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 APPLE INC.

10 UNITED STATES DISTRICT COURT  
 11 NORTHERN DISTRICT OF CALIFORNIA  
 12 OAKLAND DIVISION

14 **THE APPLE IPOD ITUNES ANTITRUST  
 LITIGATION**

**Case No. 4:05-cv-00037 YGR**

**[PROPOSED] ORDER DENYING  
 PLAINTIFFS' MOTION TO STRIKE  
 THE SUPPLEMENTAL REPORT OF  
 KEVIN MURPHY AND ROBERT  
 TOPEL DATED DECEMBER 20, 2013  
 (ECF NO. 750)**

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1 Presently before the court is Plaintiffs' Motion to Exclude the Supplemental Report of  
2 Kevin M. Murphy and Robert H. Topel Dated December 20, 2013 (ECF No. 750). Having  
3 reviewed the papers on file and considered the relevant arguments, this Court hereby DENIES the  
4 motion.

5 Plaintiffs' motion violates the local rules of civil practice, which require procedural and  
6 evidentiary objections to be included in opposition briefs, not in separate motions. *See* LR 7-3(a).  
7 Failure to comply with these rules is grounds to waive strike or deny the objections. *See Apple*  
8 *Inc. v. Samsung Elecs. Co.*, No. 11-cv-01846-LHK, 2011 BL 304343, \*3 (N.D. Cal. Dec. 2,  
9 2011); *City of Royal Oak Retirement Sys. v. Juniper Networks, Inc.*, 880 F. Supp. 2d 1045, n. 2  
10 (N.D. Cal. 2012); *Oak Point Partners, Inc. v. Lessing*, No. 11-03328 LHK, 2012 U.S. Dist.  
11 LEXIS 133407, \*3 n.2 (N.D. Cal. Sept. 18, 2012).

12 Plaintiffs' motion is also substantively wrong. The supplemental report filed by Drs.  
13 Murphy and Topel is a proper supplemental disclosure under Rule 26(e), as it merely updated  
14 their analysis and calculations, as necessitated by the new regression models presented for the  
15 first time in the rebuttal report of plaintiffs' expert. Thus, the Court finds the supplemental report  
16 justified. *See* Fed. R. Civ. P. 37(c)(1). Moreover, plaintiffs have suffered no cognizable  
17 prejudice because they have deposed Apple's experts on the supplemental report, and have had  
18 the last word with the submission of a responsive second rebuttal by their expert. *See id.* Further,  
19 the Court finds it would be unfair for plaintiffs' expert to testify about the new regression models  
20 in his rebuttal report without permitting Apple's experts to update their analysis and calculations  
21 based on the new regressions.

22 Even applying the factors identified by the Ninth Circuit in determining preclusion  
23 sanctions, plaintiffs' motion fails. The relevant factors, outlined in *Wendt v. Host Int'l, Inc.*, 125  
24 F.3d 806 (9th Cir. 1997), include: "1) the public's interest in expeditious resolution of litigation;  
25 2) the court's need to manage its docket; 3) the risk of prejudice to the [party seeking exclusion];  
26 4) the public policy favoring disposition of cases on their merits; [and] 5) the availability of less  
27 drastic sanctions." *Id.* at 814. Striking the supplemental report will not hasten the end of this  
28 case or alleviate this Court's calendar. Plaintiffs do not need time to depose the experts or

1 complete a new rebuttal report—they have already done both. Denying the motion furthers the  
2 public policy in favor of disposing of cases on their merits because all of the expert reports are  
3 now before this Court in connection with Apple’s motion for summary judgment and plaintiffs’  
4 opposition thereto. Finally, the availability of a less drastic approach weighs in favor of denying  
5 the motion because plaintiffs’ have already submitted a second rebuttal report responding to  
6 Apple’s supplemental report, to which Apple has no objection.

7 Accordingly, the Court hereby DENIES plaintiffs’ motion (ECF No. 750).

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9 **IT IS SO ORDERED.**

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11 Dated: \_\_\_\_\_, 2014

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14 Hon. Yvonne Gonzalez Rogers

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