**IN THE UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF TENNESSEE**
**AT GREENEVILLE**

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| **IN RE SOUTHEASTERN MILK ANTITRUST LITIGATION** | **Master File No. 2:08-MD-1000** |
| | **Judge J. Ronnie Greer** |
| **THIS DOCUMENT RELATES TO:** | **Magistrate Judge Dennis H. Inman** |
| ***Food Lion, LLC, et al. v. Dean Foods Company, et al.*, No. 2:07-CV-188** | |

**DEFENDANTS' RESPONSE TO PLAINTIFFS' MEMORANDUM CONCERNING OUTSTANDING ISSUES REMAINING FOR DECISION UPON REMAND**

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## INTRODUCTION

The Sixth Circuit has never considered – let alone rejected – Defendants' argument that Food Lion's formula pricing arrangement precludes it from showing that it was injured "by reason of" the alleged conspiracy. This Court expressly declined to reach that issue when it granted summary judgment against Plaintiffs on other grounds, and the Sixth Circuit's decision did not even mention, much less decide, the issue. The argument remains ripe for this Court's determination and mandates the entry of summary judgment in favor of Defendants on all, or at least the vast majority, of Food Lion's claims.

Defendants' objection to the admissibility of Professor Cotterill's testimony similarly remains ripe for this Court's review. For purposes of summary judgment, this Court assumed, without deciding, that Professor Cotterill's testimony would be admissible. Indeed, the Sixth Circuit recognized that it was reviewing a summary judgment ruling, not an admissibility determination. Whether Professor Cotterill's testimony meets the standards for admissibility under the Federal Rules of Evidence is an issue for this Court to decide, and nothing in the Sixth Circuit's opinion holds otherwise.

Plaintiffs' reliance on the so-called "mandate rule" is entirely misplaced. The issues described above are not ones that Defendants litigated before this Court and/or the Sixth Circuit and lost. To the contrary, they are issues that neither this Court nor the Sixth Circuit ever decided. They remain open and must be decided by this Court in the first instance.

## PROCEDURAL BACKGROUND

In September 2010, Defendants moved for summary judgment on Count I of Plaintiffs' Amended Complaint, arguing (among other things) that Plaintiffs had failed to establish a genuine issue of material fact on the essential element of antitrust injury for at least two reasons:[1] (1) their damages expert, Professor Cotterill, had failed to measure any impact caused by the alleged conspiracy, and instead measured the impact of Defendant Dean Food Company's 2001 merger with Suiza Foods Corporation, which Plaintiffs do not challenge; and (2) Food Lion's purchases during the alleged conspiracy period were made pursuant to a pricing formula, the components of which were based on objective factors negotiated before – and unaffected by – the alleged conspiratorial conduct. *See* Defs.' Mem. in Supp. of Suppl. Mot. for Summ. J. (Doc. 1027) at 6-11.

Defendants also moved to exclude Professor Cotterill's testimony for a variety of reasons, including that his analysis did not fit the facts or theory of Plaintiffs' case. *See* Defs.' Mot. to Exclude Cotterill (Doc. 1084); Defs.' Mem. of Law in Supp. of Mot. to Exclude Cotterill (Doc. 1086); *see also Daubert v. Merrell Dow Pharms.*, 509 U.S. 579 (1993). The magistrate judge largely denied Defendants' motion, and Defendants objected. *See* Order (Doc. 1187); Defs.' Partial Obj. (Doc. 1208).

[1] Defendants previously moved for summary judgment on Count I on the ground that Plaintiffs had failed to establish a genuine issue of material fact on the existence of the alleged conspiracy. The Court found many of Plaintiffs' arguments "unconvincing on their merits," but nevertheless held that Plaintiffs had done enough to survive summary judgment on that issue. *See* Mem. Op. (Doc. 863) at 12.

This Court previously granted summary judgment on Counts II through V. *See generally* Mem. Op. (Doc. 863); Mem Op. (Doc. 1797). Plaintiffs did not appeal those determinations. Therefore, Count I is now the sole remaining claim.

Before reaching (and without even mentioning) that objection, this Court granted Defendants' motion for summary judgment. Among other things, the Court held that Professor Cotterill could not, and did not, "measure how prices would have increased in the absence of a conspiracy," but had instead "measured the price impact of . . . the [Dean-Suiza] merger itself, conduct which is not challenged in this case." Mem. Op. (Doc. 1797) at 10. Thus, the Court reasoned, "Professor Cotterill's analysis [did] not create a material issue of fact on the question of whether the price increases were 'by reason of' an illegal conspiracy in violation of the antitrust laws and Plaintiffs [did] not allege an injury of the kind which the antitrust laws are designed to prevent." *Id.* at 10-11. The Court expressly acknowledged, but declined to reach, Defendants' alternative argument that "even if there were a conspiracy to lessen competition for sales of processed milk, Plaintiffs cannot show that such a conspiracy injured Food Lion because the prices Food Lion paid Dean for processed milk were determined pursuant to a negotiated formula, the components of which were based on objective factors having nothing to do with the alleged anti-competitive behavior." *Id.* at 9; *see also id.* at 11 n.6.

Plaintiffs appealed this Court's grant of summary judgment, and the Sixth Circuit reversed. *In re Se. Milk Antitrust Litig.*, 739 F.3d 262 (6th Cir. 2014). In doing so, the Sixth Circuit noted that "[t]he [district] court [had] not exclude[d] Cotterill's testimony, but simply concluded that it does not create a material issue of fact." *Id.* at 283 (citation and quotation marks omitted). The Sixth Circuit recognized that it was reviewing an award of summary judgment, not an admissibility determination. *See id.* at 283-84. It did not purport to address the latter issue. Nor did the Sixth Circuit address the formula pricing argument this Court had declined to reach in its summary judgment opinion.

## ARGUMENT

### I. DEFENDANTS' FORMULA PRICING ARGUMENT REMAINS RIPE FOR THIS COURT'S REVIEW.

Plaintiffs claim that Defendants' formula pricing argument is barred, purportedly because that argument is "inconsistent with the Sixth Circuit's holding that Food Lion presented sufficient evidence of antitrust injury," and because "the mandate rule [precludes] Defendants from raising this argument." Pls.' Mem. (Doc. 2019) at 8. Plaintiffs are wrong on both counts.

#### A. There Are No Inconsistencies Between Defendants' Formula Pricing Argument and the Sixth Circuit's January 2014 Decision.

In arguing that Defendants' formula pricing argument is inconsistent with the Sixth Circuit's decision, Plaintiffs repeatedly distort – and improperly conflate – (1) Defendants' primary argument on summary judgment "that Plaintiffs' injury expert [Dr. Cotterill] had conducted an econometric analysis which partly attributed an increase in the price of milk to the merger itself rather than to any anticompetitive conduct," *In re Se. Milk*, 739 F.3d at 283, and (2) Defendants' ***alternative*** argument that, even if Professor Cotterill's analysis were sound, Food Lion could not have been harmed by the alleged conspiracy because, during the alleged conspiracy period, Food Lion purchased milk pursuant to the formula mentioned above. *See* Mar. 27, 2012 Mem. Op. (Doc. 1797) at 9; *see also* Mem. in Supp. of Defs.' Suppl. Mot. for Summ. J. (Doc. 1027) at 12 ("For this reason [the formula pricing issue] ***as well***, Defendants are entitled to summary judgment.") (emphasis added). Only the first of these arguments has been adjudicated, and there is nothing "inconsistent" about Defendants now asking the Court to determine the second.

In fact, this Court previously declined to reach Defendants' formula pricing argument precisely because it recognized that this argument was complementary and alternative – rather

than, as Plaintiffs would now have it, identical – to Defendants' attack on Professor Cotterill's analysis. *See* Mar. 27, 2012 Mem. Op. (Doc. 1797) at 11 n.6 ("As a result of the Court's ruling with respect to Professor Cotterill's expert opinions and the absence of any genuine issue of fact related to antitrust injury, the Court will not consider the other argument made by defendants, that is, that the prices Food Lion paid Dean for processed milk were determined pursuant to a negotiated formula and thus Plaintiffs cannot show that a conspiracy, even if it existed, injured Plaintiffs."); *see also* Appellees' Br., *Food Lion, LLC v. Dean Foods Co.*, No. 12-5457, 2013 WL 1291160, at *34 n.11 (6th Cir. Mar. 19, 2013) (explaining that "Defendants also had ***alternative grounds*** for summary judgment that the District Court ***did not reach***") (emphasis added). Plaintiffs effectively concede this point in their brief, analogizing the present action to *Schafer v. Multiband Corp.*, No. 12-13152, 2014 WL 5511401 (E.D. Mich. Oct. 31, 2014) – a case (though inapposite for other reasons discussed below) in which the district court was presented with two separate, "alternative" arguments. Pls.' Mem. (Doc. 2019) at 7.

To be sure, both arguments advanced by Defendants – their formula pricing argument, and their argument regarding Professor Cotterill's testimony – derive from the fundamental rule that an antitrust plaintiff may only recover damages if he or she has been injured "by reason of" the defendant's anticompetitive conduct. *See* 15 U.S.C. § 15(a). But this common foundation hardly makes the two arguments the same; nor does it provide any basis for Plaintiffs' contention that the former argument is "inconsistent" with the Sixth Circuit's ruling. Ultimately, Plaintiffs are trying to manufacture an inconsistency where none exists, but there is nothing "inconsistent" about Defendants continuing to press an argument which this Court declined to reach (and which the Sixth Circuit failed even to address).

### B. The Mandate Rule Does Not Apply to Defendants' Formula Pricing Argument.

Nor is Defendants' formula pricing argument barred by the mandate rule. A "specific application of the 'law of the case' doctrine," *Nuchols v. Berrong*, 268 F. App'x 414, 417 (6th Cir. 2008), this rule bars litigation of those issues (a) that "were necessarily decided in [an] earlier appeal," *Kavorkian v. CSX Transp.*, 117 F.3d 953, 958 (6th Cir. 1997) (citation and quotation marks omitted), or (b) that were "ripe for review at the time of an initial appeal but [were] nonetheless foregone," *United States v. Lopez*, 453 F. App'x 602, 605 (6th Cir. 2011) (citation and quotation marks omitted). Neither is true of Defendants' formula pricing argument.

#### 1. The Sixth Circuit Did Not Decide Defendants' Formula Pricing Argument.

First, Defendants' formula pricing argument was not even ***presented to*** – much less decided by – the Sixth Circuit. Although Defendants made a passing reference to the argument in their appellate brief – explaining, purely as a matter of fact, that they "had alternative grounds for summary judgment that the District Court did not reach," Appellees' Br., *Food Lion, LLC v. Dean Foods Co.*, No. 12-5457, 2013 WL 1291160, at *34 n.11 (6th Cir. Mar. 19, 2013) – at no point, in that brief or otherwise, did Defendants explain or even identify the argument for the Sixth Circuit, nor did they offer any details regarding the factual or legal basis for the argument. The mandate rule does not – and cannot – apply in circumstances such as these. *See Kindle v. City of Jeffersontown*, 589 F. App'x 747, 753 (6th Cir. 2014) ("Application of [the mandate rule] is limited to those questions necessarily decided in the earlier appeal. The phrase 'necessarily decided' describes all issues that were ***fully briefed and squarely decided*** in an earlier appeal.") (citations, quotation marks, and alterations omitted) (emphasis added).

*Schafer v. Multiband Corp.*, one of the primary cases on which Plaintiffs rely, only illustrates the point. The plaintiffs in that case moved to vacate an arbitration award on two

alternative grounds. The district court granted the plaintiffs' motion on the first ground but declined to reach the second. 2014 WL 5511401, at *5. The defendant appealed, and in briefing before the Sixth Circuit, the plaintiffs "reiterated [both] arguments" made below, including the alternative argument that the district court had not reached. *Id.*; *see also id.* at *7 (explaining that the plaintiffs "identified the alternative claim—that the Arbitrator [had] exceeded his powers," they "identified the controlling statutory authority—9 U.S.C. § 10(3)-(4)," they "explained the factual circumstances underlying the alternative claim—that the Arbitrator refused to hear evidence on the alternative claims," and they "cited caselaw to support the proposition").

Ultimately, the Sixth Circuit reversed the decision below, considering but "expressly reject[ing] Plaintiffs' alternative claim." *Id.* at *8. The plaintiffs petitioned for rehearing *en banc*, once again "directly present[ing] the[ir] alternative claim to the Sixth Circuit—and even suggesting that [the Sixth Circuit] panel had erred when resolving that claim." *Id.* The Sixth Circuit denied the plaintiffs' petition, concluding that "the issues in the petition [had been] fully considered upon the original submission and decision of the case." *Id.* at *9 (citation and emphasis omitted). Following remand to the district court, the plaintiffs tried, once again, to renew their alternative argument, but the court rejected the attempt, "reluctantly" concluding that "that the Sixth Circuit [had] already 'squarely decided' [that] claim . . . , and therefore [the Sixth Circuit's] decision ha[d] become the law of the case." *Id.* at *9; *see also id.* at *10 ("The Sixth Circuit has already addressed and rejected Plaintiffs' claim that the arbitrator exceeded his power. Therefore, this determination is the law of the case, and the Court need not address Plaintiffs' claims on the merits.").

The facts of *Schafer* could not be more different than those presented here. As noted above, at no point, either in their initial briefing before the Sixth Circuit or in their petition for

rehearing *en banc*, did Defendants "identify," "explain," or "cite caselaw to support" their formula pricing argument. *Id.* at *7. Nor did the Sixth Circuit even mention, much less "squarely reject," that argument in its January 2014 opinion. *Id.* at *8. In short, Defendants' formula pricing argument was neither "fully briefed" nor "squarely decided" by the Sixth Circuit. *Kindle*, 589 F. App'x at 753. As a result, the mandate rule does not apply. *Cf. Schafer*, 2014 WL 5511401, at *9 ("Plaintiffs presented the claim to the Sixth Circuit on appeal, and the Sixth Circuit rejected it.").[2]

**2. Defendants' Formula Pricing Argument Was Not Ripe for Review on Appeal.**

Nor does the mandate rule apply on the grounds that Defendants' formula pricing argument "was ripe for review at the time of an initial appeal but was nonetheless foregone." Pls.' Mem. (Doc. 2019) at 7 (citation and quotation marks omitted). In fact, the argument was ***not*** "ripe for review," because this Court had declined to decide it. *See* Mar. 27, 2012 Mem. Op. (Doc. 1797) at 11 n.6; *see also Maldonado v. Nat'l Acme Co.*, 73 F.3d 642, 648 (6th Cir. 1996) (explaining that, absent "exceptional circumstances," an "appellate court ***will not address*** issues on appeal that were not ruled upon below") (citations omitted) (emphasis added) (reversing grant of summary judgment, but nonetheless refusing to consider collateral estoppel argument raised but not decided below); *City of Parma v. Cingular Wireless, LLC*, 200 F. App'x 423, 429-30 (6th Cir. 2006) ("We exercise our discretion to rule on an issue not decided below only in

[2] In concluding that the mandate rule applied, the district court in *Schafer* also reasoned – arguably in dicta – that in addition to "expressly" rejecting the plaintiffs' alternative argument, the Sixth Circuit must "necessarily" and "implicitly" have done so, since the plaintiffs "presented [the Sixth Circuit with] two alternative arguments for affirming [the district court's] Order," and yet the Sixth Circuit did exactly the opposite. 2014 WL 5511401, at *8; *see also id.* ("[T]he Sixth Circuit ***explicitly and necessarily*** rejected Plaintiffs' alternative argument.") (emphasis added). Of course, even this reasoning is of no help to Plaintiffs in the case at bar, since Defendants never "presented" their formula pricing argument to the Sixth Circuit.

'exceptional cases.' Such exceptional circumstances are not present here, and we will not usurp the role of the district court to exercise its initial discretion to rule on this pivotal motion [for judgment on the pleadings].") (citations omitted). Thus, even if the mandate rule "bars challenges to a decision made at a previous stage of the litigation which could have been challenged [on] appeal," Pls.' Mem. (Doc. 2019) at 3-4 (citation and quotation marks omitted), here there was no such "decision . . . at a previous stage."

*Lees v. Carthage College*, 560 F. App'x 614 (7th Cir. 2014), is instructive on this point. The plaintiff in that case, a rape victim, sued her college for negligence. The college moved for summary judgment on multiple grounds, including (1) that there was insufficient evidence of causation and (2) that the plaintiff's duty-of-care expert was unreliable. The district court excluded the expert's testimony and granted the college's motion, noting that the plaintiff had proffered no other evidence sufficient to establish breach of duty. *See* No. 10-86, 2011 U.S. Dist. LEXIS 98368 (E.D. Wis. Aug. 29, 2011). The plaintiff appealed, and the Seventh Circuit reversed, concluding that the expert's testimony should have been admitted. 714 F.3d 516 (7th Cir. Wis. 2013). The case was then remanded to the district court, but the school "again moved for summary judgment based on its alternative theories, which had never been ruled on. The [district court] again granted summary judgment, this time because [the plaintiff had] failed to provide sufficient evidence of causation." 560 F. App'x at 615.

The plaintiff once again appealed, arguing (among other things) that "the district court shouldn't have considered [the college's] renewed motion for summary judgment" because, under the mandate rule, the college was barred from pursuing its "alternative theories." *Id.* The Seventh Circuit rejected this argument out of hand and affirmed the decision below:

> The district judge limited his first summary-judgment ruling to the admissibility of [the plaintiffs' expert's] testimony, so the previous appeal

> was also limited to that issue. Neither party discussed the alternative grounds for summary judgment addressed in [the college's] initial motion to the district court, so we did not rule on them. On remand the judge had the authority to rule on [the college's] other arguments.

*Id.*

Precisely like the district court in *Lees*, this Court "limited [its] first summary-judgment ruling" to Defendants' attack on Professor Cotterill's testimony, and Defendants' "alternative [argument] for summary judgment" was not presented to the Sixth Circuit, "so [the Sixth Circuit] did not rule on [that argument]." Defendants' formula pricing argument thus remains entirely undecided, and this Court has full "authority to rule" on it. *See Kavorkian*, 117 F.3d at 958 (explaining that "the trial court is free to consider any issues not decided expressly or impliedly by the appellate court") (citations and quotation marks omitted); *Algie v. N. Ky. Univ.*, No. 08-109, 2013 U.S. Dist. LEXIS 22662, at *27 (E.D. Ky. Feb. 20, 2013) (explaining, in evaluating employment retaliation claim that had been revived on appeal, "that the mandate rule [was] inapplicable with respect to [the issue of pretext], as the Sixth Circuit did not address this precise question in its [prior] decision" reviving the subject claim).

## II. DEFENDANTS' OBJECTION TO THE ADMISSIBILITY OF PROFESSOR COTTERILL'S TESTIMONY REMAINS RIPE FOR REVIEW.

Plaintiffs also claim that the mandate rule bars Defendants' objection to the admissibility of Professor Cotterill's testimony, purportedly because "this Court effectively addressed that objection in its summary judgment opinion." Pls.' Mem. (Doc. 2019) at 4. Once again, Plaintiffs are incorrect.

At no point in its summary judgment ruling did this Court even mention – much less "effectively address[]" – Defendants' objection to the magistrate's ruling, nor did the Court have any reason to do so. It is well-established that "[t]he issue of admissibility of an expert's opinion

under Rule 703 is separate and distinct from the issue of whether plaintiffs have created a genuine issue of material fact sufficient to withstand a motion for summary judgment under Rule 56." *Hayes v. Raytheon Co.*, 808 F. Supp. 1326, 1332 (N.D. Ill. 1992) (citing *Mid-State Fertilizer Co. v. Exchange Nat'l Bank*, 877 F.2d 1333, 1339 (7th Cir. Ill. 1989)); *see also Miller v. Mandrin Homes, Ltd.*, 305 F. App'x 976, 979 (4th Cir. 2009) ("Even if expert testimony meets the *Daubert* admissibility standards, the question remains whether the evidence creates a genuine issue of material fact, *i.e.*, one that would allow the jury to find for the non-moving party on an essential element of the claim."). Here, the only question presented in Defendants' summary judgment motion was whether Professor Cotterill's testimony was sufficient to create a triable issue, and that is the only question this Court decided. *See* Mar. 27, 2012 Mem. Op. (Doc. 1797) at 11 ("Because Plaintiffs cannot establish antitrust injury, *i.e.*, there is not a genuine issue for trial on the issue, Counts I and V fail and defendants are entitled to summary judgment as to Counts I and V on this basis alone.").

Plaintiffs selectively quote from the Sixth Circuit's opinion in attempting to prove otherwise – seizing, in particular, on the panel's speculation that this Court likely "concurred with the magistrate judge" in regards to the admissibility of Dr. Cotterill's testimony. *In re Se. Milk*, 739 F.3d at 283. But that speculation, in *dicta* no less, certainly does not, as Plaintiffs would have it, constitute a "square[] h[o]ld[ing] that this Court had rejected Defendants' objection to the Magistrate Judge's decision."[3] Pls.' Mem. at 5; *Trepel v. Roadway Express, Inc.*, 40 F. App'x 104, 109 (6th Cir. 2002) (explaining that "dicta . . . is not binding on remand")

[3] This Court is plainly in the best position to understand (and clarify) exactly what it intended to accomplish in its March 2012 opinion. And even if the Sixth Circuit had, as Plaintiffs suggest, misinterpreted that opinion as denying Defendants' objection to the magistrate judge's order, this Court would not be bound by the misinterpretation, because (as noted above) it merely came in *dicta*.

(citing *Hanover Ins. Co. v. Am. Eng'g Co.*, 105 F.3d 306, 312 (6th Cir. 1997)); *see also* 18B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure*, § 4478.3, at 757 (2d ed. 2002) ("The reach of the mandate is generally limited to matters actually decided. A mere recital of matters assumed for purposes of decision and dicta are not part of the mandate.") (citations omitted); *Buckley Towers Condo., Inc. v. QBE Ins. Corp.*, No. 07-22988, 2014 U.S. Dist. LEXIS 45008, at *13 (S.D. Fla. Mar. 31, 2014) ("[I]t is . . . well established that the mandate rule requires application of the appellate court's holdings, not dicta.") (citations omitted).[4]

Moreover, in the sentence from the Sixth Circuit's opinion immediately following the one on which Plaintiffs rely, the Sixth Circuit drew the very distinction outlined above, making clear that this Court's summary judgment opinion was limited to the sufficiency of Professor Cotterill's testimony (as opposed to its admissibility): "The [district] court did not exclude Cotterill's testimony, but simply concluded that it 'does not create a material issue of fact.'" *In re Se. Milk*, 739 F.3d at 283 (quoting this Court's summary judgment opinion). Plaintiffs conveniently omit this sentence from their memorandum, and for good reason: it is fatal to their argument.

[4] The Sixth Circuit defines *dicta* as any "discussion of issues not before the court." *Moss v. United States*, 323 F.3d 445, 458 n.17 (6th Cir. 2003) (citation omitted); *see also Blount-Hill v. Bd. of Educ.*, 195 Fed. App'x 482, 488 (6th Cir. 2006) (defining dicta as "[o]pinions . . . which do not embody the resolution or determination of the specific case before the Court") (quoting Black's Law Dictionary 454 (6th ed. 1990)). Here, the only Cotterill-related issue on appeal was whether his damages model was sufficient to create a triable issue on the element of antitrust injury. True, in evaluating that issue, the Sixth Circuit found it "obvious that [this Court had] considered Cotterill's testimony in light of the magistrate judge's opinion," and it characterized this Court's opinion as "strongly suggest[ing] that the [Court had] concurred with the magistrate judge" in regards to that testimony's admissibility. *In re Se. Milk*, 739 F.3d at 283. But whether or not this Court had "concurred with the magistrate judge" as to the admissibility of Cotterill's testimony was "not before the [Sixth Circuit]." *Moss*, 323 F.3d at 458 n.17. Accordingly, the Sixth Circuit's discussion of that issue is *dicta*.

In short, Plaintiffs are once again conflating two separate issues – whether Professor Cotterill's testimony is admissible and whether it is sufficient to create a genuine issue of material fact – and they are trying to characterize the Sixth Circuit's opinion as something it is not. The Sixth Circuit did not "explicitly reject[] the notion that the admissibility of Professor Cotterill's opinion remains an open question." Pls.' Mem. (Doc. 2019) at 1. Rather, and to the extent it addressed the issue at all, the Sixth Circuit made clear that this Court's summary judgment ruling was limited, precisely as it should have been, to whether Professor Cotterill's testimony creates a triable issue. And much like this Court before it, the Sixth Circuit limited its own analysis of Professor Cotterill's model to that question (and that question alone). *See, e.g.*, *In re Se. Milk*, 739 F.3d at 284-85 ("[T]he district court concluded that Plaintiffs had not created a genuine issue of material fact as to either aspect of antitrust injury. . . . That conclusion, however, was based on flawed propositions, and summary judgment was not warranted on the issue of injury."). Defendants' objection to the ***admissibility*** of Professor Cotterill's testimony, by contrast, remains entirely undecided, and the mandate rule does not – and cannot – apply to bar this Court from deciding it. *See Kovacs*, 739 F.3d at 1024 ("A court to which a case has been remanded may address . . . the issue or issues remanded, issues arising for the first time on remand, and issues that were ***timely raised but which remain undecided***.) (citations omitted) (emphasis added).

## CONCLUSION

For the foregoing reasons, this Court should reject the misguided arguments set forth in Plaintiffs' memorandum, and it should decide both Defendants' formula pricing argument and their objection to the admissibility of Professor Cotterill's testimony.

Dated: March 17, 2015

Respectfully submitted,

*/s/ Paul H. Friedman*

Paul T. Denis
Paul H. Friedman
Dechert LLP
1900 K Street, NW
Washington, D.C. 20006
paul.denis@dechert.com
paul.friedman@dechert.com

Carolyn M. Hazard
Dechert LLP
Cira Centre
2929 Arch Street
Philadelphia, PA 19104
carolyn.hazard@dechert.com

*Attorneys for Defendant*
*Dean Foods Company*

William C. Bovender
Mark S. Dessauer
Hunter, Smith & Davis LLP
1212 North Eastman Road
Kingsport, TN 37664
bovender@hsdlaw.com
dessauer@hsdlaw.com

*/s/ Steven R. Kuney*
Steven R. Kuney
Carl R. Metz
Williams & Connolly LLP
725 Twelfth Street, NW
Washington, D.C. 20005
skuney@wc.com
cmetz@wc.com

W. Todd Miller
Baker & Miller PLLC
2401 Pennsylvania Avenue, NW
Suite 300
Washington, D.C. 20037
tmiller@bakerandmiller.com

G.P. Gaby
Milligan & Coleman
P.O. Box 1060
Greeneville, TN 37744
ggaby@milligancoleman.com

*Attorneys for Defendant*
*Dairy Farmers of America, Inc.*

*/s/ Jerry L. Beane*
Jerry L. Beane
Kay Lynn Brumbaugh
Andrews Kurth LLP
Suite 3700, 1717 Main Street
Dallas, TX 75201
jerrybeane@andrewskurth.com
kaylynnbrumbaugh@andrewskurth.com

Steven E. Kramer
Thomas M. Hale
Kramer, Rayson, Leake, Rodgers & Morgan LLP
P.O. Box 629
Knoxville, TN 37901
skramer@kramer-rayson.com
tomhale@kramer-rayson.com

*Attorneys for Defendant*
*National Dairy Holdings, LP*

**CERTIFICATE OF SERVICE**

I, Carl R. Metz, do hereby certify that on February 17, 2015, I caused a true and correct copy of the foregoing Response to be served upon all counsel of record by operation of the electronic filing system of the United States District Court for the Eastern District of Tennessee.

/s/ Carl R. Metz
Carl R. Metz