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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, Plaintiff, v. APPLE INC., *et al.*, Defendants.	12 Civ. 2826 (DLC)

THE STATE OF TEXAS, THE STATE OF CONNECTICUT, *et al.*, Plaintiffs, v. PENGUIN GROUP (USA) INC., *et al.*, Defendants.	12 Civ. 03394 (DLC)

APPLE INC.'S MOTION IN LIMINE TO EXCLUDE CERTAIN EXPERT TESTIMONY OF PROFESSOR RICHARD GILBERT

I. PRELIMINARY STATEMENT

Apple Inc. ("Apple") moves to exclude from trial certain testimony of Professor Richard J. Gilbert, the Department of Justice's ("DOJ") economic expert. The DOJ should be precluded, pursuant to Federal Rules of Evidence 403 and 702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589-91 (1993), from eliciting testimony from Professor Gilbert that (1) constitutes impermissible fact finding masquerading as expert testimony and (2) is based on a flawed and unreliable methodology.

First, the DOJ has improperly turned to its expert economist to provide a "narrative" of the DOJ's interpretation of the facts in this case. That is properly the role of the fact-finder at trial. Professor Gilbert has offered over 120 pages of "expert" reports, much of which merely recount the "evidence" on which the DOJ's case rests—a carefully curated set of emails and deposition testimony that do not reflect the entire record and have little relevance to the limited economic opinions that are offered by Professor Gilbert. This is not the first time Professor Gilbert has been retained to engage in impermissible fact finding. A court previously precluded him from testifying on "questions of fact on which an economic expert's opinion is not helpful," and for "recit[ing] some assumed facts and argument . . . [with] no analysis." *Hynix Semiconductor v. Rambus, Inc.*, No. 00 Civ. 20905, 2008 WL 73689, at *15 (N.D. Cal. Jan. 5, 2008). Fact-finding, cloaked as an expert opinion, should not be permitted in Professor Gilbert's trial testimony.

Second, Professor Gilbert's conclusion that the Apple agency agreements caused a "net reduction in volume" of e-book sales is premised on an unreliable empirical analysis that purports to compare output in a two-week period prior to the implementation of the Apple agency agreements and a two-week period after the implementation of the Apple agency agreements. Professor Gilbert acknowledges, as he must, that the result of his arbitrary and

result-oriented test (*i.e.*, whether it shows a net increase or decrease in output) changes depending on when you draw the two-week windows. As a result, it does not provide a reliable basis for establishing that the agency agreements restricted output in the relevant market. Professor Gilbert's conclusions related to a supposed post-agency reduction in the rate of growth of e-book output are also defective and should be excluded.

II. LEGAL STANDARD

Federal Rule of Evidence 702 permits witnesses qualified as experts to offer opinion testimony only if: (1) "the testimony is based upon sufficient facts or data," (2) "the testimony is the product of reliable principles and methods," and (3) "the expert has reliably applied the principles and methods to the facts of the case." Fed. R. Evid. 702. To be admissible under Rule 702, expert testimony must be (1) based on the special knowledge of the expert; (2) helpful to the finder of fact; and (3) reliable. *Daubert*, 509 U.S. at 589-91.

It is not sufficient for a party to show that its witness has special expertise. Under Rule 702 and *Daubert*, "[t]he subject of an expert's testimony must be 'scientific . . . knowledge,'" where "'scientific' implies a grounding in the methods and procedures of science," and "'knowledge' connotes more than subjective belief or unsupported speculation." *Daubert*, 509 U.S. at 589-90; *United States v. Dukagjini*, 326 F.3d 45, 54 (2d Cir. 2002) ("[E]xpert testimony should be excluded if the witness is not actually applying expert methodology."). Thus, while expert witnesses can "guid[e] the trier of fact through a complicated morass of obscure terms and concepts," *United States v. Duncan,* 42 F.3d 97, 101 (2d Cir. 1994), expert testimony is properly excludable where "[persons] of common understanding[] are . . . capable of comprehending the primary facts and of drawing correct conclusions from them," *United States v. Castillo*, 924 F.2d 1227, 1232 (2d Cir. 1991) (first alteration in original) (internal quotations and citations omitted).

Furthermore, "[e]xpert evidence can be both powerful and quite misleading because of the difficulty in evaluating it." *Daubert*, 509 U.S. at 595 (internal quotations and citations omitted). Therefore, courts "exercise[] more control over experts than over lay witnesses" under Federal Rule of Evidence 403 and should exclude expert testimony where its probative value is outweighed by possible prejudice. *Id.*

III. ARGUMENT

A. Professor Gilbert Should Not Be Permitted To Present A Factual Narrative Of DOJ's Case

Professor Gilbert has opined that the role of an economist is to "collect facts as they are known, and then . . . put those facts together with *economic reasoning to reach a conclusion.*" Snyder Declaration ("Snyder Decl."), Exhibit A (Gilbert Deposition Transcript) at 145:13-17 (emphasis added). But Professor Gilbert's written submissions fall far short of even his standard. Instead, much of the content in Professor Gilbert's expert reports simply summarize the DOJ's the narrative of the facts. Any testimony by Professor Gilbert based on his report is untethered from any *economic* conclusions that he offers and lacks grounding in Professor Gilbert's *economic* expertise. Even if Professor Gilbert's summaries of the evidence were accurate and complete (which they are not), testimony by Professor Gilbert that simply marshals the evidence and impermissibly seeks to usurp the role of the fact finder and should be excluded.

Professor Gilbert's written submissions do little more than provide an expert's imprimatur on the DOJ's factual allegations in this case, particularly in their (1) description of conditions in the e-books market prior to Apple's entry, and (2) discussion of the negotiation and implementation of the Apple agency agreements. By way of illustrative examples, Professor Gilbert makes the following conclusory statements of fact, citing to a small handful of documents:

- that Amazon "priced its ebooks very competitively" (Ex. PX-0821 ¶ 31)[1],
- that Amazon's "entry dramatically increased sales of trade ebooks" (*id.*), and
- that "Amazon had the largest share of ebook sales due in part to its strategy of charging low prices for ebooks" (Ex. PX-0821 ¶ 51) (without citation).

None of these statements is supported by economic analysis. Rather, they are "findings" of fact, proclaimed by an economist, based on record evidence. Similarly, Professor Gilbert acknowledges that "Amazon was selling popular just-released and bestselling books at very low (possibly negative) margins" (Ex. PX-0821 ¶ 55), but he does not conduct the economic analysis associated with this fact. In contrast, Apple's expert, Dr. Michelle Burtis, measures Amazon's margins or the extent to which Amazon was pricing e-books below their wholesale cost. *See* Snyder Decl., Ex. A at 86:8-18.

Professor Gilbert also offers a one-sided factual characterization of "[p]ublisher actions before the transition to agency" based on cherry-picked documents produced in discovery and selective excerpts of deposition testimony provided to him. He draws the broad conclusion, for example, from a review of *six* documents, but no deposition testimony discussing those documents, that over the course of 2009, the defendant publishers met to discuss how they "might work together to 'defend against further price erosion' of their books and end Amazon's ability to set low ebook prices" (Ex. PX-0821 ¶ 38). This inference regarding factual evidence is tantamount to argument of counsel made through the auspices of an expert. Professor Gilbert applies no economic analysis; he is just advocating his view of a certain subset of the evidence.

As this Court has noted, "[e]xpert testimony is properly excludable . . . where 'persons of common understanding are [ ] capable of comprehending the primary facts and of drawing

[1] All citations to "PX-XXX" reference Plaintiffs' exhibit list

correct conclusions from them.'" *U.S. ex rel. Anti-Discrimination Ctr. v. Westchester Cnty.*, No. 06 Civ. 2860 (DLC), 2009 WL 1110577, at *1 (S.D.N.Y. Apr. 22, 2009) (second alteration in original) (quoting *Castillo*, 924 F.2d at 1232); *see also United States v. Mejia*, 545 F.3d 179, 194 (2d Cir. 2008) ("Testimony is properly characterized as 'expert' only if it concerns matters that the average juror is not capable of understanding on his or her own."). In this bench trial, the Court is perfectly capable of evaluating all of the evidence relating to the e-books market and actions taken by Publisher Defendants prior to Apple's entry. Professor Gilbert's factual narrative, divorced from any economic analysis, provides no "specialized knowledge" that "will help the trier of fact to understand" such evidence. Fed. R. Evid. 702(a). *See also Taylor v. Evans*, No. 94 Civ. 8425, 1997 WL 154010, at *2 (S.D.N.Y. Apr. 1, 1997) (excluding expert opinion "presenting a narrative of the case which a lay juror is equally capable of constructing.").

Other district courts have excluded Professor Gilbert's economic opinion for the same impermissible fact finding. In *Hynix Semiconductor v. Rambus, Inc.*, the court excluded Professor Gilbert from testifying on "questions of fact on which an economic expert's opinion is not helpful," finding that his report "recites some assumed facts and argument but contains no analysis." 2008 WL 73689, at *15.

To the extent Professor Gilbert engages in permissible fact finding, his testimony should be similarly excluded in this District as outside the realm of proper expert testimony. *See In re Rezulin Prods. Liab. Litig.*, 309 F. Supp. 2d 531, 546–47 (S.D.N.Y. 2004) (excluding expert testimony as improper "because it describes 'lay matters which a jury is capable of understanding and deciding without the expert's help'" where the expert "merely repeated facts or opinions stated by other potential witnesses or in documents produced in discovery" and "drew simple inferences from documents produced in discovery."); *The Pension Comm. of the*

Univ. of Montreal Pension Plan v. Banc of America Securities LLC, 691 F. Supp. 2d 448, 469 (S.D.N.Y. 2010) (excluding expert from testifying regarding nature of alleged fraud because "Plaintiffs' fact witnesses and counsel will undoubtedly describe the alleged fraud at trial and allowing Weiser to testify as an expert on that subject is likely to improperly bolster those descriptions" and would be "unduly prejudicial"). Furthermore, his factual narrative constitutes "a needless presentation of cumulative evidence" and a "waste of time" under Federal Rule of Evidence 403. *Dukagjini*, 326 F.3d at 54.

B. Professor Gilbert's Conclusions Related to e-book Output In The Alleged Relevant Market Should Be Excluded

In a market where output is rising, even when some prices rise, proof of an output restriction is necessary to sustain a claim of anticompetitive effects. *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 233 (1993) ("[s]upracompetitive pricing entails a restriction in output"). In such a market, output "can only have been restricted in the sense that it expanded at a slower rate than it would have" absent the alleged anticompetitive conduct. *Id.* Professor Gilbert purports to show this is true of the ebook market when he opines that (1) the Apple agency agreements caused a "net reduction in volume" of e-book sales, based on an analysis of two-week periods before and after agency, and (2) "ebook output grew more slowly after the switch to agency than before." As the Supreme Court has emphasized, however, "[s]uch a counterfactual proposition is difficult to prove in the best of circumstances." *Brooke Grp.*, 509 U.S. at 233. Dr. Gilbert's unreliable conclusions do not provide the required proof.

1. Professor Gilbert's Empirical Analysis Related to Output is Unreliable

Professor Gilbert's opinion that the Apple agency agreements caused a "net reduction in volume" (Ex. PX-0821 ¶ 75) of e-book sales is premised on a patently unreliable empirical analysis and should be excluded. Professor Gilbert reaches this conclusion by comparing sales

of certain e-book titles over an artificial two-week period in March 2010 (before agency) with sales of those same titles in a second two-week period in April 2010 (after agency). Based on this arbitrary time-frame, he purports to find that sales for four of the five Publisher Defendants decreased, non-Defendant publishers' sales increased, and overall there was a net decrease in sales. Professor Gilbert also relies on this analysis to support other sweeping conclusions, including that "the higher prices from agency reduced total ebook sales" (Ex. PX-0821 ¶ 185). His empirical analysis, however, has fatal empirical and conceptual flaws.

First, Professor Gilbert offers no reliable, generally-accepted methodology to support his arbitrary assumptions and calculations. The two-week before-and-after snapshot of the market he "studies" is an irrational, unfounded, and litigation-driven device that cannot be presented to the fact-finder as a reliable analysis. The unreliability of Professor Gilbert's approach can be demonstrated by making small adjustments to the placement of the 2-week "pre" and "post" agency windows that he compared in his analysis. Comparing the same "before" period selected by Professor Gilbert, to an "after" period that is two weeks later than the one selected by Professor Gilbert establishes that net e-book sales were *higher* in the post-agency period. This result – which applies the same methodology used by Professor Gilbert during a slightly different time period – is contrary to Professor Gilbert's conclusion that output *declined* as a result of agency. Professor Gilbert acknowledged this shortcoming in his methodology. He does not dispute that it is possible to find an increase in total output depending on where you draw the arbitrary two-week windows. Snyder Decl., Ex. A at 347:15-17. Professor Gilbert's irrational two-week before-and-after opinion should be excluded as unreliable on this basis alone.

Second, another defect in Professor Gilbert's analysis is that it is taken over so short a time period that it cannot be used to argue credibly that the agency agreements had an

anticompetitive effect, especially in light of the overwhelming evidence that the volume of e-book sales continued to grow at very high rates following the implementation of the agency agreements. Professor Gilbert's analysis and conclusions regarding reduced output *in the alleged relevant market* is based on 0.4% of the sales of trade e-books during the period April 2010 through March 2012. [See Burtis Trial Affidavit]

To prove "harm to the whole market," *Capital Imaging Assocs., P.C. v. Mohawk Valley Medical Assocs.*, 996 F.2d 537, 543 (2d Cir. 1993), expert testimony in antitrust cases must "incorporate all aspects of the economic reality of the . . . market" or else such "deficiencies in the foundation of the opinion [and] the expert's resulting conclusions" are inadmissible as "mere speculation." *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1057 (8th Cir. 2000); *see also Blue Dane Simmental Corp. v. American Simmental Ass'n*, 178 F.3d 1035, 1040 (8th Cir. 1999) (affirming district court's exclusion of expert testimony where the expert "attributed the entire difference in market price" of a particular cattle breed to the introduction of a certain subset of cattle "despite the fact that these animals made up a tiny fraction of the market"). Professor Gilbert's cropped snapshot of less than 1% of the entire alleged relevant market does not encompass "all aspects of the economic reality" of the e-books market. It cannot serve as a helpful basis to draw conclusions about the alleged anticompetitive effects of the alleged conspiracy on the alleged relevant market.

Third, Professor Gilbert fails to account for the fact that sales of a particular title will typically decline over time, a phenomenon that Professor Ashenfelter acknowledges. Snyder Decl., Exhibit B (Ashenfelter Deposition Transcript) at 162:19-164:7. Performing Professor Gilbert's same comparison for different two week periods *prior* to the agency agreement shows

that sales of a title typically decline over time.[2] Similarly, Penguin's sales, which were not included in Professor Gilbert's analysis because Penguin had not implemented an agency agreement with Amazon during the time period studied, also experienced an overall decline in sales as well. It is therefore clear that the age of the titles affect sales volume over time and that Professor Gilbert's analysis, which ignores this fact, cannot be relied upon to draw conclusions about the general impact of agency on e-book sales.

2. Professor Gilbert's Opinion Regarding Rate of Growth in Output is Not Reliable

Professor Gilbert acknowledges the rapid growth of e-book sales in the relevant market before and after agency, but opines that "ebook output grew more slowly after the switch to agency than before." The pre-agency growth rate was characteristic of a young, dynamic market, based on a starting point of relatively few e-book sales. It is entirely unremarkable that such a growth-rate would slow and, as Professor Gilbert concedes, a 368% growth rate (as calculated by him in the year prior to agency) was not sustainable. Snyder Decl., Ex. A at 361:5-24. Professor Gilbert admits that he cannot conclude that the slowing growth rate is due to the adoption of the agency contracts. *Id.* at 358:21-24.

Given the rapid growth of e-book sales before and after agency, output "can only have been restricted in the sense that it expanded at a slower rate than it would have" absent the agency model. *Brooke Grp.*, 509 U.S. at 233 . Professor Gilbert offers no opinion that the alleged relevant market would have expanded at a greater rate but-for the Apple agency agreements. Therefore, Professor Gilbert's testimony regarding the slowing rate of growth in

[2] For example if you compare sales over the two weeks ending January 30, 2010, and February 6, 2010, with sales over the two weeks ending March 6, 2010, and March 13, 2010, there is a net decrease in output.

output is unhelpful and, at best, will mislead the fact finder. *See* Fed. R. Evid. 403. It should be excluded from presentation at trial.

IV. CONCLUSION

Apple respectfully requests that this Court grant its motion to preclude Professor Gilbert from offering the opinions discussed herein.

Dated: New York, New York
April 26, 2013

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