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. KEVIN MURPHY FROM OFFERING AT TRIAL TESTIMONY ON HIS OPINIONS #1-#3

INTRODUCTION

Faced with overwhelming direct and circumstantial evidence that it participated in a horizontal price-fixing conspiracy with Publisher Defendants, Defendant Apple, Inc. attempts to avoid liability by extending *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984), far beyond its holding. According to Apple, *Monsanto* holds that Plaintiffs cannot make their conspiracy case against Apple unless they present evidence that tends to exclude the possibility that Apple was acting in its own economic self-interest when it negotiated and agreed to the Apple Agency Agreements. Having no case law support of its reading of *Monsanto*, Apple instead relies on its economic expert, Dr. Kevin Murphy, to suggest that Apple's erroneous legal standard—*i.e.*, whether Apple's conduct was in its own interests—is of some significance for this case. But as Apple itself is forced to acknowledge, the Supreme Court has held that if a plaintiff can "prove that a conspiracy existed, *then* the defendant may not avoid liability by arguing that it stood to benefit individually from the conspiracy." (Apple's Opposition to Plaintiffs' Pre-Trial Memorandum of Law ("Apple Resp.") at 11 (emphasis in original).)

Because Apple's misguided reading of *Monsanto* is so central to its defense in this case—and because the relevance of Dr. Murphy's testimony depends on Apple's misreading—a focused discussion of what *Monsanto* says and does not say follows below. To be clear, *Monsanto* says nothing at all about requiring proof of actions contrary to a firm's economic interest to support a finding of conspiracy; it merely stands for the basic proposition that proof of a conspiracy requires evidence that reasonably tends to support the finding that the conspiring firms were acting pursuant to a conscious commitment to a common scheme. Dr. Murphy's first three opinions, however, apply Apple's erroneous interpretation of *Monsanto*, are irrelevant, and therefore must be excluded.

ARGUMENT

Apple argues that the "proper inquiry" in this case under the Supreme Court's decision in *Monsanto* is "whether Apple acted in its *independent* economic self-interest."[1] Based on this misguided claim, Dr. Murphy answered a single binary question: whether Apple found the terms it agreed to with Publisher Defendants, "attractive," or were those terms "part of a conspiracy." (Murphy Dep. 58:20-60:16.) Thus, Dr. Murphy could have found the evidence suggestive of conspiracy *only* if the terms of Apple's agreements with Publisher Defendants were *contrary* to Apple's economic self-interest.

The question Dr. Murphy studied is not the correct inquiry in this case from either a legal perspective or an economic one. Both sides acknowledge that the Supreme Court in *Monsanto* upheld a jury finding of a vertical price-fixing conspiracy, and that the Court said that "[t]here must be evidence that tends to exclude the possibility that the manufacturer and nonterminated distributors were acting independently." *Monsanto*, 465 U.S. at 764. *Monsanto* proceeds to hold that to prove action is not undertaken "independent" of the conspiracy alleged, a plaintiff "should present direct or circumstantial evidence that reasonably tends to prove that the manufacturer and others had a conscious commitment to a common scheme designed to achieve an unlawful objective." *Id*. (quotations omitted).[2]

---

[1] *See* Apple's Opposition to Plaintiffs' Motion in Limine to Preclude Professor Kevin M. Murphy from Offering at Trial Testimony on His Opinions #1-#3 ("Apple Opp.") at 2 (emphasis in original). Plaintiffs are not suggesting that the Supreme Court's decision in *Monsanto* is "inapplicable where the alleged conspirator is in a vertical relationship with its co-conspirators." (Apple Resp. at 9 (internal quotations omitted).) In fact, Plaintiffs clearly and consistently acknowledge in our papers that under *Monsanto* Plaintiffs must "present direct or circumstantial evidence that reasonably tends to prove that the [defendants] and others had a conscious commitment to a common scheme, designed to achieve an unlawful objective." (Plaintiff's Proposed Conclusions of Law ¶ 2 (quoting *Monsanto*, 465 U.S. at 764).)

[2] Notably, *Monsanto* was not the revolutionary antitrust decision that Apple perceives it to be. As early as 1963, courts made clear that proof of a conspiracy in violation of the Sherman Act required some "consciousness of commitment to a common scheme." *United States v. Standard Oil Co.*, 316 F. 2d 884, 890 (7th Cir. 1963).

Apple's argument in defending Dr. Murphy's analysis is not that, under *Monsanto*, Plaintiffs must present evidence tending to exclude the possibility that defendants were acting independently. Rather, Apple attempts to defend Dr. Murphy's analysis by arguing that, under *Monsanto*, Plaintiffs must present evidence that tends to exclude the possibility that Apple was acting in its own economic self-interest. (Apple Resp. at 9.)

No court has ever interpreted *Monsanto* in this way. The economic self-interest test Dr. Murphy applied is one factor courts often use to assess liability based on parallel conduct. Apple, however, interprets these cases as setting forth substantive standards that must be met in proving any Section 1 violation, whether or not parallel conduct is at issue. That is simply not accurate. Here, Plaintiffs do not ask the Court to determine whether Apple participated in a conspiracy with Publisher Defendants based on Apple's parallel conduct. Thus, Dr. Murphy should not have used his economic self-interest test as the sole consideration in his analysis.

A simple example illustrates why. Clearly, it was in Apple's economic self-interest to prevent Amazon from offering lower-priced e-books than Apple was prepared to offer. That Apple acted to advance that goal in its negotiations with Publisher Defendants does not mean that Apple did not conspire with Publisher Defendants as part of a common scheme to end Amazon's low pricing. Indeed, it helps supply Apple's motive for having done precisely that. Yet this common-sense understanding is wholly absent from Dr. Murphy's analysis.

It is precisely this distinction that the Third Circuit explained in *Fineman v. Armstrong World Indus., Inc.*, 980 F.2d 171, 212-15 (3d Cir. 1992). In that case, the court noted that, in a parallel conduct case to find "evidence of concerted action," courts examine whether plaintiffs can show, *inter alia*, "action contrary to the co-conspirator's economic interest." *Id.* at 214 n.32. However, the court recognized that it is "inexplicabl[e]" to apply the requirements of a

parallel conduct case in the vertical context. *Id*. Instead, in reviewing whether a firm had participated in a vertical conspiracy, the court cited a leading treatise for the proposition that a "co-conspirator's participation need only promote his *own* self-interest."[3] *Id*. at 215 (emphasis in original).

As Plaintiffs have previously explained, Apple attempts to defend Dr. Murphy's analysis by making the same argument that the defendant made in *United States v. General Motors Corp.*, 384 U.S. 127 (1966)—that the Court cannot find a conspiracy because Apple was merely signing contracts with terms that it deemed to be in its economic self-interest. That argument was squarely rejected by the *General Motors* Court in a decision that was left undisturbed by *Monsanto* and subsequent decisions. *Id*. at 142. Because this precedent is fatal to the relevance of Dr. Murphy's first three opinions, Apple must resort to extreme contortions to cast doubt on *General Motors*' applicability here.

Apple's attempts at protecting Dr. Murphy's analysis from irrelevance fall far short. Apple points to the fact that in *General Motors* the challenged conduct was a *per se* illegal conspiracy where a defendant attempted to "hide behind lawful contracts," (Apple Resp. at 11), as if that somehow differentiates its fact pattern from this case. Apple's *very next sentence*, however, identifies the issue *here* as centering on the terms of its contracts with Publisher Defendants. *Id*. But just as in *General Motors*, Plaintiffs are not separately challenging the terms of the Apple Agency Agreements. Instead, Plaintiffs challenge Apple's knowing participation in a horizontal price-fixing conspiracy to increase consumer prices and restrain

[3] Apple contends that "[n]o federal court of appeals" or "any judge of this District" "has adopted" Plaintiffs' interpretation of *Fineman*. (Apple Resp. at 9.) This careful formulation ignores that the District Court in Washington, DC has adopted precisely this interpretation of *Fineman*. *See Atlantic Coast Airlines Holdings, Inc. v. Mesa Air Grp., Inc.*, 295 F. Supp. 2d 75, 92 (D.D.C. 2003) (describing *Fineman* as standing for the proposition that there is "no need to show that a party in a vertical relationship acted contrary to its own self interest" to find a conspiracy, and applying that standard in the matter before it). Notably, Apple cites to no cases that arrive at a contrary outcome. Nor does Apple challenge the logic of Plaintiffs' interpretation of *Fineman*.

retail price competition. And just like the defendant in *General Motors*, Apple defends its conduct by pointing to outcomes—certain contractual terms—that are in its economic self-interest. That is the very argument rejected in *General Motors*.

Apple proceeds to confirm that *General Motors* holds "that *if* the plaintiff can prove that a conspiracy existed, *then* the defendant may not avoid liability by arguing that it stood to benefit individually from the conspiracy." (Apple Resp. at 11 (emphasis in original).) It is befuddling how this characterization supports the relevance of Dr. Murphy's analysis, given that Apple's primary defense is that its conduct was to its economic benefit.[4] Properly read, *General Motors* stands for the common-sense proposition that proof of a conscious commitment to a common scheme precludes Apple from defending against its participation in the conspiracy by claiming its conduct was in its own economic interest.

Apple's attempts to defend Dr. Murphy's analysis by distinguishing *Interstate Circuit, Inc. v. United States*, 306 U.S. 208 (1939)[5] and *Toys "R" Us, Inc. v. FTC*, 221 F.3d 928 (7th Cir. 2000), are similarly unconvincing. Apple recognizes that in both cases the "hub" of the conspiracy was the "party that allegedly orchestrated, directed, and enforced" the conspiracy. (Apple Resp. at 21.) Surely Apple is not arguing that either of those defendants "orchestrated, directed, and enforced" a conspiracy that was anything but "attractive" to it. Such an outcome would be ludicrous. Yet, that is precisely what Dr. Murphy's analysis, and Apple's arguments,

[4] Plaintiffs do not agree with Apple's insinuation that *Monsanto* overruled *General Motors*. (Apple Resp. at 10.) *Monsanto* did not hold that a defendant can counter proof of a conspiracy by citing its own lawful self-interest, nor did it even address the issue. *Monsanto* makes no mention of *General Motors*.

[5] Apple's claim in a footnote that *Interstate Circuit* is not a *per se* case is contradicted by the decision itself, the Supreme Court's own interpretation of *Interstate Circuit*, and the law in this and other Circuits. *See United States v. Masonite Corp.*, 316 U.S. 265, 274-76 (1942); *PepsiCo, Inc. v. Coca-Cola Co.*, 315 F.3d 101, 110 (2d Cir. 2002). To the contrary, the case Apple relies on, *Royal Drug Co. v. Group Life Health Insurance Co.*, 737 F.2d 1433, 1437 (5th Cir. 1984), (Apple Resp. at 24 n.17) mistakenly observed that *Interstate Circuit* analyzed the reasonableness of the price level fixed by the defendants, VI Phillip E. Areeda & Herbert Hovenkamp, ANTITRUST LAW ¶ 1426d n.23 (3d ed. 2010) ("the *Interstate Circuit* Court did not appraise the price level"), which therefore misled the *Royal Drug* court into believing *Interstate Circuit* was not a *per se* case.

ask this Court to find.[6] Indeed, it is difficult to see how Apple can make the argument it does in supporting the relevance of Dr. Murphy's testimony without suggesting that *Interstate Circuit* and *Toys "R" Us* were wrongly decided.

That Dr. Murphy's economic self-interest test is nothing more than a façade is made clear by his failure to apply the test to Publisher Defendants, where it would actually have relevance. The conspiracy in this case was horizontal because it was "the product of a horizontal agreement" among Publisher Defendants. *Denny's Marina, Inc. v. Renfro Prods., Inc.*, 8 F.3d 1217, 1220 (7th Cir. 1993) (quotation omitted) (citing *General Motors Corp.*, 384 U.S. at 140).[7] Thus, the relevant questions are 1) whether there was a conspiracy among Publisher Defendants, and 2) whether Apple knowingly facilitated or otherwise participated in that conspiracy. Dr. Murphy has nothing to say on the first question, and admits that he has "no comparative advantage" to offer the Court on the second. (Murphy Dep. 97:5-98:1.)

As Apple acknowledges, "an expert's failure to offer testimony relevant to the proper legal standards can be fatal." (Apple Opp. at 4-5 (citing *Williamson Oil Co., Inc. v. Philip Morris USA*, 346 F.3d 1287, 1323 (11th Cir. 2003))); *see also* FED. R. EVID. 702. Dr. Murphy's first three opinions are not relevant to the legal standards here and therefore should be excluded.

---

[6] Apple claims that both courts considered whether the defendant could offer an independent justification for its conduct. (Apple Resp. at 21.) But this merely repeats the same error Apple makes in its interpretation of *Monsanto*. There is a difference between acting independently from a common scheme and Apple's argument that its actions were in its individual economic interest. Moreover, in *Toys "R" Us*, the defendant retailer did argue its actions were a "legitimate business response to combat free riding." 221 F.3d at 937. But the court considered that argument only in the context of evaluating the competitive effects of the agreement as part of its rule of reason inquiry that it conducted in the alternative (after finding *per se* liability)—and not in considering whether Toys "R" Us participated in the conspiracy. In any event, the court's discussion is of little aid to Apple, because the court rejected the defendant's argument, finding that the defendant was truly interested in "maximizing its own profits," *id*. at 938, while noting that what the defendant "wanted or did not want is neither here nor there." *Id*. Thus, far from maximizing one's economic self-interest being a grounds for excusing liability, the court used it as a basis to uphold liability.

[7] Because Publisher Defendants are horizontal rivals, it is possible to infer an agreement among them based on parallel conduct and plus factors, including behavior that, absent a conspiracy, would be against any conspiring firm's economic self-interest. *See, e.g.*, *Apex Oil Co. v. DiMauro*, 822 F.2d 246, 253-54 (2d Cir. 1987); *In re Currency Conversion Fee Antitrust Litig.*, 265 F. Supp. 2d 385, 418-19 (S.D.N.Y. 2003).

Neither Dr. Murphy nor Apple points to any economic theory that suggests that a firm's participation in a conspiracy when it is in a vertical relationship to the other firms in the conspiracy can be determined by whether its conduct was in its own interest.[8] As Professor Gilbert has testified, Dr. Murphy offers "no reason why, as a matter of economic theory, it is necessary for a firm alleged to have facilitated a conspiracy—as opposed to the horizontal competitors who are conspiring—to act contrary to its unilateral interests for the conspiracy to succeed." (Gilbert Direct ¶ 84.) Indeed, common sense and everyday experience counsel the opposite.

Apple appears to believe that merely because Dr. Murphy's opinions are those of an economist, it follows necessarily that he is offering "economic analysis." (Apple Opp. at 4.) But this is no more necessarily true than claiming a prediction that the Mets will win the World Series this year constitutes a "legal opinion" if it is made by a lawyer. It is not the province of an economist to testify about Apple's intent or its knowledge of or participation in the conspiracy. *In re Rezulin Prods. Liability Litig.*, 309 F. Supp. 2d 531, 546-47 (S.D.N.Y. 2004). Dr. Murphy admits as much, yet still testifies on these points. (Murphy Dep. 93:8-98:18.) He should not be permitted to do so at trial.

CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that the motion *in limine* to exclude opinions 1-3 of Dr. Murphy's testimony be granted.

[8] Notably, all of the case law to which Apple cites to the contrary arises in the parallel-conduct context, where Plaintiffs acknowledge action against independent economic interest may be relevant. Again, Dr. Murphy declined to assess whether Publisher Defendants were acting against *their* independent economic interest, which is highly relevant.

Dated: May 8, 2013

Respectfully submitted,

Mark W. Ryan
Lawrence E. Buterman
David Z. Gringer
Attorneys for the United States
United States Department of Justice
Antitrust Division
450 Fifth Street, NW, Suite 4000
Washington, DC 20530
(202) 532-4753
Mark.W.Ryan@usdoj.gov

On Behalf of the United States of America

Gabriel Gervey
Eric Lipman
David Ashton
Assistant Attorneys General
Office of the Attorney General of Texas
P.O. Box 12548
Austin, TX 78711
(512) 463-1262
Gabriel.Gervey@texasattorneygeneral.gov

W. Joseph Nielsen
Gary M. Becker
Assistant Attorneys General
Office of the Attorney General of Connecticut
55 Elm Street
Hartford, CT 06106
(860) 808-5040
Joseph.Nielsen@ct.gov

On Behalf of the Plaintiff States