

EXHIBIT 2

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

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THE APPLE IPOD iTUNES)
ANTI-TRUST LITIGATION,)
)
)
) No. C 05-00037 JW
) C 06-04457 JW
)

VIDEOTAPE DEPOSITION OF MICHELLE M. BURTIS, Ph.D.
WEDNESDAY, SEPTEMBER 30, 2009

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10 Deposition of MICHELLE M. BURTIS, Ph.D., taken on
11 behalf of Plaintiffs, at COUGHLIN, STOIA, GELLER, RUDMAN
12 & ROBBINS, LLP, 100 Pine Street, 26th Floor, San
13 Francisco, California, commencing at 8:59 a.m.,
14 Wednesday, September 30, 2009, before Kelli Combs, CSR
15 7705.

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20

21 Also present: Nick Kasimatis, videographer

22 Lynn Miller with Apple Computer

23

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10

1 conduct a proper before and after regression 9:10:24AM
2 analysis when the products in the before period have
3 been modified between the before and the after
4 periods?

5 A Well, I can't answer that question 9:10:45AM
6 generally. So I don't -- I can't say that it could
7 never be the case, but as I sit here, I'm not -- I
8 can't think of a way to do that --

9 Q So --

10 A I'm sorry. 9:11:05AM
11 -- within the context of what we're
12 talking about here.

13 Q So you can't think of a way that a
14 regression analysis could take account of product
15 modifications, technological changes in a product 9:11:17AM
16 over a period of years.

17 Is that what you're saying?

18 A No.

19 Q That's what I thought you said. Maybe you
20 should rephrase your prior answer. 9:11:27AM

21 MR. MITTELSTAEDT: Objection;
22 argumentative.

23 THE WITNESS: Your question asked simply
24 about whether a regression analysis can take into
25 account changes in products, and certainly it's 9:11:42AM

1 possible to take into account product 9:11:44AM

2 characteristics and changes in products.

3 BY MS. SWEENEY:

4 Q Okay.

5 So it is possible to take into account 9:11:55AM

6 product characteristics and changes in products; is

7 that correct?

8 A In some circumstances, it is possible to

9 do that.

10 Q Okay. 9:12:07AM

11 And you're just saying that it's not

12 possible in this case to do that; is that right?

13 A What I'm saying is that the way that --

14 what Dr. Noll has proposed in his report, what he

15 has described is a before and after approach, and 9:12:20AM

16 what he's got are products that were only sold in

17 one of the two periods. And he --

18 Q You're saying the iPod was not sold -- I'm

19 sorry, did I interrupt you?

20 A You did but -- 9:12:36AM

21 Q Okay. Go ahead.

22 A Actually, I don't remember what I was

23 going to say.

24 Q Okay.

25 So are you saying that the iPod wasn't 9:12:42AM

12

1 sold in the after period? 9:12:46AM

2 A I'm saying that certain iPod products were
3 only sold in one of those two periods.

4 Q So in other words, there are different
5 models that were sold in the before period from the 9:12:59AM
6 after period; is that right?

7 A I prefer to say it the way that I did,
8 which is there were certain iPod products that were
9 sold in only one of the two periods.

10 Q So they're completely different products, 9:13:16AM
11 in your mind?

12 A I'm sorry, what is a completely different
13 product?

14 Q I was trying to draw the distinction
15 between different models of iPods. And you're 9:13:24AM
16 saying no, they are completely different products?
17 Did I misunderstand you?

18 A I wasn't focused on that difference in the
19 way that we were using those terms. So I'm not
20 quite sure what you're referring to. 9:13:38AM

21 Q All right.

22 You said that Professor Noll's
23 methodologies won't work to calculate damages.

24 Did you perform any kind of analysis to
25 test whether his methodologies would work? 9:14:03AM

1 A Well, the analysis that I performed was 9:14:09AM
2 evaluating what he had described and considering
3 that, given what I understood to be some facts about
4 the products.

5 Q So you didn't take any data yourself and 9:14:25AM
6 attempt to do a regression along the lines as
7 described by Professor Noll; is that right?

8 A Well, there -- you know, it would be very
9 difficult to do that.

10 Q But you didn't try it? 9:14:50AM

11 A Well, given what Dr. Noll has said, it's
12 unclear how I would even go about doing that.

13 Q Have you --
14 You know how to do a regression analysis,
15 though, correct? 9:15:05AM

16 A Yes.

17 Q And you were retained by Apple in this
18 litigation, correct?

19 A Yes.

20 Q So you presumably had access to Apple 9:15:11AM
21 materials, correct?

22 A I don't know what you mean.

23 Q Did Apple provide you with any materials
24 to review in connection with your retention in this
25 matter? 9:15:27AM

1 A You know, the things that are listed on 9:15:30AM
2 Exhibit 2.

3 Q But you didn't ask for anything other than
4 what Apple's counsel gave you?

5 A So your characterization is not quite 9:15:43AM
6 correct.

7 Q Okay.
8 Would you correct me?

9 A The -- I was asked to look at a particular
10 question, and I either went out and found the 9:15:54AM
11 information that I thought was relevant to evaluate
12 that information or asked Apple's counsel for that
13 information.

14 Q Okay.
15 And these two methods -- you went out and 9:16:10AM
16 found information, and then you also asked Apple's
17 counsel for information. All of that information is
18 reflected in the exhibit to your report that lists
19 all the materials you reviewed?

20 A I believe so, yes. 9:16:26AM

21 Q So Apple -- did Apple provide you with any
22 pricing data other than what's listed in your
23 report?

24 A Whatever is listed in my report.

25 Q Did you ask for anything -- did you ask if 9:16:46AM

1 you could see more data? 9:16:48AM

2 A I'm sorry, what kind of data? The
3 information --

4 Q I'm sorry, my question wasn't clear, so
5 I'm going to withdraw it. 9:16:58AM

6 Was there anything that you asked Apple to
7 look at that you didn't get?

8 A No.

9 Q And -- okay.

10 So I just want to go back to your original 9:17:22AM
11 answer where you said Professor Noll's methodologies
12 won't work, and those are your words, "won't work,"
13 to calculate damages. And I just want to make sure
14 I understand the answer.

15 So you're saying that you reached that 9:17:35AM
16 conclusion on the basis of the materials reviewed
17 that are listed in an exhibit to your report and on
18 the basis of review and evaluation of Professor
19 Noll's methodology.

20 But you, yourself, did not conduct any 9:17:51AM
21 separate regression analysis or any other
22 statistical analysis to determine whether Professor
23 Noll's methodologies would work; is that correct?

24 A I -- I have not done any statistical
25 analysis along the lines that -- that Dr. Noll 9:18:14AM

1 describes in his report. That's true. 9:18:19AM

2 Q Okay.

3 Now, you said that his methodologies don't
4 take into account certain realities of the
5 marketplace --

9:18:33AM

6 MR. MITTELSTAEDT: Sorry.

7 MS. SWEENEY: I'm going to start over.

8 BY MS. SWEENEY:

9 Q You said that Professor Noll's
10 methodologies didn't take into account certain 9:18:42AM
11 realities of the marketplace for iPods and iTunes.

12 What realities of the marketplace for
13 iTunes were you referring to?

14 A One of the -- the way that I understand
15 what Dr. Noll -- Dr. Noll thinks or the way that he 9:19:10AM
16 would perform, for example, his before and after
17 approach, it is -- and he has not described a way to
18 separate the -- the qualities of iTunes that are not
19 affected by the alleged conduct -- from the alleged
20 conduct. That is an example that comes to my mind. 9:19:40AM

21 But again, I would go back to, you know, my report
22 for a more complete answer.

23 Q Earlier you were testifying about -- you
24 said that Professor Noll didn't take into account
25 that some products were only sold in either the 9:20:07AM

1 but -- 9:28:03AM

2 Q Okay.

3 And in your report or attached to your
4 report, you had some product announcements that had
5 certain specifications for particular iPod models. 9:28:13AM

6 And as you recall those product announcements, do
7 those announcements identify those kinds of
8 characteristics that you just talked about, such as
9 capacity, weight, size, design, screen-size, et
10 cetera, et cetera? 9:28:34AM

11 A Well, I would have to look at them to know
12 the answer to that question..

13 Q Don't you remember those documents that
14 you attached to your report?

15 A I remember them generally, but I can't sit 9:28:45AM
16 here and tell you that they had each of those or any
17 of those characteristics in them.

18 Q Well, are you familiar generally with the
19 materials that Apple uses to describe and advertise
20 its products? 9:29:03AM

21 A I'm not sure what you're referring to.

22 Q Do you think it is knowable for any
23 particular iPod model what the capacity of that
24 model is?

25 A Yes. 9:29:24AM

1 Q Okay. 9:29:25AM

2 Do you think it's knowable with respect to
3 any particular iPod model what the weight of that
4 model is?

5 A Probably. 9:29:33AM

6 Q You don't know for sure?

7 A You might have to weigh it, but I think --

8 Q You don't think Apple describes the weight
9 in its product announcements?

10 A I don't know that it does that for every 9:29:44AM
11 product that it sells.

12 Q You didn't check?

13 A No.

14 Q How about size? Do you think it's
15 knowable for each iPod model to determine what is 9:29:53AM
16 the size of that model?

17 A Yes, I think you could measure them, for
18 example.

19 Q How about design? What were you referring
20 to when you said "design"? 9:30:05AM

21 A The -- the way the Click Wheel is
22 designed. Or the -- can't think of another word
23 besides "design." The way that a product looks, for
24 example, the way that the Touch looks, the way that
25 it -- icons are displayed on the Touch, for example. 9:30:42AM

1 Q Anything else? 9:30:49AM

2 A I'm sure there are other examples of that,
3 but those are the ones that occur to me now.

4 Q How about whether a particular iPod model
5 has the ability to display video or photos? Is that 9:31:03AM
6 knowable?

7 A Yes.

8 Q How about screen-size? Is that knowable?

9 A Yes.

10 Q Can you think of any product 9:31:17AM
11 characteristics, that's the phrase that you used in
12 your report, about a particular iPod model that are
13 not knowable?

14 A I don't know. I can't think of something
15 that is not knowable. By "knowable," I mean one 9:31:33AM
16 could describe it.

17 Q Okay.

18 MS. ROACH: I'm sorry, the streaming on
19 this is messing up. I just want to --

20 MS. SWEENEY: Off the record. 9:32:07AM

21 THE VIDEOGRAPHER: We're off the record at

22 9:32 a.m.

23 (Brief pause in proceedings.)

24 THE VIDEOGRAPHER: We're on the record at

25 9:40 a.m. 9:40:39AM

1 BY MS. SWEENEY: 9:40:40AM

2 Q Did you conduct any analysis of how you
3 would estimate damages in this case?

4 A Aside from what I've done in my report,
5 no. 9:40:58AM

6 Q Okay.
7 Now, if this were not a Class case, let's
8 say it were just an individual case, how would you
9 go about estimating that individual's damages?

10 A Well, I haven't really thought about that, 9:41:13AM
11 so I'm not really prepared to tell you how I would
12 do that.

13 Q But you have done damage calculations in
14 other antitrust cases, correct?

15 A I have done damage calculations, yes. 9:41:27AM

16 Q And you are familiar generally with how
17 economists go about calculating damages in antitrust
18 cases?

19 A Well, I'm not really sure there is a
20 general way to do it. I think that it really 9:41:40AM
21 depends on the particular issue and product and
22 allegation.

23 Q Well, let's talk about this case. If
24 say -- do you know who the individual Plaintiffs
25 are? 9:41:02AM

30

1 sale or that product. 9:46:44AM

2 Q Okay.

3 Here is the problem I'm having with your

4 answer and where I think perhaps we're

5 miscommunicating. You keep inserting this phrase 9:46:52AM

6 "Professor Noll has not described a way...."

7 I want you to just take Professor Noll's

8 methodology as you have read it and you have

9 understood it and assume one Plaintiff who purchased

10 one iPod in 2006. 9:47:07AM

11 Is it your opinion that Professor Noll's

12 before and after methodology would not work to

13 calculate damages for that individual Plaintiff?

14 A Again, I would refer back to my prior

15 answers. The reason for that phrase is because -- I 9:47:26AM

16 think I'm saying the same thing that you are. What

17 he has described, that is, the way that I understand

18 what he has described for a product that is not sold

19 in the two periods, he hasn't described a way that

20 before and after method could be used. 9:47:46AM

21 Q Okay.

22 Is there any before and after methodology

23 that, in your opinion, could be used to calculate

24 damages for an individual Plaintiff who purchased an

25 iPod in 2006, assuming that Plaintiff proved 9:48:01AM

1 liability in this case? 9:48:03AM

2 A My understanding of a before and after is
3 to actually compare something in the before period
4 to the after or the during period, actually, is a
5 more accurate way of describing it. So if you don't 9:48:16AM
6 have a comparison in one of those two periods, then
7 it's almost by definition you can't -- you can't use
8 that as a way to -- you don't have anything to
9 compare the price to.

10 Q And the reason you're saying there can be 9:48:37AM
11 no comparison here is because there is -- I think
12 this is the word you used in your report, there are
13 vast differences between iPods sold in the before
14 period and the after period; is that correct?

15 A Well, that's not the only reason. That is 9:48:52AM
16 certainly -- that is -- that is a problem.

17 Q You said so if you don't have a comparison
18 in one of those two periods, then it's almost by
19 definition you can't use that as a way to compare
20 the price to. 9:49:19AM

21 So what I'm trying to figure out is:
22 Apple calls this thing that we're litigating about
23 here an iPod, and it sold iPods in the before
24 period, and it sold iPods in the during period, and
25 if there is an after period, Apple continues to sell 9:49:37AM

1 iPods in the after period. 9:49:40AM

2 Now, they are all iPods, but your opinion
3 is that there are -- differences among those models
4 of iPods are so vast that you can't compare them
5 meaningfully from one period to the next; is that 9:49:52AM
6 correct?

7 A The problem is that there are differences
8 in the products and those -- and the differences in
9 the products, there are characteristics, for
10 example, of products where those characteristics 9:50:15AM
11 exist only in one of the two periods. And so in
12 order to make a comparison, you have to do something
13 to control for those characteristics while at the
14 same time controlling for the difference in the two
15 time periods. 9:50:39AM

16 Q So it is possible to control for
17 differences in characteristics; is that correct?
18 Isn't that what you just said?

19 MR. MITTELSTAEDT: Objection; misstates
20 the testimony. 9:50:52AM

21 THE WITNESS: The answer to the question
22 that -- the first question that you asked me is --
23 it is certainly possible in certain circumstances
24 and with certain methods.

25

1 BY MS. SWEENEY: 9:51:10AM

2 Q Yes.

3 I'm sorry, is that the end of your answer?

4 A Yes.

5 Q It is certainly possible in certain 9:51:18AM

6 circumstances and with certain methods to control

7 for differences in characteristics among products.

8 Is that what you're saying?

9 A I believe that's what I'm saying.

10 Q Okay. All right. 9:51:31AM

11 Now let's change it up a little bit.

12 Let's assume that instead of Melanie Tucker, our

13 only Plaintiff is Best Buy.

14 Do you know what Best Buy is?

15 A Yes. 9:51:47AM

16 Q You understand that they are a reseller of

17 iPods?

18 A (Nods head.)

19 Q In fact, they are the number one reseller
20 of iPods, at least according to data produced by 9:51:54AM

21 Apple.

22 Were you aware of that?

23 A I can't recall that, as I sit here. I
24 mean, I would -- well, I mean, for a particular time

25 period? Or overall? I mean, I just don't know what 9:52:08AM

1 A Well, you know, the yardstick method is -- 9:53:43AM
2 would it work? There are all kinds of reasons.
3 There are problems that are associated with that
4 method, and so unless one could overcome those, it
5 would not work. 9:54:13AM

6 Q Okay.
7 So all the problems that you have
8 identified with respect to Class damages and the
9 yardstick method would also apply to calculating
10 damages for an individual Plaintiff under the 9:54:25AM
11 yardstick method; is that your testimony?

12 A I'm sorry, would you repeat that? I lost
13 it.

14 Q Sure.
15 You said there are all kinds of problems 9:54:34AM
16 associated with the yardstick method. Now, is it
17 your opinion that the same problems that you have
18 identified with Professor Noll's yardstick
19 methodology would also apply if you were attempting
20 to use that methodology to calculate the damages for 9:54:51AM
21 an individual Plaintiff, assuming Plaintiff proved
22 liability?

23 A I don't know that there would be any
24 additional problems, but certainly the problems that
25 I've identified would exist for an individual 9:55:11AM

1 Plaintiff. 9:55:17AM

2 Q Okay.

3 And how about the markup methodology? Is
4 it -- assume there is just one individual Plaintiff
5 who purchased an iPod in 2006, and she proves
6 liability. 9:55:26AM

7 Is it your opinion that Professor Noll's
8 markup methodology would not work to calculate
9 damages for that individual Plaintiff?

10 A I'm sorry. 9:55:51AM

11 Q Okay. I'll start over. No problem.

12 Moving on to the markup method, and I'm
13 still using the individual consumer Plaintiff. So
14 assume a single Plaintiff who purchased an iPod from
15 the Apple store in 2006. 9:56:06AM

16 Is it your opinion that Professor Noll's
17 markup methodology would not work to calculate
18 damages for that individual Plaintiff, assuming she
19 had already proved liability?

20 A And the -- so the hangup that I am having 9:56:22AM

21 is when I'm thinking about an individual consumer,
22 to the -- Dr. Noll has this method that -- or he has
23 these three methods, and, you know, another opinion
24 in my report is that he hasn't considered in any one
25 of those three methods the -- the net overcharge, 9:56:50AM

1 product that one could compare to iPod products or 10:01:38AM
2 maybe several products to compare to several iPod
3 products, that problem would exist for Best Buy, as
4 well.

5 Q Okay. 10:01:51AM

6 Now, a few --

7 MR. MITTELSTAEDT: When you move on to a
8 different subject, if we could just take a short
9 break.

10 MS. SWEENEY: Sure. I'm just following up 10:01:57AM
11 on something.

12 MR. MITTELSTAEDT: Yeah.

13 BY MS. SWEENEY:

14 Q A few answers ago you referred to the net
15 overcharge issue. Can you explain to me what your 10:02:03AM
16 view is of the net overcharge problem?

17 A Well, the problem, I think, is that there
18 hasn't been any consideration to whether or not the
19 price of music would be different in the but-for
20 world. 10:02:24AM

21 Q And why would that matter?

22 A Well, because if the price of music is
23 higher in the but-for world, then impact and
24 damages, actually, could be different for --
25 depending how much music you buy and could be 10:02:46AM

1 different for different direct purchasers. 10:02:49AM

2 Q And why is it that you have to take -- as
3 an economist, what -- what makes you think you have
4 to take into account the but-for price of music
5 purchased from the iTunes store? 10:03:04AM

6 A Well, I think that it is part of -- it is
7 part of the theory that the Plaintiffs are advancing
8 in this case.

9 Q And what makes you think that's part of
10 Plaintiffs' theory? 10:03:25AM

11 A Because Plaintiffs are claiming that the
12 attractiveness of iTunes led to an increased demand
13 of iPods and, therefore, raised the price of iPods.
14 And so to the extent that certain people wanted to
15 buy iTunes because it was attractive but didn't 10:03:49AM
16 because they didn't want to buy an iPod, then in the
17 but-for world, they could buy some other device and
18 purchase iTunes, increasing the demand for iTunes
19 and increasing the price of iTunes.

20 Q Now, is your theory that the price of 10:04:10AM
21 iTunes matters, is that true whether we're talking
22 about a monopolization claim?

23 A Is it true -- I thought you said either,
24 but maybe I --

25 Q Yeah, I'll start over. 10:04:29AM

1 this case? I know you're not a lawyer, but just do 10:05:54AM
2 you have any understanding of what Plaintiffs'
3 claims are?

4 A Yes.

5 Q And what are they? 10:06:01AM

6 A I believe there is both a monopolization
7 claim and a tying claim.

8 Q Okay.

9 So let's say Plaintiffs are only
10 attempting to prove in Section 2 a monopolization 10:06:11AM
11 claim.

12 Is it your opinion that in order to
13 accurately calculate damages, one must take into
14 account what the price of music and videos purchased
15 from the iTunes store would have been in the but-for 10:06:24AM
16 world?

17 MR. MITTELSTAEDT: Let me object to the
18 extent it calls for a legal conclusion.

19 THE WITNESS: It's unclear to me how -- I
20 mean, I think there is just one but-for world that's 10:06:36AM
21 being -- certainly Dr. -- Dr. Noll, the way that he
22 describes the but-for world doesn't seem to change
23 depending on what the claim is.

24 So my understanding of the Plaintiffs'
25 theory in this case is as I described it earlier in 10:06:58AM

1 my prior answer. 10:07:00AM

2 BY MS. SWEENEY:

3 Q So your answer to my question is yes?

4 A I can't remember. You have a very long
5 question. 10:07:08AM

6 Q Okay. I can read it over again.

7 And I'm sorry if I'm wordy.

8 All right. Let's say Plaintiffs are only
9 attempting to prove a Section 2 monopolization
10 claim. 10:07:24AM

11 Is it your opinion that in order to
12 accurately calculate damages, one must take into
13 account what the price of music and videos purchased
14 from the iTunes store would have been in the but-for
15 world? 10:07:36AM

16 A I think with the monopolization claim or
17 the tying claim, that given Plaintiffs' theory, one
18 has to consider whether there was an effect on the
19 price of music, yes.

20 Q Okay. 10:07:50AM

21 Now, you're aware that the Class, as
22 defined by Plaintiffs, includes both consumers who
23 purchased from the Apple store and resellers, like
24 Best Buy; is that right?

25 A Yes. 10:08:06AM

1 Q Okay. 10:08:06AM

2 Now, if you were -- if you were
3 calculating damages for the resellers who are in the
4 Class, such as Best Buy, is it also necessary, in
5 your view, to take into account what the price would 10:08:20AM
6 have been in the but-for world for music and videos
7 purchased from the iTunes music store?

8 A It's an interesting question. Clearly,
9 Best Buy doesn't purchase music, at least as far as
10 I know. But I don't know. Maybe they do. I don't 10:08:45AM
11 know the answer to that. I'm not sure. I would
12 have to think about that.

13 Q Okay. Now, let's assume that Plaintiff --
14 strike that.

15 Let's assume that Plaintiff proves that 10:09:21AM
16 Apple engaged in unlawful conduct that violates
17 Section 2 of the Sherman Act. And it's time to
18 calculate damages, and let's assume that it's
19 already been proven that Apple charged a
20 super-competitive price for iPods as a result of its 10:09:39AM
21 anticompetitive behavior.

22 Now, Apple took some of those
23 super-competitive products that it achieved and used
24 them to give out goodies to its customers at the
25 Apple store. For example, you know, a free book. 10:09:59AM

1 Everybody gets a free book. Now, those free books 10:10:05AM
2 were paid for by the super-competitive prices that
3 Apple charged for iPods.

4 Is that something -- does that figure into
5 your net overcharge analysis? Is that something 10:10:19AM
6 that you would have to take into account in
7 calculating damages?

8 MR. MITTELSTAEDT: Let me object to the
9 question. It's an incomplete hypothetical and
10 perhaps incomprehensible hypothetical. 10:10:30AM

11 THE WITNESS: Actually, I don't understand
12 it.

13 BY MS. SWEENEY:

14 Q Okay. I'll try again. I'll try to make
15 it a little more specific. 10:10:41AM

16 MR. MITTELSTAEDT: I do with a little more
17 urgency renew my request for a break as soon as you
18 get to a convenient breaking spot.

19 MS. SWEENEY: All right. We can break
20 now, if you like. 10:10:54AM

21 MR. MITTELSTAEDT: I won't talk about that
22 question with her.

23 MS. SWEENEY: You can talk about it, if
24 you want.

25 MR. MITTELSTAEDT: Well, I would ask her 10:11:00AM

1 BY MS. SWEENEY: 10:37:31AM

2 Q It's a new question. I get to ask new
3 questions.

4 A The focus of your question is different
5 than -- I just want to make sure that -- 10:37:39AM

6 Q Okay.

7 Do you want me to ask it again?

8 A Yes, ask it again.

9 Q Is it your opinion that in a market where
10 there is technological changes, that there are some 10:37:49AM
11 circumstances where it's possible to construct a
12 damage model common to all Class members to
13 calculate damages?

14 A There --

15 Q Strike that. Let me redo that question. 10:38:07AM

16 Are there circumstances under which you
17 can construct a before and after regression analysis
18 to calculate damages common to all Class members
19 where the product at issue has changed significantly
20 over the Class period? 10:38:28AM

21 MR. MITTELSTAEDT: Object; incomplete
22 hypothetical.

23 THE WITNESS: I would just say it depends.

24 BY MS. SWEENEY:

25 Q And what does it depend on: 10:38:36AM

1 A One thing it depends on is whether the 10:38:38AM
2 changes in that product are occurring, for example,
3 would occur at the same time as the -- as the line
4 between the before and the after period.

5 Q Okay. 10:38:59AM

6 And so when you say "the line between the
7 before and after period," you're talking about the
8 beginning of the anticompetitive conduct? Is that
9 what you're referring to?

10 A Yes. 10:39:09AM

11 Q Okay.

12 So if those product changes don't occur at
13 the same time as the beginning of the
14 anticompetitive conduct, is it then possible to
15 construct a valid damages model, even though the 10:39:20AM
16 product has changed significantly during the Class
17 period?

18 MR. MITTELSTAEDT: Object; incomplete
19 hypothetical.

20 THE WITNESS: If -- if you are doing a 10:39:30AM
21 regression analysis of -- before and after
22 regression analysis where, you know, the standard or
23 traditional way of doing that is to use a variable
24 that distinguishes the before and after period, if
25 you are doing that and if you have characteristics 10:39:46AM

1 of products that exist in only one of the two 10:39:50AM
2 periods, then the result that you would get would
3 not validly -- could not distinguish the effect of
4 the before and after period from the effect of that
5 characteristic that was added. 10:40:08AM

6 MS. SWEENEY: I'm going to ask the Court
7 Reporter to read back my question again, please.

8 (Record read as follows:

9 "Q So if those product
10 changes don't occur at the same 10:40:18AM
11 time as the beginning of the
12 anticompetitive conduct, is it then
13 possible to construct a valid
14 damages model, even though the
15 product has changed significantly 10:40:18AM
16 during the Class period?")

17 THE WITNESS: I mean, I think I answered
18 the question.

19 BY MS. SWEENEY:

20 Q Do you know what a hedonic regression is? 10:40:46AM

21 A Yes.

22 Q What is it?

23 A It is a regression where price is
24 regressed on product characteristics.

25 Q Have you ever done one? 10:41:00AM

1 A I can't think of one, but I may have done 10:41:04AM

2 one in the past.

3 Q Okay.

4 And you have seen them done?

5 A Yes. 10:41:09AM

6 Q In other cases?

7 A Yes.

8 Q What cases?

9 A Well, I just saw one done in Flash, for
10 example. 10:41:20AM

11 Q And the expert for the Plaintiffs did it?

12 A Yes.

13 Q And who was the expert?

14 A There were two.

15 Q Who were they? 10:41:29AM

16 A Dr. Noll was one, and Janet Netz was the
17 other.

18 Q Which of these two experts did the hedonic
19 regression?

20 A Both of them. 10:41:41AM

21 Q And you were asked to comment on the
22 hedonic regression?

23 A Actually, I was not.

24 Q What was your role in that case?

25 A My role was related to the issues of 10:41:53AM

1 pass-through. 10:41:56AM

2 Q Okay.

3 So who was the expert who addressed the
4 Direct Purchaser issues, such as presented by
5 Professor Noll's report? 10:42:08AM

6 A Michael Keeley.

7 Q All right.

8 So are you familiar, then, in the Flash
9 case or in any other case of examples of where a
10 hedonic regression has been used to place values on 10:42:26AM
11 product innovations?

12 A I'm sorry, product innovations?

13 Q When I say "product innovations," I'm
14 talking about what you have referred to in this
15 case, which is that the iPod has changed over time, 10:42:45AM
16 many new features have been added and things have
17 changed. That kind of product innovation.

18 A So when you say that, what I think of is a
19 particular iPod product, like a Nano changing
20 characteristics. 10:43:08AM

21 Is that what you're talking about?

22 Q Let's use that as an example.

23 A Okay. I'm sorry, what was the question?

24 Q Have you seen a case where hedonic
25 regression was used to analyze product innovations? 10:43:22AM

1 MS. SWEENEY: Paragraph 3. 10:45:11AM

2 THE WITNESS: I'm sorry, did you ask me a
3 question?

4 BY MS. SWEENEY:

5 Q Do you have that in front of you? Did I 10:45:36AM
6 read that correctly?

7 A Yes. I don't know that you read it
8 correctly. I see the reference to the Hurricane
9 Katrina paper in paragraph 3 of my report.

10 Q Okay. 10:45:48AM

11 And you also talked about this Hurricane
12 Katrina report in the evidentiary hearing that was
13 held in the Indirect Purchaser case; is that right?

14 A Yes.

15 Q Okay.. 10:45:58AM

16 And then the article that came out of that
17 analysis was produced in this litigation and is
18 called Petroleum Refining Industry Business
19 Interruption Losses Due to Hurricane Katrina,
20 correct? 10:46:11AM

21 A Yes.

22 Q And that's a paper that you coauthored
23 with two other people?

24 A Yes.

25 Q And were you hired by insurers to conduct 10:46:16AM

1 I don't remember the source of the data. 10:48:35AM

2 BY MS. SWEENEY:

3 Q Okay.

4 Do you remember the volume of the data?

5 A What do you mean the volume of the data? 10:48:45AM

6 Q Well, did you have -- how many price
7 points over what period of time did you have data
8 for?

9 A I don't recall.

10 Q All right. 10:49:04AM

11 Now, the forecasting model that you used
12 in the Hurricane Katrina paper -- and let me know if
13 you want me to get a copy of that, and we'll do that
14 during a break because I don't want to interrupt,
15 but we'll come back to it. But you said in your 10:49:27AM
16 paper that -- you described the specification that
17 you use, and you said, "This specification is chosen
18 from 30 alternative specifications."

19 Does that mean that you looked at
20 alternatives and through trial and error chose the 10:49:40AM
21 one that best fit what you were working on?

22 A The method that we used, if I recall
23 correctly, was -- well, my recollection is that
24 there was a period of time prior to the hurricane,
25 and the model was estimated over that period of. 10:50:05AM

1 time, and there were a number of variables and 10:50:07AM
2 specifications.

3 And the -- the way that we chose the
4 particular model that we would use to forecast what
5 prices would be over the next, I think it was a few 10:50:20AM
6 weeks, I don't remember how long, maybe a couple of
7 months after the hurricane, was to pick the
8 particular specification that best fit the data in
9 the historical period.

10 Q Okay. 10:50:38AM

11 And when you say you chose the one that
12 best fit the data, did you mean that you -- you
13 chose from alternatives? You looked at some other
14 alternatives, and you figured out which one worked
15 the best? 10:50:54AM

16 A Well, there was a particular statistical
17 criteria that we used, so --

18 Q I'm sorry.

19 A Well, there was a statistical criteria
20 that we used and -- and we chose the specification 10:51:06AM
21 that most closely met that criteria.

22 Q Okay.

23 What I meant is you say this specification
24 is chosen from 30 alternative specifications. Does
25 that mean that you looked at 30 different 10:51:20AM

1 BY MS. SWEENEY: 10:58:02AM

2 Q Okay.

3 Now, in the Class certification

4 evidentiary hearing in the Indirect Purchaser case,

5 you described the work that you had done in this 10:58:16AM

6 Hurricane Katrina paper, and you said something to

7 the effect -- correct me if I misstate this -- that

8 trying to predict the price of iPods in the but-for

9 world based on iPods that were sold in the before

10 period was like trying to calculate the price of 10:58:39AM

11 oil -- or excuse me, the price of ethanol from the

12 price of oil.

13 Do you remember that comment you made?

14 MR. MITTELSTAEDT: What's the citation,

15 please? 10:58:51AM

16 MS. SWEENEY: I don't know what the

17 citation is.

18 THE WITNESS: I don't think I -- I mean, I

19 remember something along those lines, but I don't

20 think it was exactly as you're describing it. 10:58:58AM

21 BY MS. SWEENEY:

22 Q Maybe we'll find that during a break, and

23 I'll come back to that.

24 Paragraph 5 of your report says:

25 "Counsel for Apple has asked 10:59:21AM

1 me to address whether the 10:59:23AM

2 methodologies proposed by

3 Professor Noll in the Direct

4 Purchaser case can be used to

5 estimate class-wide damages." 10:59:28AM

6 Do you see that?

7 A Yes.

8 Q When did counsel for Apple ask you that?

9 A Let's see. When was this? No, that

10 can't -- when was the date of this? It was maybe a 10:59:48AM

11 month before this report was filed.

12 Q That was the first time he had ever asked

13 you to conduct that analysis?

14 A To conduct that analysis.

15 Q Was that the first time that counsel for 11:00:08AM

16 Apple asked you to address whether the methodologies

17 proposed by Professor Noll in the Direct Purchaser

18 case can be used to estimate class-wide damages?

19 A Well, that was when he asked me to -- to

20 analyze it in a -- in a -- in the way that I have in 11:00:33AM

21 this report, I guess.

22 Q Is that the first time that counsel for

23 Apple asked you to address whether the methodologies

24 proposed by Professor Noll in the Direct Purchaser

25 case can be used to estimate class-wide damages? 11:00:44AM

1 A We may have talked about those issues, you 11:00:48AM
2 know, before, you know, when -- around the time that
3 Professor Noll filed his report and was being
4 deposed. We may have also talked about it then.

5 Q But you don't -- I'm sorry. 11:01:03AM

6 A I'm sorry, but -- well...

7 Q Okay.

8 You were --

9 You were retained in this case before
10 Professor Noll's deposition, correct? 11:01:16AM

11 A I think that's right.

12 Q Well, you said in the deposition taken in
13 the Indirect Purchaser case that you were retained
14 within a couple of months before Professor Noll's
15 deposition. 11:01:34AM

16 Do you recall that?

17 A I don't, but that sounds about right. I
18 mean, I don't remember specifically when I was
19 retained or -- or I don't remember specifically
20 saying those words in my deposition. 11:01:48AM

21 Q Now, that deposition was an exhibit to
22 your report in this case, wasn't it?

23 A The deposition?

24 Q Wasn't it?

25 A I don't think so. 11:02:08AM

1 Q No, maybe not. I guess that was just the 11:02:09AM
2 evidentiary hearing that was an exhibit. Well,
3 we'll come back to that.

4 So you were --

5 You were retained before the time when 11:02:23AM
6 Apple filed its opposition to Plaintiffs' motion for
7 Class certification in the Direct Purchaser case,
8 correct?

9 A I believe so.

10 Q Okay. 11:02:41AM

11 And at that time, did you advise Apple as
12 to whether, in your opinion, Professor Noll's
13 proposed methodologies could be used to estimate
14 Class-wide damages?

15 A We may have had conversations about that. 11:02:56AM

16 Q Did you have conversations about that?

17 A I don't remember, but it's possible.

18 Q Is it your practice when you are retained
19 by a client and you read a report and you read a
20 deposition transcript, that you then have 11:03:13AM
21 conversations with counsel about it?

22 A Yes.

23 Q Okay.

24 So do you think it's likely that you had
25 discussions around that time frame, that is, before 11:03:21AM

80

1 the time when Apple submitted its opposition to 11:03:23AM

2 Plaintiffs' Class certification motion?

3 MR. MITTELSTAEDT: Objection; calls for

4 speculation.

5 THE WITNESS: I really don't remember. We 11:03:30AM

6 could have. I know we talked about the report. I

7 remember talking about tying more than -- more than

8 anything else in particular. But we could have had

9 those conversations. It wouldn't surprise me,

10 especially if we had had a conversation about what 11:03:52AM

11 regression analysis is and, you know, that kind

12 of -- of conversation.

13 BY MS. SWEENEY:

14 Q When did you first form the opinion that

15 Professor Noll's proposed methodologies for 11:04:05AM

16 calculating damages could not be used in this case?

17 A Well, I'm sure that when I first read his

18 report, I -- I would have -- well, I don't remember

19 exactly, but I'm sure that when I first read his

20 report, I would have understood that there was not a 11:04:31AM

21 lot of detail or there was a lot left out of those

22 descriptions and probably things that were not

23 considered when you thought about those three

24 methods.

25 But in terms of, you know, when I sorted 11:04:52AM

1 it all out and went back and -- and was a little bit 11:04:54AM
2 more rigorous about what the problems were, that
3 would be when I wrote this report.

4 Q So when you initially reviewed Professor
5 Noll's report and you had these initial 11:05:08AM
6 conversations with counsel for Apple, you had not
7 yet reached the conclusion that Professor Noll's
8 proposed methodologies for calculating damages would
9 not work in this case?

10 A I don't know. I don't know if -- I just 11:05:23AM
11 don't remember what I thought at that time. As I
12 said, if I -- I'm sure that when I read it for the
13 first time, it is fairly -- there isn't a lot of
14 information, so I'm -- I'm -- I'm willing to --
15 well, I'm -- I'm sure that I thought at the time 11:05:52AM
16 there was not a lot of information in his report
17 about these damage methodologies.

18 Q Now, I had asked or we asked in the
19 subpoena to you for you to produce all your time
20 records in this case. We haven't gotten those. 11:06:13AM

21 Where are those time records?

22 A They are with Jones Day.

23 MS. SWEENEY: I'd like those before the
24 end of this deposition because I want to question
25 her about them. 11:06:26AM

1 MR. MITTELSTAEDT: Well, I'll inquire. 11:06:28AM

2 THE WITNESS: I think they are.

3 MS. SWEENEY: I'll bring her back if we
4 don't have them before the end of the deposition.

5 BY MS. SWEENEY: 11:06:36AM

6 Q Did you convey to Mr. Middelstaedt or
7 anyone else at Jones Day or at Apple your views
8 about Professor Noll's proposed methodologies for
9 calculating damages back in 2008 before Apple filed
10 its opposition to Class certification? 11:06:56AM

11 A I think I answered that. I can try --

12 Q It's a little different question and I
13 apologize. These are probably very similar
14 questions, but it's a little different.

15 I just want to know if you told any -- 11:07:12AM
16 first of all, who is your primary contact in this
17 matter? Is it Mr. Middelstaedt?

18 A Yes.

19 Q Anybody else that you have talked to?

20 A I've talked to Craig Stewart. 11:07:22AM

21 Q Anybody else?

22 A I've talked to Michael Scott.

23 Q Anybody else?

24 A No.

25 Q Okay. 11:07:30AM

1 11:09 a.m. 11:09:03AM

2 (Recess taken.)

3 THE VIDEOGRAPHER: We're on the record at

4 11:20 a.m.

5 BY MS. SWEENEY: 11:20:37AM

6 Q Dr. Burtis, in your report you say that --

7 that Dr. French proposed the same three basic

8 approaches as Professor Noll.

9 How are the two reports or how are the

10 three methodologies by these two different experts 11:20:58AM

11 in these two different cases, how are they the same?

12 A Well, there are three -- they both propose

13 three methods. They both propose a before and after

14 method. They both propose a yardstick method in

15 which the price of or the prices, I guess, of iPods 11:21:19AM

16 are to be compared with some yardstick product, and

17 they both proposed a margin or markup method in

18 which the margins of iPods are compared to the

19 margins of some other product.

20 Q Are there any differences among the 11:21:44AM

21 approaches taken by Professor Noll and Dr. French?

22 A Well, that's -- none of these methods,

23 frankly, by either Dr. French or Dr. Noll are very

24 detailed. So, for example, in the before and after

25 method, they both propose such method, comparison of 11:22:06AM

1 before and after iPod prices. And they both propose 11:22:11AM
2 that there would be other variables in -- in the
3 regression equation that they would use.

4 But neither one of them really set out the
5 regression equation or, you know, said what 11:22:26AM
6 particular variables they were going to use, so I
7 can't tell you that they would be identical
8 regressions.

9 Q But based on the reports as written, and
10 you have also read their deposition testimony, I 11:22:38AM
11 believe, what differences can you identify?

12 A Well, I guess I would just repeat my same
13 answer.

14 Q You can't identify any differences in the
15 three basic approaches taken by the two experts? 11:23:00AM

16 A The three basic approaches are really the
17 same. The differences, I think, would come in the
18 way that they were implemented, and none of them
19 really went very far along the road of implementing
20 them. So we don't really know what differences 11:23:19AM
21 there would be.

22 Q But I'm just asking you based on the
23 report. I'm not saying, you know, based on what
24 they might ultimately do.

25 I'm saying based on their report, can you 11:23:30AM

1 identify any differences in the approaches between 11:23:32AM
2 Professor Noll and Dr. French in the before and
3 after yardstick and markup methodologies for
4 calculating damages?

5 A I -- I -- 11:23:49AM

6 Q It's a "yes" or "no" question. Can you
7 identify them? And if so, please do so.

8 MR. MITTELSTAEDT: Object to the "yes" or
9 "no" part as argumentative.

10 THE WITNESS: The three basic approaches 11:24:06AM
11 are very -- I mean, I don't know that there are any
12 differences in the basic approaches. If there are
13 differences, they are going to come in the

14 implementation, and I don't have sufficient
15 information to know exactly how they are going to 11:24:21AM
16 implement them.

17 BY MS. SWEENEY:

18 Q I'm not asking about implementation.

19 As the reports --

20 Have you read both reports? 11:24:30AM

21 A Yes.

22 Q And have you read the deposition of
23 Professor Noll?

24 A Yes.

25 Q Have you read the deposition of 11:24:35AM

1 Dr. French? 11:24:36AM

2 A Yes.

3 Q Now, based on that information, can you,
4 as you're sitting here today right now, identify any
5 differences in the approaches taken by the two 11:24:45AM

6 experts with respect to the before and after
7 methodology, the yardstick methodology or the markup
8 methodology for calculating damages?

9 A So I would -- I would refer back to my
10 earlier answers. And here is an example of the 11:25:03AM

11 difficulty in answering this question more
12 specifically: In Dr. Noll's report, he describes
13 generally a before and after regression analysis.

14 He describes generally the kinds of variables that
15 he would include in that analysis. I think he 11:25:24AM

16 actually says there might be two different analyses,
17 one for the consumers and one for the wholesalers.

18 In his deposition, when he was asked some
19 questions about how he would implement that before
20 and after analysis, he said, "Well, I don't know if 11:25:45AM

21 I'm going to use a dummy variable approach."

22 Now, that would be a difference from
23 Dr. French, who, I think, was planning on using a
24 dummy variable approach. But Dr. Noll has not told

25 us exact- -- what he would do in place of the dummy 11:26:07AM

1 variable approach. 11:26:11AM

2 So it's unclear to me -- that is an
3 example of why it's difficult to know without
4 further information from both of them, frankly, what
5 they would do. 11:26:26AM

6 MS. SWEENEY: I'm going to move to strike
7 the answer as nonresponsive and ask the Court
8 Reporter to read back my question.

9 (Record read as follows:

10 "Q Now, based on that 11:26:33AM
11 information, can you, as you're
12 sitting here today right now,
13 identify any differences in the
14 approaches taken by the two experts
15 with respect to the before and 11:26:33AM
16 after methodology, the yardstick
17 methodology or the markup
18 methodology for calculating
19 damages?")

20 THE WITNESS: I'm sorry, I don't know how 11:26:58AM
21 else to answer that question.

22 BY MS. SWEENEY:

23 Q Okay.

24 You said in your report -- and I'm looking
25 at paragraph 8 where you summarize your 11:27:09AM

1 conclusions -- that Professor Noll's testimony shows 11:27:11AM
2 that he is doubtful that certain of these methods
3 can work.

4 And what are you referring to there?

5 A I'm referring to the yardstick method. 11:27:27AM

6 Q Okay.

7 But not the before and after, and not the
8 markup method; is that correct?

9 A Well, it's unclear to me about the markup
10 method because it is relying -- at least one of his 11:27:38AM
11 variations relies on a comparison that is very
12 similar to the yardstick method.

13 Q But Professor Noll did not express any
14 doubts himself about the markup method, correct?

15 A He only -- I think the doubt that he 11:28:00AM
16 expressed was whether or not he could find a product
17 that was similar enough to be used as a benchmark
18 for an iPod. That problem is going to occur in both
19 the yardstick method and the markup or margin
20 method, whatever he calls it. Margin. 11:28:17AM

21 Q And that problem that you refer to of
22 finding a comparison product, that would apply no
23 matter how Professor Noll applied the markup method?

24 A No. As I said, he has two variations of
25 that margin method. One is -- well, no, I think it 11:28:48AM

1 would apply to both because -- the first variation 11:28:55AM
2 is to find a product to simply compare the margin of
3 that product to the iPod margin. The other
4 variation is to find what the iPod margin would be
5 had the structure of the market that iPods were sold 11:29:12AM
6 in was different.

7 And in order to do that, he would need
8 some -- I think he was thinking of some
9 concentration method. So he would have to now find
10 a product to be used as a benchmark where he would 11:29:29AM
11 find the, if you will, the but-for concentration.

12 Q You say in your discussion of the before
13 and after methodology that the purported baseline
14 period before the alleged violation is too short.

15 Assuming that the after period begins in 11:30:02AM
16 April of 2003, how long is that purported baseline
17 period?

18 A I think it is about one and a half years.
19 I think it's somewhere -- yes. Well, in paragraph
20 19 of my report, I say that: 11:30:21AM

21 "The first generation of iPod
22 was introduced in October of 2001,
23 just 1.5 years before the alleged
24 violation in 2003."

25 Q Now, are you aware of other cases -- 11:30:31AM

1 A No. 11:32:06AM

2 Q In paragraph 10 of your report, this is
3 still the summary of conclusions, you talk about
4 Professor Noll's yardstick method, and you say:

5 "Based on my analysis to date, 11:32:29AM

6 I do not believe that this method
7 will work."

8 And I just wanted to clarify it based on
9 your testimony that you gave earlier today. The
10 analysis that you're referring to here where you say 11:32:41AM

11 "Based on my analysis to date," it's not that you
12 conducted any kind of -- well, strike that.

13 What kind of analysis did you conduct?

14 A I considered the -- the -- the products
15 that Dr. Noll offered and thought about other 11:33:01AM

16 products that could possibly be used and had the
17 same problem that Dr. Noll had, which is I couldn't

18 really think of a product that is similar to --

19 well, you would have to, I think, use different

20 products for different iPods, but it was very 11:33:24AM

21 difficult to come up with products that could be
22 used as yardsticks here.

23 Q Okay.

24 You said you considered the products that

25 Professor Noll referred to. What were those 11:33:33AM

1 products? 11:33:36AM

2 A They were, I believe -- what was the first
3 one? PDAs, Smartphones and something else. Oh,
4 smart mobile telephones, portable CD/DVD players and
5 portable digital players produced by Apple's 11:33:57AM
6 competitors.

7 Q And just for the record, you're reading
8 from your report?

9 A Yes, in paragraph 25.

10 Q What page? 11:34:04AM

11 A Paragraph 25.

12 Q Okay.

13 When you say you considered the products,
14 what kind of research did you do on those products,
15 if any? 11:34:20AM

16 A I'm sorry, what products?

17 Q The products that you just identified that
18 are listed in paragraph 25.

19 A What kind of research did I do?

20 Q You said -- in answer to an earlier 11:34:33AM
21 question, you said you considered the products that
22 Professor Noll referred to.

23 And my question is now: What exactly did
24 you do when you considered the products? Did you
25 conduct any research into the supply and demand 11:34:47AM

1 characteristics of those products that are 11:34:51AM
2 identified in paragraph 25 of your report?

3 A What I considered were the characteristics
4 of the products themselves and whether or not they
5 were similar to the various iPod products. 11:35:03AM

6 Q Okay.

7 And what materials did you review to
8 consider the characteristics of those products
9 themselves?

10 A To the extent I reviewed any information, 11:35:18AM
11 it would be referred to in my report.

12 Q So other than what's referred to in your
13 report, you didn't review any materials in
14 connection with analyzing the characteristics of the
15 products that are identified in Paragraph 25 of your 11:35:32AM
16 report?

17 A That's correct.

18 Q Did you talk to anyone at Apple about the
19 characteristics of products that are identified in
20 paragraph 25 of your report? 11:35:43AM

21 A No.

22 Q Did you talk to anyone in the consumer
23 electronics industry about the characteristics of
24 the products that are identified in 25 -- paragraph
25 25 of your report? 11:35:58AM

1 A No. 11:36:01AM

2 Q Did you talk to anyone about it?

3 A I probably talked to colleagues at
4 Cornerstone about the characteristics of, for
5 example, a PDA, what is a PDA. What is a PDA 11:36:11AM
6 considered. What are the kind of features on a PDA.

7 Q Did you have these conversations with
8 colleagues at Cornerstone?

9 A I do remember having a conversation with
10 somebody about a PDA, about what a PDA is, yes. 11:36:32AM

11 Q Who did you talk to?

12 A I don't remember. It was either one of
13 two people, but I don't remember which one.

14 Q Who were the two people that it might have
15 been? 11:36:45AM

16 A It was either Darwin Neher, N-E-H-E-R, or
17 Samid, S-A-M-I-D, Hussain, H-U-S-S-A-I-N, I think.

18 Q And what did you learn in these
19 conversations?

20 A That PDAs, the term "PDA" is fairly broad, 11:37:01AM
21 and that the characteristics on many of the PDAs are
22 different than the characteristics on iPods, at
23 least certain iPods.

24 Q But you didn't conduct any separate
25 analysis to figure out what exactly these 11:37:22AM

1 MS. SWEENEY: We have it. Do you want to 11:38:47AM
2 look at it?

3 MR. MITTELSTAEDT: Well, as long as you
4 don't mind my going into similar questions with your
5 experts, I don't have any objection. 11:38:57AM

6 MS. SWEENEY: I think you'll find it's not
7 covered by the stipulation.

8 BY MS. SWEENEY:

9 Q All right. So going back to the work
10 performed by Dr. Neher or Dr. Hussain in connection 11:39:20AM
11 with this case, did they review your report, either
12 one of them?

13 A I know that Dr. Hussain did. I don't
14 recall if Dr. Neher did. I don't think he did,
15 but... 11:39:35AM

16 Q Did Dr. Hussain give you comments on your
17 report?

18 A Yes.

19 Q What were those comments?

20 A I don't remember. I talked to him a lot 11:39:45AM
21 about the issues and, you know, used him to, you
22 know, just talk about things and make sure that
23 things were -- made sense and were right.

24 Q Did you make changes to your report based
25 on the comments provided by Dr. Hussain? 11:40:07AM

1 A I don't remember. I mean, I -- I think 11:40:17AM
2 that he -- I don't remember making any changes as a
3 result of those comments. Certainly no substantive
4 changes to my opinions.

5 Q Did you write every word in your report? 11:40:31AM

6 A Dr. Hussain wrote a first draft, and then
7 I went through and made it my own.

8 Q When did Dr. Hussain write the first
9 draft?

10 A I don't remember specifically. 11:40:54AM

11 Q And what is Dr. Hussain's -- well, is his
12 CV on your website?

13 A I don't know.

14 Q And after Dr. Hussain wrote that first
15 draft and you revised it, did he look at subsequent 11:41:17AM
16 drafts?

17 A Probably.

18 Q So it was really a collaborative effort
19 between you and Dr. Hussain?

20 A No. The report is mine. The opinions are 11:41:30AM
21 mine. I find it very helpful to talk to smart
22 people about ideas that I have and reports that I
23 write.

24 Q But Dr. Hussain wrote the first draft of
25 your report. 11:41:47AM

1 A Only after I had talked to him. I told 11:41:49AM
2 him what I wanted in the report. I told him what
3 the conclusions were. I, you know -- it was not a
4 collaborative effort, if that's your question.

5 Q Did Mr. Middelstaedt, or any other counsel 11:42:03AM
6 for Apple, write any of your report?

7 A No.

8 Q Did Mr. Middelstaedt, or anyone else who
9 is counsel for Apple, comment on your report?

10 A They may have suggested some -- some word 11:42:18AM
11 changes.

12 Q Did you make those word changes?

13 A If -- if I thought that it made the report
14 more clear, I would.

15 Q But -- which ones do you recall having 11:42:34AM
16 made?

17 A I don't recall making any, actually.

18 Q Did anyone other than Dr. Hussain --

19 Well, first of all, was it

20 Mr. Middelstaedt or was it other counsel for Apple 11:42:46AM
21 who commented on your report?

22 A I believe it was Mr. Stewart.

23 Q Anyone other than Dr. Hussain and

24 Mr. Stewart who commented on your report?

25 A No, not that I recall. 11:43:04AM

1 Q I don't think we need to mark this as an 11:43:35AM
2 exhibit, but I'm just going to show you because it's
3 already marked as an exhibit to your report, but
4 it's Exhibit C, which is the materials that you
5 relied upon. Excuse me, in your report you say 11:43:46AM
6 that, "This is a list of material that I considered
7 in preparing this report."

8 Is that right?

9 A Yes.

10 Q Okay. 11:44:02AM

11 And is that a complete list of materials?

12 A I attempted to write a complete list of
13 materials.

14 Q Okay.

15 And since the date of your report, have 11:44:11AM
16 you reviewed any additional materials?

17 A No.

18 Q Okay.

19 You haven't looked at any price
20 announcements since the date of your report? 11:44:22AM

21 A The only hesitation I have is I may
22 have -- I think there was a new iPod product
23 introduced, but I don't remember when it was. But I
24 may have seen that announcement.

25 Q Do you remember what the product was? 11:44:42AM

1 A It's a new Nano, I believe. 11:44:44AM

2 Q You talk about Professor Noll's before and
3 after methodology, and then you also refer to what
4 you called Dr. French's, quote, "before-during,"
5 closed quote, methodology. 11:45:14AM

6 Would it matter to your opinion if there
7 were after data, that is, data, price data, product
8 data after the date that the anticompetitive conduct
9 ended? Would that change your opinion as to the
10 validity of conducting a "before-after" analysis in 11:45:37AM
11 this case?

12 MR. MITTELSTAEDT: Object; compound.

13 THE WITNESS: No.

14 BY MS. SWEENEY:

15 Q In paragraph 15 of your report, you say 11:45:51AM
16 that before and after regression analysis typically
17 includes -- and I'm quoting now -- "Explanatory
18 variables such as the relevant competitive supply
19 and demand factors," closed quote.

20 Now, when you talk about those relevant 11:46:14AM
21 competitive supply and demand factors, are you
22 talking about the features that we talked about
23 earlier, such as capacity, size, weight,
24 screen-size, design?

25 A Those would be included in that group, but 11:46:32AM

1 that's not the entire group.

11:46:34AM

2 Q Okay.

3 What else would you include in that group?

4 A Well, there are -- there are a set of

5 variables that, I guess, are somewhat obvious, and

11:46:45AM

6 then there are variables that -- there may be other

7 variables that I won't be able to list for you.

8 But, for example, their cost is a variable that

9 affects supply. There are the variables that lead

10 to changes in demand, and I don't know exactly what

11:47:13AM

11 those variables are or how one would measure them.

12 I think that's part of the challenge in modeling the

13 price of iPods, actually.

14 Q Is that a challenge unique to iPods?

15 A I think it's a -- particularly important

11:47:39AM

16 problems with respect to this product.

17 Q But it's not unique?

18 A Well, unique I take to mean it would only

19 exist for iPods. There may be other products in the

20 world where the same problem exists.

11:47:58AM

21 Q Is it unusually difficult in the case of

22 iPods?

23 A I think it is.

24 Q And that's because of what you described

25 before, the difference in the products available

11:48:14AM

1 before and during the anticompetitive conduct? 11:48:19AM

2 A No. This is a separate issue.

3 Q Okay.

4 So why is it that it's unusually difficult
5 in the case of iPods? 11:48:31AM

6 A Well, this relates to the factors, the
7 variables that you would put into a regression
8 equation that would measure, quantitatively measure
9 what effects changes in demand for iPods, why people
10 buy iPods and how those -- you know, to identify 11:48:52AM
11 those factors and quantify those factors, I think is
12 difficult in this case.

13 Q But why is it unusually difficult? Why is
14 it more difficult in the case of iPods than in the
15 case of other kinds of products? That's what I'm 11:49:06AM
16 getting at. That was my question.

17 A One of the things that I talked about in
18 this report and the other report was the notion that
19 people buy iPods because they are cool.

20 Q I did see reference to the "coolness 11:49:25AM
21 factor," as you put it.

22 And as an economist, have you ever used
23 that phrase before to talk about a product or
24 determining damages in an antitrust case?

25 A No. 11:49:44AM

1 Q No. 11:49:45AM

2 Have you made any analysis of when, if
3 ever, Apple iPods became cool? Were they cool when
4 they were first introduced in 2001?

5 A That's -- that is the hard part of the 11:50:12AM
6 question, I think. I think understanding and
7 measuring and knowing the answer to whether or not
8 they were cool and how that coolness changed over
9 time is the problem.

10 Q So it's possible that iPods weren't cool 11:50:26AM
11 when they were introduced, but they became cool in,
12 say, 2002?

13 A Just as an observer to this, I think
14 that's probably -- there is some truth to that. I
15 don't know when it happened, and I don't know why it 11:50:43AM
16 happened. But there certainly -- they have
17 certainly become more attractive -- trying to think
18 of another word besides "cool" -- over time.

19 Q You think they are cooler now than they
20 were in 2001? 11:51:02AM

21 A Yeah. I mean, I do. But I don't have
22 any -- I don't have any measure of that. I can't
23 tell you that --

24 Q I'm sorry.

25 A That's fine. 11:51:19AM

1 iPods. 11:52:58AM

2 Any others that you can identify?

3 A Well, so I suppose you could think of
4 coolness as one variable, but what I was trying to
5 communicate there is that there are various reasons 11:53:12AM
6 that people buy iPods, and the demand for iPods
7 changes over time.

8 And if you want to put those -- if you
9 want to use a before and after analysis, before and
10 after regression, you have to identify what those 11:53:28AM
11 variables are and put them in the regression.

12 And I've kind of summarized that with the
13 notion of coolness, but I don't know that they
14 are -- well, I don't think there is or could be a
15 single variable that one could use for that. 11:53:40AM

16 Q So you said that there are various reasons
17 people buy iPods. Is that -- is that unique to
18 iPods, that there are various reasons that people
19 buy them?

20 A That alone, no. 11:54:05AM

21 Q Okay.

22 Another problem that you identify in
23 Professor Noll's before and after methodology is
24 there are relatively few price changes in the
25 products over time. 11:54:36AM

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1 What in your view would be a sufficient 11:54:40AM
2 number of price changes that would make the before
3 and after methodology work better?

4 A It depends. The more variables that you
5 put into a regression equation, the more data that 11:54:56AM
6 you need, which means the more price changes that
7 you need. So to the extent that there are a lot of
8 variables that affect the price of iPods, then the
9 more price changes that you need.

10 Q Okay. 11:55:19AM

11 Well, say we use the number of -- we use
12 variables to account for the different product
13 characteristics that you identified in paragraph 25
14 of your report. How many price changes would you
15 need in order to make the before and after 11:55:37AM
16 methodology workable in this case?

17 MR. MITTELSTAEDT: Object; assumes facts
18 not in evidence that it would be workable. Also
19 object that it's an incomplete hypothetical.

20 THE WITNESS: Do you want me to answer? 11:56:06AM

21 BY MS. SWEENEY:

22 Q Yeah.

23 A So it -- the answer would still be that it
24 depends. It depends on how you specify the model.

25 Q Are you aware of -- 11:56:29AM

1 smokeless tobacco that were certified. 11:57:54AM

2 Q That was a number of State Indirect
3 Purchaser cases around the nation, correct?

4 A That's correct.

5 Q How many of those did you work on? 11:58:05AM

6 A I don't remember.

7 Q More than five?

8 A I don't think so, but I'd have to look at
9 the list.

10 Q Around five? 11:58:13AM

11 A I honestly don't remember. I know it was
12 more than three.

13 Q And the Classes in those cases were all
14 certified, correct?

15 A There were a number of Classes that were 11:58:30AM
16 certified. Whether they were all certified, I don't
17 know.

18 Q And did the Plaintiffs' expert or experts
19 in those cases use a before-after regression
20 analysis? 11:58:43AM

21 A I don't remember. I don't think so, but I
22 would have to go back and look at the reports.

23 Q You -- in your report, you mentioned
24 Apple's pricing strategy. Did you ask
25 Mr. Middelstaedt for documents from Apple that 11:59:22AM

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1 described Apple's iPod pricing strategy? 11:59:27AM

2 A No. The pricing strategy that I'm
3 referring to here is that the prices are constant
4 for, you know, fairly long periods of time, and then
5 when a new model comes out, the price of the old 11:59:47AM
6 model drops. That's what I'm referring to here, and
7 I saw that in the -- in the data.

8 Q Is that related to the life-cycle of
9 technological products? Is that common, the pricing
10 strategy that you just described? 12:00:06PM

11 MR. MITTELSTAEDT: Object; compound.

12 THE WITNESS: Common? I don't know that
13 it's common.

14 BY MS. SWEENEY:

15 Q Is this the first case that you have 12:00:15PM
16 worked on where the product at issue was a consumer
17 electronics product?

18 A No.

19 Q What other cases have you worked on
20 involving consumer electronics products? 12:00:26PM

21 A I worked on the Indirect Purchaser SRAM
22 case in which there were a number of electronics
23 products at issue. And I worked on the GPU case in
24 which there were consumer electronic products. And
25 Flash had electronics products. These are the ones 12:00:44PM

1 that come to my mind, but I could look over my CV 12:00:51PM

2 and see if there are others.

3 Q Now these three cases, do they involve
4 inputs into consumer electronic products? The SRAM

5 is -- it stands for what? 12:01:04PM

6 A Static random access memory.

7 Q And that's something that goes inside an
8 electronics product, correct?

9 A It is.

10 Q All right. 12:01:17PM

11 How about GPU?

12 A How about it what?

13 Q Is that something that goes in a consumer
14 electronics product?

15 A A GPU goes into a electronics product, 12:01:25PM

16 yes.

17 Q Okay.

18 What about Flash?

19 A Flash is memory that is used in

20 electronics products. 12:01:34PM

21 Q Okay.

22 MR. MITTELSTAEDT: When you come to a

23 convenient spot, may we break for lunch?

24 MS. SWEENEY: Why don't we wait until

25 lunch is here? We ordered in lunch. Do you know 12:01:52PM

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1 what time lunch is coming? 12:01:54PM

2 MS. ROACH: No.

3 MR. MITTELSTAEDT: Did you order lunch for
4 everybody?

5 MS. SWEENEY: Yeah. 12:02:00PM

6 MR. MITTELSTAEDT: Good. Thank you.

7 MS. SWEENEY: You're welcome.

8 THE WITNESS: That's unusual.

9 BY MS. SWEENEY:

10 Q In your work as an economist, have you 12:02:10PM
11 ever had occasion to review business documents of a
12 party to litigation, such as strategic memoranda
13 describing pricing strategies?

14 A Have I ever done that?

15 Q Yeah. 12:02:30PM

16 A Sure.

17 Q Sure.

18 And would it surprise you to find that
19 Apple had strategic memoranda or other documents
20 describing its pricing strategies with respect to 12:02:37PM
21 iPods?

22 MR. MITTELSTAEDT: That's -- I object it's
23 argumentative, assumes facts not in evidence.

24 THE WITNESS: I'm sorry, would it surprise
25 me that they had those? 12:02:47PM

1 BY MS. SWEENEY: 12:02:49PM

2 Q Would it surprise you if they did have
3 them?

4 A It wouldn't surprise me one way or the
5 other. I have found that it depends on a company's 12:02:58PM
6 kind of personality, the kinds of documents that
7 they generate.

8 Q Did you ask Apple if they had those kind
9 of documents?

10 A No. 12:03:11PM

11 Q Did you review any analyst reports?

12 A I don't recall reviewing analyst reports,
13 but if I did, they would be on this list of
14 materials considered.

15 Q Did you review the materials that 12:03:28PM
16 Professor Noll reviewed?

17 A I can't remember if I did or not. I may
18 have.

19 MS. SWEENEY: Do you want to take a short
20 break and we'll find out whether lunch is here? 12:04:01PM

21 MS. ROACH: It's here, actually.

22 MS. SWEENEY: Okay. We can break for
23 lunch now, if you like.

24 THE VIDEOGRAPHER: This is the end of Disk
25 2. We're off the record at 12:04 p.m. 12:04:13PM

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1 that the before/after method won't work, does it 1:02:36PM
2 apply to those products, as well?

3 A There are other reasons besides the fact
4 that some products are only sold in one of those two
5 periods that leads me to the conclusion that this 1:02:49PM
6 method will likely not work, yes.

7 Q Okay.

8 So even absent that objection, overall, in
9 your view, there are too many problems with the
10 before/after methodology to use it in that case? 1:03:05PM

11 A There are additional problems, that's
12 correct.

13 Q And what are the additional problems?

14 A Well, I think that I set them out in my
15 report, but I will try to summarize them. 1:03:17PM

16 One -- and I think that we've talked a
17 little bit about this this morning -- is that the
18 pricing data doesn't have a lot of variability in
19 it, which makes it more difficult to run a
20 regression. 1:03:38PM

21 Another problem, which I think we've also
22 touched on, is that the factors that determine iPod
23 pricing, that determine, for example, and affect the
24 demand for iPods are difficult to quantify. And so
25 if you can't quantify those important variables, 1:04:01PM

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1 then a regression isn't going to give you the right 1:04:04PM
2 result.

3 There is an issue with defining the period
4 that -- or the date at which there is a before and
5 after and whether or not there are other -- other 1:04:18PM
6 things that are going on at the same time that would
7 then make it more difficult to separate the effect
8 of those things from the effect of the conduct.

9 There is the issue that because there are
10 a lot of factors, there appear to be a lot of 1:04:47PM
11 factors that are affecting pricing, it's going to be
12 hard -- it's going to be more difficult to isolate
13 the effect of something that, you know, may or may
14 not have an effect on the price of iPods. It's --
15 it's like -- it's almost like finding a needle in a 1:05:07PM
16 haystack problem.

17 There are probably some other ones, but
18 I'd have to go through my report and look. Do you
19 want me to do that?

20 Q Are there any in your report -- 1:05:26PM

21 Are there any that aren't in your report
22 that you would want to identify as you sit here
23 today?

24 A No. I think that they are in my report.

25 Q You mentioned there was difficulty in 1:05:36PM

1 THE WITNESS: Sure. I mean, when I talk 1:14:54PM
2 about the Direct Purchasers, I want to be accurately
3 talking about the Direct Purchasers.

4 BY MS. SWEENEY:

5 Q Okay. 1:15:05PM

6 You say that:

7 "Professor Noll provides no
8 economic analysis to show that the
9 four possible yardstick candidates
10 that he identified satisfied his 1:15:27PM
11 criteria for validity of the
12 yardstick product."

13 What economic analysis, if any, did you
14 use to evaluate those yardstick products that he
15 identified? 1:15:45PM

16 A The -- what I did is in my report, and I
17 talked about the products are different.

18 The point here is that I think -- I mean,
19 even Dr. Noll admits that this particular approach
20 is probably not going to work because he can't find 1:16:13PM
21 products that are similar to -- similar enough to
22 iPod products or products that are -- that could be
23 used to isolate the effect of the conduct.

24 Q Is that what Dr. Noll said, he admitted
25 that this particular approach is probably not going 1:16:34PM

1 to work because he can't find products that are 1:16:36PM
2 similar enough to iPod products? Did he say that?

3 A He said that he has more doubts that this
4 yardstick method will work than the other two, and
5 he said that the hangup is identifying the 1:16:50PM
6 comparative products.

7 Q But he didn't say that he doubted it would
8 work, did he?

9 A You know, I'm -- the answer that I just
10 gave to you are -- are quotes that I'm reading from 1:17:08PM
11 my report that he said.

12 Q And those are excerpts of his testimony;
13 is that correct?

14 A Yes, that's correct.

15 Q Between those quotes, there are other 1:17:18PM
16 words that he gave in his deposition, correct?

17 A I'm sure there are.

18 Q Yeah.

19 Now, Professor Noll said in his report
20 that: 1:17:34PM

21 "This could be a case where
22 you could use as your comparison
23 products for the yardstick method
24 other personal media players."

25 Have you conducted any investigation into 1:17:46PM

1 that question, whether this is a case where you 1:17:50PM
2 could use for your yardstick method as comparison
3 products products within the same market?

4 MR. MITTELSTAEDT: Object; that's
5 argumentative and it's also compound. 1:18:02PM

6 BY MS. SWEENEY:

7 Q You can answer.

8 THE WITNESS: Do you want to read it
9 again?

10 (Record read as follows: 9:40:44AM

11 "Q Now, Professor Noll said
12 in his report that:

13 "This could be a case where
14 you could use as your comparison
15 products for the yardstick method 1:17:38PM
16 other personal media players."

17 "Have you conducted any
18 investigation into that question,
19 whether this is a case where you
20 could use for your yardstick method 1:17:52PM
21 as comparison products products
22 within the same market?")

23 THE WITNESS: No, I have not.

24 BY MS. SWEENEY:

25 Q What kind of analysis would you need to 1:18:40PM

1 conduct to make that determination? 1:18:42PM

2 A You would need to determine whether or not
3 the alleged conduct led to a price increase of those
4 other products.

5 Q And did you inquire of Apple whether there 1:18:56PM
6 were -- whether Apple had any view as to whether
7 there were competing products within the same
8 product market?

9 A No.

10 Q No. 1:19:13PM

11 Now, in paragraph 27, you conclude your
12 analysis of the yardstick approach by saying:

13 "Based on my analysis to date,
14 I don't believe that the yardstick
15 approach will work." 1:19:28PM

16 And is --

17 Did you conduct any analysis other than
18 what you have testified about today and what's
19 described in your report?

20 A No. 1:19:42PM

21 MR. MITTELSTAEDT: Objection; asked and
22 answered this morning.

23 THE WITNESS: No.

24 BY MS. SWEENEY:

25 Q Okay. 1:20:11PM

1 technology product markets? 1:29:31PM

2 MR. MITTELSTAEDT: Object; compound, asked
3 and answered.

4 THE WITNESS: I cannot recall seeing a set
5 of prices for products that look like the prices 1:29:41PM
6 that we see Apple selling its iPods for at the Apple
7 store.

8 BY MS. SWEENEY:

9 Q You talk about the effect of omitted
10 variables. 1:30:22PM

11 What -- what are the omitted variables, in
12 your view, that are not in Professor Noll's proposed
13 before and after regression analysis?

14 A Well, Dr. Noll really hasn't provided us
15 with a list of the variables that he would put into 1:30:44PM
16 this model.

17 But one thing he said was that he did not
18 think that he would be able to include in a
19 regression the characteristics of the product that
20 we were talking about as coolness. 1:31:07PM

21 Q Did he say that in his report?

22 A No, I believe he said it in his
23 deposition.

24 Q Did you read everything he said in his
25 deposition about coolness? 1:31:14PM

1 A Yes. 1:31:15PM

2 Q Okay.

3 Other than coolness, any other factors
4 that he left out?

5 A As I said, he -- I don't think that he 1:31:24PM
6 provided us with a list of the variables that he
7 would put in.

8 Q Okay.

9 Now, so the only --

10 But Professor Noll talked about taking 1:31:55PM
11 into account product characteristics, right?

12 A Yes.

13 Q Okay.

14 I want you to identify for me every
15 product characteristic that you think Professor Noll 1:32:07PM
16 should be -- should have taken account of other than
17 coolness.

18 A Well --

19 Q Are these the things that are described in
20 paragraph 25 of your report? Because I don't mean 1:32:23PM
21 to be asking you to repeat testimony you gave
22 earlier today. I just want to make sure that I've
23 covered all the bases here.

24 A 25 of my report?

25 Q Paragraph 25. 1:32:37PM

1 A I don't think that's the right paragraph. 1:32:40PM

2 Q Okay. Let me look at it.

3 You're right, it's not paragraph 25.

4 Paragraph 18. Thank you.

5 A And I'm sorry, your question is are there 1:33:02PM

6 any other factors besides those listed in paragraph

7 18?

8 Q Well, first let me ask you: Is it your

9 opinion that the factors listed between lines 4 and

10 8, is it your opinion or is it your reading of 1:33:19PM

11 Professor Noll's report that those factors would not

12 be accounted for in Professor Noll's regression

13 analysis?

14 A Well, I think that to the extent they

15 could be -- the question is whether or not you 1:33:37PM

16 actually can put the right variables into the

17 regression equation that should be in the regression

18 equation.

19 What Dr. Noll has or hasn't proposed is

20 unclear to me. 1:33:53PM

21 Q So are you --

22 I'm getting at this omitted variables

23 question, because you raised that as a critique of

24 Professor Noll, right? You say that omitted

25 variables is a problem with his analysis; isn't that 1:34:07PM

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1 respect to the Indirect Purchaser Class, correct? 1:50:01PM

2 A That's correct.

3 Q Okay.

4 Are there any other cases here that we
5 haven't talked about where you gave testimony 1:50:13PM
6 regarding issues pertaining to Class certification?

7 Johnson & Johnson, I guess. That was a
8 Class case, correct?

9 A It was, yes.

10 Q But you don't recall whether you gave 1:50:26PM
11 testimony pertaining to the Class issues?

12 A I believe I did, but I can't really
13 remember what that was -- what that testimony was
14 about.

15 Q Okay. 1:50:41PM

16 I'm sorry, and then I interrupted you.
17 You were about to list another case.

18 A Yes. In Re: Western States Wholesale
19 Natural Gas Antitrust Litigation. It's the first
20 one. 1:50:53PM

21 Q Oh. And do you recall whether the Class
22 was certified in that case?

23 A That is still going on.

24 Q Still pending. Okay.

25 All right. This morning we were trying to 1:51:15PM

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1 figure out when you were retained in this case, and 1:51:16PM
2 during the break, Mr. Middelstaedt got some
3 information.

4 Would you agree that you were retained by
5 Apple on or about September 8th, 2008? 1:51:31PM

6 A That's what the billing records indicate.
7 That sounds about right, too.

8 Q Okay.

9 And how many hours total have you worked
10 on the Direct Purchaser litigation in this case? 1:51:44PM

11 A I don't know.

12 Q In your billing, have you separated out
13 the Direct Purchaser versus the Indirect Purchaser
14 case?

15 A Yes. 1:51:59PM

16 Q Okay.

17 So can you give me a ballpark figure of
18 how many hours you have worked on the Direct
19 Purchaser case?

20 A I honestly don't know. 1:52:05PM

21 Q How much money has Apple paid to date to
22 you or to your company for the hours that you have
23 worked on the Direct Purchaser case?

24 A I don't -- I don't know.

25 Q All right. 1:52:21PM

1 Well, let's start with the expert report. 1:52:27PM

2 About how many hours did you spend working on the
3 expert report pertaining to Professor Noll?

4 A You know, I just don't know the answer to
5 this. I -- I could guess, but I don't know. 1:52:40PM

6 Q Was it more than 40 hours?

7 A I don't know. I think it's probably -- I
8 don't know.

9 Q You wrote this report when?

10 A The month of August. 1:53:07PM

11 Q Okay.

12 So -- and you don't have any idea how many
13 hours you spent during the month of August working
14 on the report?

15 A I was doing a lot of other things at the 1:53:16PM
16 same time, so at the end of the month, how many
17 hours there were, I just don't remember.

18 Q Did -- was it Dr. Hussain who wrote the
19 first draft?

20 A Yes. 1:53:32PM

21 Q How many hours, roughly, did he spend
22 working on the report?

23 A Again, I don't -- I don't remember. I --
24 I don't remember.

25 Q When you were first engaged by Apple back 1:53:44PM

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1 in 2008, how much time did you spend reviewing 1:53:48PM

2 Professor Noll's report at that time?

3 A I don't remember the number of hours. I
4 don't remember it being a lot of time just reviewing
5 his report. Is that what you're asking me? 1:54:08PM

6 Q Not just reviewing his report.

7 Taking into account the time you spent
8 reviewing his report, thinking about it, talking to
9 Mr. Middelstaedt, reviewing the deposition, you
10 know, maybe you gave Mr. Middelstaedt some questions 1:54:23PM
11 for the deposition, all of that time in the initial
12 retention before Apple opposed Plaintiff's Motion
13 for Class Certification.

14 A Again, I don't really remember how many.
15 I could guess. I mean, it was certainly more than 1:54:39PM
16 10. It was probably more than 30.

17 Q So are you able to give me a better
18 estimate of the time that you spent back in late
19 2008 -- wait. That can't be right. Is that
20 right? -- late 2008 than you are about the amount of 1:55:04PM
21 time you spent in August 2009?

22 A You know, I just don't remember. As I
23 said, I was doing a lot of things and I tend to
24 write my hours down each day, and I didn't look. I
25 mean, I did look, but it didn't register in my head. 1:55:28PM

1 I think I spent more time in, you know, 1:55:29PM
2 writing my report than I did in September of 2008,
3 when I was reading Dr. Noll's report and talking to
4 Mr. Middelstaedt about his deposition.

5 Q And did you -- 1:55:45PM

6 You read the deposition of Professor Noll
7 back then at the initial part of your retention,
8 correct?

9 A Yes.

10 Q Okay. 1:55:52PM

11 Now, I asked questions like this, but I
12 didn't ask this exact question: So why didn't you
13 write a report back in 2008 responding to Professor
14 Noll's declaration in this case?

15 A Nobody asked me to. 1:56:20PM

16 Q Did you ask why not?

17 A No.

18 Q You never discussed it with
19 Mr. Middelstaedt?

20 A I don't recall having a discussion about 1:56:28PM
21 it, no.

22 Q Now, one of the problems that you describe
23 in the before and after methodology is that this is
24 a naissant, dynamic industry.

25 And what did you mean when you said 1:56:56PM

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1 "naissant"? 1:56:58PM

2 A That it is relatively new.

3 Q So what would --

4 What would qualify as a non-naissant

5 industry? Would ten years be non-naissant, in your 1:57:17PM

6 view?

7 A That it is naissant, it began -- I guess

8 the point is that the conduct that's alleged here is

9 conduct that is -- that is alleged to have taken

10 place through almost the entire life of the product. 1:57:44PM

11 Q I'm not sure I understand how that affects

12 the determination of whether -- the whole idea that

13 the industry is naissant and, therefore, it's

14 difficult to conduct a regression analysis before

15 and after. 1:58:10PM

16 A Well, you have to explain prices not just

17 today, but you have to explain them throughout the

18 period that you're claiming damages. And that

19 period is almost the entire life of the products.

20 Q Okay. 1:58:26PM

21 So this is the same as your other

22 criticism, which is that the baseline period is too

23 short; is that it? Is that what you mean here?

24 MR. MITTELSTAEDT: Objection; compound.

25 THE WITNESS: No. 1:58:36PM

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1 BY MS. SWEENEY: 1:58:38PM

2 Q Well, what's the difference between what
3 you just described and your criticism that the
4 baseline period is too short?

5 A Well, I think you're focusing on the word 1:58:49PM
6 "naissant." The sentence says "naissant" and
7 "dynamic" and --

8 Q I was going to get to dynamic.

9 A Well, the point is that it is -- it is an
10 industry that is -- where the damage period is 1:59:03PM
11 almost over the entire time and that there is a lot
12 of -- or a lot of things going on. There are a lot
13 of changes over -- over that time period.

14 Q Now, how many --

15 You were an expert in the SRAM case, 1:59:30PM
16 correct?

17 A In the Indirect Purchasers' case.

18 Q In the Indirect Purchaser case.

19 And do you know how many products were at
20 issue in that case? 1:59:41PM

21 A Many.

22 Q How many?

23 A Are you asking me how many SRAM products
24 or how many products purchased by Indirect
25 Purchasers? 1:59:51PM

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1 Q SRAM products. 1:59:54PM

2 A No, I don't know how many.

3 Q You don't have any idea?

4 A It's a difficult question.

5 Q Were there more than 10? 2:00:03PM

6 A Yes.

7 Q More than 20?

8 A Probably.

9 Q More than 50?

10 A I don't know. 2:00:10PM

11 Q What kind of materials would you look at
12 to determine whether there were valid benchmark
13 comparison products for the yardstick methodology?

14 A I'm sorry, what would I --

15 Q Let me give you an example. 2:00:45PM

16 Would it be useful to look at analyst
17 reports that talk about -- well, two different kinds
18 of analyst reports, some that talk about the iPod
19 and some that talk about other consumer products
20 that could be possible benchmark products? 2:01:01PM

21 A It wouldn't occur to me to look at analyst
22 reports, no.

23 Q How about trade press? Are there certain
24 journals and magazines devoted to electronics
25 products? 2:01:19PM

1 MR. MITTELSTAEDT: Objection; compound. 2:01:21PM

2 THE WITNESS: There are journals that
3 are -- that are devoted to electronic products, yes.

4 BY MS. SWEENEY:

5 Q And would it be useful to look at those in 2:01:31PM
6 analyzing whether products could be used as
7 comparison products for the yardstick methodology?

8 A I think it would depend on what is in
9 those journals.

10 Q Did you look at any of the trade journals 2:01:45PM
11 having to do with this case?

12 A I can't remember doing so, but if I did,
13 they would be listed on my materials considered.

14 Q Okay.

15 Other than the articles listed in your 2:02:00PM
16 materials list, did you look at any consumer reviews
17 to analyze whether there are valid comparison
18 products?

19 A I would give the same answer.

20 Q Did you look at the documents that Apple 2:02:29PM
21 produced to the Direct Purchaser Plaintiffs in this
22 case?

23 A I think you would have to be more
24 specific. Which are you -- what kind of documents
25 are you talking about? 2:02:44PM

1 Q Well, did you ask Apple to see all the 2:02:47PM
2 documents that Apple had produced to Plaintiffs in
3 this case?

4 A No.

5 Q So you don't know whether you have seen 2:02:53PM
6 everything that was produced to Plaintiffs in this
7 case?

8 A That's correct.

9 Q How about in the Indirect Purchaser case?
10 Did you look at the -- 2:03:03PM

11 Did you ask Apple to -- if you could see
12 all the documents that were produced in the Indirect
13 Purchaser case -- Plaintiffs in that case?

14 A I don't recall asking that.

15 Q So you don't know whether you saw those 2:03:15PM
16 either?

17 A I don't recall.

18 Q Are you familiar with the rule of reason
19 and per se distinctions that are used in antitrust
20 law? 2:03:42PM

21 A Generally.

22 Q And what's your general understanding of
23 how these two terms are used?

24 A My understanding is that something that is
25 per se illegal is -- it doesn't matter why you did 2:03:52PM

1 A Well, I would want some background about 2:21:40PM
2 what the products are, when they were sold, when
3 they were introduced, you know, what kind of
4 characteristics they have, some notion of what
5 prices look like. Those are the things I can think 2:21:58PM
6 of. Certainly, that's where I would start.

7 But based on that information, you know,
8 there may be other data that I would want to look at
9 after that.

10 Q When you say "characteristics," are you 2:22:18PM
11 referring to the product features that we've talked
12 about several times today?

13 A Probably at least that.

14 Q What else?

15 A Well, I would want to understand the kinds 2:22:32PM
16 of characteristics that affect the prices of the
17 products, to the extent that I could.

18 Q And what kind of --

19 First of all, and where would you go to
20 collect this information about the characteristics 2:22:52PM
21 of the product?

22 A Well, some of the information is, I think,
23 fairly easy to get from -- from public sources, from
24 Apple's website.

25 And I think you would have to engage in a 2:23:09PM

1 little bit more research to understand the factors 2:23:12PM
2 that affect the supply and demand of the products.

3 Q What kind of research?

4 A You know, I'm not sure. I'd have to think
5 about it. 2:23:24PM

6 Q You haven't thought about that before
7 today?

8 A I have not thought about where one would
9 go to collect information about the various
10 characteristics that -- and factors that affect the 2:23:49PM
11 supply and demand of iPods.

12 Q Now, the information about
13 characteristics, you could probably get that from
14 Apple, couldn't you?

15 A The way I think you're using that is 2:24:02PM
16 product features, and yes, I think that that
17 information is available from Apple publicly.

18 Q And in addition to the information
19 available publicly, Apple also has product
20 specification kinds of documents, correct? 2:24:19PM

21 MR. MITTELSTAEDT: Object; calls for
22 speculation, lack of foundation.

23 THE WITNESS: Are you asking me are there
24 additional documents that Apple has about product
25 specifications that are not available publicly? 2:24:31PM

1 BY MS. SWEENEY: 2:24:33PM

2 Q Yes.

3 A I don't know.

4 Q You didn't ask that?

5 A No. 2:24:36PM

6 Q No.

7 And then information about when the

8 products are sold, where would you get that

9 information?

10 A That information, I believe, is in the 2:24:46PM

11 press releases.

12 Q Which you attached to your report, right?

13 A Yes.

14 Q Okay.

15 And what about the pricing data that you 2:24:57PM

16 mentioned? What kind of pricing data would you

17 want?

18 A Well, I'd want to start with the data

19 that's out there in the press releases, for example.

20 Q Now, is it true that -- 2:25:20PM

21 Say Apple issues a press release about a

22 new generation of iPod, which Apple sells through

23 its Apple store and online and to resellers.

24 Do you have that in mind?

25 A Yes. 2:25:41PM

1 Q Okay. 2:25:42PM

2 Now, for that particular product, that
3 model, that generation, for all purchasers other
4 than resellers, Apple charges the same price; is
5 that right? Is that how you understand it? 2:26:01PM

6 A That is what I understand, yes.

7 Q Okay.
8 So if two people purchase the same iPod
9 from the Apple store, they would pay the same price;
10 is that right? 2:26:15PM

11 A If they bought the same product at the
12 same time, yes.

13 Q Now, you said "at the same time."
14 You testified earlier that for each
15 generation of product, Apple keeps the price at the 2:26:29PM
16 same level for a certain period of time. I think
17 you used the expression "long period of time."

18 Did you say that?

19 A However long the period of time is, it's
20 constant over some period of time, that's correct. 2:26:42PM

21 Q Okay.
22 And so for every Class member who
23 purchased one of those iPods from the Apple store
24 during that period of time, those Class members,
25 whether it's 2 or 2,000 or 2 million, they paid the 2:26:53PM

1 same price, right? 2:26:58PM

2 A For the same product?

3 Q Right.

4 A Right.

5 Q Okay. 2:27:02PM

6 And is there any other kind of pricing
7 information that you would want to conduct the
8 before and after analysis?

9 A Well, you're now asking me about
10 conducting it, and I thought that we were talking 2:27:22PM
11 about -- actually, I did not think that we were
12 talking about the before and after analysis at all.

13 I thought the question that you were
14 asking me was, "If you were going to estimate
15 damages, what kind of information would you be 2:27:36PM
16 trying to collect?" And that's the information that
17 I gave you. I don't think I ever said that I would
18 try to do a before and after analysis.

19 Q Okay.

20 So what would you use this data that you 2:27:50PM
21 would want to collect, what kind of analysis would
22 you conduct to estimate damages?

23 A Well, the point that I was trying to make
24 is that in order for me to understand what type of
25 analysis to conduct, I would have to have some 2:28:04PM

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1 information about the products. 2:28:08PM

2 And this is the kind of information that I
3 would, at least at the beginning, try to familiarize
4 myself with.

5 Q Now, I've asked you a number of questions 2:28:27PM
6 pertaining to the kind of information you asked if
7 Apple had available.

8 Did you --

9 Did you seek out any other sources of
10 data? I mean -- let's strike that. 2:28:47PM

11 What investigation, if any, did you
12 conduct to determine whether the kinds of
13 information that you just described, whether that
14 kind of information exists?

15 A Well, I wasn't asked to estimate damages, 2:29:06PM
16 so I -- you know, I never went through this process.

17 Q Okay.

18 So you didn't conduct any analysis to find
19 out whether that kind of information exists?

20 A Well, some of the information that we 2:29:21PM
21 talked about I know exists, because we were talking
22 about it as being an exhibit to one of my reports.

23 Q Okay.

24 But other than --

25 But you didn't conduct any additional 2:29:34PM

1 remember exactly what is in the press releases 2:46:15PM
2 versus what is in some of the -- the other more
3 detailed documents that are available publicly.

4 Q And how about the non-Apple products, the
5 non-iPod products, the comparison products? You 2:46:31PM
6 would look for the same kinds of information about
7 those products?

8 A Well, you know, the problem here is you
9 can't -- you have to -- you can't just start going
10 out and looking about -- looking at technical specs 2:46:47PM
11 of all kinds of different products.

12 Q Okay.
13 Well, let's say that you hypothesized that
14 there are four or five possible comparison products.
15 Wouldn't you want to gather information about those 2:47:01PM
16 products' characteristics?

17 A It seems like -- it seems like there is a
18 step first -- you know, some step in between.

19 But if you had identified some products
20 that were comparable in some way -- I'm not really 2:47:21PM
21 sure how you would get to those four or five
22 products, but depending on how close they were to
23 the iPod products, then you might want to get, you
24 know, the similar kind of specifications for them.

25 Q Now, you seem to -- 2:47:40PM

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1 You seem very skeptical that you could 2:47:45PM
2 figure out what comparable products might be now,
3 but isn't this the kind of analysis that economists
4 do all the time, they try and find benchmark
5 products? 2:47:59PM

6 MR. MITTELSTAEDT: Object; argumentative
7 and compound.

8 THE WITNESS: You know, I can't think of
9 an example where a Plaintiff has put forward a
10 yardstick method where they are looking at -- where 2:48:11PM
11 they are trying to compare the price of some -- of
12 the product at issue with some other product. I
13 think it's really hard to do that, and I don't think
14 that it's -- it's typically done.

15 BY MS. SWEENEY: 2:48:29PM

16 Q If you are doing the -- the markup
17 analysis, would you also want to know information
18 about Apple's costs and profits?

19 A Well, the method is based on a margin, so
20 one would have to know Apple's margin. 2:48:46PM

21 Q Okay.

22 And what kind of data would you need to
23 look at that? What would you ask Apple for?

24 A You know, I have a lot of doubts about
25 this method before we get to the part where I'm 2:49:08PM

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1 explain variation in prices, what level of -- 2:52:05PM

2 I guess what I'm trying to get at is:

3 What level of perfection do you have to have or does

4 it have to be a perfect fit in order for it to be

5 useful to you as an economist? 2:52:25PM

6 A You could have a very high R squared,

7 indicating an almost perfect fit, and that would not

8 necessarily mean that you had come even close to

9 explaining the variation in prices.

10 Q And why would that be? What kinds of 2:52:46PM

11 things might account for that?

12 A Well, I can -- I can think of an example

13 of running a regression with prices of products that

14 are quite different and including in that regression

15 characteristics of those products that might 2:53:18PM

16 generate a very high R squared. But for each of

17 those products with a particular set of

18 characteristics, there could be substantial

19 unexplained variation in prices.

20 Q Now, I asked questions that are related to 2:53:58PM

21 this, but I don't think I asked this specific

22 question: Is it your view that the coolness factor,

23 which I think you identified as a possible omitted

24 variable, is it your view that that coolness factor

25 is correlated with the period of anticompetitive 2:54:16PM

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1 behavior? 2:54:21PM

2 A I think it could be.

3 Q But you haven't conducted any analysis to
4 find out whether it is or not?

5 A No. I think that would be important to 2:54:29PM
6 do.

7 Q If Plaintiffs prove their case, how would
8 the -- and the remedy was to fix the
9 inoperability -- strike that.

10 Well, do you know whether iPod prices have 2:55:07PM
11 declined recently?

12 A The price of a particular iPod product
13 or --

14 Q Any iPod products, say in the last six
15 months. 2:55:22PM

16 A I don't know.

17 Q You don't know. Okay.

18 Would that be relevant to your analysis in
19 this case?

20 A I -- you know, I can't -- I don't 2:55:39PM
21 understand the context of the question. Would it be
22 relevant to what? Anything?

23 Q Well, let's talk about the before and
24 after analysis.

25 Is it relevant to your evaluation of the 2:55:50PM

1 MR. MITTELSTAEDT: Object; compound. 2:57:45PM

2 THE WITNESS: My opinion is that there are
3 substantial barriers to even being able to -- even
4 if you ran a regression analysis, the results
5 wouldn't tell you what you wanted to know, because 2:58:03PM
6 there are some -- some problems in -- in specifying
7 a model.

8 BY MS. SWEENEY:

9 Q Now, is this --

10 Looking at how Apple prices iPods to 2:58:22PM
11 consumer purchasers, that is, people who purchase
12 directly from Apple rather than -- strike that --
13 people who purchase from -- through the Apple store,
14 would you describe that as greater or lesser
15 complexity in pricing than you have seen in other 2:58:43PM
16 cases, such as SRAM?

17 MR. MITTELSTAEDT: Object; "complexity" is
18 ambiguous and undefined.

19 THE WITNESS: I'm not really sure -- I
20 don't know exactly what you're asking me to compare. 2:59:04PM
21 I understand that you're asking me to think about
22 Apple's prices through the Apple store, and then I'm
23 not really sure what it is -- what -- the other
24 thing I'm supposed to compare that to.

25

1 BY MS. SWEENEY: 2:59:20PM

2 Q All right. Well, let me try again.

3 So we talked about this earlier. So say

4 for a particular point in time, particular iPod

5 model, the price charged the Apple store is 2:59:31PM

6 identical for all purchasers, right? You have that

7 in mind?

8 A For a particular product, yes.

9 Q Okay.

10 Now, in the SRAM case, wasn't it true that 2:59:40PM

11 at any particular point in time, there could be

12 different prices charged to different purchasers for

13 the same product?

14 A That is true, that that happened -- that,

15 you know, we -- I saw that occur in the SRAM case. 3:00:01PM

16 Q Okay.

17 And wasn't it also true in the SRAM case

18 that some buyers had the ability to negotiate

19 prices?

20 A I believe that's right. 3:00:21PM

21 Q And this case, consumers who purchase

22 iPods at the Apple store don't have any ability to

23 negotiate prices; isn't that correct?

24 A Consumers, that's correct, yes.

25 Q Okay. 3:00:36PM

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1 And what do you know about the ability of 3:00:37PM
2 resellers to negotiate prices for iPods?

3 A I don't know whether they do or not.

4 Q Okay.

5 Didn't you conclude in the SRAM case that 3:00:49PM
6 there were differentiated products?

7 A So I worked on the Indirect Purchasers
8 case --

9 Q Right.

10 A -- of SRAM. 3:01:05PM

11 Q Okay. So let me modify my question.
12 That's correct.

13 Okay. So since you were working on the
14 indirect portion of the case, you were talking about
15 SRAM that was an input, correct, into certain 3:01:16PM
16 products or not?

17 A Well, I was actually thinking about the
18 products in which the SRAM actually may or may not
19 have been included.

20 Q Okay. 3:01:30PM

21 So do you know whether, at the next level
22 up, so in the -- so for what would be the products
23 at issue in the Direct Purchaser case, whether there
24 were -- whether those products were differentiated?
25 Did you reach any conclusions about that? 3:01:44PM

1 3:15.

3:14:39PM

2 (Recess taken.)

3 THE VIDEOGRAPHER: We are on the record at

4 3:30 p.m.

5 BY MS. SWEENEY:

3:30:33PM

6 Q What work have you done on this case since
7 you submitted your report on August 31st?

8 A I've just prepared for my deposition.

9 Q And how did you prepare for today's
10 deposition?

3:30:41PM

11 A I went back, read my report, read
12 Dr. Noll's report, looked over his deposition.
13 That's pretty much it.

14 Q Did you speak with counsel for Apple?

15 A Oh, yes, I did.

3:30:53PM

16 Q And who did you speak with?

17 A Mr. Middelstaedt and Mr. Stewart.

18 Q And when did you meet, or did you speak on
19 the phone?

20 A We met yesterday.

3:31:03PM

21 Q How long?

22 A Couple hours.

23 Q Anything else you did to prepare for
24 today's deposition?

25 A I talked to Samit a little bit. I'm

3:31:13PM

1 sorry, Dr. Hussain.

3:31:18PM

2 Q Anyone else?

3 A No.

4 Q What other work do you anticipate doing in
5 this litigation?

3:31:27PM

6 A None.

7 Q Is it impossible, in your opinion, to
8 measure coolness, assuming that is a -- an attribute
9 of the iPod?

10 A I don't know of a way to measure it.

3:31:46PM

11 Q Have you investigated whether there is a
12 way to measure it?

13 A I have thought about it.

14 Q And?

15 A And I don't know of a way to measure it.

3:31:58PM

16 Q And have you talked to anybody else about
17 it?

18 A I -- I'm sure I've talked to Dr. Hussain
19 and Dr. Neher about it.

20 Q Who first introduced the term "coolness"?
21 Is that something that you came up with or is that
22 something that Mr. Middelstaedt came up with?

3:32:13PM

23 MR. MITTELSTAEDT: Objection. I'm not
24 sure what it is. I think it's compound, but it's
25 not -- that doesn't cover all the possible bases,

3:32:27PM

1 right?

3:32:31PM

2 MS. SWEENEY: Sure, it doesn't, you're
3 right.

4 MR. MITTELSTAEDT: So I think that's
5 compound, but there is something wrong with that
6 question. I'm not sure what the right term is.

3:32:35PM

7 MS. SWEENEY: I can withdraw it and ask a
8 new one.

9 BY MS. SWEENEY:

10 Q Did you, yourself, come up with the term
11 "coolness" in talking about iPods?

3:32:42PM

12 A Well, I don't know. I know that I've used
13 the term "cool" and "coolness" for many years. I'm
14 sure that I've attributed that word to iPods
15 probably long before I ever heard of this case,

3:33:05PM

16 so --

17 Q Have you used it in any other expert
18 reports?

19 A No.

20 Q Did you read the Plaintiff depositions in
21 this case?

3:33:16PM

22 A No.

23 Q Did you ask to see them?

24 A I'm trying -- I'm trying to remember if I
25 read them. I don't believe that I read them and I

3:33:30PM