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

18 THE APPLE IPOD ITUNES ANTI-TRUST)	Lead Case No. C-05-00037-JW(HRL)
19 LITIGATION)	
20 _____)	<u>CLASS ACTION</u>
21 This Document Relates To:)	PLAINTIFFS' NOTICE OF MOTION AND
22 ALL ACTIONS.)	MOTION TO STRIKE THE
_____)	SUPPLEMENTAL EXPERT REPORT OF
	DR. MICHELLE M. BURTIS, Ph.D.

23 JUDGE: Hon. James Ware
 24 DATE: TBD
 25 TIME: TBD
 26 CTRM: 8, 4th Floor

28

1 TO: ALL PARTIES AND THEIR ATTORNEYS OF RECORD

2 PLEASE TAKE NOTICE that as soon as the Court's schedule allows, in Courtroom 8, 4th
3 Floor, of the above-captioned Court located at 280 South First Street, San Jose, California 95113,
4 before the Honorable James Ware, Plaintiffs Melanie Tucker, Mariana Rosen, and Somtai Troy
5 Charoensak (collectively, "Plaintiffs") will and hereby do through undersigned counsel, move the
6 Court for an order striking the supplemental expert report of Dr. Michelle M. Burtis, Ph.D.

7 **I. MEMORANDUM OF POINTS AND AUTHORITIES**

8 On April 11, 2011, purportedly in opposition to Plaintiffs' motion to exclude the declaration
9 of Apple's expert, Dr. Michelle M. Burtis, Ph.D., Apple submitted a new, supplemental expert report
10 in support of its opposition to class certification. This new, supplemental expert report is improper
11 and must be stricken. On October 28, 2010, this Court signed an Order setting forth the schedule for
12 certain matters in this action. Dkt. No. 392. That October 28, 2010 scheduling Order provided that
13 briefing on Plaintiffs' motion for class certification would be complete on March 28, 2011. Apple
14 has flouted this deadline by submitting a 15-page expert report, with detailed exhibits and more than
15 40 footnotes, that plainly addresses class-certification matters and does not respond to Plaintiffs'
16 motion to exclude. Apple should not be allowed to submit this lengthy new report nearly two weeks
17 after briefing on class certification is over and just a week before the hearing on the motion is
18 scheduled. This back-door attempt by Apple to link this new report to its opposition to Plaintiffs'
19 pending motion to exclude Dr. Burtis is unavailing. Apple has cavalierly ignored the Court's Order
20 and has provided no justification or explanation for its outrageous conduct.

21 Plaintiffs will be unfairly prejudiced if this motion to strike is not granted. At a minimum,
22 Plaintiffs must be given a full and fair opportunity to depose Dr. Burtis regarding her new report and
23 exhibits. Additionally, matters raised in the new, supplemental report should not be considered by
24 the Court in deciding Plaintiffs' motion for class certification.¹

25

26 ¹ Plaintiffs expect Apple will seek to justify its misconduct by claiming that it had to file an
27 additional expert report to counter the preliminary regression analysis Professor Noll set forth in his
28 March 28, 2011 report. This argument fails for two reasons. First, Apple's own discovery
misconduct is the sole reason Professor Noll's report submitted January 18, 2011, did not contain a

1 Apple's gambit is contrary to the law in this Circuit. As the court in *Plumley v. Mockett*, No.
2 CV 04-2868-GHK (Ex), 2010 U.S. Dist. LEXIS 57254 (C.D. Cal. May 26, 2010), recently
3 explained, "Although Rule 26(e) obliges a party to 'supplement or correct' its disclosures upon
4 information later acquired, this 'does not give license to sandbag one's opponent with claims and
5 issues which should have been included in the expert witness' report (indeed, the lawsuit from the
6 outset). To rule otherwise would create a system where preliminary reports could be followed by
7 supplementary reports and there would be no finality to expert reports" *Id.* at *6 (quoting
8 *Beller ex. rel. Beller v. United States*, 221 F.R.D. 696, 701 (D.N.M. 2003)). To allow this "pattern
9 of behavior 'would surely circumvent the full disclosure requirement implicit in Rule 26 and would
10 interfere with the Court's ability to set case management deadlines.'" *Id.* (quoting *Beller*, 221
11 F.R.D. at 701-02).²

12 Here, Apple's actions are especially egregious. It provides no explanation for its attempted
13 end-around the Court's scheduling Order and instead it seeks to pull one over on the Court and
14 opposing counsel by submitting the new, supplemental report by Dr. Burtis as an attachment to its
15 opposition to Plaintiffs' motion to exclude the opinions of Dr. Burtis. *See* Dkt. No. 580. While the
16 new, supplemental report states on the cover sheet that it is in support of Apple's opposition to
17 Plaintiffs' motion to exclude (which would still be improper) the report is exclusively concerned
18 with Apple's arguments related to class certification.

19 The fact that Dr. Burtis's report, submitted February 28, 2011, in conjunction with Apple's
20 opposition to Plaintiffs' motion for class certification, was so obviously devoid of detail does not
21 excuse or ameliorate the problem here. Plaintiffs moved to exclude Dr. Burtis's February 28, 2011

22
23 preliminary regression analysis. Apple's failure to produce data critical to Plaintiffs' expert is the
24 subject of a pending motion to compel (Dkt. Nos. 556, 589) and has been an ongoing and serious
25 issue in this litigation. Second, as Plaintiffs have repeatedly explained, a full-blown damage analysis
is not required at class certification. *See* Dkt. No. 550, Reply Memorandum in Support of Plaintiffs'
Renewed Motion for Class Certification, at 3-5. Thus, Dr. Burtis' analysis at this point in the case is
unnecessary, regardless of the context.

26 ² *See also Trilog Commc'ns, Inc. v. Times Fiber Commc'ns, Inc.*, 109 F.3d 739, 744-45
27 (Fed. Cir. 1997) (exclusion justified where party fails to provide adequate explanation for failure to
timely provide expert disclosure in accordance with scheduling order).

1 report precisely because it failed to provide any basis for the opinions expressed in the report.
2 Apple's transparent last-ditch effort to try to cure the infirmities in Dr. Burtis's February 28, 2011
3 report by submitting an entirely new report with its opposition is pure gamesmanship and highlights
4 why Dr. Burtis's original declaration should be excluded.

5 A number of courts in the Ninth Circuit, in deciding whether to impose Rule 37(c)(1)'s
6 exclusion of evidence sanction, follow the five factors laid out in *Wendt v. Host International, Inc.*,
7 125 F.3d 806, 814 (9th Cir. 1997). These same factors are used by courts in the Ninth Circuit in
8 considering whether to strike an untimely expert report. *AZ Holding, L.L.C. v. Frederick*, No. CV-
9 08-0276-PHX-LOA, 2009 U.S. Dist. LEXIS 74515 (D. Ariz. Aug. 10, 2009). Those factors instruct
10 the court to consider the following: (1) the public's interest in expeditious resolution of
11 litigation; (2) the court's need to manage its docket; (3) the risk of prejudice to the other parties; (4)
12 the public policy favoring disposition of cases on their merits; and (5) the availability of less drastic
13 sanctions. *Id.* at *15. A finding of willfulness or bad faith is not required in order to impose the
14 exclusion of evidence sanction. *CCR/AG Showcase Phase I Owner, L.L.C. v. UA Theatre Circuit,*
15 *Inc.*, No. 2:08-cv-00984-RCJ-GWF, 2010 U.S. Dist. LEXIS 56137 (D. Nev. May 13, 2010).

16 Here, each of the *Wendt* factors support exclusion, particularly the second and third factors,
17 the risk of prejudice factor and the court's need to manage its docket. Plaintiffs will be severely
18 prejudiced if the new material in Dr. Burtis's untimely report is considered. It is unfair and
19 inappropriate for Apple as the non-moving party to have the last word. This is particularly so here
20 where Apple has submitted a completely new expert report containing specific calculations and
21 economic models that Plaintiffs and their experts are unable to test. This factor weighs heavily in
22 favor of exclusion. Additionally, Apple's flouting of the Court's scheduling Order demonstrates the
23 second *Wendt* factor is met because surely a party's purposeful disregard of the Court's need to
24 manage its docket satisfies this factor. The fourth factor, which considers the public policy favoring
25 merits-based decisions, also supports exclusion because if Plaintiffs are unable to question Dr. Burtis
26 to delve into the basis for her new opinions, the case will not be decided on its merits, but instead
27 may hinge on a one-sided presentation of evidence Plaintiffs have not been entitled to explore with
28 Apple's expert. The first *Wendt* factor, which accounts for the public's interest in expeditious

1 resolution of litigation is either neutral or inapplicable in this case which has been pending for
2 several years. Likewise, the fifth factor supports Plaintiffs as there are no less drastic sanctions
3 which would fairly maintain the Court’s current scheduling Order. All of the *Wendt* factors favor
4 exclusion of the new, supplemental report by Dr. Burtis. *See Lindner v. Meadow Gold Dairies, Inc.*,
5 249 F.R.D. 625, 642 (D. Haw. 2008) (striking untimely report where majority of the *Wendt* factors
6 favor exclusion, including delay and prejudice). In *Lindner*, despite finding that less drastic
7 sanctions (such as payment of attorneys’ fees) were available, the court struck the untimely expert
8 report, holding that the majority of factors weighed in favor of exclusion. Here, a less drastic
9 sanction, such as allowing Plaintiffs to depose Dr. Burtis and respond to her new report may serve as
10 a less drastic sanction than full exclusion, although in this case, where the conduct is so egregious,
11 exclusion should be granted. Moreover, given the timing of the Court’s hearing on Plaintiffs’
12 motion for class certification, this option is not available.

13 Under any standard, the submission of this new, supplemental report is improper and should
14 be stricken from the record. *See Storage Tech. Corp. v. Cisco Sys.*, No. C 00-1176 SI, 2001 U.S.
15 Dist. LEXIS 25876, at *10-*11 (N.D. Cal. Nov. 27, 2001) (striking submission of untimely expert
16 report where opposing party claimed the late submission prevented it from being able to properly
17 respond to it); *see also O’Connor v. Boeing N. Am., Inc.*, No. CV 97-1554 DT (RCx), 2005 U.S.
18 Dist. LEXIS 46233, at *34-*35 (C.D. Cal. Sept. 12, 2005) (“To permit these reports into evidence
19 would improperly widen the trial issues at the eleventh hour, and would unduly prejudice [the party]
20 in preparing for trial. Moreover, the new opinions appear based on information that was available to
21 these experts at the time of their initial Rule 26 disclosures”).³

22 In sum, Apple should not be rewarded for its failure to file a timely expert report in this
23 matter. Consideration of the untimely new report by Dr. Burtis would prejudice Plaintiffs and
24 provide Apple an unfair and improper litigation advantage. Plaintiffs’ motion to strike must be

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26 ³ Apple has made no showing, nor could they, that any good cause exists to allow submission
27 of the new, supplemental report by Dr. Burtis. *Cf. Vnus Med. Techs. Inc. v. Biolitec*, No. C 08-3129
28 MMC (JL), 2010 U.S. Dist. LEXIS 70555 (N.D. Cal. June 29, 2010) (denying motion to strike late
report where good cause specifically demonstrated and no prejudice shown).

1 granted. Should the Court determine not to strike the new, supplemental report by Dr. Burtis,
2 Plaintiffs request an opportunity to depose Dr. Burtis and a chance to respond to the new material in
3 the new, supplemental report.

4 DATED: April 15, 2011

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CERTIFICATE OF SERVICE

I hereby certify that on April 15, 2011, I authorized the electronic filing of the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses denoted on the attached Electronic Mail Notice List, and I hereby certify that I caused to be mailed the foregoing document or paper via the United States Postal Service to the non-CM/ECF participants indicated on the attached Manual Notice List.

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on April 15, 2011.

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