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 REPLY IN SUPPORT OF ITS MOTION IN LIMINE TO EXCLUDE CERTAIN EXPERT TESTIMONY OF PROFESSOR RICHARD GILBERT

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I. INTRODUCTION

Apple's motion *in limine* demonstrates that Professor Gilbert's non-expert fact-finding and his opinions regarding the claimed effects of Apple's agency agreements on output should be precluded pursuant to Rules 403 and 702 of the Federal Rules of Evidence, and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 588-92 (1993). The DOJ has failed to muster any meaningful response.

First, the DOJ ignores case law (including from this court) making clear that Professor Gilbert's fact-finding, untethered from any economic opinions, is impermissible and inadmissible. Instead, the DOJ (1) asserts that Apple's motion lacked requisite specificity; (2) invokes Rule 26(a) of the Federal Rules of Civil Procedure 26(a), which is irrelevant to this analysis; and (3) contends that Professor Gilbert's fact-finding was merely "background" to "confirm" his empirical analysis. None of these arguments alters the analysis: testimony by Professor Gilbert that simply marshals the evidence and impermissibly seeks to usurp the role of the fact-finder should be excluded.

Second, and remarkably, Professor Gilbert's testimony now completely omits and thus *abandons* his prior opinion that the Apple agency agreements caused a "net reduction in volume" of e-books sales. *Compare* Gilbert Decl. ¶ 71 *with* PX-0821 ¶ 75 *and* PX-0822 ¶ 47. The DOJ's fervent attempts to defend what now amounts to non-existent direct testimony are as mystifying as they are convoluted. Rather than acknowledge that the proffered opinion was unreliable (and absent from Professor Gilbert's direct testimony), the DOJ describes Professor Gilbert's conclusions regarding output as "a minor point in his analysis." Opp. 7. The DOJ's retreat is obfuscation: it attacks Apple's experts and pointlessly defends the two-week time periods used in Professor Gilbert's (again, abandoned) output analysis. Efforts to salvage Professor Gilbert's

misleading conclusions related to a supposed post-agency reduction in the rate of growth of e-book output do not fare any better. That opinion, and any effort by Professor Gilbert to resurrect his conclusion related to a "net reduction in volume" of e-books sales, should be precluded.

II. PROFESSOR GILBERT'S FACTUAL NARRATIVE SHOULD BE EXCLUDED

A. Professor Gilbert's Testimony Improperly Draws Factual Conclusions Outside His Expertise

As Apple demonstrated in its motion *in limine*, "expert testimony should be excluded if the witness is not actually applying expert methodology." *United States v. Dukagjini*, 326 F.3d 45, 54 (2d Cir. 2002). An expert opinion that merely "present[s] a narrative of the case which a lay juror is equally capable of constructing" is inadmissible. *Taylor v. Evans*, No. 94 Civ. 8425, 1997 WL 154010, at *2 (S.D.N.Y. Apr. 1, 1997).

Professor Gilbert's testimony expressly—and repeatedly—violates this basic principle. It draws factual conclusions regarding Apple's and the publishers' motives and knowledge that bear no relationship to his proffered empirical and economic analysis. *See In re Rezulin Prods. Liab. Litig.*, 309 F. Supp. 2d 531, 546 (S.D.N.Y. 2004) (excluding expert opinions on "intent, motives or states of mind of corporations" and "the 'real motive' behind certain business transactions" as "hav[ing] no basis in any relevant body of knowledge or expertise"). In his own words, Professor Gilbert:

- Commits an entire section of his testimony to "describ[ing] the defendants' *expressed motivations* that were relevant to the negotiation of the Apple Agency Agreements" (Gilbert Decl. ¶ 10 (emphasis added));

- Concludes that he has "identified three *objectives* for [the publishers'] simultaneous adoption of the Apple agency model" based on "both *internal communications* and *communications between publishers*" (Gilbert Decl. ¶ 18 (emphasis added); *see also id.* ¶¶ 19-21);

- Finds that "Apple *understood* that it shared with defendant publishers a *common interest* in restricting price competition from Amazon and other e-retailers" (Gilbert Decl. ¶ 22 (emphasis added));

- Finds "[*f*]*rom my review of the record in this case*" that "defendant publishers entered into the Apple Agency Agreements in order to increase the retail prices of e-books" (Gilbert Decl. ¶ 48 (emphasis added); *see also id.* ¶¶ 49-51 (finding that the publishers "feared," "worried," and "expressed concern and . . . desire" regarding various matters));

- Finds from "[*m*]*y review of the record in this case*" that "Apple had a pair of goals that were in tension with each other" (Gilbert Decl. ¶ 54 (emphasis added)) and concludes that "Apple *wanted* to restrict inter-retailer price competition" (*id.* at 15);

- Finds based on "[*m*]*y reading of the record*" that "Apple *knew* that the defendant publishers would have preferred even higher caps, or no caps at all" (Gilbert Decl. ¶ 91 (emphasis added)); and

- Finds based on "*the documents that I have reviewed*" that "Apple and the defendant publishers *expected* . . . that the defendant publishers would move Amazon and all other retailers to the agency model" (Gilbert Decl. ¶ 99 (emphasis added); *see also id.* ¶¶ 100-09 (quoting and citing to various record documents).

None of this testimony is central to Professor Gilbert's economic conclusions and none constitutes an expert's "specialized knowledge" that "will help the trier of fact to understand" the record evidence, Fed. R. Evid. 702(a), or that "concerns matters that the average juror is not capable of understanding on his or her own," *United States v. Mejia*, 545 F.3d 179, 194 (2d Cir. 2008). Far from it—Professor Gilbert does exactly what the law says an expert may *not* do: speculate on motives, "merely repeat[] facts or opinions stated . . . in documents produced in discovery," and "dr[aw] simple inferences from documents produced in discovery." *Rezulin Prods.*, 309 F. Supp. 2d at 546-47. Professor Gilbert's fact-finding narrative has been previously excluded and it should not be permitted here. *See Hynix Semiconductor Inc. v. Rambus Inc.*, No. CV-00-20905, 2008 WL 73689, at *15 (N.D. Cal. Jan. 5, 2008) (excluding Professor Gilbert's testimony on issues that "are questions of fact on which an economic expert's opinion is not helpful").

B. The DOJ's Attempts To Justify Professor Gilbert's Record-Reading Must Be Rejected

The DOJ does not contest that an expert's mere recitation of information or purported inferences from record documents impermissibly usurps the role of the fact-finder. It instead presents a parade of non-sequiturs, none of which supports admission of Professor Gilbert's selective record-reading testimony.

First, the DOJ's argument that Apple has not specified what portion of Professor Gilbert's testimony it seeks to exclude is wrong—and the DOJ's own briefing admits as much. The DOJ's opposition expressly recognizes that Apple's motion *in limine* "applies only to a subset of Professor Gilbert's testimony" (Opp. 3), and also expressly identifies *which* subset: "(1) [a] descri[ption of] conditions in the e-books market prior to Apple's entry, and (2) a discussion of the negotiation and implementation of the Apple Agency Agreements" (Opp. 4). This is a near *verbatim* statement of Apple's specific objections to Professor Gilbert's anticipated testimony.[1] Indeed, the DOJ insists (albeit erroneously) that Dr. Gilbert provided these very descriptions "to provide a proper context for his empirical analysis." Opp. 4. This case therefore bears no resemblance to cases cited by DOJ (Opp. 3-4) finding a motion *in limine* to be "too sweeping in scope" and to "lack[] the necessary specificity with respect to the evidence to be excluded."[2]

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[1] *Compare* Gilbert Mot. 4 (noting that "Professor Gilbert's written submissions do little more than provide an expert's imprimatur on the DOJ's factual allegations . . . 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*" (emphasis added)).

[2] *Nat'l Union Fire Ins. Co. v. L.E. Myers Co. Grp.*, 937 F. Supp. 276, 287 (S.D.N.Y. 1996) (finding motion *in limine* to lack sufficient specificity where movant sought to exclude "any extrinsic evidence as to the meaning of the various policy provisions"); *accord Baxter Diagnostics, Inc. v. Novatek Med., Inc.*, No. 94 Civ. 5220, 1998 WL 665138, at *3 (S.D.N.Y. Sept. 25, 1998) (parties' motions sought to exclude "all 'evidence of [plaintiff's] financial condition'" and any "evidence on its punitive damages claim").

Further, even if such cases were relevant (and they are not), at best, they provide grounds for postponing judgment on Apple's motion until trial. Both cases on which DOJ relies *declined* to deny the motions at issue and merely decided to "reserve judgment on the motion until trial." *Baxter*, 1998 WL 665138, at *3; *see also Nat'l Union Fire Ins. Co.*, 937 F. Supp. at 287 (same). But deferral is unnecessary where, as here, the DOJ has proffered Professor Gilbert's direct testimony.

Second, the DOJ cannot invoke Rule 26(a) of the Federal Rules of Civil Procedure as a basis for smuggling inadmissible fact-finding. *See* Opp. 4; *cf.* Fed. R. Civ. P. 26(a)(2)(B). Courts have made clear that whether a testifying expert's report meets Rule 26(a)'s requirements "should be distinguished from the question of . . . admissibility under Federal Rule of Evidence 702." *Conte v. Newsday, Inc.*, No. CV 06-4859, 2011 WL 2671216, at *4 (E.D.N.Y. July 7, 2011); *see also Giladi v. Strauch*, No. 94 Civ. 3976, 2007 WL 415365, at *7-10 (S.D.N.Y. Feb. 6, 2007) (performing separate inquiries under Rule 26(a) and Rule 702). "Whereas Rule 26(a) guards against the presentation of sketchy and vague expert reports that provide little guidance to the opposing party as to an expert's testimony, Rule 702 guards against the presentation of insufficiently reliable evidence to the finder of fact." *Conte*, 2011 WL 2671216, at *4. As a consequence, that Professor Gilbert may have met Rule 26's requirements is irrelevant to whether his fact-finding statements are admissible.[3]

[3] DOJ attempts to brush under the rug Professor Gilbert's non-expert conclusions by suggesting that "the bulk of" "the facts that Apple complains Professor Gilbert includes in his report" are "not even in dispute." Opp. 4 & n. 7. The DOJ plainly misquotes Apple's papers in doing so. Contrary to the DOJ's proffered comparisons, while Professor Murphy made the unremarkable observation that Amazon "sold a large share of e-books" (Murphy Decl. ¶ 47), Apple pointed out that Professor Gilbert stated without any supporting citation or analysis that "Amazon had the largest share of ebook sales *due in part to its strategy of charging low prices for ebooks*" (Gilbert Mot. 5 (quoting Ex. PX-0821 ¶ 51) (emphasis added)). Likewise, Professor Murphy's misquoted statement, based on economic analysis, reads: "[Amazon's] $9.99 (below wholesale cost) pricing of many new and popular e-books threatened to discourage entry by Apple and other retailers." Murphy Decl. ¶ 59. This hardly expresses the same view as Apple's citation of Professor Gilbert's judgment that Amazon "priced its

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Finally, the DOJ's argument that "the facts included in Professor Gilbert's report are not intended to be substitutes for economic analyses" and merely "provide confirmation" of and "background" for his analysis is contrary to the substance of his testimony.[4] Opp. 5. Professor Gilbert's factual conclusions regarding the defendants' motive, intent, and state of mind (*see* Section II.A, *supra*) are based—in Professor Gilbert's own words—on a rote review of documents. They have *nothing* to do with the list of "extensive empirical work and economic analysis" that DOJ claims Professor Gilbert performed (Opp. 2-3).[5] *See Rezulin Prods.*, 309 F. Supp. 2d at 546-47.

As the DOJ's own cited case makes clear, where there is no related economic analysis applied to the alleged "background information," "it is unnecessary for an expert to testify about" mere citations to the record evidence.[6] *U.S. Info. Sys., Inc. v. Int'l Bhd. of Elec. Workers Local Union No. 3*, 313 F. Supp. 2d 213, 237 (S.D.N.Y. 2004). Professor Gilbert's improper fact conclusions must be excluded.

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ebooks very competitively" (Mot. 5 (quoting PX-0821 ¶ 31)), especially where Professor Gilbert apparently believes "competitive" pricing has varying definitions (Gilbert Decl. ¶ 57).

[4] Indeed, Professor Gilbert devotes an entire separate section to "describ[ing] the background of the case," "the companies involved in the e-book industry," and "an overview of the key events in question." Gilbert Decl. ¶ 9; *see also id.* Part III.

[5] DOJ's attempts to tie Professor Gilbert's factual conclusions to economic analysis only illuminates the impropriety of Professor Gilbert's testimony. Opp. 5 n.9. Professor Gilbert's conclusion based on "the documents [he] reviewed" regarding whether the defendants subjectively "expected" Amazon and other retailers to move to agency (Gilbert Decl. ¶ 99) is qualitatively different from—and unrelated to—his conclusions regarding the publisher's self-interest based on his economic analysis of the Publisher Defendants' short-term profits (Gilbert Decl. ¶ 83). Nothing about the former can be said to "confirm" the latter.

[6] Tellingly, Professor Gilbert admitted that he ignored economic analysis when it failed to support his (and the DOJ's) preferred interpretation of record evidence. In his deposition, Professor Gilbert testified that he prepared an empirical model to quantify the claimed incentives created by the MFN, but decided to exclude it from his analysis in his reports. Snyder Decl., Ex. A at 291:13-25; 292:11-16. Instead of relying on empirical analysis, he opted to rely on his interpretation of a selected group of documents to support the DOJ's position that the retail price MFN in the Apple agency agreements created "incentives" sufficient to lead the publishers to convert Amazon to agency. *See, e.g.*, Gilbert Decl. ¶¶ 102-104. But as demonstrated by Professor Klein's empirical analysis, quantification of the "incentives," which Prof. Gilbert tellingly omitted from his testimony, shows they are actually trifling and inconsequential. Klein Decl. ¶¶ 14-29.

III. PROFESSOR GILBERT'S OUTPUT ANALYSIS IS UNRELIABLE

A. The DOJ Has Abandoned Its Only Evidence Of Decreased Output In The Alleged Relevant Market

Professor Gilbert's opinion that the agency agreements caused a "net reduction in volume" of e-book sales, which he repeatedly stated in his expert reports (PX-0821 ¶ 75; PX-0822 ¶ 47), is now wholly absent from his direct testimony.[7] And the opinion is not cited in any of the DOJ's pre-trial briefing. That opinion now has been abandoned and thus is not in this case. Nevertheless, the DOJ tries to have its cake and eat it too: having dropped the flawed opinion, the DOJ feebly attempts to defend it by claiming that "Professor Gilbert's empirical work properly focused primarily on the price effects arising from the Apple Agency Agreements" (Opp. 6), and that Professor Gilbert's findings regarding a purported market-wide decrease in output was "a minor point in his analysis" (Opp. 7).

Apple demonstrated in its motion *in limine* that Professor Gilbert does not provide a reliable basis for establishing that the agency agreements restricted output in the relevant market. Mot. 7-10. The DOJ appears to take the position that because it has supposedly demonstrated "that prices increased" on some books, it need not show output declined in order to prove an anticompetitive effect. Opp. 7. But the DOJ is now left emphatically with no evidence of decreased output or increased prices in the alleged relevant market. Indeed, the DOJ has not offered any evidence of market-wide price *increases* and has not rebutted the conclusion of one of Apple's experts, Dr. Burtis, that *the average retail price of e-books in plaintiffs' alleged*

[7] The DOJ's reversal on this point was prudent because the result of Professor Gilbert's test (i.e., whether it has a net increase or decrease in output) changes depending on where one draws the two-week pre- and post-agency windows, thus rendering this opinion inherently unreliable. See Mot. 7-8. The DOJ does not challenge that fact. Nor could it, as Professor Gilbert has already conceded this fundamental shortcoming. Snyder Decl., Ex. A. at 347:15-17 ("I will agree that depending upon where you draw the windows it is possible to find a positive effect on total output"). Although it does not appear in his direct testimony, Professor Gilbert should be precluded from offering any opinion at trial regarding a "net reduction in volume" on cross-examination or redirect.

relevant market declined following agency. *See* Burtis Decl. ¶¶ 19-23. Now that the DOJ has seemingly abandoned its only (albeit unreliable) "evidence" of a market-wide decrease in output, it has no evidence of anticompetitive harm across its alleged relevant market. The DOJ, of course, bears the burden of "showing that the challenged action has had an *actual* adverse effect on competition as a whole in the relevant market." *Capital Imaging Assocs., P.C. v. Mohawk Valley Med. Assocs., Inc.*, 996 F.2d 537, 543 (2d Cir. 1993). It cannot do so on this record.[8]

Having left Professor Gilbert's supposed "net reduction in volume" opinion on the cutting room floor, it is unclear why the DOJ persists in defending Professor Gilbert's use of arbitrary and unreliable two-week windows to measure "whether agency increased the output of those who adopted agency relative to those who did not." Opp. n.16. But rather than provide any coherent justifications for Professor Gilbert's approach, the DOJ dedicates several paragraphs to rearguing its motion to exclude Dr. Burtis' opinions related to prices and output in the alleged relevant market. *See* Opp. 8-9. Those arguments have been fully rebutted and do not need to be re-aired here.[9]

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[8] The DOJ once again misrepresent the law in asserting that *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993) "merely observ[ed] an economic truism." Opp. 6. In *Brooke Group*, the Supreme Court made clear that where "output expand[s] at a rapid rate following [the alleged conduct], output . . . can only have been restricted in the sense that it expanded at a slower rate than it would have absent [that conduct]," and that "[s]uch a counterfactual proposition is difficult to prove in the best of circumstances." 509 U.S. at 233. While the Court further noted that evidence that the alleged conduct did not restrict output was "not dispositive," it did so in speculating that output could "have tripled instead of doubled," but for the alleged conduct, but there was no "concrete evidence of this." *Id*. at 234.

Conwood Co., L.P. v. U.S. Tobacco Corp., 290 F.3d 768 (6th Cir. 2002), on which the DOJ relies, is not to the contrary. *Conwood* involved an appeal from a jury verdict for the plaintiff and the district court's denial of a motion for judgment as a matter of law based on the sufficiency of the evidence. *Id*. at 781. And under the highly deferential standard that applies on a challenge to the sufficiency of the evidence, *id.*, the court found that plaintiffs had indeed provided concrete evidence to show that "the restricted growth resulted from [defendant's] conduct," *id*. at 790.

[9] *See* Apple Inc.'s Opp. Pls.' Mot *in Limine* to Preclude Dr. Michelle Burtis Offering Trial Op. on Competitive Effects, May 3, 2013.

In any event, the DOJ is wrong that Professor Gilbert's use of short, two-week windows to measure changes in output is the obviously correct methodology in this case. The very treatise on which the DOJ relies cautions that "short-horizon methods are quite powerful if (but only if) the abnormal performance is concentrated in the event window." S.P. Kothari & Jerold B. Warner, *Econometrics of Event Studies*, in 1 *Handbook of Corporate Finance: Empirical Corporate Finance* 14 (B. Espen Eckbo ed., 2007). Thus, if the effects of the "abnormal performance," *i.e.*, the agency agreements, lasted longer than Professor Gilbert's short event window, the short-horizon method fails. Here again, the DOJ's views are murky. In its Complaint, the DOJ alleges that the agency agreements "has had and will continue to have anticompetitive effects." DOJ Compl. ¶ 102. But the DOJ now announces that the "direct effects of the conspiracy . . . occurred within a few days." Opp. 8. This about face is perplexing at best.

Also misleading is the DOJ's assertion that Professor Gilbert's short windows accounted for various industry factors such as "the rapid maturation of the industry and any life-cycle trend"—whatever that means. Opp. 8. Professor Gilbert's output analysis has been shown to produce *opposite results* for only slightly different periods. *See* Gilbert Mot. 7-8; Burtis Decl. ¶ 35. Thus, despite the claim that two-week windows "decreased the 'noise' . . . that may have affected e-book prices and sales," (Opp. 8) other factors, unaccounted for by Professor Gilbert, certainly continued to play a role in changes in output as he has measured them. *See* Burtis Decl. ¶ 35.

B. Professor Gilbert's Opinion Regarding Rate Of Growth In Output Is Not Reliable

The best Professor Gilbert can do is claim that the growth in output fell from extraordinary levels to somewhat less extraordinary levels after the agency agreements went into effect. *See* Gilbert Decl. ¶ 233 ("paid e-book purchases of all titles at all e-retailers grew *more*

slowly in the year following the switch to agency than during the year prior to agency"). This is a comparison that Professor Gilbert previously conceded cannot be relied upon to draw conclusions about the effect of the agency agreements. Snyder Decl., Ex. A at 358:21-24 ("I wouldn't conclude that the slowing of the growth from the earlier number to the later number is necessarily due to the adoption of agency contracts. . . .").

The DOJ's only rejoinder is to change the subject. It argues that Dr. Burtis failed to establish that the continued *growth* in e-book sales is attributable to the Publisher Defendants' adoption of the agency agreements. Opp. 9-10. But plaintiffs—not defendants—bear the burden of proof in establishing an actual adverse effect on competition. *See Capital Imaging*, 996 F.2d at 543; *see also K.M.B. Warehouse Distribs., Inc. v. Walker Mfg. Co.*, 61 F.3d 123, 127 (2d Cir. 1995). Moreover, as the Supreme Court has emphasized, that output allegedly "expanded at a slower rate than it [otherwise] would have" is a "counterfactual proposition" that "is difficult to prove in the best of circumstances." *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 agency agreements; his testimony regarding the slowing rate of growth in output should be excluded. It is unhelpful and will mislead the fact finder. *See* Fed. R. Evid. 403.

V. CONCLUSION

For the foregoing reasons, the Court should grant Apple's motion *in limine*.

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