

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

IN RE: PINEAPPLE ANTITRUST LITIGATION :

Civil Action No.
1:04-md-1628 (RMB)(MHD)

This document relates to all actions :

**DEL MONTE'S REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT
AND EXCLUSION OF EXPERT TESTIMONY**

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INTRODUCTION

Plaintiffs' Opposition Brief ("Opp.") relies on a "mosaic" (Opp. at 10) of out-of-context or mischaracterized snippets of evidence, yet ignores two elephants in the room, either of which dooms plaintiffs' theory of the case—that Del Monte obtained a misdescriptive patent and then misled its competitors that the MD-2 was patented (Opp. at 1-2).

First, the undisputed evidence is that the patent accurately described the CO-2 and that comparing the patent's description to the MD-2 readily showed that the patented pineapple was not the MD-2. Indeed, when plaintiffs, on the eve of summary judgment, dismissed the claim that Del Monte committed fraud on the PTO by drafting the patent description so that it appeared to cover the MD-2, they effectively admitted away their case because plaintiffs' theory of anticompetitive conduct turns on the assertion that the patent is "descriptive of the MD-2 pineapple" (Opp. at 1-2), yet that assertion cannot withstand dismissal of the fraud claim.

Second, plaintiffs' claim that Del Monte "represented to the industry" that the MD-2 was patented (Opp. at 1-2) ignores undisputed evidence from which this Court concluded that, "[q]uite the contrary, [Del Monte] seemed to be sending a message to the highest levels of its competitors ... that plainly belied the implication that it had legal protection [*i.e.*, a patent] against direct competition." *In re Fresh Del Monte Pineapple Antitrust Litig.*, 2007 WL 64189, at *15 (S.D.N.Y. January 4, 2007), *aff'd*, Order of Nov. 9, 2007 ("The Court ... adopts the Discovery Order in its entirety. ...") (hereafter "C-F").¹

¹ Plaintiffs' attack on Del Monte's reference to the Court's crime-fraud ruling (Opp. at n.5) misses the point. The exhaustive crime-fraud opinion and affirmance were based on essentially the same evidence as this motion, and plaintiffs have demonstrated no reason why the Court should not reach comparable conclusions about the same undisputed facts—facts which now compel the grant of summary judgment. Indeed, it is plaintiffs who seek to rely on a vacated crime-fraud opinion by the magistrate judge in the *Dole* litigation (Opp. at 9), with which this Court disagreed and which has no legal significance whatever.

ARGUMENT

Del Monte is entitled to summary judgment on any of four independent bases. There is no competent evidence of: (1) anticompetitive conduct; (2) a highly disfavored single-brand product market; (3) an effect on pineapple production by competitors, let alone more than a *de minimis* effect on competition; and (4) damages.

I. THERE IS NO COMPETENT ADMISSIBLE EVIDENCE OF WRONGFUL CONDUCT²

A. There Is No Competent Admissible Evidence That Del Monte Misdescribed the CO-2 in the Patent or Mised Competitors That the MD-2 Was Patented

Plaintiffs ignore undisputed evidence that the patent accurately described the CO-2, including its unique traits (SMF ¶¶ 167-171), such that, for example, Dole needed only “to look at the patent and then to look at the MD-2 and know that they were not one and the same.” (SMF ¶ 115.) They also ignore evidence establishing that “Del Monte did not seek to mislead [its] competitors” and “made clear that the patent covered only the CO-2....” (C-F at *14.) Del Monte’s undisputed conduct and assertions when the company was offered for sale to Dole and Chiquita, when it was put up for sale in a worldwide auction, when it went public, during analyst conference calls,³ and in direct communications with its competitors refute any contention that Del Monte misrepresented to its competitors that the MD-2 was patented. (*See* DM Br. at 11-12;

² Del Monte does not ask the Court to “make credibility determinations” or weigh “conflicting evidence.” (Opp. at 6.) When plaintiffs’ rhetoric, inadmissible evidence, out-of-context testimony, and rank speculation are put aside, “the record taken as a whole,” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986), mandates summary judgment. Nor do plaintiffs (Opp. at n.7) refute that the “clear and convincing evidence” standard applies to both the Costa Rica threat letters (as alleged threats of sham patent litigation) and the claims based on the *Dole* and *Maui* litigations. (*See* Del Monte’s moving Brief (“DM Br.”) at 7 n.8.) No matter the standard, however, summary judgment is appropriate.

³ Conferences with analysts are an “established market mechanism” used to make information public. *In re Enron Corp. Sec Litig.*, 235 F. Supp.2d 549, 686 (S.D. Tex. 2002). Transcripts of analyst conference calls, such as those involved here, are sufficiently reliable so that courts take judicial notice of them “to establish the content of the disclosures therein.” *In re XM Satellite Radio Holdings Sec. Litig.*, 479 F. Supp.2d 165 n. 8 (D.D.C. 2007).

SMF ¶¶ 66, 162, 127-134, 137). This unchallenged evidence alone compels summary judgment. Even the two claimed sham litigations made clear that the MD-2 was *not* patented—the *Dole* litigation did not assert a patent on the MD-2,⁴ while the *Maui* litigation asserted a patent only on the CO-2—and are thus inconsistent with plaintiffs’ alleged scheme, which turns on Del Monte falsely claiming the MD-2 was patented.

Faced with this undisputed evidence, plaintiffs set out in six bullet points purported “evidence” precluding summary judgment. (Opp. at 10.) Plaintiffs are wrong.⁵

- Plaintiffs’ assertion that Del Monte “orally threatened Dole ... that the CO-2 patent covered the MD-2 pineapple” is based on a single, inadmissible document containing double-hearsay reporting an alleged telephone call. The document’s author was never deposed; the former Del Monte employee denies making the statement attributed to him (SMF ¶ 101), and the document at best “imply[s]” that the patent covered the MD-2. (See C-F at *5; DM Br. at n. 30.) Moreover, there is no evidence that the alleged

⁴ Dole defended in part based on the fact the MD-2 was not patented. *See Del Monte Fresh Produce Company v. Dole Food Company, Inc.*, 136 F. Supp.2d 1271, 1286 (S.D. Fla. 2001).

⁵ Plaintiffs’ brief and opposition to Del Monte’s statement of undisputed facts (“Opp. SMF”) are rife with misstatements of testimony and mischaracterization of evidence, in addition to often relying on clearly incompetent evidence.



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These are but examples of how plaintiffs have misrepresented the evidence or relied on incompetent evidence.

telephone call had any impact on Dole, particularly in light of the undisputed evidence that Del Monte made clear to Dole that the patent “covered only the CO-2...and did not cover the MD-2....” (C-F at 14.) **Redacted**

- [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] (SMF ¶¶ 115, 116; Tab 6 at 46.)
- [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] (*See, e.g.*, SMF ¶¶ 137, 177.)
- [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] (SMF ¶ 162.)
- An assertion based upon a hearsay document that Banacol was “confused by Del Monte’s actions.” But in the same document Banacol itself confirms that Del Monte had not “asserted ownership of any such patent” on the MD-2. (Plaintiffs’ Tab 32.)
- Lastly, lacking evidence that Del Monte misrepresented the patent, plaintiffs argue that “Del Monte never disabused its competitors” of the notion that the MD-2 was patented. Of course, no such affirmative duty exists as a matter of law, and the evidence shows that Del Monte at all times acted with respect to the “highest levels of its competitors” in “a

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(*Id.* at 179, 183.)

manner that flatly contradicted” any notion that the MD-2 was patented. (*See* C-F at *9-10; SMF ¶¶ 54-66.)

B. Neither the Costa Rica Letters Nor the Proposed Press Release Were Wrongful Conduct

Plaintiffs rely on truncated references to Funk’s testimony to argue that the so-called threat letters were sent to deter lawful competition, not to deter theft.⁷ (*Opp.* at 2, 6-7.) Importantly, plaintiffs ignore Funk’s consistent testimony in three different litigations that the letters were sent to *laboratories Del Monte believed were propagating stolen plant material.* (*See* SMF ¶¶ 51, 52; 8/8/08 Goldfarb Decl., Tab 24 at 126-27.)⁸ Other witnesses testified similarly (SMF ¶¶ 35, 36, 48, 49)⁹ and there is no evidence to the contrary.¹⁰

Also unavailing is plaintiffs’ previously rejected reliance on “business documents” and other Del Monte testimony (*Opp.* at 7) to show a purported scheme to mislead. The “business document” is a memo proposing a press release that was *never issued*, whose author testified was his idea alone and intended to deter theft. (*See* C-F at *7; SMF ¶¶ 165, 203, 207.) The former Del Monte employee cited by plaintiffs testified that he never represented the MD-2 was patented and was unaware that anyone at Del Monte had done so. (Tab 5 at 73.)

⁷ Plaintiffs’ evidence falls woefully short of their burden to establish, by clear and convincing evidence, that deterrence of theft was “merely pretextual.” *See Trans Sport, Inc. v. Starter Sportswear, Inc.*, 964 F.2d 186, 190-91 (2d Cir. 1992). There is no evidence Del Monte acted other than to deter the “reality” of theft (C-F at *14), particularly since, at the same time, Del Monte essentially told Dole the MD-2 was not patented. (C-F at n.8, 14-15.)

⁸ This Court has recognized that “Del Monte did not seek to mislead [its] competitors-notably Dole and Maui-by virtue of this series of letters.” (C-F at *14.) **Redacted**

⁹ [REDACTED]

(Tab 2 at 123, 135.)

In complex commercial cases in general, “[t]he fact that the defendant’s state of mind is in issue does not [preclude summary judgment] where only speculative allegations are offered to demonstrate the existence of state of mind after ample opportunity to engage in relevant discovery.” *Resource Developers, Inc. v. Statue of Liberty-Ellis Island Found., Inc.*, 926 F.2d 134, 141 (2d Cir. 1991).

C. The *Maui* Litigation Was Not a Sham

Plaintiffs ignore the dispositive fact that because the *Maui* lawsuit alleged patent infringement as to the CO-2 pineapple, it could not possibly have impeded competition in a market that, according to plaintiffs' market definition, *excludes* the CO-2. (See DM Br. 17.) Plaintiffs' assertion that the claim was a sham because Del Monte made statements that Maui has an "ownership interest in the CO2 pineapple" (Opp. at 11) is simply wrong. In fact, "Maui agreed to assign its rights to the plant to Del Monte and take a license." (C-F at *10; *see also* SMF ¶¶ 78, 79, Tab 71.) **Redacted** (SMF ¶ 79).

Also meritless is plaintiffs' argument that Del Monte's counterclaim against Maui for patent infringement violated Rule 11. (Opp. at 12.) Plaintiffs ignore the key inquiry in the "objectively baseless" test for sham litigation: whether "a reasonable litigant in the defendant's position could realistically expect success on the merits of the challenged lawsuit." *Profl Real Estate Invs., Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 63 (1993).¹¹ There is no material dispute that a reasonable litigant *in Del Monte's position* "could realistically [have] expected success" on the claim. (See DM Br. 15-17; SMF ¶¶ 80-89.)¹²

D. The *Dole* Litigation Was Not a Sham

Plaintiffs' assertion that the *Dole* litigation was part of the alleged anticompetitive scheme does not make sense. Consistent with its other conduct toward competitors, Del Monte accused Dole of stealing MD-2 planting material but did not assert a patent infringement claim—effectively a clear statement that the MD-2 was not patented. (SMF ¶¶ 68, 70; *see also* Opp.

¹¹ Plaintiffs' reliance on *Q Pharma Inc. v. Andrew Jergens Co.*, 360 F.3d 1295 (Fed. Cir. 2004) (Opp. at 12 n. 15) is unavailing because the court found no sham litigation even though the patent owner had received multiple pre-suit notices of invalidity.

¹² Plaintiffs also ignore that District Court Judge Breyer in the *Maui* patent litigation rejected a claim for attorney's fees against Del Monte. (SMF ¶ 93.)

SMF ¶¶ 68, 70.) Because the *Dole* lawsuit contradicts any notion of an MD-2 patent, it cannot logically be part of a scheme to mislead competitors that MD-2 was patented.¹³

1. Dole’s Statute of Limitations Defense Does Not Show Objective Baselessness

Plaintiffs’ assertion that Del Monte’s trade secret claim was sham because it was time-barred (Opp. at 14) is wrong. The cause of action accrued when Del Monte “knew about the *misappropriation*” or should have discovered it. Fla. Stat. § 688.01. Knowing that Dole possessed the MD-2 for research purposes is not knowledge of misappropriation (*see* DM Br. 14; SMF ¶¶ 76-77), and plaintiffs cite no evidence that Del Monte knew more than three years before filing suit that Dole had acquired stolen MD-2.¹⁴

2. Del Monte’s Trade Secret Claim Was Not Objectively Baseless

The MD-2 was a trade secret when it was acquired improperly by Dole, and existing precedent supported that claim. (*See* DM Br. 14; *Del Monte Fresh Produce Co. v. Dole Food Co.*, 136 F. Supp. 2d 1271, 1292 (S.D. Fla. 2000)), affirming Del Monte’s trade secret claims as a matter of law and citing *Pioneer Hi-Bred International v. Holden*, 35 F.3d 1226 (8th Cir. 1994). Plaintiffs’ attempt to distinguish *Pioneer* is unavailing because the MD-2 was stolen even though Del Monte “took reasonable steps to protect it.” (*See* Opp. at n.21.) The fact that Dole hypothetically could have acquired some MD-2 material lawfully did not render the trade secret claim a sham. *See Pioneer*, 35 F.3d at 1237. Plaintiffs also ignore that Del Monte alleged misappropriation of its agronomic trade secrets (SMF ¶ 68), a claim which they do not (and cannot) allege was a sham.

¹³ In the *Dole* litigation, the District Court effectively rejected as a matter of law the same attacks upon which plaintiffs base their claim of sham.

¹⁴ Moreover, the limitations period was subject to tolling and waiver; plaintiffs cite no case holding that a claim asserted after the limitations period has run is sham.

3. Del Monte's Reverse Palming Off Claim Was Not Objectively Baseless

Plaintiffs' opposition makes a new argument that Del Monte's reverse palming off claim was a sham. (Opp. at 16.) This claim is baseless since Dole in settling admitted that the MG-3 (sold under the "Premium Select" label) was in fact the MD-2 and agreed not to continue to call it a "new variety" (*see* SMF 24). Plaintiffs' speculation that the settlement of the *Dole* action while a magistrate judge's partially adverse crime-fraud ruling was on appeal to the District Court shows that the case was a "sham" (Opp. at 17) fails to create an issue of fact. Magistrate Judge Dolinger reviewed the same privileged documents *in camera* and found them "consistent with defendant's contention that the letters were sent because of concern about the theft of seedlings and their apparent use by some of the Costa Rican laboratories." *See* C-F at *13.¹⁵

E. Testimony of Plaintiffs' Purported Patent Expert Is Not Admissible to Create a Triable Issue on Anticompetitive Conduct

The testimony of plaintiffs' proposed patent expert George Gould should be excluded. (DM Br. at 17-20.) Contrary to what plaintiffs' string citations suggest (Opp. at nn. 22 & 23), this is neither "a bench trial, [where] the concerns of *Daubert* are of lesser import given that there is no jury to shield," *Armament Sys. & Proc., Inc. v. IQ Hong Kong, Ltd.*, 2007 WL 4747940, at *2 (E.D. Wis. Apr. 27, 2007), nor a challenge to complex PTO rules in which the court "recognizes its own limited knowledge of the intricacies of patent regulations and appreciates the need for experts." *Tafas v. Dudas*, 511 F. Supp.2d 652 (E.D. Va. 2007).¹⁶

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¹⁵

[REDACTED] (SMF ¶ 74). *Cf.* *Farrar v. Hobby*, 506 U.S. 103, 111-12 (1992) (plaintiff who sued for \$17 million and won nominal damages of \$1 could be prevailing party under attorneys' fees provision).

¹⁶ Plaintiffs' other citations are equally inapposite. *See Arlington Indus., Inc. v. Bridgeport Fittings, Inc.*, 2003 U.S. Dist. LEXIS 27621, at *3 (M.D. Pa. 2003) (lawyer/expert permitted to rebut "advice of counsel" defense to willful infringement); *Chamberlain Group, Inc. v. Interlogix, Inc.*, 2002 WL 653893, at *1 (N.D. Ill. 2002) (motion before the close of discovery

II. THERE IS NO COMPETENT EVIDENCE TO SUPPORT A SINGLE PRODUCT MARKET

Because none of plaintiffs' allegations of anticompetitive conduct involve Del Monte's alleged acts to restrain Dole or other competitors' production of MG-1 and CO-2 pineapples, if those varieties are included in the relevant product market—as the record shows they should be—plaintiffs' case fails. (*See* DM Br. at 22-23.) Plaintiffs have provided no basis for excluding the MG-1 and CO-2 and thereby effectively creating a highly disfavored single-brand market. *See Domed Stadium Hotel, Inc. v. Holiday Inns, Inc.*, 732 F.2d 480, 488 (5th Cir.1984) (“[A]bsent exceptional market conditions, one brand in a market of competing brands cannot constitute a relevant product market.”).

A. Plaintiffs' Attempt to Establish Monopoly Power Without Defining a Relevant Product Market Fails as a Matter of Law

Plaintiffs claim that “product market definition is not legally essential” because Dr. Cotterill's testimony provides direct evidence of Del Monte's ability to control prices. (Opp. at 19-20.) However, as in *Meijer, Inc. v. Barr Pharm., Inc.*, 2008 WL 3903389, at *12 (D.D.C. 2008), the plaintiffs here “fail to cite a *single case* (and the Court is aware of none) where a court has allowed the use of direct evidence of market power to define a product market” (citing *In re Remeron Direct Purchaser Litig.*, 367 F. Supp.2d 675, 680 n. 8 (D.N.J. 2005)).

In plaintiffs' principal case (Opp. at 19), the Second Circuit found plaintiffs' “direct evidence” insufficient as a matter of law. *See Pepsico, Inc. v. Coca-Cola Co.*, 315 F.3d 101, 108 (2d Cir. 2002). The Second Circuit “require[s] *unambiguous evidence* that a defendant can control prices or exclude competition.” *RE/MAX Int'l, Inc. v. Realty One, Inc.*, 173 F.3d 995, 1019 (6th Cir. 1999) (citing *U.S. Football League v. Nat'l Football League*, 842 F.2d 1335, 1362 (2d Cir. 1988)); *see Geneva Pharm. Tech. Corp. v. Barr Laboratories Inc.*, 386 F.3d 485, 500

was premature); *Lemelson v. General Mills, Inc.*, 1987 WL 26134, at *2 (N.D. Ill. 1987) (cautionary instruction could prevent undue deference to former PTO Commissioner).

(2d Cir. 2004) (“direct proof” failed as a matter of law where it was “at best ambiguous”); *Heerwagen v. Clear Channel Comm’n*, 435 F.3d 219, 227 (2d Cir. 2006) (direct evidence “often difficult or impossible to prove”). Direct evidence of monopoly power is legally insufficient “without evidence that sheds light on material factors such as [defendant’s] price relative to its total costs (marginal *and* fixed) *and* whether output was restricted.” *In re Remeron*, 367 F. Supp.2d at 680 n. 10. Dr. Cotterill’s testimony falls far short of the requisite showing. For example, he fails to account for Del Monte’s research and development expense. *See United States v. Eastman Kodak Co.*, 63 F.3d 95, 108-09 (2d Cir. 1995) (“enormous” research expenses; “[c]ertain deviations between marginal cost and price, such as those resulting from high fixed costs, are not evidence of market power.”). Moreover, Dr. Cotterill admitted Del Monte expanded its production. (*See* Cotterill Rpt., 8/8/08 Goldfarb Decl., Tab 1 at Figure 2.) *Geneva Pharm.*, 386 F.3d at 500 (“direct evidence” was legally insufficient where no evidence defendant restricted output).

B. Cotterill’s Reliance on “Own Price Elasticity” Is a Fatally Flawed Methodology

Analyzing cross-elasticity of demand is key to defining a relevant product market, and cases are legion rejecting testimony from experts who failed to analyze cross-elasticity or conducted a flawed analysis. (*See* DM Br. at 20, 26.)¹⁷ **Redacted**

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Yet plaintiffs fail to cite a single case holding that a potential substitute can be

¹⁷ *See also United States v. Sungard Data Sys., Inc.*, 172 F. Supp.2d 172, 182 (D.D.C. 2001); *Hayden Pub. Co., Inc. v. Cox Broadcasting Corp.*, 730 F.2d 64, 71 (2d Cir. 1984); *Hornsby Oil Co., Inc. v. Champion Spark Plug Co., Inc.*, 714 F.2d 1384 (5th Cir. 1983); *Kaplan v. Burroughs Corp.*, 611 F.2d 286, 291 (9th Cir. 1979).

excluded from a relevant market by measuring “own price elasticity,” or that the Merger Guidelines require measurement of “own-price elasticity” in defining a product market, while innumerable cases hold that cross-elasticity is central to market determination. (*See* DM Br. 22-23, 26.)

Flying in the face of established law, plaintiffs cite two articles. Yet even those articles recognize the importance of cross-elasticity in market definition. One of those articles states: “Over the last decade, most courts of appeal have indicated that market delineation should focus on cross elasticity of demand, generally citing *Brown Shoe*.”¹⁸

Plaintiffs’ unsupported theory also ignores that because of the risk associated with new products, innovators must receive an expected return at least equal to their risk-adjusted cost of capital, or they have no incentive to innovate. Both Dole and Maui’s presidents acknowledged that Del Monte, in bringing the MD-2 to market, was an innovative risk taker (SMF ¶¶ 11, 55, 126, 105-114). Under plaintiffs’ approach, because the market awards a price and profit premium to successful innovators, the illogical result would be to create markets consisting only of the innovator’s product. That is not a proper market definition. *See Brown Shoe*, 370 U.S. at 326 (“[c]ourts have repeatedly rejected efforts to define markets by price variances”); *Nifty Foods Corp. v. Great Atlantic & Pacific Tea Co.*, 614 F.2d 832, 840 (2d Cir. 1980) (not “realistic” to determine product market based on “price or quality”).

¹⁸ G. Werden, *Demand Elasticities in Antitrust Analysis*, 66 Antitrust L.J. 363, 400 (1998); *see id.* at 398 (Cross elasticities of demand can play a useful role in market delineation.”); 402-03 (“Cross elasticities of demand play a central role” in conducting SSNIP test). *See also* J. Baker, *Market Definition: An Analytical Overview*, 74 Antitrust L.J. 129, 139 n. 38 (2007) (“[c]ross-price elasticities of demand ... are relevant ... to identify the next-best substitute that should be included if the candidate market is expanded”).

C. Cotterill’s Exclusion of MG-1 and CO-2 from the Relevant Market Is “Too Flawed To Be Reliable”

The proper question is whether the MG-1 and CO-2 pineapples are reasonable substitutes for the MD-2, *see PepsiCo, Inc.*, 315 F.3d at 105 (“acceptable substitutes” in same market), and the record shows they are. Plaintiffs concede that Dole sold MG-1 and MD-2 pineapples under the same trademark in competition with Del Monte, and that Maui competed with the CO-2. (SMF ¶¶ 15-16, 25, 28.) The fact that Dole eventually stopped selling MG-1 and Del Monte did not sell CO-2 (Opp. at 24-25) is irrelevant because those pineapples were in fact substitutable for the MD-2.

Redacted

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] his methodology is “too

Redacted

¹⁹ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (Tab 61 to 8/8/01 Goldfarb

Decl. at 126-128.)

flawed to be reliable,” *State v. Kraft General Foods, Inc.*, 926 F. Supp. at 329.²⁰

Plaintiffs’ final argument—that MG-1 and CO-2 cannot be in the product market because they were not available in volumes Cotterill deemed sufficient (Opp. at 27-28) misstates the law. The SSNIP test assumes that products are available “in unlimited quantities at constant prices.” (See Guidelines n. 9.) “The phrase ‘if available in unlimited quantities at constant prices’ serves to eliminate any effect of supply conditions for the substitutes and assure that only demand substitution is considered.” Werden, *supra*, 66 Antitrust L.J. at 403 n. 155. Here, there is no allegation that Del Monte created any barrier to any competitor that wished to increase its supply of MG-1 and CO-2 pineapples, and, thus there is no justification for deviating from the SSNIP test, which, as noted, assumes competing products are available in unlimited quantities.

III. THERE IS NO COMPETENT ADMISSIBLE FACT OR EXPERT EVIDENCE TO PROVE DEL MONTE’S ACTIONS REDUCED SUPPLY

A. There is No Evidence That Del Monte’s Conduct, Including the So-called Threat Letters, Delayed Any Competitor from Entering Plaintiffs’ Purported “MD-2 Market”

Dole: [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (Tab 6 at 43-47, 61, 68-69, 75, 98.)

Redacted

²⁰ [REDACTED]

See DM Br. at 25-26; *Kodak*, 65 F.3d at 108 (rejecting survey evidence of consumers’ “strong preference” in light of price sensitivity); *Streamcast Networks, Inc. v. Skype Technol., S.A.*, 547 F. Supp.2d 1086 (N.D. Cal. 2007) (rejecting market definition that did not address price sensitivity).

Redacted

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (SMF ¶¶ 112, 121-125.)²¹

Maui: [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] **Redacted**

Chiquita: [REDACTED]

[REDACTED] (DM Br. at 33-34; SMF ¶¶ 157-58). This undisputed fact demonstrates that Del Monte's actions could not possibly have had a substantial effect on competition by Chiquita because nothing Chiquita did (or tried to do)

Redacted

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[REDACTED]

(SMF ¶ 137).

would have increased the supply of extra-sweet pineapples or lowered the cost.²³

Redacted

[REDACTED]

Other growers:

[REDACTED]

Redacted

²³ [REDACTED] (SMF ¶ 159.)

By 2001, the *Maui* and *Dole* cases were filed with no MD-2 patent claims (see pp. 3, 6-7 above), and Chiquita agreed this put it on notice the MD-2 was not patented. (Tab 7 at 141-42.)

²⁵ [REDACTED] (Tab 7 at 148.)

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (SMF ¶ 151.) **Redacted**

B. Cotterill’s Proposed Testimony is Inadmissible and Fails to Establish an Anticompetitive Effect

First, plaintiffs contend that Cotterill’s testimony about *causation* is admissible under the looser standard applicable to quantifying damages. (Opp. at 35.) That argument fails because in antitrust cases, “courts have always distinguished between proof of *causation* of damages and proof of the *amount* of damages.” *MCI Communications Corp. v. AT&T*, 708 F.2d 1081, 1161 (7th Cir. 1983) (emphasis original). The relaxed standard applies only to the latter. *See Howerton v. Grace Hosp., Inc.*, 1995 WL 787529, at *15 (W.D.N.C. July 7, 1995) (expert testimony on causation “must reach a higher standard of probability rather than possibility”).

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]²⁶ That is improper. *See U.S. Info., Inc. v. IBEW*, 313 F. Supp.2d 213, 238 (S.D.N.Y. 2008) (“expert must demonstrate that he has adequately accounted for obvious alternative explanations in order for his testimony to be reliable”).²⁷

Redacted

²⁶ [REDACTED] Cotterill’s testimony should be excluded because it is unreliable, not because it also reaches the wrong results. *See Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 598 (1993) (“trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable”); *In re Vioxx Prod. Liab. Litig.*, 401 F. Supp. 2d 565, 573 (E.D. La 2005) (“focus is not on the result or conclusion, but on the methodology”).

²⁷ *See also Claar v. Burlington N. RR. Co.*, 29 F.3d 499, 502 (9th Cir. 1994) (testimony excluded where the expert failed to consider other obvious causes); *Ehlers v. Siemens Medical Solutions, USA, Inc.*, 251 F.R.D. 378, 388 (D. Minn. 2008) (summary judgment where expert failed to

Plaintiffs' claim that Del Monte confuses Cotterill's opinions with the evidentiary bases for his opinions (Opp. at 35-36) is wrong. Del Monte has shown that Cotterill brings no expertise to bear to his highly selective recitation of facts, while his factual conclusions are unreliable and usurp the jury's role. (DM Br. at 36-38; *Champagne Metals v. Ken-Mac Metals, Inc.*, 458 F.3d 1073 (10th Cir. 2006) ("generally, an economist's role in an antitrust case is not to prove facts, but to opine on economic theory".)) An expert is precluded "from reaching the ultimate legal conclusion about whether ... anticompetitive conduct actually occurred," and is not "permitted to state that the defendants did or did not engage in anticompetitive conduct," because [t]hose determinations are the province of the trier of fact." *U.S. Info. Sys.*, 313 F. Supp.2d at 240-41.²⁸

Plaintiffs' suggestion that it is premature to decide the admissibility of Cotterill's testimony (Opp. at 37-38) misses the point. Cotterill's liability testimony is inadmissible regardless of any later evidentiary rulings because it lies outside his area of expertise, invades the province of the jury, and does not account for alternative explanations. (*See* DM Br. 36-37.)

IV. PLAINTIFFS HAVE NO ADMISSIBLE TESTIMONY ON DAMAGES

Redacted

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (*see* Report, 8/18/08 Goldfarb Decl., Tab 1 at 44-45).

account for alternative causes); *In re Rezulin Products Liability Litigation*, 441 F. Supp.2d 567, n.72 (S.D.N.Y. 2006).

²⁸ Plaintiffs contend that if the Court excludes the portion of Dr. Cotterill's report that "summarizes supporting evidence," it should also exclude the "narrative sections" of the reports submitted by Del Monte's experts (Opp. at 38 n. 51). Plaintiffs' unsupported request should be denied.

[REDACTED]

Redacted

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Cotterill's methodology is so flawed that his damage testimony should be excluded because it provides no basis for "a just and reasonable inference of damages." *New York v. Julius Nasso Concrete Corp.*, 202 F.3d 82, 88 (2d Cir. 2000).²⁹

CONCLUSION


For the foregoing reasons, Del Monte is entitled to summary judgment and, in any event, the testimony of Cotterill and Gould should be excluded.

²⁹ Plaintiffs complain that Del Monte does not cite antitrust cases in which the testimony of damage experts was excluded. (Opp. at 39-40.) Regardless of the relaxed requirement for quantifying antitrust damages, evidence that does not meet the requirements of *Daubert* and Fed.R.Evid. 702, must be excluded. *See, e.g., Blue Dane Simmental Corp. v. American Simmental Ass'n*, 178 F.3d 1035 (8th Cir. 1999) (excluding damages testimony by agricultural economist); *Schwabe, Inc. v. United Shoe Mach. Corp.*, 297 F.2d 906 (2d Cir. 1982) (granting summary judgment where expert testimony would not permit rational determination of damages); *In re Aluminum Phosphide Antitrust Litig.*, 893 F. Supp. 1497 (D. Kan. 1995) (expert testimony on amount of damages caused by price fixing was inadmissible).

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by email
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