

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

ZACK WARD, ET AL.,

Plaintiffs,

vs.

APPLE INC.,

Defendant.

CASE NO. 12-cv-05404-YGR

**ORDER DENYING MOTION FOR CLASS
CERTIFICATION**

Re: Dkt. No. 158

Now before the Court is plaintiffs' motion for class certification pursuant to Federal Rule of Civil Procedure 23(b)(3). (Dkt. No. 158 ("Motion").)¹ Plaintiffs seek class certification in connection with their claims against defendant Apple Inc., which they describe as "arising out of the undisclosed and unprecedented exclusivity agreements between Apple and AT&T Mobility LLC ('AT&T') which locked Plaintiffs and all other iPhone consumers into using AT&T's voice and data service, even after their wireless services agreements ('WSAs') with AT&T expired and even if they paid an early termination fee ('ETF') under the WSAs." (Motion at 1.) Defendant opposes. (Dkt. No. 174.)

Having carefully considered the papers submitted on the motion and oral arguments held on February 6, 2018, and for the reasons set forth below, the Court **DENIES** plaintiffs' motion.

I. RELEVANT BACKGROUND

The facts of the case are well known to the parties and counsel of record. The background relevant to the instant motion is summarized as follows. On March 22, 2017, the Court granted in part and denied in part Apple's motion for summary judgment. (Dkt. No. 146.)² Based on certain

¹ The parties have filed various administrative motions to seal documents in connection with plaintiffs' motion. (See Dkt. Nos. 157, 173, 180.) The Court addresses each in a separate order.

² The Court partially granted summary judgment on the basis that AT&T's service during

1 evidence submitted by plaintiffs, the Court found:

2 Even though Apple was no longer bound to create iPhones that could only function
3 on the GSM network after 2010, those who purchased iPhones prior to the end of
4 exclusivity still had to remain on the GSM network. These consumers could have
5 expected to switch to another GSM provider, like T-Mobile, at the end of the two-
6 year contract with AT&T. However, as plaintiffs' evidence suggests, AT&T did
7 not begin providing unlock codes for such phones until April 2012. Consequently,
8 these consumers would have been locked into renewing AT&T service, or else lose
9 the cellular capabilities of their iPhones.

7 (*Id.* at 12.)

8 In light of the Court's summary judgment order, plaintiffs now allege that "[b]y locking
9 the iPhones and refusing to give consumers the software codes needed to unlock them, Apple and
10 AT&T unlawfully prevented iPhone customers from exercising their legal right to switch
11 carriers." (Motion at 6.) Among other injuries, plaintiffs allege that iPhone consumers were
12 unable to switch to a less expensive carrier and unable to use local carriers while traveling abroad,
13 thus incurring "exorbitant roaming charges." (*Id.*)

14 Despite the passage of time and a trial date set for August 20, 2018, plaintiffs now offer an
15 11-page expert declaration of Dr. Frederick R. Warren-Boulton in support of class certification,³
16 which purportedly shows that "there are established and reliable econometric methodologies
17 available to prove antitrust impact and damages caused by Apple's alleged anticompetitive
18 conduct on a class-wide basis." (*Id.* at 8.) Dr. Warren-Boulton's theories of impact and damages
19 are based on the existence of two "but-for" worlds.⁴ According to Dr. Warren-Boulton, the timing
20 and nature of the harm to members of the class, as well as the methodology for estimating that
21 harm, depends on the assumed but-for world. The Court summarizes each "but-for" world in turn.

22 The "Truthfully Exclusive" ("TE") World is a world in which Apple would have
23 adequately informed prospective customers that neither it nor AT&T would unlock their iPhones

24
25 partially denied summary judgment on the basis that there was a triable issue as to a potential
26 aftermarket for AT&T renewal service.

26 ³ Dr. Warren-Boulton is an economist and principal at Microeconomic Consulting &
27 Research Associates ("MiCRA") in Washington, D.C.

28 ⁴ These are worlds that would have existed "but for" the alleged conspiracy between

1 when their initial service contracts with AT&T ended. In the TE World, Dr. Warren-Boulton
2 posits that providing this information would have reduced consumers' willingness to pay, or
3 "reservation prices" of iPhone purchasers, by an amount equal to the present value of the lower
4 prices or higher quality on the service they could have expected to receive on their iPhones after
5 the expiration of their initial service contracts. (Dkt. No. 159-19 ¶ 8 ("Warren-Boulton Decl.").)

6 On the other hand, the "Truthfully Non-Exclusive" ("TNE") World is a world in which
7 Apple, upon request, would have agreed to unlock customers' iPhones at the end of their initial
8 service contracts. Dr. Warren-Boulton postulates that the refusal of Apple and AT&T to unlock
9 phones increased the total cost of ownership in the as-is world through higher prices or lower
10 quality (or both) on the service received by iPhone purchasers. (*Id.*)

11 Beyond the two articulated theories, the expert's declaration is devoid of analysis. Instead,
12 Dr. Warren-Boulton asserts that based on his preliminary review of certain data collected and
13 techniques employed by Dr. Simon J. Wilkie in a separate litigation involving Apple, Dr. Warren-
14 Boulton "do[es] not expect to encounter any insurmountable difficulty in applying [Dr. Wilkie's]
15 techniques to form an estimate of harm to consumers" in the TE and TNE worlds. (*Id.* ¶¶ 22, 27.)
16 Thus, according to Dr. Warren-Boulton, in both worlds "there exists a common methodology and
17 data to reliably assess the existence and amount of damages to the Class members without the
18 need for individual inquiry." (*Id.* ¶¶ 24, 29.)

19 **II. LEGAL FRAMEWORK**

20 The Court assumes familiarity with Rule 23, and a brief review of the relevant standards
21 will suffice for purposes of this Order. Under Rule 23(a), the Court may certify a class only if:
22 "(1) the class is so numerous that joinder of all members is impracticable; (2) there are questions
23 of law or fact common to the class; (3) the claims or defenses of the representative parties are
24 typical of the claims or defenses of the class; and (4) the representative parties will fairly and
25 adequately protect the interests of the class." Fed. R. Civ. P. 23(a). Where, as here, plaintiffs seek
26 to qualify for certification under Rule 23(b)(3), a class must meet two additional requirements:
27 Common questions must "predominate over any question affecting only individual members," and
28 class resolution must be "superior to other available methods for the fair and efficient adjudication

1 of the controversy.” *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 615 (1997).

2 “Considering whether questions of law or fact common to class members predominate
3 begins . . . with the elements of the underlying cause of action.” *Erica P. John Fund, Inc. v.*
4 *Halliburton Co.*, 563 U.S. 804, 809 (2011) (internal quotation marks omitted). To prove a
5 conspiracy to monopolize in violation of Section 2 of the Sherman Act, plaintiffs must prove four
6 elements: “(1) the existence of a combination or conspiracy to monopolize; (2) an overt act in
7 furtherance of the conspiracy; (3) the specific intent to monopolize; and (4) causal antitrust
8 injury.” *Paladin Assocs., Inc. v. Montana Power Co.*, 328 F.3d 1145, 1158 (9th Cir. 2003). “[I]n
9 the class action context, class certification is precluded where plaintiffs have not shown that the
10 fact of injury element can be proven for all class members with common evidence.” *Allied*
11 *Orthopedic Appliances, Inc. v. Tyco Healthcare Grp. L.P.*, 247 F.R.D. 156, 165 (C.D. Cal. 2007).

12 **III. DISCUSSION**

13 Apple does not dispute that plaintiffs have satisfied the threshold requirements of Rule
14 23(a) or the superiority requirement of Rule 23(b)(3). It contends only that the class definition is
15 overbroad and that plaintiffs have not established predominance. Accordingly, the Court limits its
16 discussion to Dr. Warren-Boulton’s hypotheses and whether they support class certification.

17 In order to prove common antitrust impact, plaintiffs must “establish, predominantly with
18 generalized evidence, that all (or nearly all) members of the class suffered damage as a result of
19 Defendants’ alleged anti-competitive conduct.” *In re High-Tech Emp. Antitrust Litig.*, 289 F.R.D.
20 555, 567 (N.D. Cal. 2013) (internal quotation marks omitted) (modifications in original). Some
21 courts have stated that a court’s inquiry on class certification should be limited to whether
22 plaintiffs merely “intend” to present “generalized” evidence of antitrust impact. *See, e.g., In re*
23 *Dynamic Random Access Memory (“DRAM”) Antitrust Litig.*, No. M 02-1486 PJH, 2006 WL
24 1530166, at *9 (N.D. Cal. June 5, 2006). However, in *In re Graphics Processing Units Antitrust*
25 *Litigation (“In re GPU”)*, 253 F.R.D. 478 (N.D. Cal. 2008), the court explained that even under a
26 plausible methodology standard, “certification [should not be] automatic every time counsel
27 dazzle the courtroom with graphs and tables.” *Id.* at 491. “[C]onducting a thorough review of
28 Plaintiffs’ theory and methodology is consistent with the requirement that the Court conduct a

1 ‘rigorous analysis’ to ensure that the predominance requirement is met.” *In re High-Tech*, 289
2 F.R.D. at 567 (citing *Comcast Corp. v. Behrend*, 133 S.Ct. 1426, 1431 (2013)).

3 Here, the Court is unable to fulfill its obligation. Dr. Warren-Boulton’s declaration is
4 essentially lacking any data-driven analysis. Instead, he refers generically to an extant “common
5 methodology and data,” which he will supposedly use to “reliably assess the existence and amount
6 of damages to the Class members.” (Warren-Boulton Decl. ¶¶ 24, 29.) His failure to provide
7 “properly analyzed, reliable *evidence* that a common method of proof exists to prove impact on a
8 class-wide basis” is fatal. *In re High-Tech*, 289 F.R.D. at 570 (emphasis in original) (internal
9 quotation marks omitted). Indeed, he has failed to submit any semblance of a “functioning model
10 that is tailored to market facts in the case at hand.” *In re GPU*, 253 F.R.D. at 492 (noting courts in
11 the antitrust context are “increasingly skeptical of plaintiffs’ experts who offer only generalized
12 and theoretical opinions” that a particular methodology may be used to show class-wide impact
13 and injury using common proof) (internal quotation marks omitted). Dr. Warren-Boulton’s “but-
14 for” world hypotheses offer only theories of impact and damages, and theory alone “is not
15 sufficient to satisfy Rule 23(b)(3)’s requirements.” *In re High-Tech*, 289 F.R.D. at 570. Absent a
16 data-driven model, plaintiffs have failed to meet their “burden under Rule 23 to provide a viable
17 method for demonstrating class-wide antitrust injury based on common proof.” *In re GPU*, 253
18 F.R.D. at 497.⁵


19 **IV. CONCLUSION**

20 For the foregoing reasons, plaintiffs’ motion for class certification is **DENIED**.

21 This Order terminates Docket Number 158.

22 **IT IS SO ORDERED.**

23 Dated: February 16, 2018

24 
25 YVONNE GONZALEZ ROGERS
26 UNITED STATES DISTRICT COURT JUDGE

27 ⁵ Because plaintiffs’ deficiency with respect to antitrust injury is dispositive as to
28 predominance, certification of the proposed Rule 23(b)(3) class is not possible. Accordingly, the
29 Court declines to address the scope of the proposed class definition.