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22 UNITED STATES DISTRICT COURT  
 23 NORTHERN DISTRICT OF CALIFORNIA  
 24 SAN JOSE DIVISION

25 THE APPLE IPOD ITUNES ANTI-TRUST )	Lead Case No. C-05-00037-JW(RS)
26 LITIGATION )	
27 _____ )	<u>CLASS ACTION</u>
28 This Document Relates To: )	
29 ALL ACTIONS. )	PLAINTIFFS' MEMORANDUM IN
30 _____ )	OPPOSITION TO DEFENDANT'S MOTION
	FOR DECERTIFICATION OF RULE
	23(b)(3) CLASS

31 Judge: Hon. James Ware  
 32 Date: November 23, 2009  
 33 Time: 9:00 a.m.  
 34 CTRM: 8-4th Floor

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1 Plaintiffs Somtai Troy Charoensak, Mariana Rosen, and Melanie Tucker (collectively,  
2 “plaintiffs”) respectfully submit this memorandum in opposition to defendant’s (“Apple”) Motion  
3 for Decertification of Rule 23(b)(3) Class (“Def’s Motion”).

4 **I. INTRODUCTION**

5 After full briefing and oral argument, this Court certified a Rule 23(b)(3) Class on plaintiffs’  
6 monopolization, attempted monopolization and related state law claims in December 2008.  
7 Dkt. No. 196 (“Class Certification Order”). Apple now wants another bite at the apple. Citing no  
8 new law or facts, and relying largely on a retreat report by an expert it had retained prior to the  
9 original class certification briefing, but chose not to use, Apple moves to decertify the Class.

10 In its Class Certification Order, the Court identified numerous common issues of law and fact  
11 that supported class certification, including market definition, market power, anticompetitive  
12 conduct, harm to competition, Apple’s willful acquisition and maintenance of monopoly power, and  
13 anticompetitive injury. Class Certification Order at 6-8. Apple’s motion challenges none of these  
14 findings.

15 Apple moves to decertify the class based solely on the report of its expert, Dr. Michele M.  
16 Burtis. Dkt. No. 241. Dr. Burtis belatedly challenges the sufficiency of the 60-page declaration  
17 submitted by plaintiffs’ expert, Stanford Professor *Emeritus* Roger G. Noll, in support of class  
18 certification, and only with regard to his proposed methodologies to show classwide damages. In  
19 addition to his detailed initial report, Professor Noll has also submitted a 56-page reply declaration,<sup>1</sup>  
20 filed concurrently herewith, that provides even more detail as to why he believes that his proposed  
21 methodologies can be utilized to show classwide damages.

22 As set forth in more detail below and in Professor Noll’s reply declaration, Dr. Burtis  
23 attempts to re-write Professor Noll’s thorough, detailed analysis in order to compare it to the analysis  
24 of a completely different expert, Dr. Gary L. French, in the indirect purchaser case, *Somers v. Apple*,

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27 <sup>1</sup> See Reply Declaration of Roger G. Noll, filed concurrently (“Noll Reply Decl.”).

1 *Inc.*, No. 07-CV-06507 JW (N.D. Cal.). The two reports bear only minimal resemblance, and the  
2 Court's concerns with Dr. French simply do not apply to Professor Noll's analysis.

3 Further, Apple seeks to use its own refusal to produce anything other than exemplar data  
4 prior to the original class certification briefing, and delay in producing merits-based discovery now,  
5 to support decertification. Its "gotcha" litigation tactics are inappropriate and certainly do not meet  
6 its burden to overturn the Court's original class certification decision.

7 Finally, when the reports of Dr. Burtis and Professor Noll are compared substantively,  
8 Professor Noll's is far more sophisticated and reasoned. In forming his opinions, Professor Noll has  
9 relied on data both from Apple and from publicly-available sources – scholarly articles, economic  
10 treatises, analyst reports, etc. – in addition to his years of experience and intimate knowledge of the  
11 industry and expertise in formulating damages models in antitrust cases. In sharp contrast, Dr.  
12 Burtis testified that she examined none of the sources specifically cited by Professor Noll. She just  
13 looked at the same things she looked at to prepare her report in rebutting Dr. French in *Somers*. Her  
14 opinions bear out this paucity of preparation. Dr. Burtis, for example, is of the opinion that even if  
15 plaintiffs make a clear showing that Apple has monopolized or attempted to monopolize the market,  
16 she does not believe *anyone* – either on a class or individual basis – could prepare a damages model  
17 to hold Apple accountable.

18 Apple's limited argument attacking Professor Noll's proposed damages methodologies  
19 cannot satisfy its burden to overcome the many common issues of law and fact that the Court  
20 identified in its original Class Certification Order. Apple's motion should be denied.

## 21 **II. PROCEDURAL BACKGROUND**

### 22 **A. The Court Certified the Class Based on Professor Noll's Report**

23 On July 21, 2008, plaintiffs filed their motion seeking certification of a class of direct  
24 purchasers of iPods, supported by the detailed 60-page expert declaration of Professor Noll. Dkt.  
25 Nos. 165, 166-1, (Declaration of Roger G. Noll, filed July 21, 2008). Relying on exemplar cost and  
26 revenue data produced by Apple, numerous analyst reports, public information on iPod  
27 characteristics and pricing, his extensive experience in technology markets, and the pleadings and  
28 depositions in this litigation, Professor Noll opined that three widely-accepted methods were

1 available to calculate damages to the class, and that each of those methods relied on evidence  
2 common to the class: (1) before-after method; (2) yardstick method; and (3) mark-up method. Dkt.  
3 No. 166-1 at 52-59.

4 On September 8, 2008, Apple retained its economic expert, Dr. Michele M. Burtis. On  
5 September 19, 2008, Apple conducted a day long deposition of Professor Noll. *See* Declaration of  
6 Thomas R. Merrick in Support of Plaintiffs' Memorandum In Support of Opposition to Defendant's  
7 Motion for Decertification of Rule 23(b)(3) Class, filed concurrently ("Merrick Decl."), Ex. 1,  
8 Deposition of Roger G. Noll, taken September 19, 2008. During the deposition, Professor Noll  
9 responded to extensive questioning by Apple concerning his report and specifically about each  
10 methodology he proposed, including the possible uses of regression analysis. *See, e.g., id.*, Ex. 1 at  
11 68:13-75:24.

12 Apple filed its opposition to plaintiffs' motion for class certification three months after  
13 plaintiffs served their motion, on October 17, 2008. Although it retained Dr. Burtis over a month  
14 earlier, Apple submitted no expert report to rebut Professor Noll. Dkt. No. 181. After briefing and  
15 oral argument, on December 22, 2008, the Court certified a class of direct purchasers of iPods for  
16 monopolization and attempted monopolization of the portable digital audio player market.<sup>2</sup> Class  
17 Certification Order.

#### 18 **B. Apple Thwarted and Continues to Thwart Discovery**

19 Prior to class certification, at Apple's request and over plaintiffs' objections, the Court  
20 sharply limited the scope of discovery. Even as to this limited discovery, Apple objected to each of  
21 plaintiffs' discovery requests on the grounds that it was not relevant to class certification. *See* Dkt.  
22 No. 261, Declaration of Bonny E. Sweeney in Support of Plaintiffs' Opposition to Apple's  
23 Administrative Motion to Set Briefing Schedule for Decertification Motion, ¶¶2-3. Plaintiffs were  
24 forced to file a motion to compel seeking financial information, including profit and loss statements,  
25 revenue, cost and sales data. Dkt. No. 137.

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26  
27 <sup>2</sup> The Court has requested further briefing on the scope of the injunctive relief class and a  
28 hearing on that issue will be held concurrently with this motion.

1 Apple took the position that plaintiffs were not entitled to production of this financial data  
2 because, according to Apple, such information was not relevant to class certification. Dkt. No. 261,  
3 ¶¶5, 7. Just prior to the hearing on the motion to compel, Apple proposed a compromise.  
4 Ultimately, plaintiffs agreed that Apple could produce *exemplars* of the requested data, as opposed  
5 to all of the data, so that Professor Noll could make a determination whether the data, when it was  
6 eventually produced, would suffice. Plaintiffs agreed because Apple's counsel, orally and in writing,  
7 took the position that, at the class certification stage, plaintiffs are not required to have completed  
8 their damages study, but rather are required to show that they can rely on common evidence to show  
9 classwide impact. *See In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, No. M 02-  
10 1486 PJH, 2006 WL 1530166, at \*8-\*9 (N.D. Cal. June 5, 2006).<sup>3</sup> As Apple's counsel said:

11 To be clear, I did not agree to, or anticipate, that we would produce the actual data  
12 beyond an exemplar of the type of data that are available. I understood that your  
13 expert wanted to know what type of data is available rather than acquiring all the  
14 data now because he does not intend to actually produce a damage study at this point.  
15 ***That's the compromise we reached, and I thought that met your pre-cert needs.***

16 Dkt. No. 261-3.

17 After the Court lifted the partial discovery stay following class certification, on May 22,  
18 2009, plaintiffs served amended discovery requests seeking, *inter alia*, the complete data as to which  
19 Apple had produced only exemplars, profit and loss information, information regarding the markets  
20 for iPods and digital audio and video files, and various aspects of Apple's DRM and its impact on  
21 interoperability of iPods and iTS with competitors' products. Apple, in contrast, has conducted *no*  
22 new discovery following certification. The parties have met and conferred several times over the  
23 past four and a half months regarding Apple's objections and the scope of plaintiffs' requests. To  
24 date, plaintiffs have received only quarterly iPod and iTS sales figures, some limited data on cost  
25 factors for iPods and iTS and some documents related to Apple's dispute with Real Networks over

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26  
27 <sup>3</sup> Citations are omitted and emphasis is added, here and throughout, unless otherwise noted.

1 its Harmony product. Plaintiffs continue to meet and confer in good faith, but believe another  
2 motion to compel will be required.<sup>4</sup>

3 Despite the lack of any new evidence or law, and only eight months after the Court's Class  
4 Certification Order, Apple now moves to decertify the Class. Apparently seeking to capitalize on its  
5 relative success using Dr. Burtis in the indirect purchaser *Somers* action, Apple belatedly submits the  
6 report of Dr. Burtis here. Dkt. No. 241. As set forth more fully below, Dr. Burtis's declaration is  
7 based on rebutting a different expert (Dr. French) in a different case (*Somers*) based on a different  
8 damages standard (indirect purchasers' pass-through damages).

9 **III. MOTIONS TO DECERTIFY ARE IMPROPER WHERE NO NEW FACTS  
10 OR LAW EXIST**

11 As a threshold matter, Apple's motion does not meet the Ninth Circuit standards for  
12 decertification. In motions to decertify a class, the defendant must meet a "heavy burden" in  
13 demonstrating that decertification is appropriate. *Gonzales v. Arrow Fin. Servs. LLC*, 489 F. Supp.  
14 2d 1140, 1154 (S.D. Cal. 2007); *see also Slaven v. BP Am., Inc.*, 190 F.R.D. 649, 651 (C.D. Cal.  
15 2000) ("Defendants' burden in urging decertification is relatively heavy."). To justify  
16 decertification, Apple must raise some new controlling law or facts to support its argument that the  
17 initial class determination was in error.<sup>5</sup> Apple cannot do so. Apple simply wants a "do-over."

18 Apple implicitly recognized the sufficiency of Professor Noll's proposed damages  
19 methodology when it opposed plaintiffs' motion for class certification twelve months ago. Apple  
20 retained Dr. Burtis approximately two weeks prior to Professor Noll's deposition in 2008 (Merrick  
21 Decl., Ex. 2 at 147:24-148:7, Deposition of Michelle M. Burtis, Ph.D., taken September 30, 2009) to  
22 assist Apple's counsel in preparing for the deposition. She read Professor Noll's declaration and  
23 discussed his proposed methodologies with Apple's counsel. *Id.*, Ex. 2 at 77:22-78:4, 78:7-11,

24 <sup>4</sup> Of course, plaintiffs' discovery does not focus solely on the information plaintiffs will  
25 ultimately need to generate their damages report. But Apple's repeated delays and refusals to  
produce are representative of its entire approach to discovery.

26 <sup>5</sup> In their Opposition to Apple's Administrative Motion to Set Briefing Schedule for  
27 Decertification Motion, plaintiffs discussed why Apple's motion was improper. Dkt. No. 260 at 2-  
3. Rather than repeat them here, plaintiffs incorporate by reference the arguments made therein.

1 79:10-15, 79:24-80:12. After the deposition, she read the transcript and again spoke with Apple's  
2 counsel. *Id.*, Ex. 2 at 151:5-9. Still, Apple made the tactical decision not to submit a report to rebut  
3 Professor Noll. *Id.*, Ex. 2 at 151:10-21.

4 Apple's sole basis for this motion is the Court's ruling on a motion for class certification  
5 brought by indirect purchasers in *Somers* using an entirely different expert, Dr. Gary French. *See*  
6 Def's Motion at 7. Apple points to no new facts or law to support its argument that the Court did not  
7 properly consider and evaluate these issues in its original class certification decision. The Court's  
8 order denying certification in *Somers* did not raise any new facts or law relevant to *this* action, but  
9 instead denied certification of the indirect purchaser class on the basis that *Dr. French* did not  
10 proffer a reliable method of proving impact and damages on a classwide basis. *Somers* Dkt. No. 80  
11 at 12.

12 In the earlier class certification briefing, argument and the Court's Order, neither the Court  
13 nor Apple ever raised concerns regarding Professor Noll's methodologies. Professor Noll has  
14 reviewed all the data available to him, has significant knowledge and experience in technology  
15 markets, and has provided substantial detail on his proposed methodologies. *See* Dkt. No. 166-1 at  
16 52-59. By contrast, Dr. Burtis's expert report contains little more than excerpts from her report  
17 submitted in *Somers* to rebut Dr. French, and is devoid of any analysis or data. Apple makes no  
18 independent assessment of Professor Noll's methodologies and raises no new facts or law.

19 **IV. PROFESSOR NOLL REVIEWED INFORMATION SUFFICIENT TO**  
20 **CONCLUDE THAT AT LEAST ONE OF HIS PROPOSED DAMAGES**  
21 **METHODOLOGIES WOULD WORK**

22 Apple's criticism that Professor Noll has "collected little if any data" (Def's Motion at 7), is  
23 disingenuous given Apple's insistence that pre-certification discovery be limited, and its insistence  
24 that revenue, cost, profit and loss and sales data are not relevant to class certification, eventually  
25 producing only "exemplar" data for Professor Noll's use in determining whether the mark-up  
26 method would work. Besides being disingenuous, Apple's argument is incorrect, because Professor  
27 Noll reviewed extensive pricing and product characteristics data that was publicly available. Dkt.  
28 No. 166-1 at 4-6 (citing scholarly papers, analyst reports, trade press reports, public information on  
features and pricing of iPods, court submissions in this litigation, and four decades of experience in

1 studying the entertainment and information technology industries).<sup>6</sup> All of this information, like the  
 2 revenue, cost and sales data, is common to the Class. Combining this information and his  
 3 experience, Professor Noll concluded that three methods were potentially available to calculate  
 4 damages. *Id.* at 5-6.

5 Moreover, Dr. Burtis has no basis for her assertion that Professor Noll “has not collected any  
 6 data or shown that data exist to implement these methods.” She never reviewed any of the exemplar  
 7 data, product feature or pricing data relied on by Professor Noll. During her deposition, Dr. Burtis  
 8 stated that she only received and reviewed the data listed in Exhibit 2 to her report. Merrick Decl.,  
 9 Ex. 2 at 13:23-14:2, 100:1-13. This was the same list of documents she reviewed in *Somers*.  
 10 Notably missing from this list is the exemplar revenue, cost and sales data produced by Apple,  
 11 hundreds of analyst reports, Apple quarterly earnings calls from 2002 through 2007, scholarly  
 12 articles, and several other trade press reports that were all reviewed and considered by Professor  
 13 Noll. Dkt. No. 166-1 at 5-6. Accordingly, Dr. Burtis cannot make a genuine assessment of the  
 14 sufficiency of the bases of Professor Noll’s opinions.

15 **V. DR. BURTIS’S REPORT IS SO INSUBSTANTIAL, IT SHOULD BE**  
 16 **GIVEN NO WEIGHT**

17 Dr. Burtis’s critique of Professor Noll’s Report should be given no weight. Besides the vast  
 18 disparity in the experience and accomplishments of Dr. Burtis and Professor Noll (*see* Dkt. No. 241-  
 19 2, Ex. 1 (Dr. Burtis CV); *Cf.* to Noll Reply Decl., Ex. 1 (Professor Noll CV), Dr. Burtis conducted  
 20 almost no independent analysis, as demonstrated by the following examples:

21 First, Dr. Burtis merely cribbed her critique of Dr. French, ignoring several critical  
 22 differences between the two experts’ approaches. She did not recognize, for example, that Professor  
 23 Noll’s methodologies do not rely on averages (unlike Dr. French), that Dr. French did not propose  
 24 relying upon a yardstick or mark-up method (unlike Professor Noll), or that Professor Noll did

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25 <sup>6</sup> *DRAM*, 2006 WL 1530166, at \*8 (accepting Noll’s antitrust impact and proposed damages  
 26 analysis for class certification based on “his analysis and conclusions on actual market share  
 27 estimates, review of contracts entered into between defendants and various DRAM purchasers,  
 28 industry and trade publications reflecting DRAM pricing information, and actual sales and price data  
 thus far produced in discovery”).

1 identify a beginning date for the period of anticompetitive conduct (unlike Dr. French). At her  
2 deposition, Dr. Burtis could not identify even a single difference between Dr. French and Professor  
3 Noll, even though Dr. French was retained by indirect purchasers. Merrick Decl., Ex. 2 at 84:6-  
4 88:21.

5 Second, Burtis revealed at her deposition how little effort went into her report. She did not  
6 write it herself, could not estimate how much time she spent on it, did no data analysis herself, and  
7 did not even inquire into the kinds of data Apple maintains about iPods. *Id.*, Ex. 2 at 12:21-16:1,  
8 24:2-13, 97:9-98:7.

9 Third, although she claimed to be aware that the certified direct purchaser class includes  
10 resellers (unlike the indirect purchaser class), her report and testimony reflected a complete absence  
11 of any thought about how the damages methodologies applied to them. When asked whether she  
12 thought the “net overcharge” adjustment had to be applied in the case of resellers that do not buy  
13 iTunes files, she testified: “It’s an interesting question. Clearly, Best Buy doesn’t purchase music,  
14 at least as far as I know. But I don’t know. Maybe they do. I don’t know the answer to that. I’m  
15 not sure. I would have to think about that.” *Id.*, Ex. 2 at 44:6-45:12.

16 Fourth, Dr. Burtis displayed a palpable discomfort when asked when she first concluded that  
17 Professor Noll’s methodologies could not work to calculate damages. *Id.*, Ex. 2 at 76:22-81:17.  
18 Apple and its expert obviously initially viewed Professor Noll’s proposed damages methodologies as  
19 unassailable, or they would have attacked them in their opposition last year. Following this Court’s  
20 ruling in *Somers*, however, Apple and Dr. Burtis had a sudden (and unjustified) change of heart.

## 21 **VI. APPLE FAILS TO IDENTIFY A SINGLE DEFECT IN PROFESSOR** 22 **NOLL’S METHODOLOGIES THAT DEFEATS CLASS CERTIFICATION**

23 As Professor Noll’s 56-page reply declaration demonstrates, Apple’s and Dr. Burtis’s  
24 challenge is without support. Professor Noll addresses in detail each of Dr. Burtis’s criticisms of his  
25 report. He makes clear that Dr. Burtis fails in her attempt to simplify his analysis so that it fits  
26 within Dr. French’s report in the indirect purchaser case. The two reports bear only the most  
27 superficial of resemblance to each other. Noll Reply Decl. at 11-17. He also provides further detail  
28 as to why the three methodologies he originally proposed – the before-after, mark-up and yardstick

1 methods – can be utilized, based on evidence common to the Class. In short, Professor Noll rebuts  
2 Dr. Burtis’s criticisms and shows why he stands behind the conclusions he reached in his report,  
3 which the Court found to be sufficient to support class certification. *Id.* at 2 (“My overall conclusion  
4 is that neither the Burtis Report nor any other material I have read causes me to change any of the  
5 opinions that I expressed in the Noll Report.”).

6 Apple and Dr. Burtis’s critique of Professor Noll’s declaration is narrowly limited to whether  
7 he has proffered a reliable methodology for calculating damages. Def’s Motion at 1-2; Dkt. No. 241  
8 at 3. Neither Apple nor Dr. Burtis challenge Professor Noll’s conclusions that economic analysis  
9 relying on common evidence could be used to establish market definition, market power,  
10 anticompetitive conduct and harm to competition. Apple’s decision not to challenge Professor Noll  
11 on liability issues is especially important because damages and liability are closely related. Noll  
12 Reply Decl. at 9-10. One can use the same methods to show both that Apple’s exclusionary conduct  
13 increased market power and thereby caused harm to competition, and that the degree of price  
14 discrimination increased when Apple began acting anticompetitively. *Id.* at 10.

15 In its Class Certification Order, the Court identified numerous common issues of law and fact  
16 that supported class certification, including market definition, market power, anticompetitive  
17 conduct, harm to competition, Apple’s willful acquisition and maintenance of monopoly power, and  
18 anticompetitive injury. *See* (Class Certification Order); Noll Reply Decl. at 6-8. Plaintiffs  
19 incorporate by reference their argument and authority contained in their motion for class certification  
20 (Dkt. No. 165), and reply memorandum in support of class certification (Dkt. No. 188). Apple’s  
21 motion challenges none of these findings. Nor do they challenge Professor Noll’s opinion that all  
22 damages models will use evidence common to the Class. Rather, Apple and Dr. Burtis merely assert  
23 that damages cannot be calculated, *whether for an individual or the class*, because there is no  
24 appropriate benchmark to which iPod prices can be compared. Def’s Motion at 7-9; Dkt. No. 241 at  
25 3-4; Merrick Decl., Ex. 2 at 30:21-31:16, 35:6-36:1.

26 Professor Noll proposes three potential methodologies for calculating damages: (1) before-  
27 after; (2) yardstick; and (3) mark-up. Dkt. No. 166-1 at 54-59; Noll Reply Decl. at 27-56. All three  
28 are valid, widely-recognized economic methods accepted by courts in antitrust cases. Noll Reply

1 Decl. at 12-14. *See DRAM*, 2006 WL 1530166, at \*10 (finding Professor Noll’s before-after,  
2 yardstick, and mark-up methods were valid means of proving damages on class-wide basis); *In re*  
3 *Static Random Access (SRAM) Antitrust Litig.*, No. C 07-01819 CW, 2008 WL 4447592, at \*6-\*7  
4 (N.D. Cal. Sept. 29, 2008) (same). At this stage, plaintiffs are not required to select which method  
5 they will ultimately use “as long as they offer a methodology that is generally accepted.” *In re*  
6 *Carbon Black Antitrust Litig.*, No. Civ. A. 03-10191-DPW, MDL No. 1543 2005 WL 102966, at \*20  
7 (D. Mass. Jan. 18, 2005) (quoting *In re Linerboard Antitrust Litig.*, 203 F.R.D. 197, 217-18 (E.D. Pa.  
8 2001)). Nor would it be appropriate without the necessary data. *See Merrick Decl.*, Ex. 2 at 69:10-  
9 70:9. As Professor Noll explains in his reply declaration, determining precisely what methodology  
10 and equations will be used before the data have been produced would be irresponsible. Noll Reply  
11 Decl. at 29. Plaintiffs have more than satisfied their burden of coming forward with “seemingly  
12 realistic” methodologies for calculating damages on a classwide basis. *DRAM*, 2006 WL 1530166,  
13 at \*8; *see also In re Rubber Chems. Antitrust Litig.*, 232 F.R.D. 346, 354 (N.D. Cal. 2005) (at class  
14 certification stage “the court’s inquiry is limited to whether or not the proposed methods are so  
15 insubstantial as to amount to no method at all”).<sup>7</sup> Apple, which bears the burden of proof on this  
16 motion, has made no showing otherwise.

17 In addition, plaintiffs in antitrust cases are not required to calculate damages with the level of  
18 certainty required in some other areas. *Los Angeles Mem’l Coliseum Comm’n v. NFL*, 791 F.2d  
19 1356, 1360 (9th Cir. 1986). This is because “[t]he vagaries of the marketplace usually deny us sure  
20 knowledge of what plaintiff’s situation would have been in the absence of the defendant’s antitrust

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21  
22 <sup>7</sup> At best, the attack on Professor Noll’s proposed methodologies are merits-based and not  
23 appropriate at the class certification stage. *See SRAM*, 2008 WL 4447592, at \*6 (“The validity of  
24 [the proposed] methods ‘will be adjudicated at trial based upon economic theory, data sources, and  
25 statistical techniques that are entirely common to the class.’”); *see also Meijer, Inc. v. Abbott Labs.*,  
26 No. C 07-5985 CW, 2008 WL 4065839, at \*10 (N.D. Cal. Aug. 27, 2008) (rejecting as a merits  
27 argument, defendants’ contention that plaintiff’s proposed damages methodologies were  
28 inappropriate and required individualized evidence); *DRAM*, 2006 WL 1530166, at \*10 (defendants’  
argument that the “‘variability’” of the DRAM market invalidated Dr. Noll’s proposed damages  
models was a merits argument that “need not be decided at this stage of the litigation.”); *In re*  
*Foundry Resins Antitrust Litig.*, 242 F.R.D. 393, 400 (S.D. Ohio 2007) (weaknesses in expert’s  
proposed methodologies irrelevant at the class certification stage where the proposed methodologies  
are reliable).

1 violation.” *J. Truett Payne Co., Inc. v. Chrysler Motors Corp.*, 451 U.S. 557, 566-67, 101 S. Ct.  
2 1923 (1981). The wrongdoer whose anticompetitive conduct has distorted the marketplace thus  
3 cannot “insist upon specific and certain proof of the injury which it has itself inflicted.” *Id.* This  
4 standard is especially relevant here, because Apple makes the unsupported – and unsupportable –  
5 argument that no plaintiff, not even an individual plaintiff, can calculate damages in this case. *See*  
6 *Merrick Decl.*, Ex. 2 at 30:21-31:16.

7 **A. Any Comparison of Professor Noll and Dr. French’s Analyses Is**  
8 **Meaningless**

9 As Professor Noll explains, given the detailed analysis he submitted and the differences  
10 between a damages analysis for indirect and direct purchase classes, Dr. Burtis’s comparisons of  
11 Professor Noll and Dr. French are specious at best. Professor Noll and Dr. French’s reports are the  
12 same in only two respects: the two discuss the same three methods for calculating damages and both  
13 propose the before-after method as a plausible method. This is not surprising given courts’ routine  
14 approval of these methods in antitrust cases to calculate a but-for price of a product. *Noll Reply*  
15 *Decl.* at 11-14. However, this is the extent of their similarity.

16 Professor Noll and Dr. French’s analyses differ in critical ways. First, because this is a direct  
17 purchaser action, Professor Noll’s analysis is focused on the overcharge direct purchasers paid for  
18 iPods. *Dkt. No. 166-1* at 52; *Noll Reply Decl.* at 14. By contrast, Dr. French’s proposed methods  
19 for calculating damages necessarily included both the overcharge to direct purchasers and pass-  
20 through to indirect purchasers. *See Somers Dkt. No. 42-1*, Affidavit of Gary L. French, ¶¶64.

21 Second, Professor Noll provides substantially more analysis on estimating overcharges to  
22 direct purchasers. His discussion is twice as long as Dr. French’s discussion of both overcharges and  
23 pass-through put together. *Dkt. No. 166-1* at 52-59; *Cf. Somers Dkt. No. 42-1*, ¶¶64-72. His 56-  
24 page reply declaration provides even more thorough analysis. The Court’s concerns about the  
25 vagueness of Dr. French’s analysis simply do not apply to Professor Noll’s detailed reports. *See*  
26 *Somers Dkt. No. 80* at 12 (Dr. French “has done nothing more than make a vague five-paragraph  
27 long collection of proposals for accomplishing what the Court sees as a daunting task.”).

1 Third, unlike Dr. French, Professor Noll actually proposes and discusses yardstick and mark-  
2 up as possible methods of calculating damages and collected exemplar data to confirm that these  
3 methods would work. Dkt. No. 161-1 at 56-59; Noll Reply Decl. at 46-56. As Apple points out, Dr.  
4 French provides one-line explanations of the general approach of the yardstick and mark-up methods  
5 (see *Somers* Dkt. No. 42-1, ¶¶65), but only proposes using the before-after method. Def’s Motion at  
6 9; *Somers* Dkt. No. 42-1, ¶¶66-68. This is why Dr. Burtis’s critique of Dr. French in the indirect  
7 case did not address these methods. *Somers* Dkt. No. 74 at 8-15. Thus, Dr. Burtis’s claim that  
8 “Professor Noll’s proposed methods suffer from the same basic flaws this Court found in Dr.  
9 French’s three methods.” (Dkt. No. 241 at 3; see also Def’s Motion at 9) is patently false. Neither  
10 Dr. Burtis nor the Court found any “flaws” in Dr. French’s yardstick and mark-up methods because  
11 Dr. French did not propose them.

12 Fourth, Professor Noll’s proposed methodologies are based on actual transaction data and list  
13 prices for each iPod model, not averages. Noll Reply Decl. at 17; Dkt. No. 161-1 at 53. By contrast,  
14 Dr. French proposed aggregating individual transaction prices of retailers and distributors for months  
15 and models of iPods to calculate the amount of pass-through to indirect purchasers. *Somers* Dkt. No.  
16 42-1, ¶¶67. None of Professor Noll’s methods are based on average prices.

17 Finally, and as discussed more fully below, unlike Dr. French, Professor Noll identifies cost  
18 and demand variables, such as technological changes in iPods, and identifies the date when the  
19 period of anticompetitive harm and damages began. Dkt. No. 161-1 at 49, 55.

20 Accordingly, Dr. Burtis’s attempt to lump Professor Noll into the same category as Dr.  
21 French in an effort to discredit Professor Noll’s opinions is entirely without merit.

## 22 **B. Professor Noll’s Methodologies**

23 In contending that his proposed methods will not work, Dr. Burtis and Apple state that  
24 Professor Noll did not: (1) develop any actual models, propose any equations, or identify variables to  
25 be used in calculating damages; (2) collect the necessary data; or (3) propose ways to overcome  
26 obstacles to implementing his methods. Def’s Motion at 7-9; Dkt. No. 241 at 3-4. Besides ignoring  
27 the impact of Apple’s refusal to produce data, and the fact that plaintiff is not required to produce a  
28 completed damages study at the class certification stage, Apple’s arguments are based on a flawed

1 analysis and a distortion of Noll's Report. As demonstrated below, Apple's arguments fail as to all  
 2 three of Professor Noll's proposed damages methodologies.

### 3 **1. Before-After Method**

4 The before-after method of calculating damages compares the price of products in the  
 5 "during" period, the period when the anticompetitive conduct affected the price of the products, with  
 6 prices of products in the periods when the anticompetitive conduct had no effect. Dkt. No. 161-1 at  
 7 55-56; Noll Reply Decl. at 27-28. This is a recognized method of proving impact and damages in  
 8 antitrust cases. *See, e.g., DRAM*, 2006 WL 1530166, at \*10; *Rubber Chems.*, 232 F.R.D. at 353; *In*  
 9 *re Citric Acid Antitrust Litig.*, Nos. 95-1092, C-95-2963 FMS, 1996 WL 655791, at \*7 (N.D. Cal.  
 10 Oct. 2, 1996).<sup>8</sup> Where the product at issue is available in different models or with different  
 11 characteristics, a regression analysis is commonly implemented. Dkt. No. 161-1 at 55; Noll Reply  
 12 Decl. at 27-28; *In re Live Concert Antitrust Litig.*, 247 F.R.D. 98, 145 (C.D. Cal. 2007).

13 Here, Professor Noll proposes comparing the price of iPods in the during period with prices  
 14 of iPods when Apple's anticompetitive conduct had no effect. Dkt. No. 161-1 at 55. This will  
 15 include a regression analysis to account for technological advances in product features of iPods over  
 16 time as well as other cost and demand factors. *Id.*; Noll Reply Decl. at 29-30.

17 Dr. Burtis contends Professor Noll's before-after method of proving damages is flawed for  
 18 three reasons: (1) Professor Noll fails to take into account that there were some models of iPods sold  
 19 in the before period that were not sold in the during period and vice versa; (2) Professor Noll omits  
 20 certain supply and demand variables that are explanatory of the price of iPods;<sup>9</sup> and (3) there is  
 21 insufficient pricing data in the before period to conduct the analysis. Def's Motion at 7-8; Dkt. No.  
 22 241 at 5-10; Merrick Decl., Ex. 2 at 30:21-31:16.

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23  
 24  
 25 <sup>8</sup> Dr. Burtis herself acknowledges that such analyses are routinely conducted. *See* Merrick  
 26 Decl., Ex. 2 at 62:20-65:11, 153:14-154:8, 187:2-24.

27 <sup>9</sup> Professor Noll assumes that by "supply" Dr. Burtis is referring to cost variables. Noll Reply  
 28 Decl. at 37.

1                   **a.     Professor Noll Sufficiently Explained How He Will**  
2                   **Account for Product Differences and Other Necessary**  
3                   **Variables**

4           The fact that multiple models of iPods exist does not make the before-after model  
5 unworkable. Indeed, courts routinely find the before-after method appropriate even where there are  
6 hundreds of different product variations within a particular market. *See, e.g., DRAM*, 2006 WL  
7 1530166, at \*10 (in a case with hundreds of product variations, the court rejected defendants’  
8 argument at the class certification stage that Professor Noll’s application of the before-after method  
9 was unworkable because of the “‘variability’ present in the DRAM market”); *In re Vitamins*  
10 *Antitrust Litig.*, 209 F.R.D. 251, 268 (D.D.C. 2002) (upholding method of establishing damage in the  
11 “but-for” world despite fact that varied products existed); *Citric Acid*, 1996 WL 655791, at \*6-\*7  
12 (“Diversity of products and pricing does not necessarily mean that plaintiffs cannot show class-wide  
13 impact . . .”).

14           The *DRAM* case is particularly instructive. There, the market at issue was much more  
15 complex than here. It consisted of many more varieties of DRAM than there are Apple models.  
16 *DRAM*, 2006 WL 1530166, at \*1. There, as here, defendants challenged Professor Noll’s testimony  
17 in support of class certification. *Id.* at \*8. “They contend that the complexity of the DRAM market,  
18 and the diversity of DRAM products and prices present therein, makes common proof of impact  
19 impossible.” *Id.* Despite this very complex market, the court in *DRAM* held that Professor Noll’s  
20 three methodologies for showing impact and damages – the same three methodologies he proposes  
21 employing here – were sufficient to support class certification. *Id.* at \*9; *see also Carbon Black*,  
22 2005 WL 102966, at \*19-\*20 (class certified where before-after method used to calculate damages  
23 for varying products with varying prices).

24           Here, a before-after model will be used to determine the price of a single product – an iPod –  
25 in a significantly less complicated market. *See Merrick Decl.*, Ex. 1 at 70:25-71:12. There are only  
26 43 models of the iPod, all produced by Apple. Although “different models of iPod have different  
27 functionality and have different prices. . . , [t]he differences among them and the changes in prices  
28 through time . . . should in part be determined by their attributes.” *Id.*, Ex. 1 at 246:21-247:4; Dkt.  
No. 161-1 at 55-56; Noll Reply Decl. at 19-20. This can be determined with the use of objective

1 criteria obtained either from Apple's internal records or public sources, all of which are common to  
2 the Class. Dkt. No. 161-1 at 49; Noll Reply Decl. at 19-20, 37; Merrick Decl., Ex. 1 at 70:25-71:12.

3 Professor Noll proposes using a hedonic regression "[b]ased on the qualitative attributes of  
4 the product, and the prices of other products, and other factors that would increase demand."  
5 Merrick Decl., Ex. 1 at 81:23-82:4; Noll Reply Decl. at 39-40. "Hedonic regressions are widely  
6 used in economics to analyze differentiated products, especially with frequent product innovation,  
7 including markets for consumer electronics." Noll Reply Decl. at 39 and n.86 (citing examples).<sup>10</sup>

8 Professor Noll would start by analyzing all plausible factors that might be significant in  
9 explaining price. Dkt. No. 161-1 at 55; Noll Reply Decl. at 28-30; Merrick Decl., Ex. 1 at 79:19-  
10 81:16, 246:15-247:21. Professor Noll has identified product features such as video and photo  
11 capabilities, internet access, memory, size, weight, battery life, color, as well as features available on  
12 other products and their prices, the availability of digital downloads, and the life cycle of the iPod, as  
13 possible cost and demand variables that may be determinative of price. Dkt. No. 161-1 at 55; Noll  
14 Reply Decl. at 29; Merrick Decl., Ex. 1 at 82:13-83:4, 83:12-85:13, 97:10-102:2, 101:15-102:2,  
15 112:23-113:8, 128:20-130:1; Merrick Decl., Ex. 2 at 135:8-12.

16 Dr. Burtis contends that because the iPod models sold in the before period have different  
17 features than the models in the during period, it is impossible to conduct a before-after analysis.  
18 Dkt. No. 241 at 7-8; Merrick Decl., Ex. 2 at 30:21-31:9, 31:17-32:15. This simplistic complaint  
19 completely ignores the purpose of a regression analysis. See Noll Reply Decl. at 35, 36. A

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21 <sup>10</sup> See also *Sun Microsystems Inc. v. Hynix Semiconductor, Inc.*, 608 F. Supp. 2d 1166, 1207-08  
22 (N.D. Cal. 2009) (using multiple regression analyses in a before-after model to control for supply  
23 and demand determinates of the price of DRAM); Merrick Decl., Ex. 3, Daniel L. Rubinfeld,  
24 *Quantitative Methods in Antitrust*, 1 Issues in Competition Law And Policy 723, 724 (ABA Section  
25 of Antitrust Law) (2008) ("A typical reduced-form model might explain the variation in the price of  
26 a product as a function of a series of variables relating to cost, demand, and market structure."); *Live  
27 Concert*, 247 F.R.D. 98 (using regression analysis to estimate the but-for price of concert tickets  
28 while controlling for artist quality and other factors affecting price); *In re Polyester Staple Antitrust  
Litig.*, MDL No. 3:03 CV 1516, 2007 WL 2111380, at \*29 (W.D.N.C. July 19, 2007) ("In  
estimating the "but-for" price, the regression analysis attempts to control for ordinary market factors  
so that the effect of the conspiracy, if any, on price can be isolated . . . ."); *Freeland v. AT&T Corp.*,  
238 F.R.D. 130, 149 n.15 (S.D.N.Y. 2006) (citing Bureau of Labor Statistics, U.S. Dep't of Labor,  
*BLS Handbook of Methods*, Ch. 14 at 5 (available at  
<http://stats.bls.gov/opub/hom/pdf/homch14.pdf>)).

1 regression analysis, like the one proposed by Professor Noll, controls for cost and demand variables  
2 that are determinative of price and change over time, including product features. Dkt. No. 161-1 at  
3 55; Noll Reply Decl. at 13-14, 18, 28-30; Merrick Decl., Ex. 1 at 70:13-24, 80:12-83:5; *Cf.* Merrick  
4 Decl., Ex. 2 at 10:13-11:2, 33:5-9, 60:15-23 (agreeing that it is possible to take into account changes  
5 in products features).

6           Importantly, as Professor Noll explained, omitted variables are only significant if they are  
7 positively correlated to the period of exclusivity. Noll Reply Decl. at 33; Merrick Decl., Ex. 1 at  
8 81:6-16, 111:15-112:11; Merrick Decl., Ex. 3 at 726. It is incorrect to say, as Dr. Burtis does, all  
9 factors that are correlated to iPod prices must be included. Dkt. No. 241 at 6. As Professor Noll  
10 explained, “[i]t’s not that [the variables] have a correlation to price. It’s that they – in order for the  
11 specification error of leaving those variables out to produce an inconsistent or biased estimate of the  
12 effect of exclusivity, it has to be the case that the exclusivity period is correlated with this alternative  
13 source.” Merrick Decl., Ex. 1 at 112:5-11; Noll Reply Decl. at 33.

14           In fact, if the omitted factors are negatively correlated to the conduct, then the impact of the  
15 anticompetitive conduct is underestimated. Merrick Decl., Ex. 1 at 81:6-16; Noll Reply Decl. at 34.  
16 For example, omission of the “coolness” factor and/or Apple’s “pricing strategy,” are only possibly  
17 important if they are correlated to the period of anticompetitive conduct. Dr. Burtis provides no  
18 evidence that this is the case or that Professor Noll would leave these factors out of a regression  
19 analysis if they were determinative of price.<sup>11</sup>

20           Dr. Burtis also claims that Professor Noll has failed to prove that data exists to measure the  
21 variables needed to run a regression analysis. Dkt. No. 241 at 7. The appropriate variables can be  
22 identified, and the effect therefrom measured, by analysis of Apple’s own documents, including  
23 Apple’s product specifications. As Professor Noll notes, it is not plausible that “Apple does not  
24 know or cannot produce in discovery the specifications for its own products.” Noll Reply Decl. at  
25 37. And “[e]ven if a tsunami has destroyed Apple’s records, all is not lost,” because plaintiffs can

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26  
27 <sup>11</sup> As Professor Noll explains, even variables that are not “observable” can be accounted for in a  
28 regression using the “instrumental approach.” Noll Reply Decl. at 33-34 (explaining this approach).

1 examine the 43 iPod models, consult industry trade sources that provide “teardown reports” of  
2 electronics products components or consult product reviews with extensive information about  
3 technical features. *Id.* Professor Noll has already reviewed public information on pricing and iPod  
4 product attributes to confirm that such a regression could work. Dkt. No. 161-1 at 53; Noll Reply  
5 Decl. at 37.

6 By contrast, Dr. Burtis has conducted no analysis of her own to support her contention that  
7 such a regression is impossible. Merrick Decl., Ex. 2 at 12:21-13:4, 15:9-16:1, 26:2-5. Dr. Burtis’s  
8 theory that the before-after analysis will not work here because “you have characteristics of products  
9 that exist in only one of the two periods” (*id.*, Ex. 2 at 61-62) is, as Professor Noll explains, “simply  
10 incorrect as a matter of economic methodology.” Noll Reply Decl. at 38. In fact, Dr. Burtis’s  
11 argument makes sense only if the measure of anticompetitive conduct is nearly perfectly correlated  
12 with the measure of product features. *Id.* This would only happen if an important product  
13 characteristic was present when Apple’s exclusionary conduct began and remained unchanged over  
14 time. *Id.* at 39. As Professor Noll explained, he has examined iPod product features and is not  
15 aware of any such characteristic. *Id.* (“In examining the features of the iPod that have been  
16 introduced since April 2003, I am not aware of any that were introduced around that date and have  
17 remained unchanged since that time. If there is not near-perfect overlap between the measure of an  
18 important feature and the measure of the exclusionary conduct, Dr. Burtis’s claim is incorrect.”).<sup>12</sup>

19 Professor Noll has not yet written an equation specifying all the variables to be used in a  
20 regression analysis because not all necessary data has been produced. Noll Reply Decl. at 18;  
21 Merrick Decl., Ex. 1 at 96:24-97:9. Once full data is collected, those variables that are “statistically

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22  
23 <sup>12</sup> Dr. Burtis references her article on the effects of Hurricane Katrina on oil refineries as an  
24 example of a before-after test that calculated prices in the but-for world. Dkt. No. 241 at 2. Dr.  
25 Burtis states that she was able to perform the test because she had sufficient data to forecast prices  
26 after Katrina. *Id.* When converted into a hypothetical antitrust damages example, this before-after  
27 regression would not fit the standard for a valid damages model as described by Dr. Burtis. Noll  
28 Reply Decl. at 40-43. Rather, suffering from the alleged defects Dr. Burtis has found in the Dr.  
French and Professor Noll reports, the Katrina regression uses average prices, assumes all refineries  
have the same output mix, assumes that relative quantities of refinery outputs are fixed over time and  
among refineries, assumes that demand after the hurricane is the same as before the hurricane, and  
uses seasons, as “a crude instrument,” for omitted variables related to weather. *Id.* at 43.

1 significant and quantitatively important in explaining price” will be identified. Noll Reply Decl. at  
2 28-32. Even Dr. Burtis agrees with this basic approach. Merrick Decl., Ex. 2 at 69:10-70:9.

3 Finally, to the extent Dr. Burtis and Apple attack the variables Professor Noll will account for  
4 in his regression analysis, this is a merits argument not appropriate for the class certification stage.  
5 *See Sun Microsystems*, 608 F. Supp. 2d at 1208-09 (“[T]o the extent that defendants challenge the  
6 accuracy or propriety of these variables, it is an issue that goes to the weight, rather than the  
7 admissibility, of [the expert]’s testimony.”).

8 **b. “Coolness” Does Not Prevent Construction of an**  
9 **Effective Damages Model**

10 Dr. Burtis claims that identification and quantification of the determinative factors in this  
11 case is “unusually difficult” (Merrick Decl., Ex. 2 at 102:21-103:12, 115:13-116:2; *Cf. id.*, Ex. 2 at  
12 23:2-25:9), but she has not collected any data or conducted any analysis to support this conclusion.  
13 *Id.*, Ex. 2 at 12:21-13:12, 170:18-171:11, 183:20-184:6. Dr. Burtis’s failure to do so is telling,  
14 because as Apple’s expert, she had access to any Apple data she requested. *Id.*, Ex. 2 at 13:17-15:8.  
15 Nor is she able to identify any plausible factors beyond those discussed by Professor Noll except for  
16 the iPod’s “coolness.”<sup>13</sup> *See* Dkt. No. 241 at 7; Merrick Decl., Ex. 2 at 103:13-19; 106:21-107-24.

17 Dr. Burtis opines that “coolness” is “an important determinant of prices” and omission of this  
18 variable “would bias an estimate of the alleged overcharge.” Dkt. No. 241 at 7; Merrick Decl., Ex. 2  
19 at 183:20-184:2. Yet, Dr. Burtis has not done even the most cursory analysis to support this  
20 conclusion. *Id.*, Ex. 2 at 104:1-9; 184:3-6. As Professor Noll explains, “[g]iven that Apple products  
21 are commonly referenced as cool and that Apple’s CEO has been interviewed about the source of  
22 coolness, the obvious next step is to learn through discovery the role of coolness in Apple’s  
23 marketing and product planning.” Noll Reply Decl. at 24. Dr. Burtis did none of this.

24 Indeed, Professor Noll concluded from his own research that “there is no reason to treat  
25 coolness seriously in a damage analysis,” because “there is absolutely no reason to believe that the

26 <sup>13</sup> Notably, Dr. Burtis admitted she had never used “coolness” in any other economic context.  
27 Merrick Decl., Ex. 2 at 103:20-25. This is a word commonly used by Apple throughout this  
28 litigation in an effort to raise individual issues where none exist. *See, e.g.*, Dkt. No. 200 at 15.

1 coolness of iPods has increased” since their introduction in 2001. Noll Reply Decl. at 24. For this  
2 reason, there is “no danger that the effects of the alleged anticompetitive conduct are likely to be  
3 confounded with an increase in the attachment of consumers to the product.” *Id.* Moreover, unlike  
4 Dr. Burtis, who merely asserted that she does not “know of any way to measure [coolness]” (Merrick  
5 Decl., Ex. 2 at 198:7-15), Professor Noll articulated a method of measuring coolness, if needed, by  
6 identifying market and academic research on coolness and what it means in the iPod market. Noll  
7 Reply Decl. at 20-25. During his deposition, he explained that while “coolness” could not be  
8 measured directly, it could be inferred “indirectly from the results.” Merrick Decl., Ex. 1 at 87:6-15.  
9 This would be done by measuring objective attributes that people find “cool” and thus, encourage  
10 them to purchase an iPod. *Id.* His theory was confirmed by his market and academic research which  
11 found that coolness is derived from the attributes of a product and not from unmeasurable success in  
12 the marketplace. Noll Reply Decl. at 21-23. Such objective attributes can be measured and included  
13 in a regression analysis.<sup>14</sup> Merrick Decl., Ex. 1 at 86:6-89:10; *see also* Merrick Decl., Ex. 3 at 730  
14 (describing the importance of accounting for “marketing variables” with branded products that may  
15 affect demand).

16 In short, Dr. Burtis’s contention that “coolness” renders a before-after methodology  
17 unworkable has no basis.

18 **c. Apple’s “Pricing Strategy” Does Not Preclude an**  
19 **Effective Damages Model**

20 With respect to Apple’s “pricing strategy,” Dr. Burtis contends Apple’s pricing of iPods  
21 “may be more complex” because there are relatively few price changes of iPods over time. Merrick  
22 Decl., Ex. 2 at 106:21-107:9. Still, Dr. Burtis provides no data to support this contention and indeed  
23 has not collected any data from Apple or done any analysis of data herself.<sup>15</sup> Dkt. No. 241 at 7;  
24 Merrick Decl., Ex. 2 at 14:21-24, 109:23-110:2, 112:10-113:10, 175:5-22. As Dr. Burtis admits, if

25 <sup>14</sup> Indeed, the fact that people buy iPods for various reasons is not unique to iPods and thus  
26 does not pose a unique problem to this case. *See* Merrick Decl., Ex. 2 at 106:16-20.

27 <sup>15</sup> If Apple uses this type of “pricing strategy,” it is not unique to Apple but is present with most  
28 consumer electronics. Merrick Decl., Ex. 1 at 130:2-10.

1 Apple's pricing strategy is a determinative factor of price, it would be identifiable by objective  
2 information common to the class (Merrick Decl., Ex. 2 at 112:10-113:10, 172:14-19) and could be  
3 accounted for in a regression analysis. *See* Dkt. No. 241 at 7 ("A model that includes demand and  
4 supply variables will show that those variables do not influence Apple's prices, but without some  
5 explanatory variable to capture Apple's strategy, the model will fail to explain prices at all."). Thus,  
6 without full discovery a regression model could not be competently specified. Noll Reply Decl. at  
7 29-31.

8 **d. Dr. Burtis Does Not Explain Why the Before Period Is**  
9 **Too Short**

10 Again without support, Dr. Burtis makes the blanket conclusion that "[t]he period before the  
11 alleged violation was too short . . . ." Dkt. No. 241 at 7-8. Although not entirely clear, Dr. Burtis  
12 seems to contend that the period is too short because there is "limited price data available." *Id.* at 8;  
13 Merrick Decl., Ex. 2 at 89:21-90:11, 152:3-19. However, Dr. Burtis has not collected any pricing  
14 data and has done no analysis to determine if the available data is sufficient. *Id.*, Ex. 2 at 14:21-15:8,  
15 109:23-110:2. Nor was she able, at her deposition, to identify any antitrust case in which a before-  
16 after methodology was used and the "before" period was longer than 18 months.

17 Professor Noll has demonstrated how changes in product features over time do not preclude  
18 using the before-after method to calculate damages. To the extent Dr. Burtis is arguing that  
19 Professor Noll does not identify when Apple's anticompetitive conduct began, he reiterates that the  
20 class period began when Apple launched iTS and why this is a reasonable starting period for the  
21 class. Noll Reply Decl. at 45. Further, in his reply declaration, Professor Noll addresses how  
22 Apple's change in DRM policy in 2009 may impact the length of the after period. *Id.* at 44-46.

23 None of Apple's and Dr. Burtis's criticisms of the before-after method support decertification  
24 of the Class. In fact, Professor Noll is confident that a before-after model can be implemented in this  
25 case. Merrick Decl., Ex. 1 at 70:25-72:1.

26 **2. Professor Noll Has Demonstrated that the Mark-Up Method**  
27 **Can Be Used in This Case**

28 Professor Noll is also confident that the mark-up method can be successfully utilized. *Id.*,  
Ex. 1 at 73:10-19, 75:2-13. Dr. Burtis makes the conclusory and incorrect statement that the mark-

1 up and yardstick methods are “effectively the same.” Dkt. No. 241 at 4, 12-13. In his reply  
2 declaration, Professor Noll discusses in detail how and why the two approaches differ (Noll Reply  
3 Decl. at 46-49) and how his two proposed versions of the mark-up method can be used to calculate  
4 damages on a classwide basis. *Id.* at 46-51; *see also* Dkt. No. 161-1 at 58-59.

5 Unlike the yardstick method, Professor Noll’s proposed mark-up method does not require  
6 identification of a single competitive benchmark. Noll Reply Decl. at 50. In fact, it is more reliable  
7 to use a group of several leading products in other markets where firms have similar inputs, employ  
8 a similar production technology, and have similar sales. *Id.* This type of analysis was illustrated in  
9 an actual published study on iPod profitability, which Professor Noll cited in his Report and which  
10 Dr. Burtis fails to address. *Id.* at 51; Dkt. No. 161-1 at 31 n.26 (citing Dedrick, *et al*, *Who Profits*  
11 *from Innovation in Global Value Chains? A Study of the iPod and Notebook PCs*, Personal  
12 Computing Industry Center, Univ. of Cal., Irvine, May 2008).<sup>16</sup>

13 The second mark-up method Professor Noll proposes is the game-theoretic model of price  
14 formulation in an oligopolistic differentiated product market. Noll Reply Decl. at 51-55; Dkt. No.  
15 161-1 at 59. Dr. Burtis asserts that Professor Noll did not identify any similar consumer electronic  
16 markets. Dkt. No. 241 at 13-14. However, throughout his report, Professor Noll identified several  
17 potential comparative markets, such as smart phones and PDAs. Noll Reply Decl. at 52; Dkt. No.  
18 161-1 at 56-57. Further in his reply declaration, Professor Noll goes into further detail as to why the  
19 dominant game-theoretic models, Nash-Cournot and Bertrand, can be used to develop a model to  
20 calculate damages for differentiated products. Noll Reply Decl. at 54-55. Although Professor Noll  
21 has not yet developed the exact model because the necessary discovery has not been completed, he  
22 has reviewed exemplar data from Apple which supports his conclusion that the mark-up method can  
23 be used.

24  
25  
26 <sup>16</sup> Dr. Burtis also seems to misapprehend the mark-up method as a means of “estimating the  
27 competitive price of iPods.” Dkt. No. 241 at 13. In fact, the method seeks to calculate the iPod’s  
28 profitability (mark-up), not price. Noll Reply Decl. at 50.

1 In summary, comparing Professor Noll's detailed analysis of his proposed mark-up method  
2 with Dr. Burtis's cursory criticisms clearly shows that Apple has no grounds to argue that the  
3 Court's initial class certification decision was in error.

### 4 **3. Professor Noll Has Demonstrated that the Yardstick Method** 5 **Can Be Used in This Case**

6 As an alternative methodology, Professor Noll proposes using the yardstick method. Dkt.  
7 No. 161-1 at 56; Noll Reply Decl. at 46-48. The yardstick method estimates the competitive  
8 benchmark by comparing the prices of iPods to the prices of other products that are subject to similar  
9 market forces except for the anticompetitive conduct. Noll Reply Decl. at 47-48. This is routinely  
10 upheld by courts in the Ninth Circuit. *See Live Concert*, 247 F.R.D. at 145.

11 Professor Noll identified several products that could be used as possible benchmarks,  
12 including personal digital assistants, portable CD/DVD players, and competing portable digital  
13 media players. Dkt. No. 161-1 at 57; Dkt. No. 241 at 11; Merrick Decl., Ex. 1 at 72:2-16; Merrick  
14 Decl., Ex. 2 at 92:23-93:11.

15 Dr. Burtis contends that Professor Noll is not confident in this method (Dkt. No. 241 at 10),  
16 but Dr. Burtis herself has not conducted any economic analysis as to whether a benchmark product  
17 could be identified. Merrick Decl., Ex. 2 at 92:2-95:6, 124:5-17, 125:18-127:9, 154:11-156:17.  
18 Contrary to published research, Dr. Burtis states that because the benchmark products must be so  
19 technically and functionally similar and sold under the same market conditions, they must be  
20 essentially the same. Dkt. No. 241 at 10-11; *Cf.* Noll Reply Decl. at 46-47. This misses the point of  
21 the yardstick method. The yardstick method is intended to identify products in other markets that are  
22 similar, not identical. Dkt. No. 161-1 at 56; Noll Reply Decl. at 46-47. Because the comparable  
23 products should typically be in another market, this necessarily means that the products will not be  
24 identical. Her conclusion appears to reflect Dr. Burtis's broader opinion that price regressions  
25 cannot be implemented in markets with differentiated products. In fact, Dr. Burtis suggests that this  
26 method is not usable in any case. Merrick Decl., Ex. 2 at 179:25-180:14.

27 Moreover, it is completely irrelevant that Dr. French "abandoned" the yardstick approach.  
28 Def's Motion at 9. Indeed, Dr. French never proposed this as a possible method. *See* discussion

1 *supra* at §VI.B.3. Professor Noll does. While Professor Noll suggests that this method poses more  
2 challenges than the before-after and mark-up methods, he remains confident that the yardstick is still  
3 a possible method. Merrick Decl., Ex. 1 at 72:2-73:9. His concerns relate to the costs and  
4 availability of data from third party sources, not whether the method can be implemented. Noll  
5 Reply Decl. at 48.

6 The yardstick method is only one of three generally accepted methods proposed by Professor  
7 Noll. Professor Noll is not required to select a method at this stage, so long as he proposes a  
8 generally accepted method. *See Carbon Black*, 2005 WL 102966, at \*20 (“There is no requirement  
9 that the plaintiffs choose one method now, as long as they offer a methodology that is generally  
10 accepted.”). Plaintiffs have satisfied their minimum burden.

11 **VII. THE COURT ALREADY CONSIDERED AND REJECTED APPLE’S**  
12 **ARGUMENT THAT A POSSIBLE UNDERCHARGE OF ITS FILES**  
13 **MUST BE CONSIDERED IN THE DAMAGES MODEL**

14 Citing the same case law, and now relying on Dr. Burtis for a second shot, Apple once again  
15 contends that Professor Noll’s proposed damage methodologies fail because he does not consider a  
16 possible undercharge some Class members may have received on their iTS purchases. Def’s Motion  
17 at 9; *see also* Dkt. No. 175 at 18-19 (Apple presenting same arguing in opposition to class  
18 certification); Dkt. No. 188 (plaintiffs responded to argument in reply brief in support of class  
19 certification). “Mere repetition of arguments that the court declined to accept in deciding plaintiffs’  
20 motion for certification are not adequate to support a decertification request.” *Heffelfinger v. Elec.*  
21 *Data Sys. Corp.*, 580 F. Supp. 2d 933, 968 n.119 (C.D. Cal. 2008). Because this argument was fully  
22 briefed and argued at the hearing before the Court on plaintiffs’ motion for class certification  
23 (Merrick Decl., Ex. 4, December 16, 2008 transcript at 9-11, 33-39), it does not form an adequate  
24 basis for decertification.

25 As plaintiffs previously demonstrated, defendant’s “net overcharge” theory has not been  
26 adopted by the Ninth Circuit, even in a tying case. Because the Court did not certify plaintiffs’ tying  
27 claims, that argument has even less relevance on this motion. *See, e.g., In re Wellbutrin SR Direct*  
28 *Purchaser Antitrust Litig.*, No. 04-5525, 2008 WL 1946848, at \*8 (E.D. Pa. May 2, 2008) (any  
economic benefits received by some victims of an illegal overcharge were “legally irrelevant

1 because the overcharge itself – not any economic effect of the overcharge – is the proper measure of  
2 recovery. . . ; if an overcharge occurred, *all* class members are entitled to recover, whether or not  
3 some plaintiffs experienced a net benefit while others experienced a net loss.”) *Id.* at \*6 (emphasis  
4 in original); *see also Royal Printing Co. v. Kimberly-Clark Corp.*, 621 F.2d 323, 327 (9th Cir. 1980)  
5 (permitting plaintiff to sue for “the full overcharge” even if a windfall would occur, so long as “the  
6 antitrust laws are vindicated and the defendant does not suffer multiple liability”).

7 Similarly, here, it is irrelevant whether some Class members benefited from their purchase of  
8 iTS files; the controlling question is whether Class members suffered an overcharge for their iPod  
9 purchases. Thus, Professor Noll’s damages methodologies appropriately consider the amount of  
10 overcharge plaintiffs and Class members suffered, if any.

11 Dr. Burtis cites no data or any source in law and/or economics to support her conclusion, nor  
12 has she conducted any analysis to determine if this is even an issue here. *See* Dkt. No. 241 at 15-16.  
13 Instead, she blindly asserts that because plaintiffs have alleged a tie between the iPod and iTS files  
14 “the demand for and price of files iTS would have decreased.” *Id.*; Merrick Decl. Ex. 2 at 40:14-  
15 41:24. There is no support that such an effect exists. Noll Reply Decl. at 26-27. As Professor Noll  
16 explained, this case is not one where market conditions have lowered the cost of the tying product  
17 because there is no fixed relationship between purchases of iPods and purchases of iTS files. *See*  
18 Merrick Decl., Ex. 1 at 141:15-143:12. Moreover, there is no indication that Apple was free to set  
19 iTS prices based on demand. Noll Reply Decl. at 26-27. Thus, regardless of the fact that plaintiffs  
20 have asserted a tying claim, a damages model need not take into account the price of iTS files.<sup>17</sup>

21 Finally, Dr. Burtis’s and Apple cannot explain how their “net overcharge” argument would  
22 apply to the reseller members of the certified class, who have not purchased any iTMS files.  
23 Merrick Decl., Ex. 2 at 44:6-45:12.

24  
25  
26 <sup>17</sup> Apple’s “net” overcharge argument only pertains to tying claims. *See Seigel v. Chicken*  
27 *Delight, Inc.*, 448 F.2d 43, 52-53 (9th Cir. 1971). Plaintiffs’ rule of reason tying claim is presently  
28 before the Court and if dismissed, Apple’s argument would be entirely irrelevant.

1 **VIII. CONCLUSION**

2 For these reasons, Apple's request to decertify the Rule 23(b)(3) class should be denied.

3 DATED: October 19, 2009

Respectfully submitted,

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1 CERTIFICATE OF SERVICE

2 I hereby certify that on October 19, 2009, I electronically filed the foregoing with the Clerk  
3 of the Court using the CM/ECF system which will send notification of such filing to the e-mail  
4 addresses denoted on the attached Electronic Mail Notice List, and I hereby certify that I have  
5 mailed the foregoing document or paper via the United States Postal Service to the non-CM/ECF  
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7 I certify under penalty of perjury under the laws of the United States of America that the  
8 foregoing is true and correct. Executed on October 19, 2009.

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