

1 Robert A. Mittelstaedt #60359  
 ramittelstaedt@jonesday.com  
 2 Craig E. Stewart #129530  
 cestewart@jonesday.com  
 3 David C. Kiernan #215335  
 dkiernan@jonesday.com  
 4 JONES DAY  
 555 California Street, 26th Floor  
 5 San Francisco, CA 94104  
 Telephone: (415) 626-3939  
 6 Facsimile: (415) 875-5700

7 Attorneys for Defendant  
 APPLE INC.

8  
 9 UNITED STATES DISTRICT COURT  
 10 NORTHERN DISTRICT OF CALIFORNIA  
 11 OAKLAND DIVISION

13 THE APPLE IPOD iTUNES ANTITRUST  
 14 LITIGATION

Lead Case No. C 05-00037 YGR  
 [CLASS ACTION]

15 \_\_\_\_\_  
 16 This Document Relates To:  
 17 ALL ACTIONS

**[PROPOSED] ORDER GRANTING  
 DEFENDANT'S MOTION FOR  
 SUMMARY JUDGMENT AND  
 EXCLUDING THE TESTIMONY OF  
 ROGER G. NOLL**

1 Presently before the court is Defendant Apple, Inc.’s Motion for Summary Judgment and  
2 to Exclude the Expert Testimony of Roger G. Noll. Having reviewed the papers on file and  
3 otherwise being fully informed of the premises of Apple’s motion, this Court hereby GRANTS  
4 the motion.

5 **I. BACKGROUND**

6 **A. Plaintiffs’ Original Theory.**

7 Plaintiffs brought this suit in 2005—when online music stores were still using DRM—  
8 alleging that Apple’s use of its proprietary FairPlay DRM was an antitrust violation. Plaintiffs  
9 asserted that using a proprietary, rather than a shared, system prevented music purchased from the  
10 iTS to play on music players made by other companies (iTS music could be “indirectly” played  
11 on competing portable devices by burning the music to a CD and importing, or “ripping,” it to a  
12 computer, but loaded “directly” only to iPods). As a consequence, plaintiffs contended once they  
13 had purchased iTS music, they had become locked-in to buying iPods rather than competing  
14 players in the sense that their “switching costs” would be greater.

15 This Court rejected plaintiffs’ original claim, holding that it was lawful for Apple to adopt  
16 its own DRM, even if the result was to make Apple’s products incompatible with competitors’  
17 products. Order Decertifying Class (ECF No. 303), pp. 2, 10; Order Granting in Part Apple’s  
18 Mot. Summ. J. (ECF No. 274), p. 10.

19 **B. The Amended Consolidated Complaint.**

20 After the Court’s rejection of their original claim, targeted iTunes 7.0, a software update  
21 issued in September 2006. Plaintiffs challenge only one aspect of iTunes 7.0: code included in  
22 the software that protected against the risk that the iPod would not play songs properly as a result  
23 of third-party programs attempting to manage the iPod incorrectly. Plaintiffs argue that iTunes  
24 7.0 was anticompetitive because it prevented music from other music stores from directly playing  
25 on certain iPods. In particular, plaintiffs argue that the updates disabled RealNetworks’  
26 Harmony, technology that enabled digital music from iTS to play on non-iPod devices.  
27 Plaintiffs’ theory of antitrust impact is that, by disabling Harmony, iTunes 7.0 resulted in some  
28 consumers purchasing more music from iTS than they otherwise would have, which in turn

1 locked them into buying an iPod when they next purchased a digital music player. According to  
2 plaintiffs, that increased demand for iPods led Apple to raise iPod prices. At the same time, they  
3 say, other customers were locked out of buying iPods after iTunes 7.0 because they had large  
4 libraries of Harmony music that would no longer play on the iPods on which the KVC was  
5 implemented. According to plaintiffs, this lock-out led to higher prices because Apple no longer  
6 had the incentive to reduce prices to attract these customers.

## 7 **II. DISCUSSION**

### 8 **A. Summary Judgment**

9 Summary judgment is proper under rule 56 when “there is no genuine issue as to any  
10 material fact and . . . the movement is entitled to judgment as a matter of law.” Fed. R. Civ. P.  
11 56(c)(2). A party seeking summary judgment bears the initial burden of informing the court of  
12 the basis for its motion, and of identifying those portions of the pleadings, depositions, discovery  
13 responses, and affidavits that demonstrate the absence of a genuine issue of material fact. *Celotex*  
14 *Corp. v. Catrett*, 477 U.S. 317 , 323 (1986). Material facts are those that might affect the outcome  
15 of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 , 248 (1986). The “mere existence of  
16 some alleged factual dispute between the parties will not defeat an otherwise properly supported  
17 motion for summary judgment; the requirement is that there be no genuine issue of material fact.”  
18 *Id.* at 247-48 (dispute as to a material fact is “genuine” if there is sufficient evidence for a  
19 reasonable jury to return a verdict for the non-moving party).

20 Courts frequently grant summary judgment in antitrust cases when the plaintiffs lack  
21 admissible evidence that the challenged conduct caused antitrust injury—including where as here  
22 the plaintiff seeks to prove injury though expert economic evidence that the court finds  
23 inadmissible. *See e.g., In re Southeastern Milk Antitrust Litigation*, 2012 WL 1032797, at \*4-6  
24 (E.D. Tenn. Mar. 27, 2012) (finding that expert’s model of antitrust injury could not identify price  
25 changes caused by alleged anti-competitive conduct and granting summary judgment for  
26 defendants); *In re eBay Seller Antitrust Litigation*, 433 Fed. Appx. 504, 506 (9th Cir. 2011)  
27 (finding expert’s econometric analysis inadequate to support claim of antitrust injury and  
28 affirming summary judgment for eBay); *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039,

1 1054-58, 1063 (8th Cir. 2000) (finding that plaintiff's expert's opinions on injury should have  
2 been excluded and remanding for entry of judgment).

3 Plaintiffs' claim of impact is unsupported by any record facts. For the alleged impact to  
4 have occurred, RealNetworks must have been selling Harmony music to iPod owners (or  
5 potential iPod purchasers) in sufficient quantities in September 2006 that a drop in those sales  
6 would have affected demand for iPods to such a degree that Apple would have changed its prices  
7 in response. That, in turn, requires the existence of consumers who, because of the update,  
8 became either locked in (by their iTS purchases) or locked out (by their Harmony purchases), and  
9 thus purchased a player different from what they would have purchased absent iTunes 7.0. And  
10 the claim requires that Apple became aware of these customers (and how many there were) and  
11 took them into account in setting its prices. Plaintiffs have no record proof of any of the facts.

12 First, plaintiffs do not show that Harmony had any significant share of music sales in  
13 September 2006 or the months thereafter. Second, plaintiffs have no evidence regarding what  
14 portion of RealNetwork's sales was of Harmony music to iPod owners or potential iPod  
15 purchasers. Third, plaintiffs have no proof of the number of people who became locked in or  
16 locked out as a result of iTunes 7.0. It is not enough merely that a Harmony purchaser owned an  
17 iPod or was a potential iPod purchaser. Plaintiffs must show, whether and to what extent  
18 consumers' decision about whether to purchase an iPod was changed as a result of iTunes 7.0.  
19 Fourth, despite extensive discovery related to Apple's pricing committee (including document  
20 production and depositions), plaintiffs cannot identify any evidence that Apple ever took into  
21 account sales (or the lack thereof) from RealNetworks or any other online store in setting iPod  
22 prices. Fifth, plaintiffs' hypothesized price effect is irreconcilable with the real-world manner in  
23 which Apple set its prices.

24 In short, plaintiffs have no documentary or percipient witness evidence to show even the  
25 most basic facts necessary for their claim to be valid. Their complaint failure of proof at this  
26 stage requires that summary judgment be granted. "[P]roof of injury is an essential substantive  
27 element" of an antitrust claim, on which plaintiffs bear the burden. *Kline v. Coldwell, Banker &*  
28 *Co.*, 508 F.2d 226, 233 (9th Cir. 1974); *Rebel Oil Co. v. Atl. Richfield Co.*, 51 F.3d 1421, 1433

1 (9th Cir. 1995) (“causal antitrust injury[] is an element of all antitrust suits”). Lack of evidence of  
2 injury caused by the challenged is thus “fatal to the merits of any antitrust claim.” *Argus Inc. v.*  
3 *Eastman Kodak Co.*, 801 F.2d 38, 41 (2d Cir. 1986). That is the situation here.

4 **B. Exclusion of Dr. Noll’s Testimony**

5 Rule 702 permits a qualified expert to present testimony that “will help the trier of fact to  
6 understand the evidence or to determine a fact in issue” if the testimony is “based on sufficient  
7 facts or data,” “is the product of reliable principles and methods,” and “the expert has reliably  
8 applied the principles and methods to the facts of the case.” FED. R. EVID. 702. As “gatekeeper,”  
9 the Court must ensure that expert testimony “rests on a reliable foundation and is relevant to the  
10 task at hand.” *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 597 (1993). “Maintaining  
11 *Daubert’s* standards is particularly important considering the aura of authority experts often  
12 exude, which can lead juries to give more weight to their testimony.” *Mukhtar v. California State*  
13 *Univ., Hayward*, 299 F.3d 1053, 1063-64 (9th Cir. 2002) *amended*, 319 F.3d 1073 (9th Cir.  
14 2003). Litigants should not be permitted to get to trial simply by attempting to “dazzle the  
15 courtroom with graphs and tables.” *In re Graphics Processing Units Antitrust Litig.*, 253 F.R.D.  
16 478, 491-92 (N.D. Cal. 2008) (rejecting an expert regression at the class certification stage).

17 Reliable expert testimony is grounded “in the methods and procedures of science,” not  
18 “subjective belief or unsupported speculation.” *Id.* at 590. While the focus is on the expert’s  
19 underlying methodology, “conclusions and methodology are not entirely distinct from one  
20 another,” and “[a] court may conclude that there is simply too great an analytical gap between the  
21 data and the opinion proffered.” *General Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997). Relevant  
22 expert testimony “fit[s]” the facts of the case and “logically advances a material aspect of the  
23 proposing party’s case.” *Daubert v. Merrell Dow Pharm.*, 43 F.3d 1311, 1315 (9th Cir. 1995)  
24 (“*Daubert II*”).

25 **1. Dr. Noll’s Regression Does Not “Fit” The Facts Of The Case Or The**  
26 **Economics Of Plaintiffs’ Own Theory.**

27 Dr. Noll’s regression must be excluded because it is premised on assumptions that are at  
28 odds with the facts of the case and with plaintiffs’ own theory. Damages models premised on the

1 types of unsupported assumptions on which Dr. Noll relies are inadmissible. *See Concord Boat,*  
2 207 F.3d at 1055-57 (expert’s economic model “should have been excluded” where it  
3 “construct[ed] a hypothetical market which was not grounded in the economic reality of the stern  
4 drive engine market, for it ignored inconvenient evidence”); *So. Pacific Comm’ns Co. v. Am. Tel.*  
5 *& Tel. Co.*, 556 F. Supp. 825, 1076-77 (D.D.C. 1982) (concluding that “plaintiffs’ model of the  
6 ‘but for’ world show[ed] no damages” where there was “obvious inconsistency between real  
7 world competitive conditions and [plaintiffs’] assumptions about competition in the imaginary  
8 ‘but for’ world”); *Daubert*, 509 U.S. at 591 (testimony must “fit” the facts of the case to be  
9 relevant). Dr. Noll’s model does not “fit” the actual evidence in several, fundamental respects.

10 First, as discussed, the price effect the model purports to find is unsupported by any real  
11 world evidence regarding the amount of Harmony sales, the purchasers of Harmony music, the  
12 degree of any lock-in or lock-out of any consumer, or any awareness or consideration by Apple’s  
13 pricing committee of any effect from iTunes 7.0. Second, Dr. Noll’s hypothesized price effect is  
14 irreconcilable with the real world manner in which Apple set its prices. Apple has consistently  
15 followed a strategy of setting prices at set intervals (*e.g.*, \$399, \$249, \$199). Yet, Dr. Noll’s  
16 model finds that, in response to sales from a store with a miniscule market share, Apple would  
17 have departed from this consistent practice and sold iPods at varying price points, such as  
18 \$184.17 or \$276.72. This finding defies reality. Third, Dr. Noll applies a single, constant  
19 percentage overcharge to every affected iPod sold during the damage period. If his theory were  
20 correct, however, the lock-in would have progressively increased during the damage period as  
21 consumers purchased more iTS music. Dr. Noll offers no coherent theory how the alleged  
22 overcharge amount could possibly remain constant in these circumstances.

23 Because it rests on unsupported assumptions that conflict with the real world, Dr. Noll’s  
24 regression must be excluded. *See McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 807 (9th Cir.  
25 1988) (affirming exclusion of expert damages study that rested on “unsupported assumptions”);  
26 *El Aguila Food Prods., Inc. v. Gruma Corp.*, 301 F. Supp. 2d 612, 625 (S.D. Tex. 2003) *aff’d*,  
27 131 F. App’x 450 (5th Cir. 2005) (excluding expert damages model where it “ignore[d] market  
28 realities”).

1                   **2. The Regression Does Not Properly Account For the Relevant Factors.**

2                   A valid regression must account for the factors that may influence the characteristic being  
3 measured—here, the price of iPods. Failure to do so can bias the results, by attributing an effect  
4 to one event or characteristic that actually belongs to another. Dr. Noll’s regression fails to  
5 satisfy this basic requirement in at least three separate respects, each of which independently  
6 requires that his testimony be excluded.

7                   a. iTunes 4.7 Variable

8                   First, Dr. Noll’s regression includes variables for events that he contends may have  
9 affected iPod prices, including iTunes 4.7. In his initial report, Dr. Noll turned the iTunes 4.7  
10 variable off as of September 12, 2006, the day iTunes 7.0 was released. By turning the iTunes 4.7  
11 variable off, his initial regression treated iTunes 4.7 as having no plausible effect on iPod prices  
12 after iTunes 7.0 was released—and thus treats the but-for world as one in which iTunes 4.7 did  
13 not exist.

14                   In his rebuttal report, Dr. Noll revised his regression to leave on the iTunes 4.7 variable as  
15 to those iPods on which iTunes 7.0 was not implemented, but he continues to turn it off as to the  
16 models as to which iTunes 7.0 was implemented. Thus, Dr. Noll again treats iTunes 4.7 as  
17 having no effect on those models once iTunes 7.0 was released. Dr. Noll compounds this error by  
18 not turning on the iTunes 7.0 variable for those iPod models which were not affected by iTunes  
19 7.0. By doing so, he treats the alleged conduct as not having any possible effect on the demand  
20 for unaffected models.

21                   b. iTunes 7.0 Variable

22                   Dr. Noll’s regression includes a single “iTunes 7.0” variable that he asserts measures the  
23 alleged unlawful overcharge in iPod prices. However, plaintiffs challenge only one aspect of  
24 iTunes 7.0—the software code that resulted in Harmony incompatibility. They do not challenge  
25 the other aspects of iTunes that are much more likely to affect demand for iPods, including new  
26 album covers views of music, TV shows, movies with better browsing capability and videos with  
27 “near DVD’ quality.” Dr. Noll’s regression must control for these other, unchallenged aspects of  
28 iTunes 7.0 to ensure that the coefficient on the iTunes 7.0 variable captures *only* the price impact

1 of the challenged conduct. By failing to do so, the model cannot ascribe any potential price-  
2 elevating impact of iTunes 7 to the challenged conduct as opposed to the other value-enhancing  
3 features of iTunes 7. Expert damages calculations that fail to “segregate the losses, if any, caused  
4 by acts which were not antitrust violations from those that were” will not assist the trier of fact  
5 and must be excluded. *City of Vernon v. S. California Edison Co.*, 955 F.2d 1361, 1372-73 (9th  
6 Cir. 1992) (damages study that treated lawful acts as “contribut[ing] to the damage figure” did not  
7 constitute competent evidence of damages) That is the situation here.

8 c. Other Characteristics and Factors Affecting Price

9 Dr. Noll recognizes that product features are important determinants of price, and thus his  
10 regression includes variables for a few such characteristics—*e.g.*, storage capacity, photo and  
11 video capability, and size (cubic inches). But he omits numerous other characteristics that are  
12 equally likely to affect price, including battery life, display size, weight, screen resolution, and  
13 type of connector (USB or FireWire).

14 “Omitted variable bias arises when important explanatory variables that have been omitted  
15 from the regression model are correlated with included explanatory variables. . . . This  
16 misspecification will bias the resulting coefficient estimates, and make these estimates unreliable  
17 for damage estimation.” American Bar Association, *Proving Antitrust Damages: Legal and*  
18 *Economic Issues* 148 (2d ed. 2010). As the court recognized in excluding the regression model in  
19 *Freeland v. AT&T Corp.*, 238 F.R.D. 130 (S.D.N.Y. 2006), “an unsupported assumption that  
20 changes in quality would never affect . . . price is insufficient to justify its exclusion from the  
21 regression analysis, particularly in light of evidence to the contrary.” *Id.* at 148. Like the expert  
22 in *Freeland*, Dr. Noll has “offered no empirical analysis to support his conclusion” that the  
23 features he has excluded are irrelevant to price. 238 F.R.D. at 146. His regression is thus “so  
24 incomplete as to be inadmissible as irrelevant.” *Id.* at 147 (quotations omitted).

25 **3. The Regression Does Not Provide Statistically Significant Results**

26 Dr. Noll’s regression is inadmissible for an additional, independent reason: his damages  
27 estimates are not statistically significant. When properly calculated, the standard errors show that  
28 the coefficient for 7.0 is statistically *insignificant*—*i.e.*, no different from zero and thus



1 meaningless to show any impact on prices.

2 A fundamental assumption relied on in regression analysis is that the errors or residuals  
3 (the portion of the price that cannot be explained by the explanatory variables) are uncorrelated or  
4 independent of one another. If the errors within a group are correlated (not independent), they are  
5 said to be clustered and must be addressed by standard correction methods. If no correction is  
6 made, the standard errors will be miscalculated and will under- or over-estimate the model's  
7 precision. .

8 Dr. Noll admits that there are standard procedures to test whether the errors in a regression  
9 are correlated. But he did not employ any of those procedures, even after Had he run such a test,  
10 he would have discovered that errors within certain groups or clusters are highly correlated,  
11 revealing that the independence assumption is false..

12 Correcting for this fundamental error renders Dr. Noll's estimated "overcharges"  
13 statistically indistinguishable from zero. Because its results are not statistically significant, Dr.  
14 Noll's "model provides no reliable evidence that the iTunes 7 update had any material effect on  
15 the prices of iPods."

### 16 C. Relevant Product Market

17 To prove a monopolization claim, the plaintiff must define the relevant product market.  
18 *See Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 455-59 (1993). Doing so requires  
19 identifying "the pool of goods or services that enjoy reasonable interchangeability of use and  
20 cross-elasticity of demand." *Oltz v. St. Peter's Cmty. Hosp.*, 861 F.2d 1440, 1446 (9th Cir. 1988).  
21 Dr. Noll purports to define two relevant product markets: the device market, which he opines  
22 includes only portable digital media players; and the music market, which he opines consists  
23 solely of digital audio files.

24 Dr. Noll did not employ the economic methods courts have recognized as valid for  
25 defining a relevant product market. He did not estimate cross-elasticity of demand or apply the  
26 "hypothetical monopolist" test endorsed by the Department of Justice. Further, Dr. Noll did not  
27 conduct any other thorough quantitative analysis of prices, costs or output of potential competing  
28 products. Like the expert excluded in *Menasha Corp. v. News Am. Mktg. In Store Servs., Inc.*,

1 354 F.3d 661, 664 (7th Cir. 2004), he “introduced no econometric of any kind” related to market  
2 definition. He asserts that economists rely on surveys of buyers, or statements of executives in  
3 the industry. But does not present any such evidence.

4 Rather than relying on any accepted economic methods, Dr. Noll offers his own truncated  
5 review of what he perceives to be the similarities or dissimilarities between certain products, with  
6 an occasional citation to a news article or other report from the internet. Such an exercise is not  
7 valid expert opinion. *See In re Live Concert*, 863 F. Supp. 2d at 994 (excluding expert report  
8 purporting to define relevant product market where expert “purported to rely on ‘industry  
9 information’ ... [but] did not utilize a reliable methodology for interpreting and applying this  
10 information”).

11 In addition to not applying any relevant expertise, Dr. Noll’s non-expert product review is  
12 flawed. Dr. Noll “focused on finding the perfect substitute[s] for [iPods and iTunes music],”  
13 ignoring the fact that some “flexible elastic buyer[s]” will switch to “substitutes, even if the  
14 substitutes are imperfect.” *Virginia Vermiculite Ltd. v. W.R. Grace & Co.-Conn.*, 98 F. Supp. 2d  
15 729, 737 (W.D. Va. 2000) (excluding expert testimony for failure “to thoroughly examine  
16 substitutes when defining the market”). *Kentucky Speedway, LLC v. N.A. of Stock Car Auto  
17 Racing, Inc.*, 588 F.3d 908, 916-17 (6th Cir. 2009) (affirming order striking expert’s “report and  
18 deposition testimony because he had included only Busch series and open-wheeled races as  
19 possible substitutes for attending live NASCAR stock-car racing events or watching them on  
20 television” without considering “other sports—and possibly other forms of entertainment—as  
21 substitutes”). His opinions are therefore inadmissible.

### 22 **III. CONCLUSION**

23 Accordingly, Apple’s Motion for Summary Judgment and to Exclude the Expert  
24 Testimony of Dr. Roger G. Noll is hereby GRANTED.

1 Dated: \_\_\_\_\_

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\_\_\_\_\_  
The Honorable Yvonne Gonzalez Rogers  
United States District Court Judge

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