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 OPPOSITION TO PLAINTIFFS' MOTION IN LIMINE TO PRECLUDE PROFESSOR KEVIN M. MURPHY FROM OFFERING AT TRIAL TESTIMONY ON HIS OPINIONS 1 TO 3

I. INTRODUCTION

One of Apple's expert economists, Professor Kevin Murphy, has concluded that "*as a matter of economics*, all the actions taken by Apple in connection with its entry into e-book retailing are consistent with it acting independently of any conspiracy with publishers." Murphy Decl. ¶ 8 (emphasis added). Plaintiffs move to exclude Professor Murphy from testifying to this conclusion, and related opinions 1 to 3 of his Initial Report, on the basis that the economic standard applied by Professor Murphy is not legally relevant in this case. Plaintiffs' motion—like their pre-trial brief—rests on a gross distortion of the applicable law. Professor Murphy's testimony on opinions 1 to 3 is highly probative of a central question in this case—whether the challenged provisions of the Apple agency agreements tend to exclude the possibility that Apple acted independently. The Court should deny the motion to exclude his testimony.

II. ARGUMENT

A. PLAINTIFFS' ARGUMENT THAT DR. MURPHY'S TESTIMONY IS BASED ON AN ERRONEOUS LEGAL STANDARD IS BASELESS

Plaintiffs' feeble effort to exclude Dr. Murphy's testimony by attempting to avoid the applicable legal standard under *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984), must be rejected. As explained more fully in Apple's Opposition to Plaintiffs' Pre-Trial Memorandum of Law, which Apple incorporates herein by reference, Plaintiffs distort both the facts and the law when they argue that it "is not relevant to any issue before the Court" that Apple acted consistent with its own economic interests when negotiating the agency agreements. Mot. 3.

First, contrary to Plaintiffs' contention, not a single piece of Plaintiffs' evidence meets the legal requirements for "direct evidence" of Apple's participation in the alleged conspiracy. *See* Opp. Br. Section I.

Second, Plaintiffs' assertion that *Monsanto*'s "tends to exclude" standard does not apply—and that evidence of independent economic self-interest carries no weight—where the alleged conspirators are in a vertical relationship is wholly contrary to binding Supreme Court and Second Circuit precedent. Indeed, *Monsanto* itself was a *vertical relationship case. See* Opp. Br. Section II. Plaintiffs' reliance on a single footnote from *Fineman v. Armstrong World Industries, Inc.*, 980 F.2d 171, 214 n.32 (3d Cir. 1992), and a gross misrepresentation of *United States v. General Motors Corp.*, 384 U.S. 127 (1966), do not show otherwise.[1] Mot. 2, 6. And Plaintiffs miss the point completely by remarking that they are "hard-pressed to imagine" whether a vertical actor would ever join or orchestrate "a conspiracy where it was *not* in its economic self-interest to do so." Mot. 6. The proper inquiry under *Monsanto* is whether Apple acted in its *independent* economic self-interest—the overwhelming evidence in this case proves that it did.

Third, Plaintiffs invoke *Interstate Circuit, Inc. v. United States*, 306 U.S. 208 (1939), and *Toys "R" Us, Inc. v. Federal. Trade Commission*, 221 F.3d 928 (7th Cir. 2000), as though they offer a freestanding means of proving a section 1 conspiracy. Mot. 7. That is flatly incorrect.

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[1] Plaintiffs' quotation from *General Motors* rewrites that case and distorts its meaning. *See* Mot. 2. Plaintiffs state, "Nor is it of consequence for this purpose whether [**the challenged conduct was**] economically desirable [**to one of the conspirators]**." *Id.* (additions bolded). The actual quotation is, "Nor is it of consequence for this purpose whether the ***'location clause' and franchise system*** are lawful or economically desirable," *Gen. Motors*, 384 U.S. at 142 (emphasis added). Plaintiffs' reference to "the challenged conduct" is a complete misstatement of the facts: the "location clause" and "franchise system" were *not* the challenged conduct in that case. *See id.* at 140.

Neither case permits Plaintiffs to short-circuit *Monsanto*; both cases were decided on proof of critical facts not present in this case. *See* Opp. Br. Part IV.

Accordingly, Plaintiffs' bald assertion that "Dr. Murphy's testimony is premised on clear legal error" and thus "not relevant" (Mot. 3) is facially meritless and must be rejected.

B. PROFESSOR MURPHY'S TESTIMONY IS WELL WITHIN HIS SPECIALIZED KNOWLEDGE

Plaintiffs also claim that Professor Murphy's first three opinions should be excluded because he applied a "legal standard," and not "economic[]reasoning," to the record evidence in this case. Mot. 2. Not true. Plaintiffs wrongly equate economics with econometrics. *See* Mot. 4 ("Dr. Murphy did not engage in any empirical or econometric analysis."). Whether an expert has rendered an economic opinion does not depend on the presence of an econometric or other numerical analysis. If the rule was otherwise, many of the opinions offered by the DOJ's expert, Professor Gilbert, and nearly all of the opinions offered by the States' expert, Professor Baker, would be excludable on that ground alone. Whether Apple's conduct was consistent with its independent business interests (absent a conspiracy) is a question that is susceptible to economic analysis. Economists can and do testify as to whether a defendant's challenged conduct is contrary to its unilateral self-interest, i.e., its economic self-interest. *See, e.g., Fed. Trade Comm'n v. Abbott Labs*., 853 F. Supp. 526, 534-35 (D.D.C. 1994) (crediting expert testimony that challenged conduct was in defendant's unilateral and independent self-interest and that the government "failed to show . . . that [defendant's] action was the result of collusion . . . "); *see also* ABA Section of Antitrust Law, *Proof of Conspiracy Under Federal Antitrust Laws* 223-24 (2010) ("[E]conomists can bring their expertise to bear in assessing whether a competitor's conduct is in its unilateral, economic self-interest. Put differently, an economist can help answer

the following question: Are firms behaving in a manner that would be rational (i.e., that would increase their profits or net worth) absent a collusive agreement?").

That is what Professor Murphy did here. Opinion 1 is that an economic evaluation of whether the evidence tends to exclude the possibility that Apple behaved independently should consider the economic incentives Apple faced. Initial Report ¶ 11. Opinion 2 is that Apple's negotiation of the Apple agency agreements was consistent with its historical practices and economic incentives absent a conspiracy. Initial Report ¶ 12. And Opinion 3 is that the challenged provisions in the Apple agency agreements were in Apple's economic self-interest absent any participation in or knowledge of an alleged conspiracy among the publishers. Initial Report ¶ 14.

The fact that Professor Murphy framed the relevant economic question and his opinions in a way that is congruent with the legal standard is not a basis for exclusion.[2] Indeed, as demonstrated in Apple's motion to exclude the testimony of the Plaintiff States' expert, Professor Baker, the opposite is true: an expert's failure to offer testimony relevant to the proper legal standards can be fatal. *Williamson Oil Co., Inc. v. Philip Morris USA*, 346 F.3d 1287, 1323

[2] Cases cited by Plaintiffs at page 8 of their motion stand for the unremarkable proposition that an economist may not offer a legal conclusion. Professor Murphy does not offer any opinion on the legality of Apple's conduct. His opinions do not touch the ultimate issue of liability, even if they do go to issues of fact that are relevant to determining liability under the governing legal standard—whether Apple's conduct was consistent with it unilateral business interest absent conspiracy. Such testimony is not improper, as demonstrated by the very cases cited by Plaintiffs. *See United States v. Bilzerian*, 926 F.2d 1285, 1294 (2d Cir. 1991) (an expert may opine on "an issue of fact within the jury's province"); *United States v. Duncan*, 42 F.3d 97, 103 (2d Cir. 1994) (declining to exclude expert testimony that "merely posited factual conclusions which are not prohibited even if 'they embrace an ultimate issue to be decided by the jury'") (quoting *Bilzerian*, 926 F.2d at 1294); *see also* Fed. R. Evid. 704(a) ("An opinion is not objectionable just because it embraces an ultimate issue.").

(11th Cir. 2003) (affirming lower court's exclusion of Plaintiffs' expert opinion as irrelevant where expert did not differentiate between lawful behavior and collusive price-fixing).

In any event, Plaintiffs can only identify two fragments of Professor Murphy's Initial Report as evidence that his opinions are bereft of economic analysis. Mot. 8. They fault Professor Murphy's conclusion that Apple followed a "business strategy . . . of negotiating simultaneously, but independently, with the major publishers . . . ." Mot. 8 (quoting Initial Report ¶ 46). They also attack Professor Murphy's conclusion that Apple's negotiations with the publishers "by themselves suggest neither anticompetitive effect nor intent" and "do not suggest Apple's participation in or knowledge of a conspiracy." Initial Report ¶ 40; *see also* Mot. 8. Neither of these snippets reflects improper "inferences" about Apple's intent or motive, as Plaintiffs appear to claim. Rather, these statements are part of Professor Murphy's broader conclusions, drawn from analyzing economic *facts*, that Apple's strategy for negotiating the agency agreements was consistent with Apple's historic practice and in Apple's *economic interest*, absent the existence of a conspiracy. Initial Report ¶¶ 29-40, 41-46. As described, this is a permissible mode of economic inquiry and Plaintiffs' cases are not to the contrary.[3]

[3] In *Mid-State Fertilizer Co. v. Exchange National Bank of Chicago*, 877 F.2d 1333 (7th Cir. 1989), summary judgment for defendants was granted where plaintiffs' expert affidavit contained seven one-sentence conclusions and "no facts, no hint of an inferential process, no discussion of hypotheses considered and rejected." *Id.* at 1338-40. The Court held that "[a]n expert who supplies nothing but a bottom line supplies nothing of value to the judicial process." *Id*. at 1340. In contrast, Professor Murphy has served Plaintiffs with 46 pages of expert analysis and submitted a detailed declaration to the Court, describing his conclusions and the bases for his conclusions. Plaintiffs' reliance on *In re Rezulin Products Liability Litigation*, 309 F. Supp. 2d 531 (S.D.N.Y. 2004), is similarly misplaced. There, the court excluded opinions that "have no basis in any relevant body of knowledge or expertise." *Id*. at 546. In contrast, Professor Murphy's opinions about whether Apple acted in its unilateral self-interest absent conspiracy is a question that is susceptible to economic analysis, as discussed above.

III. CONCLUSION

Apple respectfully requests that this Court deny plaintiffs' motion to preclude Professor Murphy from offering opinions 1 to 3 at trial.

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Respectfully submitted,

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