**Facts**

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| **Jurisdiction** | | **Color** | |
| **Where does this Court’s jurisdiction lie?** | | **This Court has jurisdiction under 28 U.S.C. § 1292(e) and Federal Rule of Civil Procedure 23(f). On June 1, 2018, this Court granted plaintiffs’ petition for permission to appeal the district court’s February 16, 2018, order denying plaintiffs’ motion for class certification. Ward Br. 1.** | |
| **What was the basis of the district court’s jurisdiction in this case?** | | **The district court had subject matter jurisdiction under the Clayton Antitrust Act of 1914, 15 U.S.C. § 15, and 28 U.S.C. §§ 1331, 1337. The district court also had jurisdiction** **under 28 U.S.C. § 1332(d)(2) because the parties are diverse, the aggregate amount in controversy exceeds $5,000,000, and there are 100 or more members of the class. Ward Br. 1-2.** | |
| **Issues  Presented** | | **Color** | |
| **Did the district court abuse its discretion by denying class certification?** | **No. Plaintiffs failed to offer a working econometric model for proving that antitrust impact was a common issue, which made it impossible for the district court to rigorously scrutinize such proof.** | |
| **If there is a remand, should this case be reassigned to a different district court judge?** | **No. Since inheriting this case in 2012 (when Judge Ware retired), Judge Gonzalez Rogers has been impartial and has provided plaintiffs ample opportunity to establish their case. Neither being reversed by this Court once before in this case, nor pressing to have this decade-old case go to trial is an adequate basis for reassignment.** | |
| **Statement  of the Case** | **Color: Yellow** | |
| **What is this case about?** | **This case is part of a 10-year effort by plaintiffs’ counsel to attack Apple’s decision to introduce its first iPhones (the iPhone, iPhone 3G, and iPhone 3GS) exclusively on AT&T’s cellular network.** | |
| **When was the original lawsuit against Apple filed?** | **In 2007, a few months after Apple launched the first iPhone in June 2007.** | |
| **When was this action filed?** | **2012.** | |
| **Who are the plaintiffs in this case?** | **A putative class of consumers who purchased iPhones and corresponding AT&T voice and data service between October 19, 2008, and April 8, 2012.** | |
| **What claims do plaintiffs assert in this case?** | **Plaintiffs assert a single claim under Section 2 of the Sherman Act, 15 U.S.C. § 2, alleging that Apple conspired with AT&T to have AT&T monopolize an “aftermarket” limited to voice and data services for the iPhone.** | |
| **Who is the alleged monopolist according to plaintiffs’ claims in this case?** | **AT&T is the alleged monopolist, not Apple, because the alleged monopoly is over ATT wireless service.** | |
| **If ATT is the alleged monopolist, what is Apple doing here?** | **Apple is alleged to have conspired with ATT.** | |
| **What is plaintiffs’ theory in this case?** | **AT&T monopolized an iPhone-only “aftermarket” for voice and data service and charged monopoly prices for that service.** | |
| **How was AT&T able to monopolize the “aftermarket” according to plaintiffs?** | **The iPhone was initially only available on AT&T’s network, and AT&T (which owned the iPhone “unlock” codes) would not unlock the iPhone for use on the T-Mobile network.** | |
| **What networks were iPhones compatible with when they were first launched?** | **The first iPhones were compatible only with GSM networks (not CDMA networks). In the United States, that meant they were only compatible with AT&T’s GSM network, and with the T-Mobile network (although with significant limitations in functionality).** | |
| **When did iPhones become compatible with CDMA networks?** | **In 2011, Apple introduced its first CDMA iPhone, which was a version of the iPhone 4.** | |
| **What is the basis of plaintiffs’ “aftermarket” concept?** | **The “aftermarket” concept comes from the Supreme Court’s decision in*****Eastman Kodak Co. v. Image Technical Services, Inc.* (1992), which explained that a firm with strong competition (like AT&T faces from Verizon, Sprint and T-Mobile) might nevertheless be able to exploit customers who are “locked-in” to purchasing consumables from the manufacturer (e.g., replacement parts) *if* consumers were not able to anticipate the lock-in when they purchased the original durable product.** | |
| **When did Apple launch its first cellular phone?** | **Apple launched the iPhone (2G) on June 29, 2007.** | |
| **What was Apple’s agreement with AT&T when it launched its first iPhone?** | **Consistent with common industry practice at the time, Apple introduced the iPhone under an exclusivity agreement with AT&T known as the Distribution and Revenue Share Agreement (“DRSA”). Under this agreement, AT&T was the exclusive provider of voice and data services for the iPhone in the United States.** | |
| **When did Apple enter the DSRA with AT&T?** | **August 10, 2006.** | |
| **What did the DSRA do?** | **The DSRA made AT&T the exclusive provider of wireless service for the iPhone. In exchange for the exclusivity given to AT&T, Apple received a percentage of AT&T’s revenues and profits on the first generation of iPhones, known as the iPhone 2G. Ward Br. 2-3.** | |
| **How did the agreement between Apple and AT&T work?** | **Under the DRSA, iPhones sold in the United States were “locked” to AT&T’s network. AT&T owned the unlock codes and prohibited Apple from unlocking iPhones for use on other networks.** | |
| **What was the original term of the DSRA between Apple and AT&T?** | **The DRSA had a five-year term from the date of execution (August 10, 2006), but could be terminated “for convenience” two years after the date of the sale of the first iPhone (June 29, 2007).** | |
| **Plaintiffs argue that the economic viability of both Apple and AT&T depended on customers being “locked” to AT&T as the exclusive iPhone wireless service provider. Is that correct?** | **The DRSA was so important to Apple and AT&T that the economic viability of both Apple and AT&T depended upon customers being “locked” to AT&T as the exclusive iPhone wireless service provider. Apple and AT&T expressly agreed not to disclose any of the terms or conditions of the DRSA and to coordinate their public announcements about it. Ward Br. 3.** | |
| **Did Apple and AT&T ever disclose the five-year term of exclusivity to the public?** | **Technically no, not in those precise terms. But Plaintiffs concede that Apple and AT&T disclosed a “multi-year” term. Plaintiffs argue that Apple and ATT took great pains to keep the length of ATTM’s exclusivity period secret. *See*, *e.g.*, EOR 489 (employees told “multiyear”); EOR 492 (“WHAT WE ARE NOT TALKING ABOUT: Terms of the deal other than stating ‘multi-year, exclusive’”). Ward Br. 3-4.** | |
| **Were either of the named plaintiffs told that they would be required to use AT&T longer that the two-year term of their service agreements?** | **They allege that they weren’t told by Apple or AT&T that they would be required to use AT&T beyond the two-year term of their service agreements, or that they would not receive unlock codes that would allow them to switch to another wireless service provider upon expiration of their two-year agreementsWard Br. 4.** | |
| **Do you agree that the named plaintiffs probably were not told that they would have to use AT&T after the initial two-year service agreement?** | **They may not have been specifically told that. But we certainly dispute what expectations these or other consumers would have had with respect to exclusivity.** | |
| **What is the gist of Plaintiffs’ argument about Apple and AT&T’s exclusivity agreement?** | **Apple and AT&T’s exclusivity agreement and the technological impediments that Apple embedded in the iPhones effectively locked iPhone users into using AT&T for longer than two years. Ward Br. 4.** | |
| **When Apple started selling iPhones to the public, did it charge all customers the same price?** | **Yes, they charged all customers the same price for 2G iPhones, 3G iPhones, and 3GS iPhones. All iPhone customers also were required to enter two-year wireless service agreements with AT&T for iPhone wireless service at uniform prices. Ward Br. 4-5.** | |
| **Did AT&T offer any discounts or promotions for iPhone wireless service?** | **AT&T gave some corporate discounts of 10-20 percent off the consumer prices for 3G and 3GS iPhone wireless service. The corporate discount was the only discount, promotion, or other price reduction offered by AT&T. Ward Br. 5.** | |
| **How was the DSRA amended in June 2008?** | **In June 2008, one year after the first sale of the original iPhone, Apple and AT&T amended the DRSA. The amendment set a specific termination date of December 31, 2010 for AT&T’s exclusivity. That meant AT&T ended up being the exclusive voice and data service provider for the iPhone in the United States for about three and a half years. (AT&T’s exclusivity therefore ended a little over two years into the four-year class period in this case.)** | |
| **After the DSRA was amended in 2008, who owned the iPhone unlock codes?** | **AT&T retained ownership of the iPhone unlock codes, and Apple remained prohibited from unlocking any iPhone.** | |
| **Did the 2008 amendment to the DSRA eliminate revenue sharing between Apple and AT&T?** | **Yes. The 2008 amendment eliminated a revenue-sharing component of the DRSA that, in an earlier version of this case, Plaintiffs claimed was particularly anticompetitive because it allowed Apple to share in allegedly monopolistic prices for mobile service. The amended agreement operated with the more well-known subsidy model, where ATT would basically subsidize consumers’ purchases of the iPhone in exchange for a two-year service agreement** | |
| **What did class members agree to when they purchased their iPhones?** | **Each plaintiff and class member entered into two-year wireless service agreements with AT&T.** | |
| **Please explain how the two-year service plan between Apple and AT&T worked?** | **During this period, “the iPhone was essentially sold bundled together with a two-year service plan through AT&T.” ER166. AT&T subsidized the purchase price of the iPhone, charging the consumer substantially less than AT&T paid for the iPhone, on the condition that the consumer agreed to a two-year service agreement.** | |
| **What did Apple do to enforce AT&T’s exclusivity?** | **To enforce AT&T’s exclusivity, Apple programmed and installed software locks on each iPhone that prevented consumers from switching to any other carrier’s wireless service and agreed with AT&T to never give consumers the iPhone unlock codes—either for international travel or to lawfully switch to another carrier—even after they fulfilled their original service commitments with AT&T. Ward Br. 5. AT&T owned the unlock codes.** | |
| **How were iPhone consumers harmed when Apple locked the iPhones and refused to give consumers the software codes to unlock them?** | **Plaintiffs allege iPhone consumers were unable to switch to a less expensive carrier in the U.S. (such as T-Mobile) after the first two years of service, and were unable to use local carriers while traveling abroad, thus incurring exorbitant roaming charges – amounting to thousands of dollars per trip – to AT&T, which it agreed to share with Apple under certain circumstances. Ward Br. 6.** | |
| **How, according to Plaintiffs, did the DSRA affect the prices charged by AT&T for wireless services?** | **Plaintiffs claim that because of the DSRA, AT&T charged supra-competitive prices for wireless services, which it shared with Apple during the terms of these agreements. This raised the total ownership cost for all class members.**  **Plaintiffs also say that Apple extracted supra-competitive profits from all class members by charging more for the iPhone than they could have if the exclusivity arrangements had been disclosed. Br. 6.** | |
| **Why do you argue that it was “exceedingly unlikely” that iPhone purchasers during this period failed to understand that they were committing to two years of AT&T service when they purchased an iPhone? Apple Br. 11.** | **Because customers knew that AT&T was subsidizing the cost of the iPhone (and charging them less for it) on the condition that they agreed to a two-year service agreement. And in fact Apple and ATT specifically advertised that the iPhone was available only on ATT.** | |
| **Did the named plaintiffs understand that AT&T was the exclusive provider of cellular service for the iPhone?** | **Yes. Named plaintiffs Buchar and Ward both understood that AT&T was the exclusive provider of cellular service for the iPhone. Buchar even believed that “AT&T was going to have it into perpetuity,” and thought it was an “impossibility” to switch carriers.** | |
| **Please explain how this case fits into the history of iPhone litigation?** | **This case is the third of three putative class actions filed by the same counsel alleging that Apple and AT&T conspired to monopolize various “aftermarkets” for iPhone voice and data services. The original case was filed in October 2007.  *In re Apple & AT&TM Antitrust Litig.* (N.D. Cal.) (“*iPhone I*” or “*Apple I*”).** | |
| **How did the *iPhone I* case differ from this case?** | **In the *iPhone I* case, AT&T was a named defendant, and the plaintiffs focused on a revenue-sharing provision in the original DRSA, which did not apply to the 3G and 3GS iPhones sold during the class period in this case.** | |
| **What was different about the damages theories offered by plaintiffs in *iPhone I* compared to this case?** | **Unlike here, in *iPhone I* (also litigated by plaintiffs’ counsel), the plaintiffs’ expert, Dr. Simon Wilkie, deduced his damages theories into estimates of class-wide injury and damages at class certification.** | |
| **What was the result of the *iPhone I* case?** | **Judge Ware certified a class in *iPhone I*, but the case came to an abrupt halt when the Supreme Court decided *AT&T Mobility LLC v. Concepcion* (2011). In that case, the Supreme Court held that an arbitration clause within AT&T’s wireless service agreement compelled arbitration of plaintiffs’ claims. As a result, the district court granted AT&T’s motion to compel arbitration.** | |
| **What was the class that Judge Ware certified in *iPhone I*?** | **In *iPhone I*, Judge Ware certified a class of “[a]ll persons who purchased or acquired an iPhone in the United States and entered into a two-year agreement with Defendant AT&T Mobility, LLC for iPhone voice and data service any time from June 29, 2007, to the present.” *In re Apple & AT&TM Antitrust Litig.* (N.D. Cal. July 8, 2010). Ward Br. 7. Plaintiffs note that this class is identical to the one they want to have certified here, but they are now proceeding on a narrower theory, based only on renewal service.** | |
| **What happened after the claims against AT&T in *iPhone I* went to arbitration?** | **Plaintiffs’ counsel brought a second lawsuit (“*iPhone II*” or “*Pepper*”), which attempted to circumvent the arbitration clause by naming only Apple as a defendant.** | |
| **When did plaintiffs file the complaint in *iPhone II* (or *Pepper*)?** | **On October 19, 2012, plaintiffs filed the complaint in *Pepper* against Apple only. Ward Br. 7.** | |
| **What happened in *iPhone II*?** | **Judge Ware dismissed the monopolization claims in *iPhone II* because he concluded that AT&T was an indispensable party. Plaintiffs’ counsel then proceeded with an amended complaint focused solely on Apple’s role as the exclusive distributor of apps for the iPhone. In May 2019, the Supreme Court held that customers who purchased apps for their iPhones though Apple’s app store, were direct purchasers from Apple under *Illinois Brick Co. v. Illinois* and may sue Apple for allegedly monopolizing the retail market for the sale of iPhone apps. *See Apple Inc. v. Pepper* (2019).** | |
| **What was the basis for this lawsuit?** | **This lawsuit (“*Ward*” or “*iPhone III*”) was brought as a way to obtain immediate appellate review of Judge Ware’s indispensable party ruling in *iPhone II*. Plaintiffs’ counsel drafted a complaint that included the AT&T-related claims from *iPhone II*, and then proposed a stipulated dismissal of the case based on Judge Ware’s *iPhone II* reasoning. Apple agreed to this on December 17, 2012.** | |
| **What did this Court decide regarding whether AT&T was an indispensable party?** | **This Court reversed Judge Ware’s finding that AT&T was an indispensable party. *Ward v. Apple* (9th Cir. 2015). This Court specifically held that AT&T is not a necessary or indispensable party under Federal Rules of Civil Procedure 19(a) and (b). Ward Br. 7.** | |
| **Did the district court express disagreement with this Court’s ruling that AT&T was not a necessary party?** | **Yes. On August 31, 2015, at a case management conference following remand, the district court called the reversal an “interesting opinion by the Ninth Circuit.” During the same conference, the district court also said the case was “stale.” Ward Br. 7-8. At another case management conference on May 1, 2017, the district court again expressed the view that AT&T was an indispensable party and that the case was too old. Ward Br. 9.** | |
| **What did Apple argue below regarding plaintiffs’ aftermarket claims?** | **Apple moved to dismiss the aftermarket claims, arguing that an iPhone voice and data services aftermarket is not a cognizable antitrust market under *Kodak* and its progeny. The district court denied Apple’s motion to dismiss, but later granted summary judgment in part, which substantially narrowed the scope of plaintiffs’ aftermarket claims.** | |
| **How did the district court’s summary judgment decision narrow the scope of plaintiffs’ aftermarket claims?** | **Plaintiffs initially sought damages relating to *all service* purchased during AT&T’s exclusivity over the iPhone, including the initial two-year service contract. The district court eliminated claims related to the initial two-year contract, finding no triable issue that consumers were unaware that they’d have to use AT&T service for the duration of those** **contracts (which is a necessary condition of a *Kodak* aftermarket claim).** | |
| **How does this *Kodak* aftermarket theory work?** | **The Supreme Court in *Kodak* held that aftermarket claims may be cognizable in certain circumstances. The notion is that there can be circumstances where there is sufficient competition in the primary market, but because of some monopolistic behavior, a monopolist can give itself power in the aftermarket.** | |
| **What is *Newcal* and why is it significant?** | ***Newcal* is a Ninth Circuit case that applied the *Kodak* theory to claims regarding computers and a repair service aftermarket. It developed the critical aspect of the framework being applied here: That no antitrust claim for an aftermarket lies where consumers have knowingly given the alleged monopolist its alleged market power. In other words, if consumers knowingly agree to exclusivity in the aftermarket, or even if they simply are well aware that exists when they make their initial purchasing decision, there is no claim.** | |
| **What did the district court decide regarding plaintiffs’ principal aftermarket claims based on all ATT service, rather than just the renewal term?** | **The court held that there were no distinct initial and aftermarkets for iPhones and wireless service. The transactions in which consumers bought iPhones and agreed to two-year service plans were one and the same, foreclosing any notion of an aftermarket claim.** | |
| **What about the aftermarket claims for renewal service? What happened there on summary judgment?** | **Plaintiffs seemingly tried to base their claims on a theory of five years of exclusivity. That didn’t work because the five-year exclusivity Plaintiffs alleged didn’t actually materialize. But, the district court recognized that exclusivity—whether by the five-year agreement or otherwise—beyond the two-year service period initially agreed to by the consumer *could* potentially support an aftermarket claim.** | |
| **What did the district court decide regarding the antitrust market *after* the initial two-year service period?** | **The district court found that plaintiffs could prove that Apple manipulated the aftermarket for iPhone wireless service by refusing to unlock iPhones for either domestic or international use after the initial two-year service period expired, and denied Apple’s motion for summary judgment to that extent. Ward Br. 8.** | |
| **What did the district court say about international roaming?** | **It dropped a footnote and said there might be an additional claim based on consumer expectations that their phones would be unlocked during the initial two-year-service periods for use on international networks. The court said that the claims was not sufficiently developed, but still said the claims may be viable.** | |
| **After the district court’s summary judgment decision, what claims remained in the case?** | **The district court held that plaintiffs had a triable antitrust claim only with respect to iPhone purchasers who *kept* their iPhones *after* the expiration of their initial two-year AT&T service contract and purchased AT&T *renewal* service. The court found some evidence that consumers “could have expected to switch to another GSM provider, like T-Mobile, at the end of the two-year contract with AT&T.”** | |
| **After the district court’s summary judgment decision, what remained of plaintiffs’ liability theory?** | **Only “a very narrow slice” of plaintiffs’ original liability claim remained. ER146. During the relevant period, the average iPhone customer held his or her phone about 18-22 months, and then upgraded to a new phone. Only a small minority of iPhone customers kept their iPhones long enough to buy renewal service.** | |
| **What percentage of iPhone customers bought renewal service during the class period?** | **We say that only a small minority of iPhone customers kept their iPhones long enough to purchase renewal service. And we say the great majority of putative class members never purchased renewal service.** | |
| **What did the district court decide regarding international charges on iPhones?** | **The district court referenced a “not sufficiently developed” theory based on international charges on iPhones, that similarly depended on consumer expectations and knowledge: “whether consumers were aware that neither AT&T nor Apple would unlock their phones during the initial two-year contract for the purposes of international use.”** | |
| **After summary judgment, what was the basis for class certification?** | **After summary judgment, the only remaining basis for class certification was the alleged aftermarket for *renewal* voice and data services.** | |
| **When did plaintiffs file their motion for class certification in this case?** | **On August 15, 2017, plaintiffs filed their motion to certify a class under Rule 23(b)(3).** | |
| **What class did plaintiffs seek to certify?** | **Despite the court’s summary judgment order substantially narrowing their case, plaintiffs sought to certify essentially the same class they had advanced before: “All persons**  **… who purchased an iPhone anywhere in the United States at any time from October 19, 2008, through April 8, 2012, and who purchased voice and data service for their iPhones from AT&T.”** | |
| **Why do you argue that plaintiffs’ proposed class is overbroad?** | **Because the great majority of putative class members never purchased renewal service from AT&T, which is what is left of plaintiffs’ liability claim after summary judgment. In fact, plaintiffs sought to certify a class *broader* than what they had originally alleged in their complaint, extending the class period by over a year.** | |
| **What expert materials did plaintiffs submit in support of their class certification motion?** | **Plaintiffs submitted an 11-page declaration from an economist, Dr. Frederick R. Warren-Boulton, which presented two inconsistent theories of common impact.** | |
| **What did Dr. Warren-Boulton say in his expert declaration?** | **In his expert declaration, Dr. Warren-Boulton said:**  **(1) Apple’s alleged conduct in “the aftermarket for iPhone [Wireless Service], if proven, can establish that all or almost all members of the proposed Class in this case sustained similar economic injury,” and**  **(2) “there exist a common methodology and data to reliably assess the existence and amount of damages to the Class members without the need for individual inquiry.” Ward Br. 9-10.** | |
| **What were Dr. Warren-Boulton’s two theories of common impact?** | **Dr. Warren-Boulton’s posited two theories of common impact were:**  **(1) the “truthfully exclusive” world, in which AT&T’s exclusive rights were generally known; and**  **(2) the “truthfully non-exclusive” world, in which AT&T and Apple agreed to unlock iPhones after a customer’s initial two-year service contract.** | |
| **What are these but-for worlds? Like, how do they work?** | **The idea is to determine what the world would look like without the alleged conspiracy. Plaintiffs envision the question of which world actually supplies the damages theory being a question of fact. So the factfinder would determine whether Apple and ATT would have proceeded in the TE world—telling people there was exclusivity beyond two years—or the TNE world—abandoning exclusivity completely.** | |
| **What was Dr. Warren-Boulton’s first theory — the “truthfully exclusive” world?** | **In the “truthfully exclusive” world, Apple would have informed customers that neither it nor AT&T would unlock their iPhones when their initial two-year wireless service agreements ended. According to Dr. Warren-Boulton, this would have reduced what consumers were willing to pay for their iPhones, or the “reservation prices,” by an amount equal to the present value of the lower prices or higher quality of the wireless service they could have expected to receive on their iPhones after the expiration of their agreements. Ward Br. 11.** | |
| **Why do you argue that Dr. Warren-Boulton’s first theory (the “truthfully exclusive” world) is inconsistent with plaintiffs’ aftermarket theory?** | **The “truthfully exclusive” world theory is inconsistent with the aftermarket theory because *nothing happens to the prices for the allegedly monopolized service*, let alone renewal service. Instead, the prices for *all iPhones* are allegedly too high, resulting in injury to *all* iPhone purchasers*.* That is, the thing that’s monopolized is cell service, so fixing that thing ought to have an effect on the price of cell service, not the iPhone.** | |
| **Why does Plaintiffs’ TE world result in higher iPhone prices rather than higher service prices?** | **Warren-Boulton says that because ATT has a monopoly in both the actual world and the TE world, it was Apple who was able to sell iPhones with inflated values based on the conspiracy. The parties dispute whether this concept is legally or logically possible. Apple says the very notion that the aftermarket prices stay the same is inconsistent with an aftermarket theory, and plaintiffs say there’s nothing wrong with it. Neither side provides case law.** | |
| **What was Dr. Warren-Boulton’s second theory — the “truthfully non-exclusive” world?** | **In the “truthfully non-exclusive” world, Apple would have agreed to unlock iPhones (upon request) at the end of the customers’ wireless service agreements. According to Dr. Warren-Boulton, the refusal of Apple and AT&T to unlock iPhones at the end of class members’ agreements increased the total cost of ownership in the as-is world through higher** **prices or lower quality iPhone voice and data service (or both). Ward Br. 11-12.** | |
| **Why do you argue that Dr. Warren-Boulton’s second theory (the “truthfully non-exclusive” world) is problematic?** | **Dr. Warren-Boulton hypothesizes that AT&T’s renewal service prices might have been lower if Apple and AT&T had agreed to unlock iPhones after a customer’s initial two-year service contract. This is problematic because AT&T’s exclusivity and unlocking policies are not challenged as unlawful in this case; nor have they ever been challenged as unlawful. So the TNE theory presupposes that Apple/ATT would do a thing (eliminate exclusivity) that they were not required to do by law.** | |
| **What is Plaintiffs’ response to your argument that the TNE world wrongly supposes that Apple and AT&T would have eliminated exclusivity, even though exclusivity is not itself unlawful?** | **They say what Apple and AT&T would have done absent the conspiracy they did engage in is a fact question.** | |
| **How does Dr. Warren-Boulton argue that iPhone purchasers would have been harmed under his second (“truthfully non-exclusive”) theory?** | **He argues that, by not unlocking their iPhones after the initial two-year service contract, every iPhone purchaser would have been harmed by losing an “option value” of being able to switch to T-Mobile, even if they were never able to do so.** | |
| **Have AT&T’s exclusivity provisions (and unlocking policies) ever been challenged as unlawful?** | **No, AT&T’s exclusivity and unlocking policies are not challenged as unlawful in this case, nor have they ever been challenged as unlawful. That is, the existence of exclusivity itself isn’t unlawful. What is being challenged is amassing power in an aftermarket for service through *undisclosed* exclusivity under *Kodak* and *Newcal*.** | |
| **Why do you argue that Dr. Warren-Boulton’s theories are problematic?** | **Dr. Warren-Boulton’s declaration did not provide any functioning econometric model of impact or damages. Nor did he provide any evidentiary or empirical foundation for the existence of class-wide damages.** | |
| **What is the main problem with Dr. Warren-Boulton’s “truthfully non-exclusive” world theory?** | **Dr. Warren-Boulton posits that, if AT&T and Apple had agreed to unlock iPhones after the initial two-year service contract, service prices for AT&T and T-Mobile would have converged. This is a testable hypothesis (Dr. Warren-Boulton said so himself), yet he did nothing to establish that an injury and damages model consistent with this hypothesis would reliably show that AT&T’s renewal service was overpriced. He just asked the Court to take his word for it.** | |
| **What did Dr. Simon Wilkie, plaintiffs’ antitrust economist expert in *Apple I*, conclude regarding T-Mobile’s wireless service?** | **Dr. Wilkie determined that T-Mobile’s wireless service was a reasonable alternative to AT&T’s wireless service, and he was able to measure damages based on the differences between AT&T’s prices and T-Mobile’s prices for similar wireless service plans. Ward Br. 12.** | |
| **Was the T-Mobile network competitive with the AT&T network in the 2008-2012 period?** | **No. There were technology limitations with T-Mobile’s different spectrum, which impeded iPhone usage on T-Mobile’s network. That is why T-Mobile did not distribute the iPhone until April 2013, after the class period in this case.** | |
| **Once T-Mobile began carrying the iPhone in 2013, was there any convergence between the prices for T-Mobile and AT&T’s service plans?** | **No. Apple’s expert showed that, when T-Mobile began carrying the iPhone in April 2013, there was no convergence between T-Mobile and AT&T’s comparative service plan prices.** | |
| **What did Dr. Warren-Boulton conclude regarding class members’ damages?** | **Dr. Warren-Boulton concluded that “Class members who purchased iPhones have been harmed by Apple’s conspiracy with [ATTM] to monopolize the aftermarket for iPhone Wireless Service in each of the but-for worlds as measured by an increase in the total cost of ownership (“TCO”) of iPhones and [Wireless Service] for those consumers.” Ward Br. 12.** | |
| **What does the “total cost of ownership” of iPhones and wireless service mean?** | **The total cost of ownership includes the purchase price of the iPhone plus the cost of service for the iPhone over its expected useful lifetime (the expected lifetime extends until the iPhone is expected to be scrapped; *i.e.*, it includes use as a used or refurbished iPhone).” Ward Br. 12.** | |
| **Did Apple submit an expert declaration in response to Dr. Warren-Boulton’s declaration?** | **Apple submitted a declaration from Dr. Michael L. Katz, identifying several issues with Dr. Warren-Boulton’s methodologies.** | |
| **What did Dr. Katz opine?** | **Dr. Katz opined, among other things, that the two but-for worlds would not be able to accurately determine whether there was antitrust injury from the conspiracy and, if they did, they would not be capable of accurately measuring the extent of that injury.** | |
| **Aren’t the questions of whether plaintiffs can show antitrust injury and damages merits-based arguments that are inappropriate at the class certification stage?** | **No. *Comcast* specifically prescribes a look at the merits to ensure that Rule 23’s requirements are met.** | |
| **When did Dr. Warren-Boulton say that harm to class members arose?** | **In his supplemental declaration, Dr. Warren-Boulton explained that class members were harmed by Apple’s monopolization of the wireless service aftermarket *as soon as they purchased their iPhones and began paying for AT&T wireless service*. Plaintiffs say this harm occurred regardless of when they purchased their iPhones during the class period or whether they completed their two-year term. Ward Br. 13-14.** | |
| **How did the district court respond to Dr. Warren-Boulton’s theories at the class certification hearing?** | **The district court responded with exasperation that plaintiffs and Dr. Warren-Boulton had not provided the court with anything it could actually analyze in discharging its Rule 23 burden: “[a]ll [Dr. Warren-Boulton] says is: ‘Yeah, I can do it.’ Well, okay. I’m just supposed to believe him?”** | |
| **Why did the district court deny class certification?** | **The district court denied class certification because “Plaintiffs’ expert’s declaration is devoid of analysis.” The court noted that, although it was required to conduct a rigorous analysis of plaintiffs’ theory and methodology “‘to ensure that the predominance requirement is met,’” it was “unable to fulfill its obligation” because plaintiffs’ expert had not presented anything for the court to scrutinize.** | |
| **Plaintiffs contend that the district court denied class certification because Dr. Warren-Boulton’s report lacked a “data-driven model” for proving impact or damages on a class-wide basis. Is that what the district court held?** | **The district court did use the term “data-driven model.” Plaintiffs suggest that this created some kind of bright-line rule that should not exist. But it is not clear what a model would look like that isn’t data-driven. Ultimately Plaintiffs’ theories are going to have to be put into practice with actual empirical evidence that yields hard numbers—that is, their conceived models are inherently data-based, they just haven’t actually supplied any of the data and showed that the model would work. That’s all the district court was saying.** | |
| **What did the district court say about Dr. Warren-Boulton’s theories in denying class certification?** | **The district court stated that Dr. Warren-Boulton’s theories did not provide a “functioning model that is tailored to market facts in the case at hand.” ER5. Rather, Dr. Warren-Boulton referred generally to “common methodology and data,” which he would supposedly use to “reliably assess the existence and amount of damages to the Class members.” The district court found that insufficient to satisfy Rule 23(b)(3), which requires providing “a viable method for demonstrating class-wide antitrust injury based on common proof.”** | |
| **What was the only issue analyzed by the district court in its class certification decision?** | **The district court noted that Apple did not dispute that plaintiffs satisfied the threshold requirements of Rule 23(a) or the superiority requirement of Rule 23(b)(3). Apple argued only that the class definition was overbroad and that plaintiffs had not established predominance. Therefore, the district court limited its analysis to one issue: whether Dr. Warren-Boulton’s expert** d**eclaration adequately supported plaintiffs’ class certification motion. Ward Br. 14-15.** | |
| **Did the district court reach Apple’s argument that the class definition was overbroad?** | **No.** | |
| **When did plaintiffs file their petition under Rule 23(f)?** | **March 2, 2018. On June 1, 2018, a motions panel of this Court granted the petition.** | |
| **Why did plaintiffs file an emergency motion under Circuit Rule 27-3 to stay discovery and vacate the trial date pending this Court’s decision on the Rule 23(f) petition?** | **After plaintiffs filed their Rule 23(f) petition for permission to appeal the denial of class certification, the parties filed a stipulation requesting a stay of discovery and adjournment of the trial and associated dates pending resolution of the Rule 23(f) petition. The district court summarily denied the joint request the next day without explanation. Plaintiffs therefore were forced to file an emergency motion with this Court, which was granted on March 20, 2018. Ward Br. 15.** | |
| **What rulings are presented for review in this case?** | **Plaintiffs submit for review all rulings in the district court’s February 16, 2018 order denying plaintiffs’ motion for class certification. Ward Br. 16.** | |

**Arguments 1-2**

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| **Standard of Review** | **Color:** |
| **What standard of review do we apply?** | **This Court reviews the district court’s class certification decision for abuse of discretion. *Just Film, Inc. v. Buono* (9th 2017).** |
| **If we find that the district court’s decision was based on a flawed legal conclusion, are we compelled to find an abuse of discretion and reverse and remand?** | **Yes. As this Court held in *Yokoyama v. Midland Nat’l Life Ins. Co.* (9th 2010), “[i]f the district court’s determination was premised on a legal error, [the Court] will find a per se abuse of discretion.” But in the absence of a legal error, as is the case here, this Court “proceed[s] to review the district court’s class certification decision for abuse of discretion as [it] always ha[s] done.” *Id.* Ward Br. 16.** |
| **Can we evaluate whether the district court judgment is based on legal error as part of our discussion of the class certification merits, or do we need to resolve that legal error question as a separate inquiry?** | **The answers are interrelated. In the Ninth Circuit, “when an appellant raises the argument that the district court premised a class certification determination on an error of law, [the Court’s] first task is to evaluate whether such legal error occurred.” *Yokoyama v. Midland Nat’l Life Ins. Co.* (9th 2010). Ward Br. 16. But in determining that no legal error occurred, you can answer the determinative question that there was no abuse of discretion and affirm.** |
| **In your brief, you claim that it would have been an abuse of discretion for the district court to have certified a class on the record before it. Could you explain that claim for us?** | **Without any evidence beyond 11-pages of guesswork and unfounded promises from plaintiffs’ expert, the district judge could not fulfill his obligation under Rule 23 and *Wal-Mart* (U.S. 2011) to rigorously analyze whether antitrust impact could indeed be established through class-wide proof or whether “[q]uestions of individual [injury] will inevitably overwhelm questions common to the class.” *Comcast Corp. v. Behrend* (U.S. 2013). Certifying without having anything to analyze or even consider would have constituted an abuse of discretion.** |
| **Can you give us an example where we have found a judge’s certification of a class to be an abuse of discretion?** | **Yes. In *In re Hotel Tel. Charges*, this Court reversed certification where the lower court “relied on the ‘imagination’ of [plaintiffs’] counsel to provide solutions that will, at some point in the future, prevent these individual issues from splintering the action into thousands of individual trials.” (9th 1974).** |
| **Plaintiffs claim that the district court’s decision must be supported by sufficient findings to be entitled to the traditional deference traditionally given under the abuse of discretion standard. Is this true?** | **[Explain.] Ward Br. 17.** |

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| **Argument I:**  **District court did not abuse its discretion; plaintiffs failed to show their injury could be resolved with proof** | | **Color:** | |
| **How did 1998’s amendment to the Federal Rule of Civil Procedure 23(f) change the landscape of antitrust class cases?** | | **The 1998 amendment to Federal Rule of Civil Procedure 23(f) made class certification decisions subject to interlocutory appeals. Before this amendment, plaintiffs could obtain certification in most class antitrust cases, by offering an expert who proposed theoretical methods for establishing common proof of impact and damages—essentially exactly what Plaintiffs have done here. In recent years, the Supreme Court, this Court, and many other jurisdictions have rejected that pre-1998 paradigm of effortless certification.** | |
| **What elevates the Rule 23 certification question above a “mere pleading standard”?** | | **Courts have been clear that Rule 23 now requires a plaintiff to establish to the district court’s satisfaction that the Rule’s requirements are “in fact” satisfied. *Comcast Corp. v. Behrend* (U.S. 2013) (quoting *Wal-Mart Stores, Inc. v. Dukes* (U.S. 2011)). This is a strict standard, and it requires a “rigorous analysis” that invariably will “entail some overlap with the merits of the plaintiff’s underlying claim.” *Wal-Mart*.** | |
| **Has our Circuit interpreted the Supreme Court’s decisions in *Wal-Mart* and *Comcast* to have established this strict standard?** | | **Yes. *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 980 (9th 2011).** | |
| **Have our sister circuits followed suit and found that before certifying, district courts need to engage a rigorous inquiry?** | | **Several have, including the D.C. Circuit in *In re Rail Freight Fuel Surcharge Antitrust Litig.* (D.C. 2013), holding that “[i]t is now indisputably the role of the district court to scrutinize the evidence before granting certification, even when doing so ‘requires inquiry into the merits of the claim.’” *Id.* (quoting *Comcast*, (U.S. 2013)).** | |
| **If district courts have a heightened burden to go through a rigorous analysis to certify, is the opposite true that they must do a rigorous analysis to de-certify?** | | **[Explain.]** | |
| **How is the decision to certify a class under Rule 23(b)(3)—plaintiff’s chosen course here—more difficult than certifying under Rule 23(a)?** | | **The Court has called Rule 23(b)(3) an “adventuresome innovation” created for situations “in which class-action treatment is not as clearly called for.” *Wal-Mart Stores, Inc. v. Dukes* (U.S. 2011) (quoting *Amchem Products, Inc. v. Windsor* (U.S. 1997)). That explains Congress's addition of procedural safeguards for (b)(3) class members beyond those provided for (b)(1) or (b)(2) class members (e.g., an opportunity to opt out), and the court's duty to take a “close look” at whether common questions predominate over individual ones.” *Id.*** | |
| **Why should plaintiffs have to prove definitively that their models can successfully calculate impact damages for all members of the class at this early class certification stage? Isn’t a theoretical model enough?** | | **The Supreme Court clarified in *Wal-Mart* (U.S. 2011), that the key question in all contemporary certification cases is whether plaintiffs can make a showing of “aggregate proof” that can resolve key issues against defendants “in one stroke,” rather than through individualized evidence. Since this Court’s 1995 decision in *Rebel Oil Co. v. Atlantic Richfield Co.*, it’s been clear that “causal antitrust injury[ ] is an element of all antitrust suits.” It follows that the critical aggregate proof is the plaintiffs’ injury and damages model, typically a regression or benchmark model that purports to estimate the price or prices that putative class members would have paid in the absence of the alleged anticompetitive conduct.** | |
| **What does a model have to do for Plaintiffs’ class to be certified? (General)** | | **Plaintiffs’ model must accomplish three main objectives to achieve certification:**  **(1) provide a workable, reliable way to model antitrust injury for all class members;**  **(2) show how that “common proof” will indicate that substantially all class members have suffered the same injury; and**  **(3) show that it will be possible for defendants to defend against this aggregate proof at a class trial without losing substantive rights. If Plaintiffs cannot show any one of these three things, the class cannot be certified.** | |
| **What does a model have to do for Plaintiffs’ class to be certified? (First Requirement)** | | **First, Plaintiffs seeking certification in this context must provide a workable, reliable way to model antitrust injury for all class members. In *Comcast* (U.S. 2013), the Supreme Court reversed class certification where lower courts refused to consider whether the plaintiffs’ damages model in fact produced just and reasonable damages estimates for all class members. In *Rail Freight* (D.C. 2013), the DC Circuit held that reliable injury and damages “models are essential to [a] plaintiff[’s] claim they can offer common evidence of classwide injury.” The First Circuit too required a “common proof” showing in *In re New Motor Vehicles Canadian Exp. Antitrust Litig.* (1st 2008). The Third Circuit came to the same conclusion in *In re Hydrogen Peroxide Antitrust Litig.* (3rd 2008), as did the Fifth Circuit in *Bell Atl. Corp. v. AT&T Corp.* (5th 2003). Appl Br. FN 9.** | |
| **What does a model have to do for Plaintiffs’ class to be certified? (Second Requirement)** | | **Second, that “common proof” modeled by Plaintiffs must indicate that substantially all class members have suffered the same injury, as explained by the DC Circuit in *Rail Freight* (2013), and the First Circuit in *In re Asacol Antitrust Litigation* (2018). In *In re Asacol Antitrust Litigation*, the First Circuit reversed class certification for lack of predominance in antitrust action where the evidence indicated that 10 percent of putative class members would not have been injured.** | |
| **Could you explain what the First Circuit held in *In re Asacol* (1st 2018)?** | | **[Explain.]** | |
| **Why is *Asacol* (1st 2018) relevant to our analysis here?** | | **[Explain.]** | |
| **Why does it matter that the *Asacol* Plaintiffs didn’t argue a similar theory of relief as the plaintiffs here did?** | | **[Explain.]** | |
| **But counsel, there will always be some degree of individual issues in class litigation, so what is the standard?** | | **It’s clear that common issues must predominate over individual issues, and any dissimilarity among the claims of class members must be dealt with in a manner that is not inefficient or unfair. *Amgen* (U.S. 2013); *Asacol* (1st 2018). To assess efficiency and fairness, courts have looked to whether the proposed class adjudication will be both “administratively feasible” and “protective of defendants’ Seventh Amendment and due process rights.” *Asacol*.** | |
| **What does a model have to do for Plaintiffs’ class to be certified? (Third Requirement)** | | **Third, Plaintiffs must show that it will be possible for defendants to defend against this aggregate proof at a class trial without losing substantive rights. The Supreme Court made clear in *Wal-Mart*, that “a class cannot be certified on the premise that [the defendant] will not be entitled to litigate its statutory defenses to individual claims,” (2011), affirming a principle outlined by this Court decades ago in *In re Hotel Telephone Charges* (9th 1974), where this Court found that allowing the plaintiffs there to proceed as a class would be impossible unless the Court were to disregard the substantive requirements of maintaining private antitrust class actions—which, of course, it was not willing to do.** | |
| **In what ways do Plaintiffs’ proffered models fall short?** | | **Plaintiffs do not even advance a model—just unsubstantiated theories in a cursory 11-page declaration. As the district judge noted, Dr. Warren-Boulton’s declaration lacks “any data-driven analysis.” It refers only to “common methodology and data,” that he will supposedly use to “assess the existence and amount of damages to the Class members.” In the absence of any data-driven model that is tailored to market facts in the case, the district court came to the correct conclusion that Plaintiffs failed to meet their burden under Rule 23.** | |
| **You argue that plaintiffs should have gone beyond these models to show classwide impact, but why would they at this early stage?** | | **[Explain.]** | |
| **Have any courts required this rigorous showing that you believe is necessary from plaintiffs’ experts to grant certification?** | | **Yes. Our sister circuits have routinely refused to grant class certification in cases where the plaintiffs and their experts did far more than what occurred here. In *In re Hydrogen Peroxide Antitrust Litigation* (3rd 2008), the Third Circuit reversed a district court decision to grant class certification where the plaintiff’s expert had “not completed any benchmark or regression analyses” or shown that it “would work.” Likewise, in *Carrera v. Bayer Corp.*, the Third Circuit held that a plaintiff cannot satisfy Rule 23 by proposing a method with just “plaintiff’s assurances” that it will work, “without any evidentiary support that the method will be successful.” (3d 2013). Like in *Carrera*, Plaintiffs’ expert’s assurances alone are not enough.** | |
| **Isn’t the Third Circuit’s *Carrera* case distinguishable because the only live issue there was whether the class members are ascertainable?** | | **Yes. [Explain.]** | |
| **Can you give us an example of a district court case where the court refused to certify a case because the expert’s model or method was insufficiently developed?** | | **Yes. The Central District of California decertified a class in *Saavedra v. Eli Lilly & Co.* (C.D. Cal. 2014), holding that because plaintiffs’ expert “has yet to design the survey and method he will use[,] ... Plaintiffs have done worse than not even advancing a reliable method of calculating class-wide damages—they have advanced ‘no damages model at all.’” This is exactly what occurred here.** | |
| **But these “but for” analyses posed by Plaintiffs’ expert are common in antitrust cases; isn’t that enough to show that it will work?** | | **No. As the Eighth Circuit held in *Blades v. Monsanto Co.*, (8th 2005), general “assumptions,” “presumptions,” and “conclusions” are not enough, even if they are based on common antitrust theories.** | |
| **What is traditionally required of these expert models in class certification antitrust cases if you’re right that Plaintiffs’ expert’s models are insufficient?** | | **District courts in this circuit routinely require plaintiffs to come forth with working impact and damages models—as opposed to mere theory—that can then be scrutinized at the class certification stage. In *In re High-Tech Emp. Antitrust Litigation* (ND Cal. 2013), the Northern District of California explained that “theory is not sufficient to satisfy Rule 23(b)(3)’s requirements,” and then proceeded to analyze the documentary and statistical evidence presented in that case. Again, in *In re Optical Disk Drive Antitrust Litigation* (N.D. Cal. 2014), the Northern District determined that the predominance inquiry requires the plaintiffs to show that the “proffered expert testimony has the requisite *integrity* to demonstrate class-wide impact.” (emphasis added).** | |
| **If we remand instructing Plaintiffs to add statistics and numbers to back their current expert report, will that solve your issues with the predominance question?** | | **Not necessarily. Courts have still denied certification when presented with more developed statistical models if they still can’t show that their “functioning model is tailored to market facts in the case at hand.” In *In re Graphics Processing Units Antitrust Litigation* (N.D. Cal. 2008) the Northern District of California concluded even after analyzing the statistical model of the plaintiff’s expert, that “plaintiffs have fundamentally failed to show that the many factors influencing pricing of GPU products were systematic and are now controllable.”** | |
| **But counsel, since certification occurs at such an early stage in the litigation, why can’t we certify a class based on plaintiffs’ renowned expert’s assurances that his models will result in the necessary common proof?** | | **First, Supreme Court precedent—*Comcast* (U.S. 2013) and *Wal-Mart* (U.S. 2011)—mandates that this Court require more than just unfounded theories. But there are also practical reasons why antitrust plaintiffs must produce a working model at the class certification stage:**  **(1) Certifying classes on the basis of promises rather than a working model impermissibly gives plaintiffs a free ride to certification if they simply hire a competent expert.**  **(2) Scrutiny of actual models is critical because many such models fail when tested.** | |
| **As a policy matter, why should we require antitrust plaintiffs to produce more detailed models than those presented by plaintiffs’ expert here? (First Reason)** | | **If courts certify plaintiffs on the basis of their expert’s promises rather than a working model, this practice would impermissibly delegate “judicial power to the plaintiffs, who can obtain class certification just by hiring a competent expert,” as explained by the Seventh Circuit in *West v. Prudential Sec., Inc.* (7th 2002).** | |
| **And why is that bad? (Follow-up to First Pragmatic Reason)** | | **Giving all power to the plaintiffs’ expert exacerbates the circularity inherent in justifying class certification “by reference to evidence that presupposes—at least as a matter of economic or statistical methodology—the aggregate unit whose legitimacy the court is to determine.” Nagareda, 84 N.Y.U. L. Rev. at 103 (2009).** | |
| **As a policy matter, why should we require antitrust plaintiffs to produce more detailed models than those presented by plaintiffs’ expert here? (Second Reason)** | | **Scrutiny of actual models is critical because many such models fail when tested. This is precisely the problem that the D.C. Circuit noted in *In re Rail Freight Fuel Surcharge Antitrust Litigation* (D.C. 2013) in vacating a district court’s grant of class certification in part because plaintiffs’ models in question appeared to generate “false positives,” findings of injury where, under plaintiffs’ own theory of the case, none should exist. On remand, and after a one-week evidentiary hearing, the district court confirmed the false positives and denied class certification. *In re Rail Freight Fuel Surcharge Antitrust Litigation* (D.D.C. 2017).** | |
| **Isn’t the D.C. Circuit’s decision in *Rail Freight* distinguishable?** | | **While *Rail Freight* (D.C. 2013) involved different facts, its legal conclusions are particularly illustrative in this case. That case involved allegations of a conspiracy among the major freight railroads to impose fuel surcharges, and the key issue was whether “separate trials are needed to distinguish the shippers the alleged conspiracy injured from those it did not.” *Id.* The plaintiffs offered two, fully realized models with impressive damages estimates, and the district court (applying pre-*Comcast* legal standards) initially certified the class. But the D.C. Circuit vacated that decision because Rule 23 not only authorized but clearly requires “a hard look at the soundness of statistical models that purport to show predominance,” which the district court failed to do, and second because the models in question appeared to generate “false positives” findings of injury where, under plaintiffs’ own theory of the case, none should exist. *Id.* at 253.** | |
| **Your lead case for why plaintiffs must deliver a working model at the class certification stage is *Comcast*, but as Justice Ginsburg noted in her dissent, that case did not require plaintiffs to show at class certification that damages attributable to class-wide injury are measurable on a class-wide basis. That principle was uncontested right?** | | **[Explain.]** | |
| **How does *Comcast* (U.S. 2013) support your argument that plaintiffs’ expert’s “but for” models were insufficient to survive class certification?** | | ***Comcast* articulates loud and clear the vital role of a plaintiffs’ developed models and the district court’s rigorous scrutiny in modern antitrust class certification cases.** | |
| **Can you summarize the relevant *Comcast* facts for the Court?** | | **In *Comcast* (U.S. 2013) the plaintiffs moved for class certification with a fully realized classwide damages model: “a regression model comparing actual cable prices in the Philadelphia DMA with hypothetical prices that would have prevailed but for petitioners’ allegedly anticompetitive activities. The model calculated damages of $875,576,662 for the entire class.” *Id.* The lower courts accepted the model uncritically—which the Supreme Court ultimately held was legal error—but also partially granted summary judgment for the defendants, allowing plaintiffs to proceed on just one of the four theories of antitrust liability that they had proposed. *Id.*** | |
| **What did *Comcast* hold?** | | **Because plaintiffs model failed to isolate the damages from the single liability theory that had survived summary judgment, the model offered fell “far short of establishing that damages are capable of measurement on a classwide basis.” *Id.* “In light of the model’s inability to bridge the differences between supra-competitive prices in general and supra-competitive prices attributable to the deterrence of overbuilding, Rule 23(b)(3) cannot authorize treating subscribers within the Philadelphia cluster as members of a single class.” *Id.*** | |
| **Can you explain how the district court’s decision was in line with *Comcast* and other Supreme Court antitrust cases?** | | **The district court did exactly what these clear and binding recent Supreme Court precedents required. It demanded a model that was sufficiently developed to permit rigorous scrutiny. The district court rightly refused to do what the district judge in *In re Hotel Charges* (9th 1974) did. In that case, this Court reversed a district court’s certification grant where that court relied on the “‘imagination’ of [plaintiffs’] counsel to provide solutions that will, at some point in the future,” become evident. To certify a class on that basis would fly in the face of the “rigorous analysis” required by *Wal-Mart* (U.S. 2011) and *Comcast* (U.S. 2013) at the time of certification.** | |
| **The district court said plaintiffs failed to present a “data-driven model” but this type of model is not specifically required by the rules or caselaw, right?** | | **No, these exact words are not mandated in the rule or Supreme Court cases, but practically speaking, there is no such thing as an injury and damages model that is not “data-driven.”** | |
| **Could you elaborate on what you meant in your brief that there is no such thing as an injury and damages model that is not data-driven?** | | **[Explain.]** | |
| **Shouldn’t we find that plaintiffs met their predominance burden in light of the Supreme Court’s decision in *Tyson Foods*?** | | **No. In *Tyson Foods*, the Court rejected the defendant’s argument that individual damages questions predominated where the plaintiffs failed to provide a mechanism to ensure that uninjured class members did not contribute to the size of any damage award and would not recover damages. The Court upheld certification of a class of workers claiming entitlement to overtime pay for time spent donning and doffing protective gear despite individual differences and a lack of records as to overtime spent because *“[w]hen ‘one or more of the central issues in the action are common to the class and can be said to predominate*, the action may be considered proper under Rule 23(b)(3) even though other important matters will have to be tried separately, such as damages or some affirmative defenses peculiar to some individual class members.’” *Id.* Ward Br. 37-38.** | |
| **How is your case distinguishable from our holding in *Just Film*, which held that plaintiffs need only show that damages are capable of measurement on a classwide basis?** | | ***Just Film* (9th 2017) interpreted *Comcast* to require that ‘“damages are capable of measurement on a classwide basis’ . . . in the sense that the whole class suffered damages traceable to the same injurious course of conduct underlying the plaintiffs’ legal theory.” Ward Br. 34-35.** | |
| **Is class certification presumed in antitrust cases?** | | **No. Plaintiffs’ cases that seem to imply a looser standard for class certification in antitrust cases (*Amchem Prods. v. Windsor* (U.S. 1997); *In re Scrap Metal Antitrust Litig.* (6th 2008); *In re Tableware Antitrust Litig.* (N.D. Cal. 2007)) all occurred before the Court decided *Wal-Mart* (U.S. 2011) and *Comcast* (U.S. 2013). The only exception is *In re Cathode Ray Tube (CRT) Antitrust Litigation* (N.D. Cal. 2015), but this case relied on pre-Comcast decisions. Ward Br. 23-24.** | |
| **Plaintiffs cite numerous cases showing that antitrust impact should be presumed—how do you distinguish those?** | | **Most of the cases Plaintiffs cite are simple price-fixing cases where, on account of the *per se* rule, the element of conspiracy dominates. This early and now-discredited case law suggested that antitrust impact could be presumed in some price-fixing cases.** | |
| **Has the presumption present in price-fixing cases ever carried over to monopolization cases like this one?** | | **No, there has never been a presumption in favor of class certification in monopolization actions such as this case. And even with regard to simple conspiracy cases, this Court held in *In re Hotel Telephone Charges* (1974), that the presence of “allegation[s] that a conspiracy existed to violate the antitrust laws does not insure that common questions will predominate.” The DC Circuit elaborated further in *In re Rail Freight Fuel Surcharge Antitrust Litigation* (D.C. 2013), clarifying that “meeting the predominance requirement demands** **more than common evidence the defendants colluded to raise fuel surcharge rates.”** | |
| **What about *In re Cathode Ray Tube (CRT) Antitrust Litigation* decided by the Northern District of California in 2015?** | | **In *In re Cathode Ray Tube (CRT) Antitrust Litigation* (N.D. Cal. 2015) the Northern District relied on a 2005 case in observing that courts “resolve doubts in these actions in favor of certifying the class.” *In re Rubber Chemicals Antitrust Litigation*, 232 F.R.D. 346, 350 (N.D.Cal.2005). And it relied on a 2010 case in noting that “[c]ourts have stressed that price-fixing cases are appropriate for class certification because a class-action lawsuit is the most fair and efficient means of enforcing the law where antitrust violations have been continuous, widespread, and detrimental to as yet unidentified consumers.” *In re TFT–LCD (Flat Panel) Antitrust Litigation (“LCDs”)*, 267 F.R.D. 583, 592 (N.D.Cal.2010), *amended in part*, 2011 U.S. Dist. LEXIS 84476, 2011 WL 3268649 (N.D.Cal. July 28, 2011). *Wal-Mart* (U.S. 2011) and *Comcast* (U.S. 2013) clearly changed the scene here, especially *Comcast*. Ward Br. 23-24.** | |
| **What about Plaintiffs’ reliance on the Supreme Court’s language *in Amchem Prods., Inc. v. Windsor* (U.S. 1997) that “[p]redominance is a test readily met”?** | | **The Court itself certainly doesn’t subscribe to that. In *Comcast* (U.S. 2013), an antitrust case decided 16 years after *Amchem*, the Supreme Court did not apply a relaxed certification standard. Instead, the Court took that occasion to state that “[t]he class action is an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.” Even if Amchem was still the reigning authority here, as the Third Circuit explained in *In re Hydrogen Peroxide Antitrust Litig.* (3rd 2008), “it does not follow” from *Amchem* “that a court should relax its certification analysis, or presume a requirement for certification is met,” in every antitrust case.** | |
| **Has the Court reinforced the *Amchem* (U.S. 1997) view asserted by Plaintiffs that certification is to be presumed or readily accepted in antitrust cases?** | | **No, in fact the opposite is true. In a 2013 antitrust case, *American Express Co. v. Italian Colors Restaurant* (U.S. 2013) the Court stated that Rule 23 “imposes stringent requirements for certification that in practice exclude most claims.”** | |
| **Isn’t predominance in this case easy to establish because this is an antitrust involving a single monopolized service, priced uniformly, as Plaintiffs claim?** | | **No. *Comcast* (U.S. 2013) considered the same scenario involving a cable TV service. The Supreme Court nevertheless identified** **one fatal error in the proposed common proof and hinted at more—suggesting that damages may have varied by geography. Further, class certification has often been denied in comparable monopolization cases.** | |
| **Isn’t this case factually distinguishable from the Second Circuit’s decision in *Heerwagen v. Clear Channel Communications* (2d. 2006)?** | **[Explain.]** | |
| **Isn’t this case factually distinguishable from the Fifth Circuit’s decision in *Bell Atlantic Corporation v. AT&T Corp.* (5th 2003)?** | **[Explain.]** | |
| **What was the key takeaway from *Bell Atlantic Corp. v. AT&T Corp.* (5th 2003)?** | **In *Bell Atlantic* (5th 2003), the Fifth Circuit held that “where fact of damage cannot be established for every class member through proof common to the class, the need to establish antitrust liability for individual class members defeats Rule 23(b)(3) predominance.”** | |
| **Aren’t Plaintiffs’ expert’s methods enough to satisfy the Seventh Circuit’s standard in *Messner v. Northshore Univ. HealthSystem* (7th 2012)?** | **[Explain.]** | |
| **Isn’t this case factually distinguishable from the New Jersey district court’s decision in *In re Thalomid & Revlimid Antitrust Litigation* (D.N.J. 2018)?** | **[Explain.]** | |
| **Isn’t this case factually distinguishable from the Middle District of Florida court’s decision in *In re Photochromic Lens Antitrust Litigation* (M.D. Fla. 2014)?** | **[Explain.]** | |
| **Isn’t this case factually distinguishable from the Eastern District of Montana court’s decision in *Sample v. Monsanto Co.* (E.D. Mo. 2003)?** | **[Explain.]** | |
| **Isn’t this case factually distinguishable from the Western District of Oklahoma court’s decision in *Meyers v. Sw. Bell Tel. Co.* (W.D. Okla. 1997)?** | **[Explain.]** | |
| **Isn’t this case factually distinguishable from the Northern District of California court’s decision in *Somers v. Apple* (N.D. Cal. 2009)?** | **[Explain.]** | |
| **What about Plaintiffs’ argument based on our decision in *Torres v. Mercer Canyons Inc.* (9th 2016) that “[p]redominance is not ... a matter of nose- counting,” but “[r]ather, more important questions apt to drive the resolution of the litigation are given more weight in the predominance analysis”?** | **We don’t disagree. Antitrust impact is precisely the kind of “important question[ ] apt to drive the resolution of the litigation,” and it therefore plays a significant role in the predominance inquiry when it comes to antitrust class actions.** | |
| **Are you essentially just arguing that Plaintiffs’ expert’s model cannot sufficiently quantify the amount of damages at stake here?** | **No. Plaintiffs’ briefs attempt to misdirect the Court to think that we are only arguing about the amount of damages, but this is merely a diversion. Our primary contention of why plaintiffs’ class cannot be certified is that they have not yet proposed and defended a data-driven model for proving injury-in-fact on a class-wide basis. This is precisely the reason the district court denied certification in the first place.** | |
| **What do we do with Plaintiffs’ cases that hold that the amount of damages does not, standing alone, preclude class certification?** | **These cases put the cart before the horse. The district court’s decision does not even implicate that principle, let alone violate it. Plaintiffs have not identified any damages estimates of any kind here. That is the core problem: Plaintiffs did not even evolve Dr. Warren-Boulton’s theories into a proof concept that allows us to see what his hypotheses yield. That is a total failure of proof, not a question of whether individualized damages issues defeat predominance.** | |
| **Are you saying that Plaintiffs’ entire line of arguments that uncertainty as to the amount of damages does not necessarily preclude certification is nothing more than a red herring?** | **That’s right. The district court’s decision rested entirely on plaintiffs’ failure to carry their initial burden to demonstrate that impact common to the class could be established with common proof. It did not even discuss the amount of damages. As the Third Circuit noted in *Harnish v. Widener Univ. School of Law* (3d 2016), “[o]nly if the fact of damage is established does a court reach the question of remedy and the exact calculation of each plaintiff’s damages.”** | |
| **Does the Clayton Act require antitrust plaintiffs to prove impact as distinct from the quantification of damages?** | **Yes, and Plaintiffs concede as much on pages 25-26 of their opening brief. The Supreme Court held in *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 114 n.9 (1969) that the “burden of proving the fact of damage . . . is satisfied by . . . proof of some damage flowing from the unlawful [conduct],” so it is key to show the fact of damage, not necessarily the precise amount.** | |
| **Do antitrust cases subscribe to the common law principle that once “the fact of damage” has been established by evidence with reasonable certainty, the amount of damages can be estimated by “just and reasonable inference”?** | **Yes, this ancient rule focusing on the fact of damage rather than the precise amount of damages at the certification stage comes from the Court’s decision in *Story Parchment Co. v. Paterson Parchment Paper Co.* (U.S. 1931). It rests on the insight that once wrongdoing and individual harm have been established, uncertainty about the extent of that harm should (within reason) not benefit the defendant.** | |
| **Aren’t we required to hold that the need for individual damages calculations, need not preclude class certification?** | **No. This Court has already found individual damages issues to prohibit class certification in *In re Hotel Telephone Charges* (9th 1974). In fact, in *Comcast* (U.S. 2013), the Supreme Court also held that a class could not be certified where the damages model was inconsistent with the remaining liability theory.** | |
| **What are the overarching individualized concerns present here?** | **[Explain.]** | |
| **If uncertainty about amount of damages does not necessarily preclude certification, can doubts about the fact of class-wide impact or “injury” preclude class certification?** | **Yes. The “first dollar of damages,” as the DC Circuit put it in *Rail Freight* (D.C. 2013) must be proven by or for each class member with reasonable certainty, and the antitrust case law is clear that if the fact of impact cannot be adjudicated through common proof, class certification is inappropriate.** | |
| **How do we deal with Plaintiffs’ reliance on *Lambert v. Nutraceutical Corp.* (9th 2017) for the principle that whether plaintiffs can prove damages to a reasonable certainty is a question of fact that should be reserved for trial?** | **First, the fatal flaw with Dr. Warren-Boluton’s declaration is that he failed to submit any semblance of a functioning model tailored to market the facts in this case, not that he didn’t calculate damages with enough certainty. In other words, the issue is that he didn’t calculate damages at all, not that he didn’t do it well enough. Second, *Lambert*** ***v. Nutraceutical Corp.* (9th 2017) and the other cases plaintiffs cite for this proposition, *Just Film, Inc. v. Buono* (9th 2017) and *Pulaski & Middleman, LLC v. Google, Inc.* (9th 2015), are not antitrust cases. These cases therefore do not address what an antitrust plaintiff must do to prove that the Clayton Act’s requirement of individual injury can be met on a classwide basis.** | |

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| **Argument II:**  **Plaintiffs’ Injury Theories Are Inconsistent with Their Only Remaining Liability Theory** | **Color:** |
| **Do we even need to consider in the first instance whether Plaintiffs’ hypothetical damages theories would support class certification?** | **No. In fact, it would be inappropriate. These theories were not developed below at all, and Apple had no opportunity to test or respond to a tangible implementation of those theories. Likewise, the district court had no opportunity to conduct the required rigorous scrutiny, or thereafter exercise its considerable discretion as to whether to certify a class.** |
| **Why did you even address Plaintiffs’ hypothetical damages theories in your briefs?** | **We did so only out of an abundance of caution. We wanted to play out our argument that had Plaintiffs attempted to implement their theories into some semblance of a model, they never would have worked.** |
| **In your briefs, you argue that Dr. Warren-Boulton cannot even decide on a method of calculating damages, but aren’t his two “but for” worlds just different measures of calculating damages?** | **No. They are not different measures of** **damages, but radically different conceptions of the harm the challenged conduct might produce. The first “truthfully exclusive” theory is not even about the alleged monopolist’s pricing (since AT&T, not Apple, is the alleged monopolist). It tries to make this case into something it has never been—one based on the price of the cellular handset rather than the cellular service. The second “truthfully non-exclusive” theory seems more connected to this case, but even that is not true, since Dr. Warren-Boulton also proposes to award every iPhone user—including the majority of those who never purchased renewal service from AT&T—renewal service damages on a theory of lost “option value.”** |
| **Can you explain what you believe is wrong with Dr. Warren-Boulton’s first theory, the truthfully exclusive but-for world?** | **Yes, essentially the first model tries to contort this case into one that focuses not on the alleged monopolist, AT&T’s, cellular service prices but instead on the device supplier, Apple’s, cellular handset prices. This theory posits a “truthfully exclusive” (“TE”) but-for world under which more robust disclosures about AT&T’s exclusivity at the outset would have reduced the *initial sale price of the iPhone*, thereby making every actual iPhone price supracompetitive. The first TE theory is not even about the alleged monopolist’s pricing (since AT&T, not Apple, is alleged monopolist). It tries to make this case into something it has never been—one based on the price of the cellular handset from Apple rather than the cellular service from AT&T.** |
| **Can you explain what you believe is wrong with Dr. Warren-Boulton’s second theory, the truthfully non-exclusive but-for world?** | **Dr. Warren-Boulton’s second theory posits a “truthfully non-exclusive” (“TNE”) but-for world under which the ability to switch to T-Mobile at the end of the initial two-year contract period, or possibly earlier, would have driven down *AT&T’s voice and data pricing* for renewal periods. This theory, while somewhat more connected to this case, is still not sufficiently tailored because Dr. Warren-Boulton also proposes to award every iPhone user—including the majority of those who never purchased renewal service from AT&T—renewal service damages on a theory of lost “option value.”** |
| **Why is it troubling that plaintiffs have not chosen between their expert’s two theories?** | **Plaintiffs’ refusal to commit to one theory signals to the court that they have not met their burden under Rule 23(b)(3) to certify. In virtually every antitrust class action today: plaintiffs offer a functioning injury and damages model, the defendants critique it, and the district court conducts a rigorous analysis focused on “the soundness of [the] statistical models that purport to show predominance.” *In re Rail Freight Fuel Surcharge Antitrust Litig.* (D.C. 2013). But that’s not what happened here. Plaintiffs presented two barely conceived ideas for diametrically opposite damages conceptions, and when confronted with criticisms from Apple’s expert (Dr. Katz) regarding their viability, Dr. Warren-Boulton merely reiterated his confidence that what he promised to do could be done: “Regardless of which but-for world is contemplated, it remains my expert opinion that Class members suffered harm, which can be measured on a class-wide basis by applying standard economic principles commonly used by economists.” This is not enough.** |
| **Why can’t plaintiffs keep their two differing but-for world models at this stage as alternative methods to calculate damages?** | **The inability to even take a position on what injury actually results from the alleged anticompetitive conduct is fatal at this stage.** |
| **Why should we expect more of Plaintiffs than their expert’s “but-for” models at this early class certification stage?** | **Two reasons: First, because without a functioning injury and damages model from plaintiffs, the defendants have nothing to critique, and the district court cannot do its duty to conduct a rigorous analysis.**  **Second, defendants frankly find it unbelievable that we are now more than ten years into this multi-case litigation, and all that plaintiffs presented to the district court is an 11- page expert declaration that, at best, described what the expert *intended to do******at some later* date to establish that antitrust impact could be adjudicated for all class members with common proof.** |
| **What more did you expect plaintiffs’ expert to present at the certification stage?** | **Dr. Warren-Boulton certainly could have implemented at least one of his two theories with an econometric model or undertaken some level of analysis to verify that one or both were actually viable.** |
| **Plaintiffs argue that a functioning econometric model is not required at the certification stage; is that true?** | **No. Even if there may have been a day pre-*Comcast* (U.S. 2013) when developed, functioning econometric models were not required at the certification stage of antitrust cases, they are now absolutely required. This is because injury-in-fact is an essential element of liability in a private antitrust claim, and because of the now-universal recognition as the D.C. Circuit explained in *Rail Freight* (D.C. 2013), that “[c]ommon questions of fact cannot predominate when there exists no reliable means of proving classwide injury in fact.”** |
| **Do either of Plaintiffs’ theories of harm or models match the sole surviving theory of liability?** | **No, neither of Plaintiffs’ contradictory theories of harm actually match the theory of liability that remains in the case after summary judgment. This is fatal under *Comcast* (U.S. 2013) where the Supreme Court held that “at the class certification stage (as at trial), any model supporting a ‘plaintiff’s damages case must be consistent with its liability case, particularly with respect to the alleged anticompetitive effect of the violation.’”** |
| **Can you explain how each of Plaintiffs’ models are inconsistent with the surviving theory of liability?** | **[Explain.]** |
| **Can you explain why you believe Plaintiffs’ expert’s but-for world theories are flawed?** | **A foundational flaw of both theories is the failure to account for what consumers knew about AT&T’s exclusivity and iPhone unlocking policies, and what AT&T might have done if “better informed” consumers pushed back. Any reliable impact and damages theory must address these questions, given that Plaintiffs’ aftermarket theory turns entirely on Apple’s alleged failure to adequately inform consumers about exclusivity and unlocking, such that consumers unknowingly gave AT&T an aftermarket monopoly over iPhone voice and data services and therefore uniformly paid monopolistic service prices.** |
| **Why do plaintiffs need to look any further than the models and figure out exactly what customers knew about AT&T’s exclusivity at the certification stage?** | **Plaintiffs have to look into these questions because there cannot be a generic answer. As the Supreme Court held in *Eastman Kodak Co. v. Image Tech. Servs., Inc.* (U.S. 1992), it all depends on the responsiveness between equipment and service pricing, what consumers know about aftermarket practices, the degree of lock-in, and whether there are opportunities for price discrimination.** |
| **Why are Dr. Warren-Boulton’s two “but-for” models not enough when they are common in the antitrust class action industry?** | **Because his theories simply assume that the influence of all of these factors will yield a common impact capable of proof on a classwide basis. So he does not actually study and present conclusions on anything: Not on “whether ... consumers [who] entered into certain [aftermarket] transactions [did so] ‘knowing that they were agreeing to such a commitment.’”; and not on whether AT&T’s response to more market information about exclusivity would have been uniform or discriminatory.** |
| **Why is it troubling that Dr. Warren-Boulton cannot yet speak to the class members’ knowledge of the scope of their commitment with AT&T that they were agreeing to?** | **It is problematic because the knowledge issues implicated by Plaintiffs’ aftermarket claim are precisely the kind that present inherent difficulties for class treatment. For example, in *Thorn v. Jefferson-Pilot Life Ins. Co.* (4th 2006) the Fourth Circuit noted that “in cases where the legal issue is similarly focused on the plaintiff’s knowledge ... [the court has] consistently held that individual hearings are required.” The Western District of Texas put it best when it held that “[k]nowledge is highly individualistic and cannot be determined on a classwide basis.” *Martin v. Home Depot U.S.A., Inc.* (W.D. Tex. 2004).** |
| **What exactly are these assumptions that Dr. Warren-Boulton makes that are so concerning?** | **To give a few examples, he assumes, without analysis, that all consumers expected to unlock their iPhones, and therefore more information inevitably means uniformly lower prices.** |
| **In what ways were Dr. Warren-Boulton’s assumptions in creating his models inaccurate?** | **As Apple’s expert Dr. Katz explains, there is no basis for such assumptions given (i) variance in consumer experiences with AT&T and other carriers, (ii) variance in exposure to media, including coverage of this and other “locking” litigation against AT&T, (iii) variance in exposure to Apple and AT&T marketing materials, and (iv) non-uniform responses AT&T may have undertaken in a world with even more information and attention on exclusivity.** |
| **You’ve argued that Plaintiffs’ model lacks the requisite substance for the district court to conduct its mandated “rigorous analysis,” but if that were true, how then did Apple’s expert Dr. Katz have enough material to critique for more than 60 pages in his declaration?** | **[Explain.]** |
| **In your view, what did Plaintiffs’ expert need to show to qualify for certification?** | **Plaintiffs needed to show that they had solved for the issues pointed out by Apple’s expert, Dr. Katz and show how their solutions could withstand rigorous scrutiny. Simply presuming (without any actual analyses, such as consumer surveys) that every customer thought the same way and every but-for world was one with a uniform AT&T response does not meet a plaintiff’s Rule 23 burdens.** |
| **Can you summarize the flaws with the TE model?** | **The truthfully exclusive model suffers from four main flaws:**  **(1) it turns *Kodak* on its head, creating a logical impossibility by basing aftermarket damages on foremarket (iPhone) pricing;**  **(2) there is no basis for the TE’s predictions that (a) iPhone prices were too high or (b) AT&T service prices were anything but normal;**  **(3) the TE theory was used in *iPhone I*, to build an injury theory around the revenue-sharing provisions of the DRSA, but that is inapplicable here because every iPhone sold during our class period was no longer subject to Apple and AT&T’s revenue-sharing provision; and**  **(4) the TE theory does not control for the variables necessary to establish that the allegedly inadequate disclosures regarding exclusivity and unlocking, yielded a marketwide effect in the form of universally inflated iPhone prices.** |
| **Could you explain why the TE theory does not comport with the Supreme Court’s *Kodak* decision?** | **The truthfully exclusive “TE” theory turns *Kodak* upside-down. The justification for an aftermarket as a distinct “relevant market” is that a second, aftermarket purchase might become economically disconnected from the first purchase (in the “foremarket”) of a primary product. The doctrine presumes that the first purchase (here, the iPhone), because it takes place in a competitive market, is at a competitive price. The injury question is therefore whether the second purchase was at a monopolistic price (thereby raising systems prices as well). It is logically impossible to base aftermarket damages on foremarket (iPhone) pricing, because under *Kodak* itself the degree of interdependence (or cross-elasticity) between iPhone and service pricing that the TE theory presumes defeats the aftermarket claim.** |
| **What evidence do you have that there is no basis for the TE predictions that (a) iPhone prices were too high or (b) AT&T service prices were anything but normal?** | **Uncontested evidence shows that iPhone prices remained constant—throughout the class period and after the end of exclusivity—and that iPhone prices were the same as various other smartphones offered by AT&T. Likewise, there is no evidentiary basis for the theory’s assumption that AT&T’s renewal service prices were in fact monopolistic. AT&T was prohibited contractually from charging iPhone users prices greater than those offered to other handset customers. And AT&T’s renewal service pricing did not differ from service prices during the initial two-year contract period— prices which were constrained by the vigorous competition AT&T faced from other carriers. But the TE theory deals with none of this evidence and assumes without any evidence that AT&T’s exact same prices for renewal service suddenly became supracompetitive.** |
| **Shouldn’t it be helpful to use a model that has already been vetted and used in *iPhone I*? You seem to argue that it’s a strike against the TE theory that it was used in that case.** | **In iPhone I the same TE theory that plaintiffs are trying to advance here attacked and built an injury theory around the revenue-sharing provisions of the DRSA, which supposedly allowed Apple to share in AT&T’s monopoly service pricing. But every iPhone sold during the class period in this case was no longer subject to Apple and AT&T’s revenue-sharing provision. Absent revenue sharing, Apple could not have “extract[ed] the full economic rents from the iPhone, ... leaving AT&T to earn only normal economic profits despite its monopoly over ... [renewal] service.” The TE theory nevertheless assumes that Apple did.** |
| **In what ways did the TE theory not control for variables that would show a marketwide effect of universally inflated iPhone prices?** | **As Dr. Katz explains, Dr. Warren-Boulton failed to consider the valuations of the marginal consumer, which matter in predicting whether iPhone prices would have been higher or lower in the truthfully-exclusive but-for world. The theory also fails to account for innumerable differences in the individual knowledge that would naturally occur among class members. There is nothing to explain whether customers would have demanded a cheaper iPhone if they understood the extent of AT&T’s exclusivity, much less whether enough customers would have cared to affect Apple’s iPhone pricing decisions. And there is nothing to account for the individual differences in knowledge and expectations regarding unlocking, and how (if at all) those variations would have affected consumer demand with respect to AT&T’s service prices. Nor is there any consideration of the inevitable variations across how individuals value iPhone service. And there is not anything to account for Apple and AT&T’s consistent disclosures, which informed consumers that the iPhone would not be unlocked after the initial two-year contract expired.** |
| **What did plaintiffs do to solve these individualized issues of knowledge and disclosures?** | **Nothing. Rather than attempting to solve for these issues, the plaintiffs’ TE theory ignores them altogether and merely assumes impact common the class.** |
| **What is your understanding of plaintiffs’ expert’s second truthfully non-exclusive theory?** | **Under this theory, Dr. Warren-Boulton advances two “alternative” approaches, both borrowed from Dr. Simon Wilkie—the plaintiffs’ expert in *iPhone I*: (i) a “Benchmark Approach” that assumes AT&T would have lowered its service prices to match T-Mobile’s in the absence of exclusivity; and (ii) a “Real-Option Approach” that assumes that, without exclusivity, a gap would have remained between AT&T’s and T-Mobile’s service prices, constituting the option value of switching carriers for iPhone customers.** |
| **Why is it bad to borrow models from Dr. Wilkie in *iPhone I*? Wouldn’t they be pertinent here?** | **[Explain.]** |
| **Is plaintiffs’ TNE theory better or worse than the TE theory?** | **The theories are equally flawed, but for different reasons.** |
| **Why does it matter that the two alternative approaches advanced by the TNE theory are incompatible?** | **These two TNE approaches require opposite assumptions: the first assumes AT&T would have lowered its service prices; the other does not.** |
| **Why is the Benchmark approach in the TNE theory unreliable?** | **The Benchmark Approach is unreliable for many reasons, but one in particular stands out. Numerous years’ worth of data about AT&T and T-Mobile service prices following the end of AT&T’s exclusivity over the iPhone firmly contradict the assumption that AT&T’s prices would have fallen to T-Mobile levels. AT&T and T-Mobile service prices simply did not converge once both carriers offered iPhones. That is because the AT&T and T-Mobile networks were not of comparable quality.** |
| **How can you know that AT&T and T-Mobile networks were not of comparable quality such that AT&T’s prices would not have fallen to T-Mobile’s levels in the TNE theory?** | **On all cellphones, and before and after its iPhone exclusivity, AT&T enjoyed a price premium over T-Mobile because of its substantially greater nationwide coverage and the superior performance of its 3G networks nationally. This uncontroverted evidence entirely undermines the TNE theory.** |
| **Would anything prevent Dr. Warren-Boulton from using the Benchmark approach in the TNE theory to calculate damages using a common methodology that would apply class-wide, as he claims he can do?** | **Yes, several individualized questions that would vary throughout the class make Dr. Warren-Boulton’s TNE theory untenable. The Benchmark approach fails to account for the wide variation in pricing plans available to both AT&T’s and T-Mobile’s customers.** |
| **What exactly was the variation in pricing plans available to AT&T’s and T-Mobile’s customers?** | **Before, during, and after the Class period, each carrier offered multiple rate plans that differed from one another along multiple dimensions, including allowances for voice calls, texts, and data.”** |
| **Why do these individualized considerations matter in proving a class-wide common impact?** | **Dr. Warren-Boulton insists that these concerns are merely “complications” for his TNE theory; but rather than address them, he simply casts then aside to be somehow dealt with at a later time: He assured the district court that these complications “do not mean we cannot calculate damages using a common methodology that would apply to virtually all members of the Class.”** |
| **Why can’t we rest on Dr. Warren-Boulton’s assurances that these complications can be sorted out at trial?** | **The Supreme Court’s decision in *Comcast* (U.S. 2013) clarified that courts should consider whether plaintiffs’ experts’ models generated “just and reasonable” damages. Otherwise, “*any* method of [damages] measurement” would be acceptable if it could be applied classwide, “no matter how arbitrary the measurements may be. Such a proposition would reduce Rule 23(b)(3)’s predominance requirement to a nullity.”** |
| **Does the Benchmark approach in the TNE theory present potential individualized issues?** | **Yes, in fact Dr. Warren-Boulton concedes that under the Benchmark Approach, the degree of harm would vary among individuals: “the harm suffered by iPhone customers may differ somewhat between those would have stayed with AT&T (at a lower AT&T rate), those who would have switched to T-Mobile (at T-Mobile’s** **lower rate), and those who would have sold or transferred their iPhones (at a higher price or value).”** |
| **How does Dr. Warren-Boulton handle these potential individualized concerns in the Benchmark approach in the TNE theory?** | **He ignores them. Yet again, he merely assumes, incorrectly, and without any basis that the issues pointed out by Dr. Katz will not create individualized issue that would thwart class certification.** |
| **Do these individualized concerns in the Benchmark approach in the TNE theory rise to the level that would thwart class certification?** | **Yes. As Dr. Katz notes, such an inquiry would be “a fact-intensive inquiry that must be conducted at the individual level.”** |
| **Why won’t the Benchmark approach in the TNE work?** | **The Benchmark Approach is not a reliable way to “determin[e] whether any iPhone customer suffered harm, let alone that all iPhone customers suffered the same (non-zero) harm.”** |
| **Is the Real Option approach in the TNE theory any better than the Benchmark approach?** | **No, it too rests on unsubstantiated assumptions. The real-option approach is another one-size-fits-all analysis that not only fails to assess accurately numerous individual factors affecting impact, but ignores undisputable marketplace facts.** |
| **Could you please describe the Real Option approach in the TNE theory?** | **The Real Option approach in the TNE theory rests on the naked assumption that every iPhone customer within the alleged class period similarly valued the option of being able to switch from AT&T to T-Mobile, despite the numerous individual-specific marketplace factors that would implicate their individual valuations of being able to do so.** |
| **What are the individual-specific marketplace factors that would implicate AT&T’s customers’ individual valuations of being able to switch to T-Mobile?** | **Those include variations in service prices by locale, as well as differences in cellular network quality by geography. This approach also fails to account for the many consumers who purchased AT&T and not T-Mobile wireless service during the class period even though they did not purchase iPhones, meaning that any differential in service prices could not have accurately represented the “value” of being able to use the iPhone on T-Mobile (or another carrier).** |
| **Do any of Dr. Warren-Boulton’s theories match the theory of liability remaining in the case after summary judgment?** | **No. In the ten-plus year multi-case history of this litigation, Plaintiffs’ theory of liability has always been that AT&T charged monopoly prices for iPhone voice and data services throughout the period of AT&T’s exclusivity over the iPhone. At summary judgment, the district court narrowed this period of potential injury significantly, by holding that Plaintiffs have triable evidence of a legally cognizable “aftermarket” only with regard to renewal voice and data service offered by AT&T after the expiration of each customer’s initial two-year contract.** |
| **Why do Plaintiffs’ theories need to match the theory of liability remaining in the case after summary judgment?** | **Because of the Supreme Court’s decision in *Comcast* (U.S. 2013). This case presents the quintessential *Comcast* problem. “[A]t the class certification stage (as at trial), any model supporting a ‘plaintiff’s damages case must be consistent with its liability case, particularly with respect to the alleged anticompetitive effect of the violation.’”** |
| **Can we affirm on the basis that the models do not comport with the only remaining theory of liability?** | **Yes, this Court “may affirm on any basis supported by the record, whether or not relied upon by the district court.” *Zixiang Li v. Kerry* (9th 2013). The fundamental mismatch presented here thus provides an alternative basis for affirmance.** |
| **How does the TE theory run counter to the remaining theory of liability?** | **The TE theory is a damages theory relating to prices for the *iPhone itself*, which is something that by definition every class member buys, but which Plaintiffs do not claim is a monopolized product. Furthermore, as explained earlier, Plaintiffs’ aftermarket theory would fail as a matter of law if iPhone and service pricing were so tightly connected that monopoly pricing in renewal service only would affect the price of every iPhone.** |
| **Does the TE theory even align with the pleaded claims in this case?** | **No. A claim about iPhone pricing would have required different pleadings and different evidence in order to survive the litigation up to this point—none of which has been offered.** |
| **Could you explain how Plaintiffs TE theory failed *Comcast*’s (U.S. 2013) first step in a damages study: to translate the legal theory of the harmful event into an analysis of the economic impact of that event?** | **Yes. Plaintiffs’ methodology does not measure monopoly overcharges by AT&T in the *renewal voice and data market* (the only theory left after the district court’s partial summary judgment grant). Instead, Plaintiffs’ models measure unalleged supracompetitive pricing for *iPhones themselves*, thereby failing *Comcast*’s requirement that “any model supporting ‘a plaintiff’s damages case must be consistent with its liability case, particularly with respect to the alleged anticompetitive effect of the violation.’”** |
| **Is Dr. Warren-Boulton’s TNE theory also flawed under *Comcast*?** | **Yes, because Plaintiffs have never contended that there was anything unlawful about the exclusivity itself, nor could they.** |
| **Why does the fact that Plaintiffs can’t assert the exclusivity as unlawful matter under *Comcast*?** | **[Explain.]** |
| **Why couldn’t Plaintiffs contend that Apple and AT&T’s exclusivity was itself unlawful?** | **Exclusive arrangements between phone manufacturers and carriers are common, and an exclusive deal for the launch of a new product with zero market share could not possibly be anticompetitive. Dr. Warren-Boulton himself agreed that “the extension of exclusivity into the Renewal Service Period, by itself and with full information to purchasers,” would not have been anticompetitive or unlawful.** |
| **What is wrong with the Plaintiffs’ TNE theory measuring the damages that occurred from the alleged consumer deception?** | **Plaintiffs liability theory is based on their claim that consumers lacked full information about the fact that their iPhones would not be unlocked after their initial two-year contracts, and therefore became vulnerable to supracompetitive pricing in the voice and data renewal services “aftermarket.” Dr. Warren-Boulton’s “TNE” but-for world does not, however, even purport to measure the impact of that alleged consumer deception and “lock in.” Instead, it explicitly measures the impact of *exclusivity itself*.** |
| **How does the TNE’s but-for world measure only the exclusivity itself and not the impact of the alleged consumer deception?** | **[Explain.]** |
| **Do both the TE and the TNE theories fail to estimate class-wide damages?** | **Yes, both of Plaintiffs’ expert’s theories fail to estimate “damages stem[ming] from the defendant’s actions that [allegedly] created the legal liability.” *Leyva v. Medline Indus., Inc.*, 716 F.3d 510, 514 (9th Cir. 2013).** |

**Argument 3**

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| **Argument III: Reassignment is Unwarranted** | | **Color:** | |
| **Under what circumstances is reassignment warranted?** | **This Court exercises its statutory supervisory authority to reassign cases on remand only in “rare and extraordinary circumstances.” *Krechman v. County of Riverside* (9th Cir. 2013). Such circumstances exist only where “the district court has exhibited *personal bias* requiring recusal from a case” or in other “*unusual circumstances*.” *United Nat’l Ins. Co*. *v. R&D Latex Corp.* (9th Cir. 2001).** | |
| **What three factors do we consider in deciding whether unusual circumstances warranting reassignment exist?** | **1. Whether the district court judge would “have substantial difficulty in putting out of his or her mind previously-expressed views or findings determined to be erroneous or based on evidence that must be rejected.”**  **2. Whether reassignment “is advisable to preserve the appearance of justice.”**  **3. Whether reassignment would “entail waste and duplication out of proportion to any gain in preserving the appearance of fairness.”**  ***McSherry v. City of Long Beach* (9th Cir. 2005).** | |
| **On what basis do plaintiffs request reassignment?** | **Plaintiffs’ argument for reassignment amounts to an attack on the impartiality of the district court.** | |
| **Did the district court demonstrate any bias in the case below?** | **No. Since inheriting this case in 2012 (when Judge Ware retired), the district court has been patient, evenhanded, and provided plaintiffs with every opportunity to prove their case. The district court has issued rulings favoring both sides, and its conclusion that plaintiffs failed to carry their burden of proof at the certification stage was grounded in settled law.** | |
| **On what basis do plaintiffs argue that the district court will have difficulty setting aside its views on remand?** | **Plaintiffs give three reasons why the district court would have difficulty setting aside its views on remand:**  **1. Its decision denying class certification.**  **2. Its decision to deny a stay of the proceedings pending this appeal.**  **3. This Court’s reversal of the district court’s stipulated dismissal under Fed. R. Civ. P. 12(b)(7) for plaintiffs’ failure to join AT&T as an indispensable party.** | |
| **What did the district court say in denying class certification?** | **In denying class certification, the district court found that plaintiffs’ theories were not developed enough to allow for the rigorous scrutiny required under Rule 23. Should its decision be reversed, there is nothing to suggest that the district court would be unable to comply with this Court’s mandate on remand.** | |
| **Why did the district court deny plaintiffs’ request for a stay pending this Court’s decision on their Rule 23(f) petition?** | **Rule 23(f) petitions do not automatically stay proceedings. Because such petitions are “granted sparingly,” *Chamberlan v. Ford Motor Co.* (9th Cir. 2005), it was reasonable for the district court to conclude that this one would most likely be denied, and to plan accordingly. The district court’s denial of a stay does not suggest that it harbors any particular views that could not be set aside on remand.** | |
| **What did we say in *United States v. Morales*, (9th Cir. 2012), regarding the district court’s rejection of the parties’ stipulated request to stay proceedings?** | **In *United States v. Morales* (9th Cir. 2012), an unpublished case, this Court said that “[t]he strength of [the District Court judge’s] beliefs is manifest in [its] rejection of the [parties’ stipulated] request to stay proceedings pending [this] interlocutory appeal[], requiring this court to enter an emergency stay.” Ward Br. 50.** | |
| **What happened in *Earp v. Cullen* (9th Cir. 2010)?** | **In *Earp v. Cullen* (9th Cir. 2010), this Court reassigned the case where it had to intervene and enter an emergency stay. Ward Br. 50.** | |
| **Did this Court’s decision that AT&T was not a necessary party make it difficult for the district court to set aside its views?** | **No. First, this Court reversed the dismissal order entered by Judge *Ware*, not Judge Gonzalez Rogers. And, in any event, the parties stipulated to the dismissal order for the very purpose of seeking this Court’s immediate review on the question of whether AT&T was an indispensable party. This Court’s reversal of an order by another district judge does not impede the district court’s ability to set aside any previously held views should remand be necessary.** | |
| **What order did this Court reverse in holding that AT&T was not a necessary and indispensable party?** | **This Court reversed Judge Ware’s order of dismissal from December 17, 2012. Ward Br. 48-49.** | |
| **What did the district court say about this Court’s June 29, 2015 decision reversing the district court’s order of dismissal?** | **The District Court referred to this Court’s holding as an “interesting opinion by the Ninth Circuit” and later continued to express its belief that AT&T is an indispensable party, despite this Court’s clear holding that it is not. Ward Br. 49.** | |
| **What did we say in *Nozzi v. Housing Authority* (9th Cir. 2015)?** | ***Nozzi v. Housing Authority* (9th Cir. 2015) is inapposite. That case involved a district court judge who expressed open hostility to the rulings of this** **Court, and who explicitly said that the case should be remanded to a different district judge if his decision were reversed.** | |
| **Has the district court ever demonstrated hostility to plaintiffs or their case?** | **No. Since this Court originally remanded this case to the district court after reversing the dismissal order by Judge Ware, the district court has never suggested that it is hostile to plaintiffs or their case.** | |
| **Has the district court prejudged any of the issues presented?** | **No. [Explain.]** | |
| **When is reassignment necessary to preserve the appearance of justice?** | **Such circumstances are exceedingly rare. *See California v. Montrose Chem. Corp.* (9th Cir. 1997); *Krechman v. County of Riverside* (9th Cir. 2013). Reassignment is only necessary when a “district court’s expressions of frustration with an attorney or party [must have] somehow *appeared* to affect his or her handling of the substantive issues in the case.” *California v. Montrose Chem. Corp.* (9th Cir. 1997).** | |
| **Is reassignment necessary in this case to preserve the appearance of justice?** | **No. The district court has diligently guided this case toward a final disposition. It denied a motion to dismiss by Apple, permitted plaintiffs to conduct discovery in opposition to Apple’s motion for summary judgment, addressed class certification motions, and set a schedule for trial. The district court has provided plaintiffs every opportunity to prove their case, at every juncture. The court denied Apple’s** **summary judgment motion in part, and permitted plaintiffs to take some of their claims to a jury.** | |
| **Has the district court made *any* comments that could be seen as affecting its handling of the substantive issues in the case?** | **The district court has noted numerous times that it was “having a difficult time understanding why this case is still here,” and has complained that the case is “stale” and “too old.” Ward Br. 51.** | |
| **Plaintiffs argue that the district court prejudged their class certification motion by questioning their damages methodology before the motion was fully briefed. How do you respond?** | **[Explain.] Ward Br. 52.** | |
| **Plaintiffs argue that the district court relied on *In re GPU* (N.D. Cal. 2008) in denying their class certification motion, but failed to mention that the *GPU* court *certified a class similar to the proposed class here*. How do you respond?** | **[Explain.] Ward Reply 28.** | |
| **Why do you argue that reassignment would be wasteful and duplicative?** | **The district court is already deeply familiar with this case’s complicated factual and procedural history and has guided it through a motion to dismiss, a motion for summary judgment, discovery, and a ruling on class certification.** | |
| **Has discovery been completed in this case?** | **No. Ward Br. 52.** | |
| **Did the district court’s denial of plaintiffs’ class certification motion in a cursory five-page order demonstrate bias?** | **[Explain.] Ward Br. 52-53.** | |
| **Why do you argue that plaintiffs’ request to reassign this case to a different district judge is disingenuous?** | **[Explain.]** | |