UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, Plaintiff, v. APPLE, INC., et al., Defendants.	Civil Action No. 12-cv-2826 (DLC)

THE STATE OF TEXAS; THE STATE OF CONNECTICUT; et al., Plaintiffs, v. PENGUIN GROUP (USA) INC. et al., Defendants.	Civil Action No. 12-cv-03394 (DLC)

PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF THEIR MOTION IN LIMINE TO PRECLUDE DR. MICHELLE BURTIS FROM OFFERING AT TRIAL ANY OPINION ON COMPETITIVE EFFECTS

INTRODUCTION

Apple and Penguin do not dispute the fact that Dr. Burtis's competitive effects analysis fails to take into account or control for any variables external to the Apple Agency Agreements that may have affected e-book prices, output, or innovation. And Apple and Penguin do not dispute the law that, in order to be admissible, an expert's opinion must adequately account for alternative explanations of data observed. *See* Apple Inc.'s Opposition to Plaintiffs' Motion *in Limine* to Preclude Dr. Michelle Burtis from Offering at Trial any Opinion on Competitive Effects ("Burtis Response") at 9-10. Thus, there is no basis to allow Dr. Burtis to render any opinion here on competitive effects.

Rather than address the serious flaws in Dr. Burtis's analysis, Defendants devote the majority of their brief to "doubling-down" on them: arguing that the state of the world today proves that their actions in 2010 caused no anticompetitive harm to consumers. That makes as much sense as arguing that a company's stockholders suffered no harm from securities fraud because, two years after the company issued a corrective disclosure, its stock was trading at an all-time high.

What matters here is the impact that the Apple Agency Agreements had on the market. On that question, Dr. Burtis has no answer. Instead, Defendants remarkably suggest that this Court perform the empirical analysis Dr. Burtis failed to: "Dr. Burtis' testimony *will allow the Court to assess* whether 'other factors' independent of entry by Apple and the advent and success of the agency model caused prices to fall." Burtis Response at 7 (emphasis added). But, under Federal Rule of Evidence 702, it is the expert's analysis that is supposed to assist the trier of fact, not the trier of fact that is supposed to assist the expert's analysis.

ARGUMENT

Dr. Burtis's opinion is that the prices, output and innovation that existed in the e-book and e-reader markets in 2012 are "inconsistent with Plaintiffs' allegations of anticompetitive harm in the alleged relevant market." Burtis Decl. ¶ 3. The only issue to be decided in this motion is whether Dr. Burtis's failure to take into account or control for any variables that may have affected the levels of prices, output and innovation in her competitive effects analysis, makes that analysis so unreliable as to render her opinion inadmissible under cases such as *Daubert v. Merrell Dow Pharmaceuticals Inc.*, 509 U.S. 579 (1993), *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999), and *Bickerstaff v. Vassar College*, 196 F.3d 435, 449 (2d Cir. 1999). Defendants do not even address that issue until page 7 of their brief, and when they do, they simply suggest that the Court should undertake the analysis to determine whether factors other than the Apple Agency Agreements contributed to changes that occurred in e-book prices from 2010 through 2012. Burtis Response at 7. In so doing, Defendants essentially admit that Dr. Burtis's analysis is fundamentally flawed.

It appears that Defendants' argument is that because Plaintiffs alleged a trade e-books market, it was necessary for Dr. Burtis to focus her analysis on the entire market over a long period of time. *See, e.g.*, Burtis Response at 3 ("Given Plaintiffs' claim that the alleged conspiracy caused harm in the alleged relevant market . . . Dr. Burtis sought to 'examine indicia of competition across Plaintiffs' entire alleged relevant market,' based on the 'full range of transactional data produced. . . . Accordingly, her analysis measures 'longer-term effects' in the alleged relevant market post-agency . . . ."). Whether we agree with Dr. Burtis's decision not to focus on the effects the Apple Agency Agreements had on the cartel members' e-books—and, to be clear, we disagree with Dr. Burtis—is irrelevant for purposes of this motion. What matters is

that, once Dr. Burtis made the decisions she did, it was incumbent upon her to rule out alternative explanations that could call into question her opinions. *See, e.g.*, Burtis Response at 10 (citing *In re Wireless Telephone Servs. Antitrust Litig.*, 385 F. Supp. 2d 403, 427-28 (S.D.N.Y. 2005) (excluding testimony where expert "failed to consider or test for any alternative explanations")). As an economist, Dr. Burtis cannot reliably conclude that the economic evidence in this case is inconsistent with the allegation that the Apple Agency Agreements led to anticompetitive effects, since Dr. Burtis did not attempt to isolate the impact of the Apple Agency Agreements in that economic evidence. *See Kumho Tire Co.*, 526 U.S. at 152 (*Daubert*'s gatekeeping requirement is intended to make certain that an expert "employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field"). Without any attempt to rule out alternative explanations for the changes in prices, output, and innovations that Dr. Burtis observes occurred after April 2010, Dr. Burtis's conclusion suffers from the classic logical fallacy of *post hoc ergo propter hoc.*

The fact that Dr. Burtis conducted a "'before and after' analysis," *see* Burtis Response at 5, only confirms the unreliability of her opinion. As noted in our opening brief, Dr. Burtis admitted that, with respect to analyzing the effects of the Apple Agency Agreements, prices and output prior to the agency agreements did not constitute a "but-for world." *See, e.g.*, Plaintiffs' Motion at 3 (citing Burtis Dep. 108:20-109:22). Thus, simply comparing "raw" before and after figures necessarily leads to faulty conclusions. Indeed, even Defendants, in describing the cases they believe support their position, note that experts need to make an "observation on trends." *See* Burtis Response at 9 (citing *United States v. Valencia*, 600 F.3d 389, 427 (5th Cir. 2010)).[1] By definition, Dr. Burtis's "before and after" analysis does not take into account trends.

[1] As *Valencia* makes clear, when an expert is attempting to establish a causal relationship—as Dr. Burtis is here—the expert should eliminate all confounding variables or potential contributory factors in order to present an opinion

As for the remainder (which is indeed the overwhelming majority) of Defendants' Response, it fails to address issues relevant to Plaintiffs' motion and therefore requires no reply. However, Plaintiffs do want to make one point clear:

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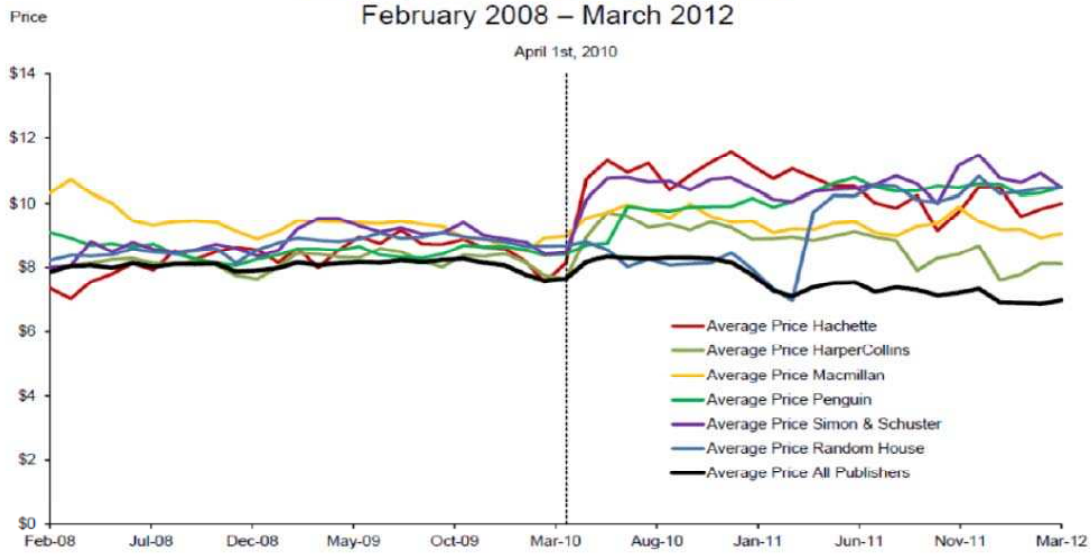
that is both relevant and reliable. *See* 600 F.3d at 427. Similarly, Defendants' reliance on *Brooke Group, Ltd. v. Brown & Williamson Tobacco Corp.*, Burtis Response at 6-7, is misplaced. Far from endorsing "unadjusted market price and output data," the Supreme Court's decision condemns reliance on long-term price data that fails to consider other variables that were part of market realities. 509 U.S. 209, 235-36 (1993). And, Apple's reliance on a ten-year-old press release announcing the closing of a Department of Justice investigation is even more mystifying. Not only is the decision to exercise prosecutorial discretion in a case involving a different set of facts irrelevant, *see, e.g.*, *United States v. Kahn*, 711 F. Supp. 2d 9, 11 (D.D.C. 2010), but the actual text of the release does not suggest that the investigative staff—unlike Dr. Burtis—ignored other factors that could have affected price.

Graph 1
Average eBook Retail Prices for Sony, Amazon, Barnes & Noble, Apple, Google, Books-A-Million, and Kobo
February 2008 – March 2012



Source: Sony Transactions Data, Amazon Transactions Data, Barnes & Noble Transactions Data, Apple Transactions Data, Google Transactions Data, Books-A-Million Transactions Data, Kobo Transactions Data

This is Graph 1 from Dr. Burtis's initial report. Putting aside the flaws in Dr. Burtis's methodology, it shows that average retail prices of Publisher Defendants' e-books went up immediately after the Apple Agency Agreements went into effect and stayed above the pre-agency levels throughout the entire two-year time period that Dr. Burtis considered. Dr. Burtis's chart also shows that the average retail price of all publishers' e-books (Publisher Defendants plus non-cartel members) increased after the Apple Agency Agreements went into effect and stayed above the pre-agency levels for approximately 9 months (through January 2011). Thus, the statement by Defendants that Professor Baker is the "sole expert in this litigation who claims that average retail prices of e-books in the alleged relevant market increased following the agency agreements," Burtis Response at 3-4, is flatly wrong. Every expert, whether retained by Plaintiffs or Defendants, agrees that average prices of all publishers' e-books went up after the Apple Agency Agreements went into effect. All that Dr. Burtis is opining is that because prices

of other publishers' e-books eventually went down enough to swamp the effects of Publisher Defendants' price increases, the Court can and should ignore everything else. That is unreasonable.

CONCLUSION

For the foregoing reasons and those set forth in our initial memorandum, Plaintiffs respectfully request that Dr. Burtis be precluded at trial from offering any opinions on competitive effects.

Dated: May 8, 2013

Respectfully submitted,

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