITION of GARY L. FRENCH, Ph.D.,
taken on behalf of Defendants at 555
California Street, 26th Floor, San
Francisco, California, on Friday, April
3, 2009, commencing at 10:09 a.m.
before LINDA VACCAREZZA, CRP, RPR, CLR,
CSR NO. 10201

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GARY L. FRENCH,

having been duly sworn, by the Certified
Shorthand Reporter, was examined and testified as
follows:

EXAMINATION

BY MR. MITTELSTAEDT:

Q Okay. If you'd state your full name for
the record, please.

A Gary Leslie French.

Q As I read your report, your opinion is
that there are two approaches for demonstrating
common proof of impact on the indirect
purchasers: One is to show impact on the direct
purchasers, and then show that they passed on
some or all of the overcharge to indirect
purchasers. And the other is to estimate the
overcharge directly at the retail level.

Do I have that right?

A Yes.

Q In this case, have you actually
undertaken either of those approaches?

A No. Not at the class certification
stage, no.

Q In any other case, have you ever
actually done either approach, as opposed to just

02:26 1 Q Do you know any way -- do you know any way to
02:26 2 measure, in your regression analysis, for a coolness
02:26 3 factor?

02:26 4 A In a regression analysis?

02:26 5 Q Right.

02:26 6 A No, you couldn't measure by regression a
02:26 7 coolness factor.

02:26 8 Q Now, the fact that there's a feature or a
02:26 9 function that increases the demand for a product,
02:26 10 that's not anti-competitive by itself, is it?

02:26 11 A No.

02:26 12 Q You need something more for an economist to
02:26 13 say a feature or a function is anti-competitive?

02:26 14 A Well, you need to show that -- in the context
02:26 15 of the Section 2 or tying claim, you need to show
02:26 16 there's market power, not just that demand was
02:26 17 increased.

02:26 18 Q Well, you need to show more than that,
02:26 19 right? You can have market power and have a feature
02:26 20 in a product that increases the demand without
02:26 21 violating the antitrust laws, right?

02:26 22 A Conceivably.

02:26 23 Q Well, not just conceivably but every day.

02:26 24 A Yeah. I mean, you can have legitimately
02:26 25 obtained market power. And unless you do something

DEPOSITION OFFICER'S CERTIFICATE

STATE OF CALIFORNIA

ss.

COUNTY OF SONOMA

I, LINDA VACCAREZZA, hereby certify:

I am a duly qualified Certified Shorthand Reporter in the State of California, holder of Certificate Number CSR 10201 issued by the Court Reporters Board of California and which is in full force and effect. (Fed. R. Civ. P. 28(a).)

I am authorized to administer oaths or affirmations pursuant to California Code of Civil Procedure, Section 2093(b) and prior to being examined, the witness was first duly sworn by me. (Fed. R. Civ. P. 28(a), 30(f)(1).)

I am not a relative or employee or attorney or counsel of any of the parties, nor am I a relative or employee of such attorney or counsel, nor am I financially interested in this action. (Fed. R. Civ. P. 28.)

I am the deposition officer that stenographically recorded the testimony in the foregoing deposition and the foregoing transcript is a true record

/ / /

1 of the testimony given by the witness. (Fed. R. Civ. P.
2 30(f)(1).)

3 Before completion of the deposition, review of
4 the transcript [XX] was [] was not requested. If
5 requested, any changes made by the deponent (and
6 provided to the reporter) during the period allowed, are
7 appended hereto. (Fed. R. Civ. P. 30(e).)

8 Dated: 04/06/09,

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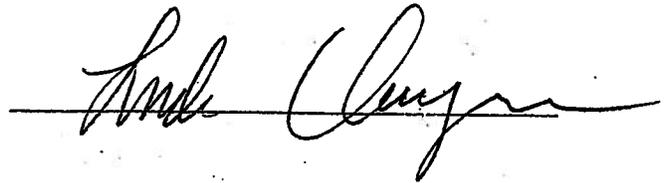


Exhibit 2

1 UNITED STATES DISTRICT COURT FOR THE
2 NORTHERN DISTRICT OF CALIFORNIA
3 SAN JOSE DIVISION

4 ---000---

COPY

5
6 THE APPLE IPOD iTUNES ANTI-
7 TRUST LITIGATION,

No. C-050037-JW(RS)

8 _____ /
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11 DEPOSITION OF ROGER G. NOLL, Ph.D.
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17 Taken before EARLY K. LANGLEY, RPR, RMR

18 CSR No. 3537

19 September 19, 2008
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Oakland, California 94612
Ph 510-451-1580
Fax 510-451-3797
www.aikenwelch.com

1 appearing.

2 MS. SWEENEY: Bonny Sweeney from the
3 Coughlin Stoia law firm representing the direct
4 purchaser plaintiffs.

5 MS. ROACH: Paula Roach from Coughlin 10:10
6 Stoia representing plaintiffs.

7 MS. ZELDES: Helen Zeldes from Zeldes &
8 Haeggquist representing the indirect purchaser
9 plaintiffs.

10 MR. MITTELSTAEDT: And Bob Mittelstaedt 10:10
11 for the defendant with Jeff LeVee, Michael Scott
12 and Carlyn Clause.

13 THE VIDEOGRAPHER: Would the counsel
14 please state any stipulations or statements that
15 they would like on the record at this time. 10:11

16 MR. MITTELSTAEDT: None.

17 THE VIDEOGRAPHER: The reporter may now
18 swear the witness.

19 ROGER NOLL, Ph.D.

20 sworn as a witness,

21 testified as follows:

22 EXAMINATION BY MR. MITTELSTAEDT:

23 Q. Good morning. If you would state your
24 name and business address, please.

25 A. My name is Roger G. Noll and I'm in the 10:11

1 little variation, there's only two or three
2 product models, sometimes a simple little table
3 will do it.

4 So, but in principle, it is normally the
5 case that damages are estimated using a regression 11:31
6 model. And I suspect that will happen here, but I
7 don't know that until I see the data.

8 Q. Okay. Have you concluded that you can use
9 a before-after method of determining whether
10 there's damages and, if so, the amount without a 11:31
11 regression analysis in this case?

12 A. No.

13 Q. Okay.

14 A. I mean, what I described in the before or
15 after analysis is a method of estimating the 11:31
16 damages that is -- can have an implementation of
17 many forms. All right.

18 And it is -- it is normally the case that
19 the implementation method is a price regression
20 that attempts to take into account variation in 11:31
21 price due to all of the factors that are likely to
22 affect supply and demand and then see if there's
23 anything left over that can be explained by the
24 anticompetitive act.

25 Q. All right. Have you done enough work in 11:32

1 advantage. I don't know.

2 Q. Okay. Are you sure that the yardstick
3 method can be implemented in this case?

4 A. As I have said in my report, that is the
5 one I'm least happy about, all right, in that it 11:33
6 requires identifying the appropriate comparative
7 products. And my -- I believe that's -- that's
8 the hangup, is identifying the appropriate
9 benchmark products.

10 But, you know, as I've said in the report, 11:34
11 there are some candidates out there. If the
12 plaintiffs had completed the market correctly,
13 then the most obvious candidates are the products
14 that are the closest functionally to portable
15 digital media players, but that are not in the 11:34
16 same market.

17 Q. Okay.

18 A. And I also gave an explanation of why it's
19 possible, although you normally don't do it, you
20 might even be able to use products in the same 11:34
21 market because of the effect that tying has in
22 segmenting the market, so that even though in the
23 absence of anticompetitive acts, all the products
24 would be in the same market, the anticompetitive
25 act may have reduced competition among portable 11:34

1 digital media players sufficiently such that you
2 can actually use the -- some of the competitors in
3 the portable digital media player market as a
4 yardstick. So that's possible, but, again, it
5 requires data that I'm not sure exists. 11:35

6 So, I would say that's a candidate,
7 someone should pursue it, if they were going to
8 estimate damages, but I have more doubts that that
9 one will work than the other two.

10 Q. Have you done enough work to determine if 11:35
11 the markup method can, in fact, be implemented in
12 this case?

13 A. Well, actually, I'm not the one who did
14 the work. I cited a paper that I found that was
15 fairly recently written that -- that essentially 11:35
16 does this.

17 Now, it doesn't have internal data,
18 unfortunately. It has -- what they did is they
19 tried to build up the cost.

20 Q. Okay. Can you just answer the question? 11:35
21 And the question is: Have you done enough work --
22 have you seen enough work to determine if the
23 markup method can, in fact, be implemented?

24 A. Yes.

25 MS. SWEENEY: Object. He was answering 11:35

1 just used it when I had dinner with them on
2 Wednesday night.

3 Q. In reference to?

4 A. Oh, nothing to do with any of this. It
5 had -- what were they referring to?

11:50

6 Q. Do you think the coolness factor affects
7 demand for iPod?

8 A. I don't know even how to answer the
9 question. I think in the sense that I need to
10 back up. I'd have to know what you meant by it. 11:50

11 I mean, people have attachments to products, and a
12 large part of what marketing is about is trying to
13 build those attachments. Those -- those affect
14 demand. But I'm having a hard time knowing how we
15 would go out and measure units of cool -- 11:50

16 Q. Well, that was going to be my next
17 question --

18 A. -- for a regression analysis.

19 Q. But the first question is: Do you think
20 that type of attachment to a product is something 11:50
21 that affects demand?

22 A. Well, it affects demand but it affects
23 it -- you can -- that's what determines elasticity
24 of demand. All right. So you're out there
25 estimating elasticity of demand and what's going 11:51

1 THE WITNESS: Okay.

2 MR. MITTELSTAEDT: Let's take a short
3 break now.

4 MS. SWEENEY: Okay.

5 THE VIDEOGRAPHER: This ends tape No. 1 of 12:01
6 the deposition Roger Noll. The date is September
7 19th, 2008, and the time is 12:01.

8 We are now off the record.

9 (Break taken.)

10 THE VIDEOGRAPHER: Test 1, 1, 2. 12:15

11 Stand by. On the record. This begins
12 tape No. 2 of the deposition of Roger Noll. The
13 date is September 19th, 2008, and the time is
14 12:16. We're back on the record.

15 BY MR. MITTELSTAEDT: 12:16

16 Q. For the before-after model, can you be any
17 more specific as to what variables you're going to
18 include in the regression analysis than to say as
19 you do in the report, "product features, input
20 cost and the stage of the product in its life 12:16
21 cycle"?

22 A. Do you want specific examples of product
23 features and input costs?

24 Q. I want whatever you are going to put in
25 your regression analysis as a variable. 12:16

1 A. I don't know what I am going to put in my
2 final regression analysis as a variable because I
3 haven't collected the data to see what's
4 significant and what isn't.

5 I can -- the -- the -- I think what you 12:16
6 really want to know is what things might be tried
7 as opposed to what's going to be in the final
8 model because I have no idea what would be in the
9 final model.

10 Q. What variables are you going to put in 12:17
11 your various versions of your regression analysis
12 for the before-after model?

13 A. Again, the -- I start off with the answer
14 I've given several times.

15 They would be specific functions the 12:17
16 product can perform, would be the first category,
17 such as what specifically can you do with it,
18 because that's changed over time. All right.

19 An iPod today isn't the same thing an iPod
20 was in 19 -- or 2001. And as time has progressed, 12:17
21 it's had greater and greater functionality, and,
22 you know, like the introduction of Internet
23 access, the adding of video, increases in memory
24 size.

25 So, it's -- it's -- it's the -- it's 12:17

1 instead of a price estimate which you then plug
2 into the Cornell model of imperfect competition.

3 Q. Okay. And have you performed that
4 analysis in any case you've done?

5 A. I personally have not done it in a case. 12:46
6 I have done it in a paper. And I've seen it done
7 twice by Dan McFadden.

8 Q. Okay. What paper did you do it in?

9 A. It's just -- the results of it are just in
10 footnotes in two papers. I did it once in a 12:47
11 little paper I wrote a long time ago with Paul
12 McAvoy on competition among natural gas pipelines
13 and I did it again on -- in a paper about
14 intellectual property rights --

15 Q. Okay.

16 A. -- which was about five or six years ago.

17 Q. After lunch I'll ask you to show me that
18 in a minute.

19 A. Yeah. If I can remember the title of it
20 looking at my CV and trying to remember what's in 12:47
21 papers by names. I'm not sure I can do it, but
22 I'll try.

23 Q. Okay.

24 A. I know I can do the natural gas pipelines
25 one, because it's the only paper I've ever written 12:47

1 case, then the total monopoly profits go up, if
2 you can engage in tying.

3 Q. Okay. Have you made any analysis of the
4 impact of the alleged tying arrangement on the
5 price of music? The price of iTunes music? 14:24

6 A. I have done no analysis of the effects of
7 the alleged tying. I don't have a merits
8 conclusion. So I -- I haven't done it for the
9 tied product or the tying product, though. This
10 is not the liability phase. This is the class 14:24
11 certification phase.

12 Q. Is it --

13 A. I don't have a conclusion about what the
14 effects on the price of anything were.

15 Q. Okay. Is it plausible that if the 14:24
16 plaintiffs were right that there was a tying
17 arrangement, it would have caused the price of
18 iTunes store music to drop?

19 A. Maybe, maybe not.

20 Q. Compared to the but-for world? 14:25

21 A. There's -- you can't -- you cannot --
22 there's no theoretic answer to that question.
23 It's an empirical question. Maybe, maybe not. It
24 depends.

25 Q. It depends on the results of a regression 14:25

1 curve effect. You don't have to separate out the
2 magnitude of the cost differential and the number
3 of people who experience it. What you have is the
4 cumulative effect of those two things determining
5 a change in the demand curve. 15:56

6 Q. So when you do your regression analysis,
7 if you do it right, you'll come up with a certain
8 amount of the iPod price that has not been
9 allocated or attributed to some other variable, it
10 will be sort of left over to your dummy variable 15:56
11 and then that dummy variable will reflect what you
12 say is the price effect of -- of whatever wasn't
13 measured in your various variables; is that right?

14 A. Well, I'm not sure it's going to be a
15 dummy variable. You know, as I said earlier, the 15:56
16 effect can depend on the nature of the
17 alternatives, and those may vary continuously.

18 Q. I don't understand that.

19 A. The magnitude of the lock-in effect in my
20 expectation went down in September of 2007. So I 15:57
21 would -- I think a valid damage estimation would
22 at least have to admit the possibility and
23 estimate whether the anticompetitive harm was
24 affected by the events of September 2007.

25 And that's what I meant. I mean what's 15:57

1 A. Oh, I'm sorry. I'm sorry. It's late in
2 the day. Explain what we're after now.

3 Q. You understand that the purported class
4 includes both direct consumers and resellers like
5 Best Buy? 17:01

6 A. The wholesale market?

7 Q. Yes.

8 A. Yes. Remind me what I was asked again.

9 Q. Do you know whether or not you can use the
10 same regression analyses for both? 17:02

11 MS. SWEENEY: Both being resellers and
12 consumers?

13 BY MR. MITTELSTAEDT:

14 Q. Yes.

15 A. My best guess is there's going to be two 17:02
16 regression analysis models because obviously the
17 wholesale price differs from the retail price.

18 What I -- what I need to know is how the
19 wholesale market actually works. I need documents
20 about Apple's pricing policy in the wholesale 17:02
21 market. I need transactions data in the wholesale
22 market and how I'll go about doing it -- doing
23 that part of the analysis would depend on those
24 details.

25 Let's take the simplest possible case, 17:02

1 which I doubt that it's true, but let's assume
2 that it's true. Assume that the wholesale market
3 looks exactly like the retail market, that there's
4 a posted price for each model of iPod that's 30 or
5 40 percent below the retail price and everybody 17:03
6 can buy as much as they want at that posted price.

7 In that case, the -- a product-specific
8 dummy variable whether the buyer was a wholesaler
9 would be sufficient, right. But that's almost
10 certainly not going to be true. It might be true. 17:03

11 But I suspect there are quantity discounts
12 and advance purchase discounts, and, you know,
13 special promotional discounts if you spend some
14 money on advertising we'll pay some of it. So
15 there's likely to be more complexity in the price 17:03
16 formation in the wholesale market than in the
17 retail market in which case there will probably
18 have to be two equations.

19 Q. And can you tell me anything more than --
20 more than what is in your report on what the 17:03
21 equation will look like for the wholesale --

22 A. Actually, if that's the case, it will look
23 a whole lot like the one I just did which is
24 static random access memory, static random access
25 memory, which is a different kind of case. It's a 17:04

1 STATE OF CALIFORNIA)
2) ss.
3 COUNTY OF ALAMEDA)
4
5

6 I, EARLY LANGLEY, a Shorthand Reporter, State
7 of California, do hereby certify:

8 That ROGER G. NOLL, in the foregoing deposition
9 named, was present and by me sworn as a witness in the
10 above-entitled action at the time and place therein
11 specified;

12 That said deposition was taken before me at
13 said time and place, and was taken down in shorthand by
14 me, a Certified Shorthand Reporter of the State of
15 California, and was thereafter transcribed into
16 typewriting, and that the foregoing transcript
17 constitutes a full, true and correct report of said
18 deposition and of the proceedings that took place;

19 IN WITNESS WHEREOF, I have hereunder subscribed my hand
20 this 24th day of September 2008.

21 
22 _____
23 EARLY LANGLEY, CSR NO. 3537
24 State of California
25