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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:)	REPLY MEMORANDUM IN SUPPORT OF
22 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 In opposition to Plaintiffs' Motion to Exclude the Opinions of Defendant's Expert Dr.
3 Michelle M. Burtis, Ph.D. ("Motion to Exclude" or "Pltfs' Mem.") (Dkt. No. 554), Apple glaringly
4 fails to respond to the issues Plaintiffs raised in their motion. Instead, Apple attempts to use the
5 opposition to back-door a supplemental report of Dr. Burtis in opposition to Plaintiffs' motion for
6 class certification, and provides yet another set of objections to Plaintiffs' expert's opinions on the
7 eve of the Court's scheduled hearing.¹ For the reasons set forth below and in Plaintiffs' Notice of
8 Motion and Motion to Strike the Supplemental Expert Report of Dr. Michelle M. Burtis, Ph.D.
9 ("Motion to Strike") (Dkt. No. 605), and Plaintiffs' Opposition to Apple's Supplemental Objections
10 to Reply Declaration of Roger G. Noll and Supplemental Opposition to Class Certification Motion
11 ("Opposition to Supplemental Objections") (Dkt. No. 608), filed on April 15, 2011, Apple's
12 additional attacks on Professor Noll's opinions are unavailing, and completely irrelevant to the
13 issues raised in Plaintiffs' Motion to Exclude.

14 **II. ARGUMENT**

15 **A. Apple Does Not Rebut Dr. Burtis's Complete Lack of Preparation,**
16 **Evidentiary Basis for Her Opinions, or Analysis**

17 Plaintiffs based their motion to exclude Dr. Burtis's opinions largely on two grounds. First,
18 in preparing her opinions, Dr. Burtis did not review the enormous quantity of information available
19 to her from Apple or the information Professor Noll relied upon. Pltfs' Mem. at 3. Second, she did
20 not opine on whether many of the legal issues in Plaintiffs' class certification motion could be
21 proven through methods common to the class. Apple has rebutted neither basis of Plaintiffs' motion.
22 *Id.* at 4.

23 As Plaintiffs noted in their opening brief, in preparing her February 28, 2011 report, it is
24 undisputed that Dr. Burtis

25
26 ¹ These are in addition to: Apple's Opposition to Renewed Motion for Class Certificaiton
27 (Dkt. Nos. 512, 529), Expert Report of Dr. Michelle M. Burtis (Dkt. No. 511), Apple's Objections to
28 Plaintiffs' Evidence Filed in Support of Plaintiffs' Renewed Motion for Class Certification (Dkt. No.
572) and Apple's Supplemental Objections to Reply Declaration of Roger C. Noll and Supplemental
Opposition to Class Certification (Dkt. No. 582).

1 did not did not review [REDACTED]
2 [REDACTED], and she did not analyze in any way the databases
3 produced by Apple. *Id.* She did not read the deposition transcripts of any of the
4 named Plaintiffs in this case. [Dkt. No. 555, Declaration of Alexandra S. Bernay in
5 Support of Plaintiffs' Motion to Exclude the Opinions of Defendant's Expert Dr.
6 Michelle M. Burtis, Ph.D. ("Bernay Decl."), Ex. 1 (Burtis Depo. at 27:14-16). She
7 also admitted she did not review the documents identified by Professor Noll in the
8 Appendix to his report in reaching her conclusions. *Id.*, Ex. 1 (Burtis Depo. at 30:2-
9 33:16; 46:9-17). She further professed that she was unfamiliar with documents that
10 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
12 Professor Noll's proposed methodologies. *Id.*, Ex. 1 (Burtis Depo. at 35:6-11); *see*
13 *generally id.*, Ex. 1 (Burtis Depo. 35:11-36:22). In fact, nobody working at Dr.
14 Burtis' direction conducted any detailed analysis of the data sets in Professor Noll's
15 report. *Id.*, Ex. 1 (Burtis Depo. at 33:11-16). [REDACTED] Bernay
16 Decl., Ex. 1 (Burtis Depo. at 46:4-12). Nor did she conduct any analysis of whether
17 and the extent to which Apple's share of the digital audio market changed during the
18 time period that Harmony was working. *Id.*, Ex. 1 (Burtis Depo. at 117-21-118:3).

11 Pltfs' Mem. at 3.²

12 In its Opposition, Apple only tangentially touches on two of these key flaws in Dr. Burtis's
13 preparation. *See* Apple's Opposition to Motion to Exclude the Opinions of Defendant's Expert, Dr.
14 Michelle M. Burtis, Ph.D. ("Def.'s Mem." or "Opposition") (Dkt. No. 580) at 8. First, Apple weakly
15 argues that "she or her staff reviewed relevant documents." *Id.* In fact, the deposition testimony
16 Apple relies on says otherwise. In response to questions regarding whether she reviewed any of the
17 documents or data that Plaintiffs' experts relied on Dr. Burtis testified:

18 A. . . . I asked somebody to go through and look at them to see if there was
19 anything in there of – you know, that was relevant or important to what I was
20 doing.

20 Q. And who was that somebody?

21 A. That was Shiv.

22 Q. And did he, in turn, recommend that you read any of those Noll materials?

23 A. Not specifically, but – no, I don't really remem – I mean, I remember us
24 talking about it. I think there's – there were some data somewhere that I
25 remember us talking about, but there was nothing – there was nothing
26 specific, no.

26 Bernay Decl., Ex. 1 at 30:22-31:9.

27 ² Unless otherwise noted citations are omitted and emphasis is added.

1 The only other asserted flaw in Dr. Burtis's preparation that Apple even half-heartedly
2 responds to is that Dr. Burtis [REDACTED]

3 [REDACTED]. Pltfs' Mem. at

4 3. All Apple can argue in response is that Dr. Burtis noted a slight dip in Apple's share price during
5 Harmony's successful introductory promotion. Def.'s Mem. at 8. Apple's share price has little to do
6 with an econometric analysis of changes in the digital audio market attributed to Harmony.

7 Other than those two exceedingly weak arguments, Apple does not – because it cannot –
8 rebut the fact that Dr. Burtis's preparatory work in developing her opinions was so scant as to be
9 virtually nonexistent. On this basis alone, Plaintiffs' motion should be granted.

10 Expert testimony is only admissible “if (1) the testimony is based upon sufficient facts or
11 data, (2) the testimony is the product of reliable principles and methods, *and* (3) the witness has
12 applied the principles and methods reliably to the facts of the case.” Fed. R. Evid. 702. Given the
13 paucity of Dr. Burtis's knowledge of the facts and data underlying the case and Professor Noll's
14 opinions, her opinions are not “based upon sufficient facts or data,” which could not have been
15 applied “reliably to the facts of the case.” *Id.* They should be excluded.

16 **B. Apple Concedes Numerous Common Issues with Regard to Class**
17 **Certification**

18 Likewise, Apple affirmatively concedes that Dr. Burtis provided no opinions to rebut
19 Professor Noll's about issues crucial to the class certification analysis, including:

20 whether proof of the appropriate market definition is common to all class members;
21 whether proof regarding Apple's relative share of the market for portable digital
22 media players would be common to all class members; whether proof regarding the
23 existence of barriers to entry in the market for portable digital media players would
24 be common to all class members; whether proof regarding the existence of barriers to
25 entry in the market for audio downloads would be common to all class members;
26 whether proof regarding the costs Apple incurred to maintain technical
27 incompatibility with competing products would be common to all class members;
28 whether proof of whether Apple was justified in creating and maintaining technical
compatibility because Apple's products “worked better” together than with
competitors' products would be common to all class members; or whether proof
regarding whether Apple was contractually obligated to disable the interoperability
created by RealNetworks' Harmony would be common to all class members.

Pltfs' Mem. at 3-4.

1 Apple's only response is that Dr. Burtis was not required to opine on all issues. Def.'s Mem.
2 at 9. While true in theory, it points out that Professor Noll's opinions as to all of these issues have
3 not been rebutted and are thus conceded by Apple.³ *Wofford v. Bonilla*, No. CIV-07-013-KEW,
4 2008 U.S. Dist. LEXIS 45833, at *2 (E.D. Okla. June 10, 2008) (granting motion to exclude where
5 expert's qualifications were not challenged).

6 **C. Dr. Burtis's Qualifications Alone, Without a Review of the Pertinent**
7 **Facts, Data, and Documents Are Irrelevant**

8 Apple argues that Plaintiffs "do not challenge Dr. Burtis' expertise." Def.'s Mem. at 7. This
9 ignores the grounds for Plaintiffs' challenge of Dr. Burtis's opinion and is thus, irrelevant. The fact
10 that Dr. Burtis has a Ph.D. in economics and has had her opinions accepted in other federal courts⁴
11 adds no weight whatsoever to whether her opinions should be admitted in this case.⁵ Plaintiffs' basis
12 for moving to exclude her testimony is that she has not shown any evidence of having adequately
13 prepared to provide an opinion, other than simply reading Professor Noll's declaration and saying, in
14 a vacuum, that what he proposes cannot be done. Even a highly qualified expert who opines without
15 "sufficient facts or data" to allow for an informed opinion, should have that opinion rejected by the
16 Court under the standard of Rule 702. Fed. R. Evid. 702.

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22 ³ Given the number of critical issues Plaintiffs have thus shown are common to the class,
certification should clearly be granted.

23 ⁴ Apple's repeated citation to Dr. Burtis's opinion in the indirect purchaser action is both
24 irrelevant and telling. Def.'s Mem. at 3-4. Try as it might, Apple cannot tar Professor Noll with a
25 report in a different case, by a completely different expert, based on a different legal theory, and an
inherently different damages model. This tactic was unsuccessful in Apple's earlier motion to
decertify and is no more persuasive this time.

26 ⁵ Apple certainly does not appear to be arguing that Professor Noll's far superior academic
27 achievement and much more substantial experience in providing opinions in federal court and other
28 settings means that his opinion should be given greater weight.

1 **D. Apple's Additional Attacks on Professor Noll's Opinions Are**
2 **Irrelevant to Plaintiffs' Motion to Exclude Dr. Burtis and Are**
3 **Unavailing**

4 Since Apple is forced to concede the points Plaintiffs assert in support of their motion to
5 exclude, it spends most of its "Opposition" trying to insert into the record further argument in
6 support of its opposition to Plaintiffs' Motion for Class Certification.

7 As stated more fully in the Motion to Strike (Dkt. No. 605), incorporated herein by reference,
8 Apple attempts to cure the fact that it filed a baseless expert report by submitting another expert
9 report purportedly under the guise of opposing Plaintiffs' motion to exclude. This is clearly
10 improper. *See Plumley v. Mockett*, No. CV 04-2868-GHK (Ex), 2010 U.S. Dist. LEXIS 57254, at *6
11 (C.D. Cal. May 26, 2010) ("Although Rule 26(e) obliges a party to 'supplement or correct' its
12 disclosures upon information later acquired, this 'does not give license to sandbag one's opponent
13 with claims and issues which should have been included in the expert witness' report (indeed, the
14 lawsuit from the outset). To rule otherwise would create a system where preliminary reports could
15 be followed by supplementary reports and there would be no finality to expert reports"); *see*
16 *also id.* (To allow this "pattern of behavior 'would surely circumvent the full disclosure requirement
17 implicit in Rule 26 and would interfere with the Court's ability to set case management deadlines.'").

18 Apple is clearly submitting this supplemental expert report in support of its opposition to
19 class certification, giving it the last word, in direct contravention of the Court's scheduling order for
20 class certification. Plaintiffs have had no opportunity to examine Dr. Burtis on her opinions or their
21 bases, or for Plaintiffs' experts to evaluate them and respond. For the reasons set forth in the Motion
22 to Strike, the Expert Report of Dr. Michelle M. Burtis in Support of Apple, Inc.'s Opposition to
23 Plaintiffs' Motion to Exclude ("Burtis Supplemental Report") (Dkt. No. 580-1) should be excluded
24 as well.

25 Apple will likely argue that it was justified in filing an additional expert report to counter the
26 preliminary regression analysis Professor Noll set forth in his March 28, 2011 report. This argument
27 fails for two reasons. First, Professor Noll's declaration, submitted January 18, 2011, did not contain
28 a complete preliminary regression analysis solely due to Apple's own discovery misconduct. *See,*

1 e.g., Dkt. No. 488, Declaration of Roger G. Noll at 14-19. Apple's failure to produce data critical to
2 Plaintiffs' experts is the subject of a pending motion to compel (Dkt. Nos. 556, 589) and has been an
3 ongoing and serious issue in this litigation.⁶ Second, as Plaintiffs have repeatedly explained, a full-
4 blown damage analysis is not required at class certification. See Dkt. Nos. 550, 566, Reply
5 Memorandum in Support of Plaintiffs' Renewed Motion for Class Certification at 3-5; see also
6 Dkt. Nos. 486, 532, Plaintiffs' Notice of Motion and Renewed Motion for Class Certification and
7 Appointment of Lead Class Counsel at 18-21. Thus, Dr. Burtis's analysis at this point in the case is
8 unnecessary, regardless of the context, and at any rate, has no bearing on Plaintiffs' motion to
9 exclude that is at issue here.

10 In both its Opposition and the Burtis Supplemental Report, Apple also uses out-of-context
11 and misleading sound bites from Professor Noll's deposition. Def.'s Mem. at 1, 2, 10-11; see also
12 Burtis Supplemental Report at 2 n.5-n.6, 4 n.11-n.18 (where Dr. Burtis attacks Professor Noll for not
13 submitting a complete damages regression analysis despite knowing that Professor Noll only
14 intended- and did -prove that a regression analysis could be done). Dkt. No. 609, Ex. 2 at 94:1-5;
15 Dkt. Nos. 551, 567, Reply Declaration of Roger G. Noll at 39); Burtis Supplemental Report at 3 &
16 n.8-n.10 (where Dr. Burtis uses quotes that show Professor Noll has not finished his final regression
17 as evidence a regression is not possible). Plaintiffs thoroughly rebut these quotes in their Opposition
18 to Supplemental Objections (Dkt. No. 608), incorporated by reference herewith. At any rate, none of
19 Apple's cherry-picked proof texts is relevant to whether Dr. Burtis's opinions are adequately
20 supported by her review of any facts, data or documents from this litigation – the only matter at issue
21 in this motion.

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25 ⁶ See Dkt. No. 567 at 29-34; Dkt. No. 609, Declaration of Carmen A. Medici in Support of
26 Plaintiffs' Opposition to Apple's Supplemental Objections to Reply Declaration of Roger G. Noll
27 and Supplemental Opposition to Class Certification Motion, Ex. 2 at 9:16-23. Apple's dilatory
28 tactics are further detailed in the Declaration of Alexandra S. Bernay in Support of Plaintiffs' Motion
to Compel Production of Data, pending before the Court (Dkt. No. 557).

1 **III. CONCLUSION**

2 Apple does not effectively challenge the grounds for Plaintiffs' motion to exclude Dr.
3 Burtis's opinions. It cannot show that she adequately prepared for her report by familiarizing herself
4 with the documents and data that Apple could have easily provided her, and that Professor Noll
5 relied on in forming his opinions. Apple's attempt to cure this insufficiency by slipping in an 11th-
6 hour Burtis "Supplemental" Report, purportedly in opposition to this motion, but actually in support
7 of its class certification opposition, is both procedurally and tactically incorrect. Plaintiffs cannot
8 test Dr. Burtis's "new and improved" opinions either through deposition or through supplemental
9 briefing and expert analysis. Apple's sound bites to undermine Professor Noll's opinions are
10 likewise misleading, unavailing and irrelevant to this motion to exclude Dr. Burtis's opinions. For
11 the reasons stated herein and in Plaintiffs' earlier-filed Motion to Strike and Opposition to
12 Supplemental Objections, Plaintiffs' Motion to Exclude should be granted.

13 DATED: April 17, 2011

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 17, 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 17, 2011.

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