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15 UNITED STATES DISTRICT COURT
 16 NORTHERN DISTRICT OF CALIFORNIA
 17 SAN JOSE DIVISION

THE APPLE IPOD ITUNES ANTI-TRUST LITIGATION)	Lead Case No. C-05-00037-JW(HRL)
This Document Relates To:)	<u>CLASS ACTION</u>
ALL ACTIONS.)	PLAINTIFFS' MOTION TO EXCLUDE THE OPINIONS OF DEFENDANT'S EXPERT, DR. MICHELLE M. BURTIS, Ph.D.
		JUDGE: Hon. James Ware
		DATE: May 2, 2011
		TIME: 9:00 a.m.
		CTRM: 8, 4th Floor

25 **REDACTED**

1 **I. INTRODUCTION**

2 Defendant Apple supports its opposition to Plaintiffs’ renewed motion for class certification
3 with the Expert Report of Dr. Michelle M. Burtis, Ph.D., (“Burtis Report”) that provides no analysis
4 of the data Apple has produced about iPod sales, costs and prices, offers opinions that do not rely
5 upon accepted sources in antitrust economics and ignores the analysis of transaction prices contained
6 in the Declaration of Roger G. Noll (“Noll Decl.”), dated January 18, 2011. Dr. Burtis offers no
7 meaningful insight regarding any topic relevant to class certification or damages. Instead, she
8 merely asserts, with no support, that Professor Noll’s proposed methodology for determining impact
9 and estimating damages on a class-wide basis will not work. This is her *only* opinion. Dr. Burtis’s
10 unsupported assertion fails to meet the test for admissibility of expert testimony and is refuted by the
11 Noll Decl. as well as the Reply Declaration of Roger G. Noll (“Noll Reply Decl.”), in which
12 Professor Noll demonstrates the feasibility of the regression analysis that Dr. Burtis contends is
13 impossible. *See* Noll Reply Decl. at 34-39. Because Dr. Burtis’s opinion would be unhelpful to the
14 trier of fact and merely seeks to put an expert’s imprimatur on Apple’s legal arguments, it should be
15 excluded.

16 **A. Standards of Admissibility of Expert Opinion**

17 Federal Rule of Evidence 702, which governs the admissibility of expert evidence, requires
18 the trial court to examine the sufficiency of data or studies underlying an expert’s opinion. In
19 particular it states:

20 If scientific, technical, or other specialized knowledge will assist the trier of
21 fact to understand the evidence or to determine a fact in issue, a witness qualified as
22 an expert by knowledge, skill, experience, training, or education, may testify thereto
23 in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient
facts or data, (2) the testimony is the product of reliable principles and methods, and
(3) the witness has applied the principles and methods reliably to the facts of the
case.

24 *Id.* The trial court acts as a gatekeeper to the admission of expert scientific testimony, and must
25 “ensure that any and all scientific testimony or evidence admitted is not only relevant but reliable.”
26 *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 580, 589, 113 S. Ct. 2786 (1993).

27 In the Ninth Circuit, “[t]he general test regarding the admissibility of expert testimony is
28 whether the jury can receive ‘appreciable help’ from such testimony.” *United States v. Gwaltney*,

1 790 F.2d 1378, 1381 (9th Cir. 1986); *see also In re Apollo Grp. Inc. Sec. Litig.*, 527 F. Supp. 2d 957,
2 961 (D. Ariz. 2007) (“As articulated in [Fed. R. Evid.] 702, expert testimony is relevant if it assists
3 the trier of fact in understanding evidence or in determining a fact in issue.”) (citing *Daubert*, 509
4 U.S. at 591); *Mukhtar v. Cal. State Univ.*, No. 01-15565, 2002 U.S. App. LEXIS 27934, at *22 &
5 n.7 (9th Cir. Aug. 7, 2002).

6 Additionally, expert opinions must “bring to the jury more than the lawyers can offer in
7 argument.” *In re Air Crash Disaster at New Orleans*, 795 F.2d 1230, 1233 (5th Cir. 1986); *see also*
8 *Dukes v. State*, 428 F. Supp. 2d 1298, 1315 (N.D. Ga. 2006) (The conclusions asserted by the expert
9 in question were excluded under Rule 702 as “no different from that which Plaintiff’s lawyers will
10 argue during their closing statements. [The expert’s] stamp of approval on the Plaintiff’s contentions
11 does nothing to advance a material aspect of Plaintiff’s case. . . . [C]ontributes nothing to assist the
12 jury . . . [and] is not relevant . . .”), *aff’d*, 212 F. App’x 916 (11th Cir. 2006).

13 Here, because Dr. Burtis’s opinions are merely naked conclusions unsupported by any
14 discernable analysis and only serve to parrot Defendant’s legal arguments, the opinions provide no
15 meaningful assistance to the trier of fact and should be excluded.

16 **B. Dr. Burtis’s Conclusions Are Unsupported by Any Evidence or**
17 **Analysis**

18 Dr. Burtis’s opinions are not supported by any evidence. Throughout her 44-paragraph
19 report, Dr. Burtis claims Plaintiffs’ expert Professor Noll’s reasonable and well-accepted
20 methodologies for determining class-wide impact and damages, a set of methodologies that *have*
21 *now been shown to work*, “will not work.” Burtis Report at 11, 14, 15. Rather than supporting
22 these sweeping statements with any reference to accepted academic literature, economic analysis or
23 studies or facts from the record, she simply states her conclusion.¹ Not surprisingly, at deposition
24 Dr. Burtis admitted that she reviewed almost no new documents other than Professor Noll’s

25 ¹ The Burtis Report is bereft of citation to data sets, internal Apple documents, the proposed
26 class representatives’ depositions or other material that is highly relevant to an analysis of the issues
27 on this motion. Instead, Dr. Burtis cites only to news articles, [REDACTED], a few
28 isolated references to Apple depositions and Apple employee declarations, a small number of SEC
filings and references to Professor Noll’s Declaration.

1 Declaration submitted in support of Plaintiffs' motion for class certification. See Declaration of
2 Alexandra S. Bernay in Support of Plaintiffs' Motion to Exclude the Opinions of Defendant's
3 Expert, Dr. Michelle M. Burtis, Ph.D. ("Bernay Decl."), Ex. 1 (Burtis Depo. at 9:13-10:11); Burtis
4 Report, Ex. A. She herself did not review [REDACTED]
5 [REDACTED], and she did not analyze in any way the databases
6 produced by Apple. *Id.* She did not read the deposition transcripts of any of the named Plaintiffs in
7 this case. Bernay Decl., Ex. 1 (Burtis Depo. at 27:14-16). She also admitted she did not review the
8 documents identified by Professor Noll in the Appendix to his report in reaching her conclusions.
9 *Id.*, Ex. 1 (Burtis Depo. at 30:2-33:16; 46:9-17). She further professed that she was unfamiliar with
10 documents that demonstrate Plaintiffs' theory of liability in the case. *Id.* Critically, Dr. Burtis
11 attempted no regression analysis, and performed no empirical analysis at all to test Professor Noll's
12 proposed methodologies. *Id.*, Ex. 1 (Burtis Depo. at 35:6-11); *see generally id.*, Ex. 1 (Burtis Depo.
13 35:11-36:22). In fact, nobody working at Dr. Burtis's direction conducted any detailed analysis of
14 the data sets in Professor Noll's report. *Id.*, Ex. 1 (Burtis Depo. at 33:11-16).² Nor did she conduct
15 any analysis of whether and the extent to which Apple's share of the digital audio market changed
16 during the time period that Harmony was working. *Id.*, Ex. 1 (Burtis Depo. at 117-21-118:3). These
17 obvious and critical failings demonstrate that Dr. Burtis's report is unreliable and unhelpful to the
18 trier of fact.

19 Dr. Burtis also failed to provide *any* opinion on many of the issues critical to Plaintiffs'
20 motion for class certification. She testified that she was not offering an opinion as to whether proof
21 of the appropriate market definition is common to all class members; whether proof regarding
22 Apple's relative share of the market for portable digital media players would be common to all class
23 members; whether proof regarding the existence of barriers to entry in the market for portable digital
24 media players would be common to all class members; whether proof regarding the existence of

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27 [REDACTED] Bernay Decl., Ex. 1 (Burtis Depo. at 46:4-12). [REDACTED]
28 [REDACTED] *Id.*, Ex. 1 (Burtis Depo. at 46:15-17).

1 barriers to entry in the market for audio downloads would be common to all class members; whether
2 proof regarding the costs Apple incurred to maintain technical incompatibility with competing
3 products would be common to all class members; whether proof of whether Apple was justified in
4 creating and maintaining technical compatibility because Apple's products "worked better" together
5 than with competitors' products would be common to all class members; or whether proof regarding
6 whether Apple was contractually obligated to disable the interoperability created by RealNetworks'
7 Harmony would be common to all class members. *Id.*, Ex. 1 (Burtis Depo. at 98:5-100:18); *compare*
8 Noll Decl. at 28-67.

9 Failure to conduct independent analysis is a grounds to exclude expert opinion in antitrust
10 cases. *See Stein v. Pac. Bell*, No. C 00-2915 SI, 2007 U.S. Dist. LEXIS 19193, at *34 (N.D. Cal.
11 Mar. 19, 2007) (striking expert opinion where "Wilson [the expert] admitted that he did not engage
12 in any independent fact-finding to reach his conclusions"). Reliable testimony must be grounded in
13 the methods and procedures of science and signify something beyond "subjective belief or
14 unsupported speculation." *Daubert*, 509 U.S. at 590. Dr. Burtis admits that she conducted no
15 independent evaluation of the evidence or of Professor Noll's proposed methodologies.

16 In addition to Dr. Burtis's failure to conduct any economic analysis of her own, Dr. Burtis
17 wrongly claimed Professor Noll had conceded that the initial technological tie between iPods and
18 iTunes was not anticompetitive, when simple reference to Professor Noll's report reveals only that
19 Professor Noll cited to the Court's holding dismissing tying claims. Noll Decl., 5 n.1. Professor
20 Noll was merely reporting what he understood the Court's orders to encompass and no
21 "concessions" were made by him. At deposition, Dr. Burtis was forced to confront this distortion.
22 Bernay Decl., Ex. 1 (Burtis Depo. at 102:15-105:12).

23 Considering the absence of any analysis underlying the Burtis Report, it is no surprise that
24 Dr. Burtis's conclusions were soundly disproven by Professor Noll. Exclusion of her opinions in
25 these circumstances is proper.

26 **II. CONCLUSION**

27 Dr. Burtis's only opinion, a conclusory statement that finds no support in the record or
28 economic literature, is that Professor Noll's methodology "will not work." Burtis Report at 11, 14,

1 15. Without conducting any analysis of Apple's sales and cost data or even reviewing those
2 materials, Dr. Burtis's analysis cannot be helpful to the trier of fact. Here, Dr. Burtis did not perform
3 any meaningful analysis that could help the trier of fact. For these reasons, her opinion must be
4 excluded.

5 DATED: March 28, 2011

Respectfully submitted,

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1 CERTIFICATE OF SERVICE

2 I hereby certify that on March 28, 2011, I authorized the electronic filing of the foregoing
3 with the Clerk of the Court using the CM/ECF system which will send notification of such filing to
4 the e-mail addresses denoted on the attached Electronic Mail Notice List, and I hereby certify that I
5 caused to be mailed the foregoing document or paper via the United States Postal Service to the non-
6 CM/ECF participants indicated on the attached Manual Notice List.

7 I certify under penalty of perjury under the laws of the United States of America that the
8 foregoing is true and correct. Executed on March 28, 2011.

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