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VIA ELECTRONIC MAIL

The Honorable Denise L. Cote
United States District Judge
United States District Court for the Southern District of New York
500 Pearl Street, Room 1610
New York, New York 10007-1312

Re: United States v. Apple Inc., 12 Civ. 2826 (DLC); Texas v. Penguin Group (USA) Inc., 12 Civ. 3394 (DLC)

Dear Judge Cote:

We submit this letter in response to Plaintiffs' continued efforts to exclude the testimony of Apple's experts, Drs. Kevin Murphy and Michelle Burtis.

Dr. Murphy. Plaintiffs admit that "Apple has excised or modified significant portions of Dr. Murphy's testimony." Yet they assert the revised declaration is "based on an erroneous legal standard" without anywhere identifying the supposedly erroneous standard. In fact, Dr. Murphy's opinions are fully consistent with the governing legal standard in *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984).[1] Dr. Murphy is not opining (and Apple is not arguing) that independent self-interest renders a defendant immune from a conspiracy claim. Indeed, as the Court stated last week when this point was reaffirmed, "So, I don't think we have a disagreement then." Tr. 53:9-19. The Court later stated that it was "obviously . . . happy to receive at trial evidence from Apple that it acted consistent with its own independent economic interest." Tr. 59:6-8. Expert testimony on this point is routinely allowed and wholly proper in antitrust cases. *See, e.g., FTC 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," so the government "failed to show . . . that [defendant's] action was the result of collusion"); ABA Section on Antitrust, *Proof of Conspiracy Under Federal Antitrust Laws* 211 (2010) ("economists can assess whether observed market outcomes are consistent with independent action").

[1] Apple believes that Dr. Murphy's original declaration was also fully consistent with *Monsanto* and has moved for reconsideration of the Court's ruling.

Plaintiffs' remaining objections lack merit. The motion was granted as to *only one* of Dr. Murphy's opinions, not the entire declaration. Tr. 52:7-10 ("I struck one opinion."). Moreover, the revised testimony confirms that Dr. Murphy reaches his opinions through a series of assumptions. The DOJ's expert, Dr. Gilbert, is being allowed to testify regarding the question of whether challenged conduct is "economically rational as unilateral actions," based on a description of facts treated as "a series of assumptions." Tr. 38:11-16. The Court should allow Dr. Murphy to tender an opinion on the same question on the same basis.

Dr. Burtis. Plaintiffs admit that Dr. Burtis has "deleted the conclusions" the Court excluded about the economic evidence being "inconsistent with Plaintiffs' allegations of anticompetitive harm."[2] Apple has not "buried" these in a new ¶ 56. That paragraph makes it clear that Dr. Burtis has rooted her conclusion in economic fact and has not limited her focus artificially to lengthy time "windows":

> Based on my extensive analysis of the empirical data, including a month-by-month price analysis resting on a comprehensive market database of over four years of transactional data covering hundreds of thousands of eBook titles and over half a billion transactions, it is my opinion that competition in the alleged relevant market (trade eBooks) has not been reduced by Apple's entry or the adoption of the agency model.

If Plaintiffs wish to contest the factual bases for this opinion, they may ask Dr. Burtis to "disclose those facts or data on cross-examination" under F.R.E. 705. She will direct them to the economic data already produced. For example, the fact that the post-agency decline in average e-book prices "was not the result of any pre-existing downward trend" does not (as Plaintiffs assert) constitute a new opinion. It is a description of Dr. Burtis's data (*e.g.*, DX-434, DX-435), which show the month-by-month evolution in average e-book retail prices.

The first sentence of what is now ¶ 19 of Dr. Burtis's testimony also fully complies with the Court's ruling. That sentence reads: "If the analysis was performed based on the one-year time period that Professor Gilbert uses to measure the 'long run effect of the switch to agency on eBook retail prices' by Publisher Defendants, my conclusion would be unchanged." "My conclusion" now refers to the conclusion in the preceding paragraph that the average retail price of e-books was lower during the post-agency period than during the pre-agency period. This conclusion was not excluded by the Court.

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[2] This no small matter; to the contrary, Apple has moved the Court for reconsideration. As Apple has explained in its motion, nothing about Dr. Burtis's conclusion regarding competitive effects is improper. It is supported by a reliable economic analysis of relevant market factors. See Mot. at 16-18.

Respectfully submitted,

Orin Snyder

OS/mrc

cc: All Counsel