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

IN RE: SOUTHEASTERN MILK ANTITRUST LITIGATION	**MDL No. 1899** **Master File No. 2:08-md-1000**
THIS DOCUMENT RELATES TO:	**Case No. 2:07-cv-188**
FOOD LION, LLC and FIDEL BRETO, d/b/a FAMILY FOODS, on behalf of themselves and a class of all others similarly situated,	**Judge J. Ronnie Greer** **Magistrate Judge Dennis H. Inman**
***Plaintiffs*,**	
v.	
DEAN FOODS COMPANY, DAIRY FARMERS OF AMERICA, INC., NATIONAL DAIRY HOLDINGS, L.P., DAIRY MARKETING SERVICES, LLC, and SOUTHERN MARKETING AGENCY, INC.,	
***Defendants*.**	

RETAILER PLAINTIFFS' MEMORANDUM CONCERNING OUTSTANDING ISSUES REMAINING FOR DECISION UPON REMAND

This memorandum is filed pursuant to the Joint Report of All Parties Identifying Issues for the Court's Determination (Dkt. 2010). In that Report, Defendants identified, *inter alia*, two issues that remain to be decided: (1) Defendants' objection to the Magistrate Judge's denial, in part, of their motion to exclude the testimony of Professor Ronald Cotterill, and (2) Defendants' argument that Food Lion did not suffer injury because its prices were determined pursuant to a negotiated formula. *Id.* at 2 (issues 6 and 7). Plaintiffs noted in the Report that they would be filing a short supplemental brief addressing the impact of the Sixth Circuit's opinion overturning the Court's summary judgment ruling on these issues. *Id.* at 4. Specifically, Plaintiffs

demonstrate below that the Sixth Circuit's decision precludes re-litigation of these issues in this Court.

First, with respect to Defendants' Motion to Exclude (Dkt. 561), the Sixth Circuit stated that although the "district court never formally" resolved the objection to the Magistrate Judge's determination that Professor Cotterill's testimony was admissible, it "is obvious that the district court considered Professor Cotterill's testimony in light of the magistrate judge's opinion." *In re Se. Milk Antitrust Litig.*, 739 F.3d 262, 283 (6th Cir. 2014). The Sixth Circuit thus explicitly rejected the notion that the admissibility of Professor Cotterill's opinion remains an open question.

Second, with respect to the no injury argument, the Sixth Court ruled that Food Lion presented sufficient evidence of injury to defeat summary judgment. *Id.* at 285-86. Any ruling by this Court that Food Lion cannot prove that it suffered injury, for whatever reason, would thus be directly contrary to the Sixth Circuit's ruling. Moreover, although Defendants noted the issue in a footnote in their appeal brief, they failed to advance the formula pricing argument as an alternative basis on which summary judgment could be affirmed, thus precluding re-litigation of that issue in this Court.

I. BACKGROUND

Defendants initially moved for summary judgment on all five counts of Plaintiffs' Complaint. Dkt. 461. The Court granted Defendants' motion with respect to Counts II, III, and IV, but denied summary judgment with respect to Counts I and V. Dkt. 863. Defendants then filed a supplemental motion for summary judgment as to Counts I and V on Oct. 27, 2010. Dkt. 1026. In the brief in support of that motion, Defendants argued that Plaintiffs could not show that any increase in milk prices they may have paid amounted to an antitrust injury for two

reasons. First, they argued that Professor Cotterill's model measured the impact of the Dean-Suiza merger and not the alleged antitrust conspiracy. Dkt. 1027 at 6-8. Second, Defendants argued that any increase in price experienced by Food Lion must have been due to increases in raw milk prices under a formula pricing arrangement, and thus that any higher prices could not have been "by reason of" an antitrust violation. *Id.* at 11-12.

Shortly thereafter, Defendants moved to exclude Professor Cotterill's damages opinion under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), again arguing that Professor Cotterill had merely measured the impact of the merger. Dkts. 1084, 1086. The Court referred the motion to the Magistrate Judge, who rejected that argument, concluding that "[a]lthough Cotterill began his analysis as of the time of the Dean-Suiza merger, what he ultimately purported to measure was the result of the subsequent anticompetitive actions that were facilitated or enabled by the preceding merger." Dkt. 1187 at 2. Defendants appealed the Magistrate Judge's Order to this Court, again arguing that Professor Cotterill's model merely measures the impact of the merger. Dkt. 1208.[1] The District Court never formally acted on that Objection, but nevertheless it granted Defendants' supplemental summary judgment motion. Dkt. 1797. The Sixth Circuit reversed and remanded the case to this Court.

II. ARGUMENT

Plaintiffs' initial briefing on these issues demonstrates why Defendants' arguments fail on their merits. Dkts. 1128, 1231. Plaintiffs address herein only the impact of the Sixth

[1] Defendants also raised two new grounds, never before advanced in either their *Daubert* or summary judgment motions. They claimed that Professor Cotterill's model failed to distinguish the impact of the conduct challenged in Count I and that his model failed to account for all relevant supply and demand factors. Both of these issues were either raised by Defendants on appeal and rejected or otherwise decided by the Sixth Circuit. *See* Appellees' Br. (Case No. 12-5457, Dkt. 50) at 25-26 (arguing that Professor Cotterill failed to separate out injury attributable to Count I); *In re Se. Milk*, 739 F.2d at 285-86 (concluding that Professor Cotterill's model properly accounted for increase in price greater "than an econometric analysis could justify").

Circuit's decision.[2] As demonstrated below, the result of the Sixth Circuit's decision is that the Court no longer needs to, nor is it empowered to, address Defendants' objection to this Court of the denial of the Cotterill Motion to Exclude or Defendants' continuing argument that Food Lion cannot prove that it suffered antitrust injury.

A. The Mandate Rule Limits the Issues that the Court May Decide on Remand.

The mandate rule "holds that a district court is bound to the scope of the remand issued by the court of appeals." *Schafer v. Multiband Corp*. __ F. Supp. 3d __ (2014), No. 12-cv-13152, 2014 WL 5511401, at *6 (E.D. Mich. Oct. 31, 2014) (noting that the rule is "a specific application of the law-of-the-case doctrine"). The mandate rule "has two components—the limited remand rule, which arises from action by an appellate court, and the waiver rule, which arises from action (or inaction) by one of the parties." *United States v. O'Dell*, 320 F.3d 674, 679 (6th Cir. 2003). The court explained these two aspects:

> The mandate rule compels compliance on remand with the dictates of the superior court and forecloses relitigation of issues expressly or *impliedly* decided by the appellate court. Likewise, where an issue was ripe for review at the time of an initial appeal but was nonetheless foregone, the mandate rule generally prohibits the district court from reopening the issue on remand unless the mandate can reasonably be understood as permitting it to do so.

Id. (quoting *United States v. Ben Zvi*, 242 F.3d 89, 95 (2d Cir. 2001). The mandate rule encompasses issues that are both explicitly, as well as implicitly, decided by the higher court. *Schafer*, 2014 WL 5511401, at *8. Moreover, as follows from the "waiver" portion of the rule, it also "bars challenges to a decision made at a previous stage of the litigation which could have

[2] Despite indicating in the Joint Report that they would not be filing additional briefing on these issues, Defendants filed a supplemental brief in support of the formula pricing argument on Friday, February 13, 2015, one business day before this brief was due. Plaintiffs will file a timely response to that brief, but do not address it herein.

been challenged in a prior appeal" but was not. *Sanford v. Main Street Baptist Church Manor, Inc.*, 449 F. App'x 488, 493 (6th Cir. 2011).

B. The Sixth Circuit Ruled that this Court Has Already Decided the Admissibility of Professor Cotterill's Damages Opinion.

Defendants ask this Court to decide their objection to this Court of the Magistrate Judge's decision finding that Professor Cotterill's opinions are admissible because Professor Cotterill measured the impact of the conspiracy, not the impact of the Dean-Suiza merger. The Sixth Circuit already ruled, however, that this Court effectively addressed that objection in its summary judgment opinion. Indeed, it was ***Plaintiffs*** who argued to the appellate court that the Court had never acted on Defendants' objection, and that the Court had failed to give the Magistrate Judge's finding the proper deference. But the Sixth Circuit rejected this argument. Thus, the admissibility of Professor Cotterill's opinion is no longer an open question.

The Sixth Circuit began its analysis of Professor Cotterill's damages opinion by recognizing that the Magistrate Judge "ruled that Cotterill's testimony was admissible" but that the "district court never formally ruled on the objection." *In re Se. Milk*, 739 F.3d at 283. The appellate court then went on to note that the wording of the Court's summary judgment opinion "led the Plaintiffs to believe that the district court was agreeing with the Defendants' objection, contrary to the ruling of the magistrate judge." *Id.* But the Sixth Circuit rejected that claim, saying:

> [A]lthough the district court never explicitly addressed Defendants' objections to Cotterill's testimony, ***the summary judgment opinion strongly suggests that the district court concurred with the magistrate judge***. . . . No doubt it would have been clearer for the district court to explain with particularity why Defendants' objections were not compelling. ***Nevertheless it is obvious that the district court considered Cotterill's testimony in light of the magistrate judge's opinion and after independent examination of the evidence***.

Id. at 283-84 (emphasis added). The Sixth Circuit thus squarely held that this Court had rejected Defendants' objection to the Magistrate Judge's decision. Moreover, the Sixth Circuit decided the appropriate standard of review (deference or *de novo*) based on this ruling. *Id*. By including their appeal of the denial of the motion to exclude Professor Cotterill on their list of issues to be decided, Defendants seek to have the Court entirely undo the Sixth Circuit's ruling. Under any interpretation of the mandate rule, this Court is required to accept the Sixth Circuit's determination, and the admissibility of Professor Cotterill's damages opinion may not be re-litigated.[3]

C. Defendants Cannot Re-litigate the Issue Whether Food Lion Has Sufficient Evidence of Injury to Defeat Summary Judgment.

The Sixth Circuit could not have more clearly stated that Food Lion has produced sufficient evidence of antitrust injury:

> Cotterill's model, as applied to the facts, reveals three conclusions which, taken together, can be viewed as evidence of antitrust injury. First, it is clear that Plaintiffs purchased processed milk from the Defendants. Second, Cotterill's model indicates that after the merger Plaintiffs were charged 7.9% more for milk than an econometric analysis could justify. And third, the district court found that evidence indicated that Dean Foods and NDH, due to the influence of DFA, conspired to avoid competing vigorously. . . . Accordingly, ***summary judgment was not warranted based on the lack of antitrust injury***.

In re Se. Milk, 739 F.3d at 285-86 (emphasis added). Incredibly, in the face of this unequivocal holding by the Sixth Circuit that "summary judgment was not warranted based on the lack of antitrust injury," Defendants are asking this Court to grant summary judgment based on the lack of antitrust injury. The fact is that Professor Cotterill's model shows that Food Lion, like the

[3] The Sixth Circuit's opinion is relevant to Defendants' proposed objection to the Magistrate Judge's ruling in another way. That objection is based on their argument that Professor Cotterill measured the impact of the merger. The Sixth Circuit, however, expressly rejected this argument. *In re Se. Milk*, 739 F.3d at 285. Thus, even if the Court concludes that it may address the objection, the Sixth Circuit's decision requires that the Court overrule it on the merits.

other class members, paid "more for milk than an econometric analysis could justify." The Sixth Circuit held that Professor Cotterill's model is a valid method for proving antitrust injury. Defendants cannot attempt an end-run around that decision by asking this Court to ignore the Sixth Circuit's holding that Food Lion has presented sufficient evidence of antitrust injury.[4]

There is no question that Plaintiffs' appeal squarely presented the question whether Plaintiffs had come forward with sufficient evidence of antitrust injury. Defendants could have urged affirmance of the Court's summary judgment ruling by asserting any argument that they made below as to why Plaintiffs' asserted injury did not constitute antitrust injury, including the formula pricing argument. *See Corell v. CSX Transp., Inc.*, 378 F. App'x 496, 499-500 (6th Cir. 2010) (courts of appeals may "affirm a district court's summary judgment decision on any grounds supported by the record, even if different than those relied on by the district court"). In fact, Defendants' appellate brief alluded to the formula pricing argument in a footnote, stating that it had also offered an alternative ground on which summary judgment could be granted which the district court had not reached. *See* Appellees' Br. (Case No. 12-5457, Dkt. 50) at 33-34 n.11. Although Defendants made a tactical decision not to make the formula pricing argument more robustly, they did assert it as a basis on which this Court's judgment could have been affirmed.[5]

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[4] Indeed, it would be ironic for the Court to find that Food Lion did not suffer antitrust injury when Defendants' conspiracy was unraveled in part by Food Lion's recognition that it was paying excessive margins on its milk costs and commissioning of a study to determine why that was the case. Ex. 1, Ault Dep. at 37:20-38:14, 41:9-15, 43:1-4, 226:1-19.

[5] Defendants' tactical decision not to emphasize the formula pricing argument on appeal is not surprising. As Plaintiffs will explain in detail in response to Defendants' Rule 7.1(d) supplemental formula pricing brief (Dkt. 2017), there are numerous reasons why summary judgment cannot be granted on this ground, including the testimony of Defendants' own expert, Professor Kalt. Of course, because of the Sixth Circuit's opinion, this Court will not need to consider Defendant's supplemental brief.

There can be no doubt that if Defendants urged the Sixth Circuit to affirm the Court's summary judgment ruling on the alternative ground of formula pricing, the Sixth Circuit's reversal would foreclose any reconsideration of that argument on remand. That is what happened in *Schafer*, 2014 WL 5511401. In that case, the plaintiff advanced two alternative grounds in support of a motion to set aside an arbitrator's decision. *Id.* at *1. The district court granted summary judgment for the plaintiff based on the first ground, without deciding whether the second ground also warranted setting aside the award. *Id.* After the Sixth Circuit reversed, the plaintiff claimed that the district court could decide on remand whether the previously undecided alternative ground warranted setting aside the arbitrator's decision, notwithstanding the appellate court's reversal. The district court concluded, however, that the Sixth Circuit had at least "implicitly" also decided that the second ground likewise did not support summary judgment, thus precluding the lower court from considering that argument again on remand. *Id.* at *8. The court reasoned that the plaintiffs had presented to the Sixth Circuit both alternative arguments in support of affirming the district court's ruling and that a finding on either would have been sufficient to affirm. However, because the Sixth Circuit reversed the judgment, it must have "implicitly concluded both of Plaintiffs' arguments were meritless." *Id*.

Defendants here fare no better having made an intentional, and tactical, decision to relegate the formula pricing argument on appeal to a footnote. Even if Defendants had completely ignored the formula pricing argument in their appeal, it would have been waived. That is because of the component of the mandate rule which provides that "where an issue was ripe for review at the time of an initial appeal but was nonetheless foregone, the mandate rule generally prohibits the district court from reopening the issue on remand." *O'Dell*, 320 F.3d at 679. As the Sixth Circuit explained that aspect of the mandate rule, it "would be absurd that a

party who has chosen not to argue a point on a first appeal should stand better as regards the law of the case than one who had argued and lost." *Sanford*, 449 F. App'x at 493 (quoting *Fogel v. Chestnutt*, 668 F.2d 100, 109 (2d Cir. 1981)).

Even if Defendants are not deemed to have raised the formula pricing issue on appeal, and the court of appeals did not implicitly reject it as in *Schafer*, that does not help them. Under the rule expressed in *Sanford*, Defendants cannot stand in a better position by having purposefully avoided the issue on appeal than if they had argued and lost the point. These cases make plain that a party that foregoes the opportunity to urge an appellate court to affirm a district court's ruling in its favor on a particular ground cannot later avoid the mandate rule by claiming that the issue was not considered by the appellate court.

The Sixth Circuit's decision bars Defendants' formula pricing argument for two reasons. First, it is flatly inconsistent with the Sixth Circuit's holding that Food Lion presented sufficient evidence of antitrust injury. Second, to the extent there is any room for doubt about the first reason (which there is not), the mandate rule bars Defendants from raising this argument. Accordingly, the formula pricing issue raised by Defendants in the Parties' Joint Report is not an open question and may not be addressed by the Court.

CONCLUSION

For the foregoing reasons, the Court should reject Defendants' claim that the issue of the admissibility of Professor Cotterill's damages opinion remains open, or that it can yet grant summary judgment for Defendants on the ground that formula pricing caused price increases that do not constitute antitrust injury.

Respectfully submitted,

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Dated: February 17, 2015

CERTIFICATE OF SERVICE

I certify that, on the 17th day of February, 2015, a true and correct copy of Retailer Plaintiffs' Memorandum Concerning Outstanding Issues Remaining for Decision Upon Remand was served by operation of the electronic filing system of the U.S. District Court for the Eastern District of Tennessee upon all counsel of record.

/s/ Max W. Holland III
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