

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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IN RE PINEAPPLE ANTITRUST LITIGATION :
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This Document Relates To: All Actions :
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Civil Action No.
1:04-MD-1628 (RMB) (MHD)

**DIRECT AND INDIRECT PURCHASER PLAINTIFFS' JOINT
OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT
AND EXCLUSION OF EXPERT TESTIMONY**

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PRELIMINARY STATEMENT

This is a straightforward, well-supported antitrust case, and presents genuine issues of material fact which make summary judgment inappropriate on each of the bases urged by Del Monte.

Del Monte's Anticompetitive Intent – The “Threat Letters:” Del Monte’s primary argument is that the evidence suggests its “threat letters” were sent with the sole intention of deterring theft of stolen planting material, and that “there is no evidence that the letters were sent to improperly exclude others from the market.” Del Monte’s Memorandum in Support of Summary Judgment and Exclusion of Expert Evidence (“DM Br.”) at 7. Such questions of intent are uniquely inappropriate for summary judgment.¹ Moreover, the unambiguous testimony of Del Monte’s own personnel contradicts Del Monte’s contentions, making clear that Del Monte’s intent was anticompetitive.

Del Monte prematurely commercialized a revolutionary new pineapple (the “MD-2” pineapple) without first obtaining a patent on the product. Once the MD-2 was commercialized and within the public domain, it could not be patented.² OSMF ¶¶ 12, 47A. Competitors could, therefore, legally grow and sell the MD-2 in competition with Defendants. To prevent competition in this lucrative new market, Del Monte [REDACTED] [REDACTED] but that it

¹ *Hunt v. Cromartie*, 526 U.S. 541, 552 (1999) (It is error “to resolve the disputed facts of motivation at the summary judgment stage.”); *Graham v. L.I.R.R.*, 230 F.3d 34, 38 (2d Cir. 2000) (“Summary judgment is sparingly used when intent and state of mind are at issue.”); *McDarren v. Marvel Entm’t Group*, 1995 U.S. Dist. LEXIS 4649, at *19 (S.D.N.Y. Apr. 7, 1995) (“[W]here the motive, intent and knowledge of a moving party is at issue, summary judgment is particularly inappropriate.”).

² See 35 U.S.C. § 102 (“A public use or an offer for sale of a patented invention in the United States more than a year before the effective filing date of the patent application renders invalid the claims to the invention.”).

could describe in language that also would seem to Del Monte's competitors to be descriptive of the MD-2 pineapple. Del Monte then falsely represented to the industry that the CO-2 patent covered the MD-2 pineapple. Using U.S. Plant Patent 8,863 dated August 16, 1994 (the "CO-2 patent") as a "sword of Damocles," Del Monte issued "threatening letters" to seed propagation laboratories which were growing MD-2 planting materials for its competitors. The "threat letters" warned recipients that:

Del Monte is the developer of this [MD-2] plant material and intends to protect its interests as necessary. In addition, be advised that Del Monte owns U.S. Patent No. Plant 8,863 dated August 16, 1994 ["CO-2" patent]. Please govern yourself accordingly.

OSMF ¶ 37, 47C. There was no valid reason to include any reference to the CO-2 patent in these letters other than to deceive because, as a Del Monte employee has admitted, the CO-2 patent has *absolutely nothing* to with the MD-2 pineapple. OSMF ¶¶ 47C, 53.

Del Monte contends the "threat letters" were issued solely to prevent theft of MD-2 planting material from their Costa Rican farms. DM Br. at 6-11. But this claim is belied by explicit testimony from the former Del Monte Vice President who signed the "threat letters":

[REDACTED]

OSMF ¶ 47B, D. Additional testimony from another [REDACTED] at

[REDACTED]

[REDACTED]. *Id.* Del Monte's protestations of innocent intent also are belied by evidence demonstrating that Del Monte made misleading statements to salespeople and the trade so that [REDACTED]

[REDACTED]
[REDACTED] direct and circumstantial evidence led a U.S. Magistrate Judge in the Southern District of Florida and this Court to make different findings of fact and reach different conclusions on virtually identical motions to compel production of documents based on the crime-fraud privilege exception.³ These decisions “in the setting of a discovery motion neither anticipate nor foreshadow any rulings that the District Court might make with respect to the merits of plaintiffs’ claims,” *Fresh Del Monte*, 2007 U.S. Dist. LEXIS 1372, at *67 n. 24, but demonstrate that genuine issues of material fact do indeed exist concerning Del Monte’s anticompetitive intent.

The Maui Litigation Was A Sham: Del Monte contends it was justified in filing a patent infringement counterclaim against Maui Land & Pineapple Company (“Maui”) because “Maui’s actions in seeking a license under the CO-2 patent provided Del Monte with ample reason to believe the patent was valid.” DM Br. at 16. This argument sidesteps the issue. Del Monte sued Maui for patent infringement when it [REDACTED]
[REDACTED] OSMF ¶ 78. Del Monte’s patent infringement counterclaim against its co-owner defies both logic and patent law, since a co-owner cannot be prevented from using the patented

³ Compare *Del Monte Fresh Produce Co. v. Dole Food Co.*, Case No. 00-1171-CIV-GOLD (S.D. Fla. filed Jan. 10, 2002) (Dkt. #498) (granting crime-fraud motion in part) (Buchman Decl. Tab 65) with *In re Fresh Del Monte Pineapple Antitrust Litig.*, 2007 U.S. Dist. LEXIS 1372 at *39-40 (S.D.N.Y. Jan. 4, 2007) (Dkt. #127) (denying crime-fraud motion).

invention.⁴ Moreover, as described in detail below, [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED] Rather than conduct an investigation into the [REDACTED] and the information contained in [REDACTED], Del Monte turned a blind eye to the information in violation of Fed. R. Civ. P. 11, filed the counterclaim, and persisted in pursuing this claim for approximately two years. OSMF ¶¶ 80-82. While Del Monte contends it was justified in dismissing the information contained in the [REDACTED] because it was [REDACTED]

[REDACTED] that raises issues of Del Monte's state of mind and credibility which cannot properly be resolved on summary judgment. *See* n. 1, *supra*.

The Dole Litigation Was A Sham: The trade secret litigation against Dole Food Company, Inc. and Dole Fresh Fruit Company (collectively "Dole") was baseless for four reasons: (i) the trade secret claim under the Florida statute was time barred after three years and Del Monte had been aware for approximately six years that competitors possessed MD-2 planting materials; (ii) the MD-2 pineapple could not be a trade secret since it had been previously commercialized and was, for many years, within the public domain; (iii) Del Monte, like Dole, also claimed the MD-2 was a "unique variety" even though it was genetically the same as the PRI 73-114; and (iv) [REDACTED]

⁴ See 35 U.S.C. § 262; see also *Sprinturf, Inc., v. Southwest Rec. Indus., Inc.*, Civil Action No. 01-7158, 2002 U.S. Dist. LEXIS 23948 (E.D. Pa. Oct. 11, 2002).

Del Monte's Actions Had Anticompetitive Effects: In an antitrust case, Plaintiffs must prove "the existence of actual anticompetitive effects, such as the reduction of output, increase in price, or deterioration in quality of goods and services." *Orson, Inc. v. Miramax Film Corp.*, 79 F.3d 1358, 1367 (3d Cir. 1996). The record clearly shows reduction in output resulted from Del Monte's anticompetitive behavior. Dr. Cotterill's Expert Report shows [REDACTED] [REDACTED]. All of Del Monte's major competitors, Dole, Maui, Chiquita, Banacol and Kingston, suffered some degree of reduction of potential output, a situation that affected the entire marketplace. That Del Monte offers some contrary evidence on this motion merely establishes genuine questions of material fact.

STATEMENT OF FACTS

The relevant facts are set forth in full in Plaintiffs' Opposition to Del Monte's Statement of Material Facts, and are cross-referenced below where relevant.⁵

ARGUMENT

I. Direct Evidence From Del Monte's Own Employees And Business Records Shows Anticompetitive Intent.

A party seeking summary judgment must *conclusively* show that there exists no genuine issue of material fact, and all reasonable inferences are to be drawn in favor of

⁵ Throughout their opening brief, Defendants have cited to Magistrate Dolinger's opinion in *Fresh Del Monte, supra*, as record evidence. That decision is not record evidence and explicitly states that it should not be treated as such. 2007 U.S. Dist. LEXIS 1372, at *67 n. 24.

the non-movant.⁶ A court's role is not "to weigh the evidence and determine the truth of the matter," and there is no room for credibility determinations or for measured weighing of conflicting evidence such as takes place at trial. *Anderson*, 477 U.S. at 248-49; *Nabisco, Inc. v. Warner-Lambert Co.*, 220 F.3d 43, 45 (2d Cir. 2000).⁷

Plaintiffs contend Del Monte deceptively used the CO-2 patent to deceive competitors into believing mistakenly that the MD-2 pineapple was patented. As shown below, Plaintiffs' theory has overwhelming, direct evidentiary support.

A. Testimony of Del Monte's own former employees.

The evidence of anticompetitive intent in this case is extraordinarily clear and direct. [REDACTED]

[REDACTED] testified, on more than one occasion, that Del Monte

[REDACTED] was patented and

[REDACTED]

⁶ *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); *Zelnik v. Fashion Inst. of Tech.*, 464 F.3d 217, 224 (2d Cir. 2006), *cert denied*, 1275 S. Ct. 2062 (2007).

⁷ Del Monte's arguments for a higher burden of proof on Plaintiffs' claims (Def. Mem. at 5, n.4, p. 7, n. 8.) are mistaken. The Supreme Court made clear in *Grogan v. Garner*, 498 U.S. 279, 286 (1991) that the burden of proof is preponderance of the evidence in the absence of a congressional mandate. *See also Indep. Ink, Inc. v. Illinois Tool Works, Inc.* 547 U.S. 28 (2006); *Crawford-El v. Britton*, 523 U.S. 574 (1998). Congress has not mandated any heightened standard for claims involving bad faith enforcement of a patent, sham litigation or trade secrets. *See Litton Systems, Inc. v. American Tel. & Tel. Co.*, 700 F.2d 785, 813-814 (2d. Cir. 1983). But at all events, whether "clear and convincing" standards apply is academic since even when they do apply, on summary judgment "credibility determinations" remain for the jury, "weighing" of evidence is still impermissible, "[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson*, 477 U.S. at 255. *See id.* at 267 (Justice Brennan opining he "cannot imagine" how a "clear and convincing" standard could make a practical difference on summary judgment) and 270-71 (same as to Justice Rehnquist).

[REDACTED]

This direct evidence from Del Monte's employees is dispositive.⁸

B. Contemporaneous business documents.

[REDACTED]

Such credibility questions would be an impermissible basis for summary judgment even if they were persuasive. *See* n. 1, *supra*. However, Del Monte's credibility arguments are unpersuasive because [REDACTED]

[REDACTED]. For example, such [REDACTED]

C. Circumstantial evidence.

The evidence shows Del Monte became aware in the early 1990s that it could not legitimately patent the MD-2 pineapple, and that [REDACTED]

⁸ *See Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 609 n.39 (1985) (“[p]roof of specific intent to engage in predation may be in the form of statements made by officers or agents of the company, evidence that the conduct was used threateningly and did not continue when a rival capitulated, or evidence that the conduct was not related to any apparent efficiency.”) (quoting Robert H. Bork, *The Antitrust Paradox*, p. 157 (New York: Free Press 1978) (emphasis added in the original)).

[REDACTED] Only thereafter did Del Monte patent the CO-2 pineapple. The evidence further shows [REDACTED]

[REDACTED]

[REDACTED] F

[REDACTED] 3. The evidence also directly shows that [REDACTED]

[REDACTED] d. All of these facts provide circumstantial

support for Plaintiffs' contention that the CO-2 pineapple was patented for the unlawful purpose of using that patent to deceive Del Monte's competitors.

D. There was no legitimate reason to reference the CO-2 patent in the threat letters.

The evidence in this case demonstrates that there was no need to reference the CO-2 pineapple in the "threat letters." [REDACTED]

[REDACTED]

Magistrate Dolinger acknowledged as much in his prior opinion in this case, noting the "absence of any compelling explanation by Del Monte" for the patent language in the letters. *Fresh Del Monte, supra*, at n. 13. Notably, Del Monte now concedes that this reference to the CO-2 patent in the "threat letters" was "misleading." DM Br. p. 7, n. 7.

E. Whether other language in the threat letters had some other purpose is irrelevant.

Lacking any plausible innocent explanation for the CO-2 patent language in the "threat letters," Del Monte argues in its motion that *other* language contained in the "threat letters" had the collateral business purpose of discouraging theft of plant material. DM Br. at 6-22. However, even if Del Monte's intent behind that *other* language in the "threat letters" had been, in part, to address theft of MD-2 planting materials, that does

- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]

* * *

At minimum, there are material disputed facts with regard to Del Monte's intent in the "threat letters." The merits of this claim are even more compelling when coupled with evidence of later anticompetitive lawsuits filed by Del Monte against Dole and Maui to keep these competitors out of the MD-2 market, which presents a mosaic of

12 [REDACTED]

exclusionary conduct by Del Monte, as shown below. This interrelated evidence must be considered in its totality.¹³

II. The Maui Litigation Was A Sham.

To establish sham litigation a party must establish that the lawsuit was objectively baseless – *i.e.*, that an objective reasonable litigant would not realistically expect a favorable outcome on the merits.¹⁴ Here, a reasonable litigant with Del Monte’s industry experience and information would not expect a favorable outcome for two reasons. *First,*

[REDACTED]

Second, Del Monte was on explicit notice that the CO-2 patent was invalid and unenforceable. OSMF ¶¶ 80-82. [REDACTED]

[REDACTED]

¹³ *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962) (factual components of an antitrust case should be viewed together).

¹⁴ *Professional Real Estate Investors v. Columbia Pictures Indus.*, 508 U.S. 49 (1993) (“PRE”).

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Instead of speaking with its employees and using its contacts within the industry to conduct a pre-suit investigation, Del Monte turned a blind eye to [REDACTED] and the [REDACTED] filed the patent infringement counterclaim without conducting any presuit investigation, and pursued this baseless claim for nearly two years before conceding the patent was invalid. OSMF ¶¶ 80, 81, 90, 91, 95. A Del Monte investigation prior to the commencement of the patent infringement counterclaim against Maui, pursuant to Fed. R. Civ. P. 11, would certainly have involved

[REDACTED]

[REDACTED] CO-2 pineapple and the [REDACTED]. Del Monte was, in fact, aware that CO-2 patent might be invalid and unenforceable as a result of pre-patent commercialization of the CO-2 pineapple. [REDACTED]

[REDACTED]

[REDACTED] CO-2

[REDACTED] further supports

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

¹⁵ See *Q-Pharma, Inc., v. Andrew Jergens Co.*, 360 F.3d 1295, 1302 (9th Cir. 2004) (citing *Judin v. United States*, 110 F.3d 780, 784 (Fed Cir. 1997) (no presuit investigation constitutes sanctionable conduct).)

OSMF ¶ 80. However, whether a reasonable person in [REDACTED] would have conducted some investigation into the claim, and whether [REDACTED] “believed” facts that they had been explicitly told, are determinations for the jury at trial. *Anderson*, 477 U.S. at 248. OSMF ¶ 95. A jury also would be entitled to consider that [REDACTED]

[REDACTED]

III. The Dole Litigation Was A Sham.¹⁷

¹⁶ See, *Gil v. Reed*, 535 F.3d 551, 557 (7th Cir. 2008) (a reasonable jury could disregard a doctor’s assertions “that he did not believe” there had been substandard care).

¹⁷ Del Monte errs in arguing that sham litigation standing is limited to competitors and not purchasers. DM Br. n. 13. The cases Del Monte cites involved standing for antitrust claims under *Walker Process Equip., Inc. v. Food Machinery & Chem. Corp.*, 382 U.S. 172 (1965), not sham litigation under *PRE*. Indeed, in *In re Ciprofloxacin Hydrochloride Antitrust Litig.*, 363 F. Supp 2d 514, 547 (E.D.N.Y. 2005), *appeal docketed*, No. 2008-1097 (Fed. Cir. Nov. 19, 2008), the court implicitly recognized that its holding as to *Walker Process* standing was *inapplicable* to sham litigation, granting summary judgment on sham litigation claims for the *different* reason that the patentee had prevailed three times in defending the patent. Moreover, even if it had any applicability to sham litigation – which it does not – the ruling made as to purchaser standing in *Cipro* and *In re DDAVP Direct Purchaser Antitrust Litig.*, 2006 U.S. Dist. LEXIS 96201 (S.D.N.Y. Nov. 2, 2006), *appeal docketed*, No. 06-5525 (2d Cir. Dec. 6, 2006), is currently *sub judice* on appeal, where that ruling has been decried in *amicus* briefs filed by the

To thwart, or at least delay, competition in the extra-sweet pineapple market, Del Monte sued Dole, asserting a frivolous and time-barred claim that the MD-2 was a trade secret, and seeking a worldwide injunction to bar Dole from producing or selling MD-2 pineapples. OSMF ¶¶ 72, 77. This suit was a sham and a further anticompetitive act.

A. Del Monte knew its trade secret claim was time barred, and therefore a sham.

Even if the MD-2 were a trade secret, which it clearly was not, the lawsuit was a sham because it was time-barred. Del Monte's claim for misappropriation of a trade secret under the Florida Trade Secrets Act was governed by a three-year statute of limitations.¹⁸ Del Monte concedes in its brief that

[REDACTED]

Tellingly, Del Monte does not state when exactly it made this discovery, only that it was definitely within three years of filing suit.¹⁹ Del Monte sat on its hands for roughly six years. Only after Dole entered the market with a competing product did Del Monte commence suit.

Department of Justice (available at www.ftc.gov/os/2007/05/DDAVPCCommission-DOJBrief.pdf), the Federal Trade Commission (*id.*), and 40 state attorneys general.

¹⁸ See Florida Stat. § 688.001.

¹⁹ While the court hearing the lawsuit against Dole denied Dole's Motion to Dismiss on statute of limitations grounds, it did so only because it was "unclear from the face of Del Monte's complaint" that the suit was filed more than three years after Del Monte became aware that Dole had the MD-2 pineapple. *Del Monte Fresh Produce Co., v. Dole Food Co.*, 136 F. Supp. 2d 1271, 1293-94 (S.D. Fla. 2001). The fact that a court denied a motion to dismiss is not relevant to whether the litigation was a sham. Complaints can omit and misstate facts, which requires the evidence to be weighed in determining whether an action is a sham. See *New York Jets LLC v. Cablevision Sys. Corp.*, 2005 U.S. Dist. LEXIS 33362 (S.D.N.Y. Dec. 14, 2005). Statute of limitations issues often

B. The MD-2 was not a trade secret.

“Fundamental to the existence of a trade secret is that the matter be, in fact, secret.” *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 475 (1974). It is undisputed

that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] to support

[REDACTED]

[REDACTED] Had

cannot be resolved on a motion to dismiss. *See Xechem, Inc. v. Bristol-Myers Squibb Co.*, 372 F.3d 899 (7th Cir. 2004).

²⁰ Also fatal to Del Monte’s Trade Secret Claim is the fact that the [REDACTED]

[REDACTED]

Instead, the purported trade secret would be jointly owned by [REDACTED]. For Del Monte to assert in litigation that the MD-2 was its trade secret alone, when it was well aware of [REDACTED] was a sham.

²¹ Del Monte’s reliance on *Pioneer Hi-Bred Int’l v. Holden Found. Seeds*, 35 F.3d 1226 (8th Cir. 1994) for the proposition that a plant sold in the open market can be a trade secret is misplaced. Unlike Del Monte, the plaintiff in *Pioneer* never placed the trade secret (a type of male corn seed) in the public domain without taking reasonable steps to protect it. To the contrary, the Plaintiff in *Pioneer* would commingle the male seeds with other corn to make it harder to isolate. *Id.* at 1236. When the Plaintiff in *Pioneer* sold seed in Russia that included the male corn, it did so pursuant to restrictions on use and a confidentiality provision. *Id.* at 1236. Had the plaintiff in *Pioneer* spent years selling the purported trade secret in the United States without any restriction on its use, the law would have necessitated a different result in that case.

complete facts regarding this purported “proprietary interest” in the trade secret case been disclosed in the complaint to the trial court hearing Del Monte’s claim against Dole, the case would have been dismissed on the pleadings.

C. Del Monte’s reverse palming off claim was also a sham.

Del Monte’s claim that Dole was engaged in reverse “palming off” by marketing the Dole Premium Select as a “new” variety of pineapple was also a sham. Del Monte’s own marketing materials for its MD-2 pineapple, marketed under the Del Monte Gold name, falsely stated that it was a “unique variety” even though Del Monte was well aware that other growers were also selling MD-2 variety pineapples. Del Monte had no standing to attack Dole’s marketing materials when its own materials were even more misleading and likely to cause confusion. [REDACTED]

[REDACTED] Del Monte had no basis to assert a reverse “palming off” claim for a product that it did not create, or even have sole ownership of.

D. The timing of the Dole litigation and terms of the settlement confirm it was a sham designed to hinder competition.

The timing of Del Monte’s suit confirms its improper purpose. If Del Monte really believed the MD-2 pineapple was a trade secret, [REDACTED] Del Monte’s lawsuit was not about protecting a purported trade secret in the MD-2 -- it was about preventing competition in the MD-2 market. OSMF ¶ 47, 48.

The anticompetitive purpose of the litigation against Dole also can be inferred [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] Del Monte settled the case just after a crime-fraud motion was granted requiring Del Monte to produce certain privileged documents concerning the “threat letters.” If Del Monte truly believed it had exclusive rights to the MD-2 pineapple and could lawfully bar Dole from entering a billion-dollar market for extra sweet pineapples, why would it relinquish that right [REDACTED] The settlement amount and timing of settlement support the conclusions that the action was a sham brought to discourage Dole and others from entering the market, and that Del Monte hastily abandoned the case for nuisance value before its anticompetitive motivation was revealed by production of the ostensibly privileged documents.

IV. Mr. Gould’s Patent Testimony Is Admissible.

Non-scientific testimony by patent law experts is not governed by *Daubert*, but by a more flexible analysis under *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999). Although courts do not permit patent law experts to instruct the jury on substantive patent law, they do permit such experts to frame their factual opinions by reference to patent law standards.²² Given difficulties in drawing that fine line, courts generally defer until trial

²² See *Arlington Indus. v. Bridgeport Fittings, Inc.*, 2003 U.S. Dist. LEXIS 27621, at *11 (M.D. Pa. July 8, 2003) (“[p]atent law experts ‘must walk a fine line: they must give their expert opinions on ultimate issues of fact, while explaining their own understandings of the law, but without purporting to give expert opinions as to what the law is.’”) (quoting *Donnelly Corp. v. Gentex Corp.*, 918 F. Supp. 1126, 1137 (W.D. Mich. 1996)); *Arlaine & Gina Rockey, Inc. v. Cordis Corp.*, 2004 U.S. Dist. LEXIS 30763, at *68 (S.D. Fla. Jan. 5, 2004) (a patent expert “may explain his own understandings of the law and apply it to opinions of the scientific experts on the issues of fact, without giving expert opinions as

the separation of patent law opinions that might be impermissible from permissible patent expert testimony, rather than making all-or-nothing rulings on a threshold motion.²³ A much better informed decision can be made at the time of trial, because the touchstone under Fed. R. Evid. 702 is simply whether such testimony “will assist the trier of fact to understand the evidence.”²⁴ In view of the difficulty of complex patent office practices and scientific questions, to permit patent law expert testimony is vital to an informed jury decision. The circumstances here are completely different from those in *Del Monte’s*

to what the law is.”) (citing *Reiffin v. Microsoft Corp.*, 270 F. Supp.2d 1132, 1145 (N.D. Cal. 2003), and *Donnelly Corp.*, *id.*).

²³ See *Chamberlain Group, Inc. v. Interlogix, Inc.*, 2002 U.S. Dist. LEXIS 6998, at *4 (N.D. Ill. Apr. 18, 2002) (denying exclusion because “[t]his court cannot determine whether Nixon’s testimony will assist the trier of fact without considering his testimony in the context of the relevant issues.”); *Tafas v. Dudas*, 511 F. Supp. 2d 652, 662 (E.D. Va. 2007) (“striking the entire report would be extraordinary, particularly given Manbeck’s obvious qualifications in the field and clear ability to explain the complexities of patent regulation and the background of this matter.”); *Bausch & Lomb, Inc. v. Alcon Lab., Inc.*, 79 F. Supp. 2d 252, 258 (W.D.N.Y. 2000) (rulings “may have to await the trial itself, so that the court can assess the nature of the proposed testimony in context”); *Lemelson v. General Mills, Inc.*, 1987 U.S. Dist. LEXIS 11117, at *5 (N.D. Ill. Dec. 1, 1987) (any potential for undue influence by a patent expert can be dealt with by instruction as to the “weight to be accorded” to the testimony); *Arlaine*, 2004 U.S. Dist. LEXIS, at *69 (same); *Armament Sys. and Procedures, Inc. v. IQ Hong Kong Ltd.*, 2007 U.S. Dist. LEXIS 31306, at *6-*7 (E.D. Wis. Apr. 27, 2007) (“to the extent [patent expert’s] testimony might stray into matters that are the exclusive purview of the court . . . the testimony can be properly curtailed during the trial”); *Arlington*, 2003 U.S. Dist. LEXIS 2762, at *11 (“If necessary, defense counsel may revisit this issue at trial.”).

²⁴ See *Parker-Hannifin Corp. v. Champion Labs., Inc.*, 2008 U.S. Dist. LEXIS 32921, at *9 n.3 (N.D. Ohio Apr. 22, 2008) (“truisms do not preclude the Court from accepting expert opinions where such opinions will assist it in understanding the evidence of determining a fact in issue.”); Fed. R. Evid. 702, Advisory Committee Notes, 1972 Proposed Rules (“test for determining when experts may be used [is] the common sense inquiry whether untrained laymen would be qualified to determine intelligently and to the best possible degree *the particular issue* without enlightenment from those having a specialized understanding”) (citation omitted) (emphasis added).

inapposite cases, which involved legal conclusions in simple criminal cases – not patent law experts. DM Br. at 18-19.²⁵

Under these principles, the Court should reject Del Monte’s efforts to have Mr. Gould’s expert report excluded merely for framing his opinions by reference to patent law and for offering “conclusions.” As to Del Monte’s argument that claims of fraud on the PTO have been dropped (DM Br. 18-19), because plaintiffs do not even plan to offer at trial those portions of Mr. Gould’s report that support *only* that claim, the Court should wait until trial to determine which specific components of Mr. Gould’s testimony are offered and remain relevant. Finally, as shown in Part V B below, the entire premise of Del Monte’s last argument with regard to Mr. Gould is mistaken, because it is entirely appropriate for an expert to show that his opinions “fit the facts” based on record evidence.

V. The MD-2 Product Market Is Supported By Competent, Admissible Evidence.

Del Monte misstates established Second Circuit law, contending that “[p]laintiffs must establish a relevant product market” DM Br. 20. “The core element of a monopolization claim is market power, which is defined as ‘the ability to raise price by restricting output.’” *Pepsico, Inc. v. Coca-Cola Co.*, 315 F.3d 101, 107-08 (2d Cir. 2002) (citation omitted). Accordingly, “a relevant market definition *is not a necessary component* of a monopolization claim.” *Id.* (emphasis added). Instead, “[m]onopoly power ‘may be proven directly by evidence of the control of prices or the exclusion of

²⁵ Even Del Monte’s inapposite cases held testimony framed by legal standards to be admissible, not inadmissible. See *United States v. Duncan*, 42 F.3d 97, 103 (2d Cir. 1994)(testimony *admissible* despite “embracing ultimate issue”); *United States v. Bilzerian*, 926 F.2d 1285, 1295 (2d Cir. 1991)(testimony *admissible* in view of limiting instructions).

competition, or it may be inferred from one firm's large percentage share of the relevant market." *Heerwagen v. Clear Channel Communs.*, 435 F.3d 219, 227 (2d Cir. 2006) (citation omitted). Dr. Cotterill has provided testimony showing [REDACTED]

[REDACTED]²⁶ Accordingly, product market definition is *not* legally essential to plaintiffs' case.

Nevertheless, Dr. Cotterill also offers opinions regarding product market definition. As shown below, there is no basis to exclude those opinions.

A. Cross elasticity analyses for MG-1 and CO-2 are unnecessary.

Del Monte argues that because Dr. Cotterill [REDACTED]

[REDACTED] ot
[REDACTED] y
[REDACTED] er
[REDACTED] (the "Gardens").

The touchstone of such an analysis is whether a monopolist would be able profitably to increase prices on its own product by five percent, without losing sufficient sales to make the price increase unprofitable. [REDACTED]. It would be necessary to perform this test on a larger product group including "nearby" candidate

²⁶ [REDACTED]

substitute products *only if* substitution were to make such a price increase on the monopolist's *own* product unprofitable. *Id.* at 6.²⁷

[REDACTED]

²⁷ Del Monte's own brief acknowledges that under conventional SSNIP analysis "the analysis is expanded to include the closest substitutes for the initial product" *only* "[i]f such a price increase causes enough buyers to shift to other products so that the price increase is unprofitable for the hypothetical monopolist. . ." DM Br. at 24. In the words of the Guidelines, so-called "next best substitute" products are added only "[i]f, in response to the price increase, the reduction in sales of the product would be large enough that a hypothetical monopolist would not find it profitable to impose such an increase in price," and the product market is to be limited to "the *smallest* group of products that satisfies this test." Guidelines § 1.11 (*emphasis added*).

²⁸ [REDACTED]

Del Monte's "cross-elasticities" argument makes a muddle of established market definition principles. The correct criterion for market definition is so-called "own-price elasticity" – *i.e.*, the elasticity of demand for the monopolist's "own" product based on changes in its "own" prices.²⁹ The proper role of cross-elasticities is merely to determine what "next-best substitutes" might be included in the tested market, *if* the monopolists "own price elasticity" does *not* satisfy a SSNIP test.³⁰ Recent economic literature sharply criticizes the only court decision, relied upon here by Del Monte, in which cross-elasticities were erroneously identified as market definition criteria.³¹ By faulting Dr. Cotterill for not analyzing "cross-elasticities" to define a market, Del Monte misconstrues established market definition principles.³²

²⁹ See Gregory J. Werden, *Demand Elasticities in Antitrust Analysis*, 66 Antitrust L.J. 363, 384 (1998)(containing an entire section titled "The Own Elasticity of Demand and Market Delineation"); Jonathan B. Baker, *Market Definition: An Analytical Overview*, 74 Antitrust L.J., 129, 139 n. 38 (2007) ("The demand elasticity at issue in market definition is an own-price elasticity. . .").

³⁰ Baker, *supra*, at 139 n.38 ("Cross-price elasticities of demand are relevant because they can be used to identify the next-best substitutes that should be included if the candidate market is expanded. . .").

³¹ See Werden, *supra*, at 401 ("It is most unfortunate that the [one case] has focused on cross elasticities of demand in the delineation of markets. . . . Although there is a direct relationship between the own elasticity of demand for a product and the potential to exercise market power over that product, the same cannot be said for the cross elasticities of demand between that product and any other product. Except through their effect on the own elasticity, *cross elasticities have nothing to do with market power.*") (emphasis added). The Werden article heavily criticizes, as "perhaps the only example," *id.*, in which a court has ever suggested that such use of cross-elasticities is necessary, *New York v. Kraft Gen. Foods, Inc.*, 926 F. Supp. 321 (S.D.N.Y. 1995), which tellingly is one of two prior cases involving Dr. Cotterill that Del Monte cites in an unfounded attempt to attack him professionally. *Cf.* n. 34, *infra*.

³² Del Monte's cases do not support its argument. In *Lantec, Inc. v. Novell, Inc.*, 306 F.3d 1003, 1025 (10th Cir. 2002) the expert's report was excluded based on the cumulative effect of five defects including unreliable data, a failure to understand the

Moreover, even if cross-elasticity analysis could play some imaginable secondary role in market definition, an expert's report cannot be excluded under *Daubert* merely because one can conceive of additional tests which might have been performed. Otherwise under Del Monte's logic, any expert's opinion could be rejected, because it is always possible for an adversary to imagine additional tests. The question under *Daubert* is merely whether probative tests that *were* performed by the expert conform to acceptable methodologies.³³ If the challenging party believes additional or different tests would be illuminating, it is free to have such tests performed by its own expert, in which case the persuasiveness of the opposing opinions is a question for the trier of fact. Tellingly, however, in this case none of Del Monte's experts has even purported to

market, and changes by the expert to his opinion. In *Kentucky Speedway, LLC v. National Ass'n of Stock Car Auto Racing, Inc.*, 2008 U.S. Dist. LEXIS 1076, at *11-*12 (E.D.Ky. Jan. 7, 2008), it was excluded not because of an absence of cross-elasticity tests, but because *no* form of SSNIP test – which the court broadly defined as being “if such a [5%] price rise were implemented, would the consumers go elsewhere?” – was applied. In *McLaughlin Equip. Co. v. Newcourt Credit Group, Inc.*, 2004 U.S. Dist. LEXIS 13939, at *20 (S.D. Ind. Feb. 18, 2004), there was neither any SSNIP analysis nor any other “type of data reasonably relied upon by economists such as market data analysis or cost analysis.” And in *Worldwide Basketball and Sport Tours, Inc. v. NCAA*, 388 F.3d 955, 962 (6th Cir. 2004), the expert “did no test” statistically but offered only qualitative conclusions “derived from ‘common sense.’”

³³ See, *Bazemore v. Friday*, 478 U.S. 385, 400 (1986) (“Normally, failure to include variables [in a regression analysis] will affect the analysis’ probativeness, not its admissibility”); *Lauzon v. Senco Prods., Inc.*, 270 F.3d 681, 693 (8th Cir. 2001) (“an “expert's causation conclusion should not be excluded because he or she has failed to rule out *every* possible alternative cause.””) (quoting *Westberry v. Gislaved Gummi AB*, 178 F.3d 257, 265 (4th Cir. 1999) (quoting *Heller v. Shaw Indus., Inc.*, 167 F.3d 146, 156 (3^d Cir. 1999)) (emphasis added in the original); *In re High Pressure Laminates Antitrust Litig.*, 2006 U.S. Dist. LEXIS 21546 at * 9 (S.D.N.Y. Apr. 7, 2006) (“At most the failure to disaggregate goes to the weight of the testimony”).

perform any statistical analysis of cross-elasticities of demand as to the MG-1 or CO-2 pineapple.³⁴

B. Dr. Cotterill did not “ignore” the qualitative evidence.

Del Monte argues that Dr. Cotterill’s report “ignores” a few isolated bits of qualitative evidence that Del Monte claims support inclusion of the MG-1 or CO-2 pineapples in the product market. However, as Dr. Cotterill explains in his report, the

[REDACTED]

³⁴ Del Monte argues that Dr. Cotterill’s opinions have been excluded on two occasions, but Dr. Cotterill has testified as an expert in twelve cases over more than 30 years. The fact that courts in two of those cases have disagreed with Dr. Cotterill’s opinions is irrelevant – especially when one of those courts has itself been harshly criticized in economics literature for mistaken reasoning. *See* n. 31, *supra*. Moreover, both cases cited by Del Monte found only insufficient evidence to support equitable relief – not exclusion under *Daubert*. *Delco LLC v. Giant of Md., LLC*, 2007 U.S. Dist. LEXIS 82711 (D.N.J. Nov. 8, 2007)(insufficient probability of success to support preliminary injunction); *Kraft Gen.*, 926 F. Supp. 2d at 366 (insufficient evidence to warrant equitable relief). No court has ever excluded an opinion of Dr. Cotterill under *Daubert*.

³⁵ [REDACTED]

the results of his statistical analysis reinforce the conclusion he also would reach based on extensive qualitative evidence showing the MD-2 to be an independent product market.

This evidence falls squarely within two qualitative criteria that the Guidelines identify as vital to market definition (*see* Guidelines, § 1.11):

(i) **“Evidence that buyers have shifted or considered shifting purchases between products in response to relative changes in price.”**

[REDACTED]

not

(ii) **“Evidence that sellers base business decisions on the prospect of buyer substitution between products in response to relative changes in price.”**

[REDACTED]

Although Del Monte cites isolated snippets of evidence that it claims support a contrary conclusion (DM Br. 22-23), an expert's opinion cannot be rejected under *Daubert* merely because a few tidbits of evidence suggest a different view of the facts.³⁶ Moreover, Del Monte mischaracterizes even the sparse evidence on which it relies.³⁷

C. Del Monte's "over time" argument is nonsense.

Del Monte criticizes Dr. Cotterill for analyzing market definition "over time," stating that the Guidelines call for it to be determined at a single point in time. DM Br. 25. But in the merger context for which the Guidelines were developed, the issue is market definition at the specific time of merger. By contrast, in an antitrust class action like this one, definition of the product market throughout the class period is the proper question. The aspect of the Guidelines that Del Monte relies upon here is thus patently

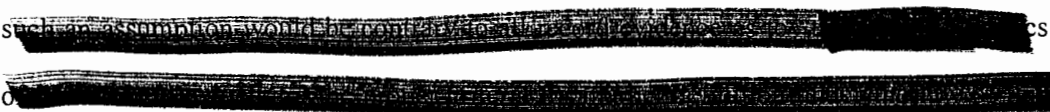
³⁶ Del Monte's cases involved extreme failures by experts even to consider the central evidence – not merely disputed views of the facts. *Brooks v. Outboard Marine Corp.*, 234 F.3d 89, 92 (2d Cir. 2000)(accident reconstruction expert "had never seen the actual boat or motor either in person or in photographs, has never spoken to either of the boys involved in the accident, was unaware of the dimensions of the boat . . . and had never attempted to reconstruct the accident and test his theory."); *MTX Communs. Corp. v. LDDS/Worldcom, Inc.*, 132 F. Supp. 2d 289 (S.D.N.Y. 2001)(corporate valuation expert ignored the financial statements of the company being evaluated, did not consider the quality of its management, and relied entirely upon unverified data obtained from third parties).

³⁷ [REDACTED] G-2
C
b
7. [REDACTED] G-3
S
"G [REDACTED] Del Monte's argument strains to make a

inapposite. In this Circuit, slavish adherence to such criteria when taken out of context is plainly inappropriate.³⁸ Contrary to Del Monte's wooden arguments, there are different acceptable ways to perform such a SSNIP test, and an appropriate SSNIP test differs for different types of cases. *See, generally*, Baker, *supra*, at 129; Coate & Fischer J., *supra*.³⁹

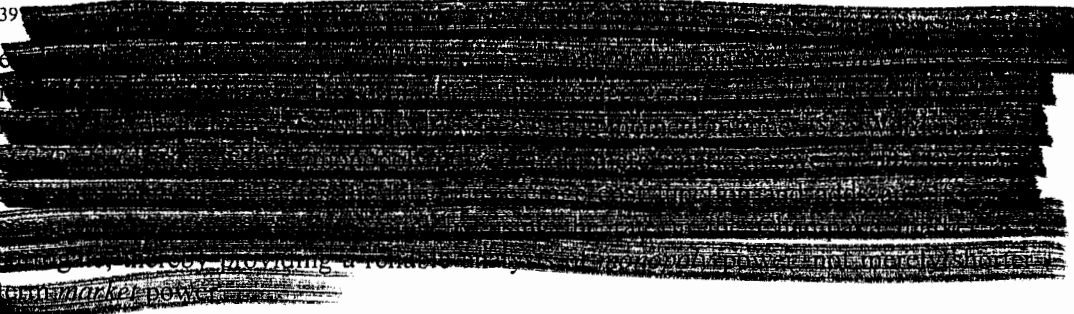
D. One would err to assume "unlimited quantities at constant prices."

Del Monte argues that the Guidelines would assume that possible competing products are available "in limited quantities at constant prices." DM Br. 25.



Circuit. *Geneva*, 386 F. 3d at 496.⁴⁰ Moreover, even if such an assumption were realistic, footnote 9 of the Guidelines -- which Del Monte cites as its sole basis for the notion that the assumption must be made -- deals only with identification of "next best

³⁸ *Geneva Pharms*, 386 F.3d at 496 ("The emphasis [in a *Daubert* analysis] is always on the actual dynamics of the market rather than the rote application of any formula."). Del Monte's own case law recognizes that the Guidelines "are applied by DOJ to mergers, not Section 1 claims" and that their "mechanical application" outside the merger context "may provide misleading answers to the economic questions raised under the antitrust laws." *Gulfstream Park Racing Ass'n v. Tampa Bay Downs, Inc.*, 294 F. Supp. 2d 1291, 1310 (M.D. Fla. 2003) (citation omitted), *aff'd*, 479 F.3d 1310 (11th Cir. 2007).

³⁹ 

⁴⁰  16-17.

substitutes,” not market definition. Thus, Del Monte again improperly conflates criteria that properly go only to identification of such substitutes with the different criteria governing market definition. See Part VA, *supra*.

E. Dr. Cotterill’s factual assumptions are not erroneous.

Del Monte claims three factual assumptions by Dr. Cotterill are incorrect. DM Br. at 27. Del Monte’s challenge fails as to all three, both because Dr. Cotterill’s contentions have evidentiary support and because they involve tertiary rather than primary issues.⁴¹

1. The MG-1 pineapple as a “Champaka.”

[REDACTED]

⁴¹ Del Monte’s cited cases, unlike this matter, involved assumptions of fact that were contrary to uncontested evidence and that lay at the core of the expert opinion. See *Quinones-Pacheco v. American Airlines, Inc.*, 979 F.2d 1, 6 (1st Cir. 1992)(assumption of permanent, total disability when “[t]he record is utterly barren of any evidence” thereof); *U.S. v. Rushing*, 388 F.3d 1153, 1156-57 (8th Cir. 2004)(opinion regarding contraction of disease based on assumption of sex two to three times per week, when uncontested testimony showed it was once per week). Indeed, one of Del Monte’s cases reversed an exclusion under *Daubert* both because correctness of the expert’s assumptions “remain[ed] open to debate” and because the assumed fact “was not, however, the issue,” *Casas Office Machs., Inc. v. Mita Copystar Am.*, 42 F.3d 668, 683 & n. 15 (1st Cir. 1994), and another reversed the district court because the evidence assertedly “ignored” by the expert was contradictory. *Greenwell v. Boatwright*, 184 F.3d 492, 497-98 (6th Cir. 1999). Thus, even if evidence on Dr. Cotterill’s three “assumptions” were contradictory, Del Monte’s own case law vividly shows that his opinions could not properly be excluded.

2. [REDACTED]

3. The CO-2 not comparable to the Gold.

F. *Brown Shoe* factors do not support exclusion.

Del Monte retreads the same evidence previously discussed to support a broader product market definition by referring to them as *Brown Shoe* factors. DM Br. 28-29. However, Del Monte has not cited even one case suggesting an admissible quantitative product market analysis can be excluded based on *disputed* evidence with regard to such qualitative factors. The law is to the contrary.⁴² Moreover, *Brown Shoe* factors strongly support Dr. Cotterill's opinion. For example:

⁴² See, *United States v. Mooney*, 315 F.3d 54, 63 (1st Cir. 2002) (“*Daubert* does not require that the party who proffers expert testimony carry the burden of proving to the judge that the expert’s assessment of the situation is correct.”); Fed. R. Evid. 702,

1. industry or public recognition.

2. the product's peculiar characteristics and uses.

3. unique production facilities.

4. distinct customers.

5. distinct prices.

6. sensitivity to price changes.

VI. Direct Evidence From Dole, Maui and Chiquita Shows They Were Confused By the "Threat Letters" and Delayed Entering The MD-2 Market Due To Defendants' Threats.

Even if Del Monte had succeeded in

Advisory Committee note to 2000 amendments (a court must *not* "exclude an expert's testimony on the ground that the court believes one version of the facts and not the other.").

[REDACTED]

[REDACTED]

[REDACTED] the [REDACTED] evidence makes clear that Del Monte remained [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] and therefore of all previous [REDACTED]

[REDACTED] 25.

B. Maui.

Del Monte claims plaintiffs can show no “market impact” with regard to Maui’s potential entry into the extra-sweet pineapple market. It relies solely on quotations from the Crime Fraud Order (Del Monte Mem in Supp at 32-33), and not from the actual record. The record establishes that there are disputed material facts with regard to whether Maui’s entry was delayed or prohibited by Del Monte’s conduct. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] 37.

[REDACTED] in [REDACTED]

[REDACTED] and

[REDACTED]

[REDACTED]

[REDACTED]

He also confirmed that M [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Id. at 270. [REDACTED] is

d. [REDACTED] 03:

Q. I [REDACTED]
[REDACTED] n?

A. [REDACTED]

[REDACTED]

[REDACTED]

Q. [REDACTED]
[REDACTED] was?

A. I [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

43. [REDACTED]

[REDACTED]

Furthermore, [REDACTED]

[REDACTED]

at [REDACTED]

C. Chiquita

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Chiquita

[REDACTED] 3.

D. Impact on MD-2 production.

There can be no doubt that the volume of MD-2 production was reduced as a result of Del Monte's anticompetitive conduct as described above. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

E. Deterrence of competition.

Defendants argue, relying on Magistrate Dolinger's reasoning, that no rational competitor could rely on the fact that the CO-2 patent covered the MD-2. For that hypothesis to be true, Dole, Chiquita, Banacol, Maui and a plethora of others must all be

44 [REDACTED] 0.

45 [REDACTED]

assumed to have been irrational actors in the pineapple marketplace. Moreover, it was not merely confusion about the patent that kept competitors out of the marketplace; it was also the sham litigation initiated against Dole and Maui.

F. Dr. Cotterill's opinions on "but for" competitive entry.

Dr. Cotterill has extensive background and experience in agricultural economics. Based on that experience he has reviewed extensive record evidence detailed in pages 19-44 of his report, and offers opinions that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

43-47). [REDACTED]

[REDACTED]

elements of Dr. Cotterill's opinions are set forth in Part VII (Buchman Deal, Tab 59) at 4 n. 8.⁴⁶ Accordingly, for legal reasons set forth in Part VII below, the opinions of Dr. Cotterill are subject to the lower standard of proof that applies, under *Daubert*, to expert testimony concerning quantification of damages. These opinions also fall within an agricultural economist's realm of expertise and would assist the trier of fact "to understand the evidence," and are thus admissible under Fed. R. Evid. 702.

Del Monte unjustifiably seeks to exclude Dr. Cotterill's opinions on the basis that in explaining and detailing the evidentiary *bases* for his opinions, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] However, Del Monte has cited no case suggesting that an expert's testimony can be excluded merely because it rests in part on disputed facts. Such a rule would make virtually all expert testimony inadmissible.⁴⁷ Moreover, Dr. Cotterill has not offered expert opinions on competitors' plans or intentions. Instead, he merely describes the evidentiary basis, in pertinent deposition testimony and business documents, for his opinions concerning the times when Del Monte's competitors would have entered the market absent Del Monte's challenged conduct. Under Fed. R. Evid. 703, the evidentiary bases of expert testimony need not even be admissible so long as they are of a type reasonably relied upon by experts in the field -- which Del Monte cannot seriously dispute as to the pertinent evidence here.

Del Monte's argument improperly confuses Dr. Cotterill's opinions with his mere descriptions of their "basis" in the record evidence. Del Monte relies for its argument on *Champagne Metals v. Ken-Mac Metals, Inc.*, 458 F.3d 1073 (10th Cir. 2006).⁴⁸ However,

47 [REDACTED]

[REDACTED] ab
[REDACTED] es. But in any event, because economists routinely evaluate evidence with regard to business incentives and economic decisionmaking, analysis of business documents with regard to such matters is a natural and appropriate element of an economist's opinion.

⁴⁸ Other cases Del Monte cites make clear that *Daubert* issues are *not* raised by mere "basis" testimony -- which need not even be admissible under Fed. R. Evid. 703 -- but rather only by expert opinions that lack opinion content beyond mere regurgitation of evidentiary material. See, *Highlands Capital Mgmt. L.P. v. Schneider*, 379 F. Supp. 2d 461, 468 (S.D.N.Y. 2005)(opinion inadmissible only "to the extent that" it merely rehashed evidence because "an expert cannot be presented to the jury *solely for the purpose of constructing a factual narrative* based on the record evidence")(emphasis added); *In re Rezulin Prods. Liab. Litig.*, 309 F. Supp. 2d 531 (S.D.N.Y. 2004)(narrative

in *Champagne Metals*, the court was unable to distinguish the expert's "opinion" testimony from his "basis" testimony. *Id.* at 1080. [REDACTED]

[REDACTED]

Moreover, in *Champagne Metals*, the crux of the court's ruling was that facts asserted by the expert were highly unreliable, being based solely on "self-serving statements of an interested party." 458 F.3d at 1073 (quoting that phrase at both the beginning and the end of the discussion). Here, the evidence Dr. Cotterill summarizes comes from business records and testimony of Del Monte itself and its competitors -- not from self-interested statements by the plaintiff. Del Monte's argument that Dr. Cotterill "should be precluded from testifying concerning any alleged impact of Del Monte's actions on its competitors" merely because some of Dr. Cotterill's supporting observations of fact might be inadmissible at trial is a legal *non-sequitur*, and flies in the face of Fed. R. Evid. 703.⁴⁹

Del Monte also faults Dr. Cotterill for supposedly "ignoring or contradicting" Del Monte's preferred evidence. DM Br. at 28. Evidently, in Del Monte's view, an expert's opinion should be excluded both if the expert *does* reference and describe record evidence, and if (like Del Monte's economics expert) he *does not*. By specifying record

excluded when not basis for any actual expert opinion but offered merely to "provide an historical commentary of what happened") (citation omitted).

⁴⁹ Other cases cited by Del Monte are simply inapposite. *See Dibella v. Hopkins*, 2002 U.S. Dist. LEXIS 20856 (S.D.N.Y. Oct. 29, 2002)(opinion excluded because it related to ethical issues distinct from the factual issues to be decided, was "unfairly one-sided" and stated that a person was "a credible witness"); *Linkco v. Fujitsu Ltd.*, 2002 U.S. Dist. LEXIS 12975 at * 10 (S.D.N.Y. July 5, 2002)(rejecting expert testimony having many inapposite infirmities including that it addressed issues fully "within the understanding of the jury").

evidence that supports his opinions, Dr. Cotterill appropriately shows that his opinion “fits the facts,” which is one of the criteria of admissibility under *Daubert*. See *Daubert*, 509 U.S. at 591 (describing “fit” as admissibility criterion). An expert’s opinion cannot properly be excluded, consistently with Fed. R. Evid. 703, merely because some of its recited evidentiary basis would be inadmissible if merely narrated at trial independent of a legitimate expert opinion derived from it.⁵⁰

It would be premature to rule at this time on the independent admissibility of all of the detailed observations made by Dr. Cotterill as to evidence that forms the basis for his opinions. Instead of ruling on the admissibility of such “basis” testimony now, the court should wait until trial to see what “basis” testimony, if any, Dr. Cotterill may be asked to offer at trial and whether any documents that he references in his testimony are already in evidence at that time, and should rule on the admissibility of such specific testimony at that time, with a full eye to its proposed evidentiary context.⁵¹

⁵⁰ At the time of Dr. Cotterill’s trial testimony, business documents that he references as bases for his opinion may already be in evidence. Once they are in evidence, there should be no evidentiary difficulty in his referencing them as bases for his opinions. On the contrary, such references would assist the jury greatly in understanding how existing record evidence connects with Dr. Cotterill’s opinions.

⁵¹ Consistently with our view of the permissibility of “basis” testimony in an expert’s report, we also believe that the Court should not exclude at this time the many “narrative” portions of the reports of Del Monte’s experts, but should instead rule on such questions at trial after seeing whether and how Del Monte seeks to introduce such information into evidence. In the alternative, however, in the event the Court were to take a more strict approach at this time toward the portions of Dr. Cotterill’s report that summarize supporting evidence, we then would respectfully request that the Court also rule at this time on admissibility of the many factual narratives contained in the reports of Del Monte’s experts other than Dr. Carlton. All of Del Monte’s other experts include lengthy evidentiary narratives concerning what “the evidence shows” about innumerable matters, including such matters as what market participants “thought.” See, Scott Rep. at 7-9, 11-14, 15; Harris Rep. at 5-10, 14-22, 28-30, 32-33, 42-44; Bardnell Decl. at 8-39; and Orkin Rep. at 15-16, 22-23. (These reports are at Tabs 60-63 of the Buchman Declaration, respectively.) If some portion of Dr. Cotterill’s report were to be excluded on such a

VII. Dr. Cotterill's Damages Testimony is Admissible.

In quantifying antitrust damages, an expert necessarily posits a hypothetical “but for” world that cannot be ascertained with precision or certainty. Accordingly, it has been established law for over 75 years that plaintiffs are *not* required to quantify their antitrust overcharge damages with any exactitude.⁵² Instead, it is “enough if the evidence show the extent of the damages as a matter of just and reasonable inference, although the result be only approximate.” *Story Parchment*, 282 U.S. at 563. Given that analysis under *Daubert* is a matter of federal law, these same “reasonable approximation” principles control any *Daubert* analysis.⁵³ Tellingly, in the only two conventional antitrust cases that Del Monte cites as to damage calculations, district courts’ exclusions of expert reports quantifying damages were reversed or vacated on appeal despite clear shortcomings in the expert opinions, because insufficient recognition had been given to the relaxed standard of proof governing antitrust damage calculations.⁵⁴

basis, the same shoe would fit all of Del Monte’s proposed experts as well -- the sole exception being Dr. Carlton, who disclaims all responsibility for ascertaining consistency between his economic conclusions and the actual evidentiary record.

⁵² *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 563 (1931)(“The wrongdoer is not entitled to complain that [damages] cannot be measured with the exactness and precision that would be possible if the case, which he alone is responsible for making, were otherwise”). See also, *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100 (1969) and *Bigelow v. RKO Pictures, Inc.*, 327 U.S. 251 (1946)).

⁵³ *New York v. Julius Nasso Concrete Corp.*, 202 F.3d 82, 88 (2d Cir. 2000) (relaxed standard of *Bigelow* and *Zenith* should have been taken into account under *Daubert*); *High Pressure Laminates*, 2006 U.S. Dist. LEXIS 21546 at * 7-*8 (same).

⁵⁴ *Julius Nasso*, 202 F.3d at 88 (Second Circuit vacating exclusion of expert testimony and saying plaintiff “need only provide the court with some relevant data from which the district court can make a reasonably estimated calculation of the harm suffered”);

Even while confessing its awareness of these principles (DM Br. 43 & n. 37), Del Monte strains to reason by false analogy to inapposite “lost profits” cases such as *DSU Medical Corp. v. JMS Co.*, 471 F.3d 1293 (Fed. Cir. 2006). DM Br. 38, 43 & n. 36. However, “lost profits” proof in tort or contract cases is governed by a much more stringent “reasonable certainty” standard.⁵⁵ Most of Del Monte’s inapposite cases did not involve quantification of damages at all.⁵⁶ Others include a personal injury disability case, *Elcock v. Kmart Corp.*, 233 F.3d 734 (3d Cir. 2000), a state law misrepresentation claim concerning a “conspiracy to mislead the public as to the health risks of smoking,” *Group Health Plan, Inc. v. Philip Morris USA, Inc.*, 344 F.3d 753 (8th Cir. 2003), and dubious “automatic damages” and lost profits claims for violations of the Robinson

Dolphin Tours, Inc. v. Pacifico Creative Service, Inc., 773 F.2d 1506, 1513 (5th Cir. 1982).

⁵⁵ *MindGames, Inc. v. Western Publ’g Co.*, 218 F.3d 652, 654-57 (7th Cir. 2000)(a minority of states bar a “new business” outright “from obtaining damages for lost profits as a result of a tort or a breach of contract”, while the others “are content to control the award of damages for lost profits by means of a standard – damages . . . *must be proved to a reasonable certainty.*”) (Posner, J.) (emphasis added).

⁵⁶ *Mike’s Train House, Inc. v. Lionel, L.L.C.*, 472 F.3d 398, 408 (6th Cir. 2006)(rejecting expert testimony as to copying of Korean model train parts because it assigned copying significance to use of common part numbers even though all Korean manufacturers “share a common numbering system”); *Daubert v. Merrell Dow Pharms.*, 43 F.3d 1311, 1317 (9th Cir. 1995)(rejecting expert testimony of birth defects caused by Benedictin because causation mechanism was unknown, opinions were contrary to conclusions of all extant scientific studies, and experts had done no independent studies); *Salazar v. United States*, 2003 WL 25695854 (S.D.W.Va. Feb. 18, 2003)(rejecting opinion on vehicle speed at time of accident based on arbitrary assignment of speed of fastest traffic observed at that location); *Lippe v. Bairnco Corp.*, 288 B.R. 678 (S.D.N.Y. 2003)(opinion as to “going concern value” to determine whether conveyance was fraudulent or for “fair value”), *aff’d*, 99 Fed. Appx. 274 (2d Cir. 2004); *Hudgens v. Bell Helicopters/Textron*, 328 F.3d 1329 (11th Cir. 2003)(opinion concerning negligence in a helicopter crash).

Patman Act, when there was no actual evidence of any injury at all.⁵⁷ Del Monte has not cited even one case under the Sherman Act in which an expert's opinion as to quantification of damages has been excluded under *Daubert*. Del Monte's patchwork of case law taken from other contexts is misplaced since -- as even its own cited case law shows -- the "burden of proving antitrust damages is not as rigorous as in other types of cases." *Nasso Concrete*, 202 F.3d at 88 (Second Circuit vacating exclusion of antitrust damages opinion).

A. Del Monte's arguments mischaracterize Dr. Cotterill's damages analysis.

Del Monte errs in stating that Dr. Cotterill makes a "central assumption" that "Del Monte's actions deterred all competitors from entering the extra-sweet market by exactly the same amount of time." DM Br. 38-39. In fact, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

(*id.* [REDACTED])

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] 48. Dr. Cotterill's analysis is

⁵⁷ See *Drug Mart Pharm. Corp. v. American Home Prods. Corp.*, 472 F. Supp. 2d 385, 426 (E.D.N.Y. 2007)(plaintiff's damages theory under Robinson-Patman was "merely an iteration of the discredited automatic damages theory"); *Chrysler Credit Corp. v. J. Truett Payne Co.*, 670 F.2d 575, 582 (5th Cir. 1982)(lost profits on Robinson-Patman claim were "mere speculation and guesswork").

- B. The two “adjustments” that Del Monte criticizes are necessary to take into account: (i) the time of competitive entry and (ii) Del Monte’s need to act profitably.

Del Monte errs in arguing that Dr. Cotterill’s downward reduction in price in the “but for” world was an *ad hoc* adjustment made to avoid “nonsensical results.” DM Br. at 41. In fact, as D. _____

mi _____

er. _____

“K _____

w _____

prepared to explain, if necessary, in the event a hearing is held on this motion. Thus, even the analysis conducted by Del Monte’s own expert confirms the fairness and accuracy of Dr. Cotterill’s damages analysis.

⁵⁹ See D. Carlton and J. Perloff, *Modern Industrial Organization*, p. 207 (1990)(“We can also express the effect of the fringe’s supply on the dominant firm using elasticities. . . . Thus all else the same, the higher the . . . elasticity of the residual demand facing the dominant firm (and hence the lower the price it charges), the higher the supply elasticity of the fringe. . . . If the fringe does not exist the dominant firm’s residual demand elasticity equals the industry (market) demand elasticity (so it charges the same price as a monopolist.”).

significantly different in the two periods.”), see also Cotterill, *supra* note 59, at 42. ~~_____~~
~~_____~~
~~_____~~
~~_____~~
~~_____~~
~~_____~~
~~_____~~
~~_____~~

Del Monte’s second argument, that it is economically “unjustified” for Dr. Cotterill’s model to assume that the but-for price will not drop below long-run marginal cost (DM Br. at 42), is equally baseless. Economic theory posits that as a declining dominant firm loses market share due to competitive entry, “[i]ts optimal price will gradually converge toward the limit price and eventually equal it as the dominant firm’s market share dwindles either to zero or (more plausibly) to a level at which the firm no longer has power over price.” F.M. Scherer and D. Ross, *Industrial Market Structure and Economic Performance*, pp. 263-64 (Rand McNally). The “limit price” within this conventional scenario “is the price that limits to zero the entry and expansion of fringe rivals.” *Id.* at 358. Once entry has run its course and eliminated supra-competitive profits, the long run effectively competitive price is long run marginal cost. Del Monte’s criticisms on this point are senseless, because in a rational “but for” world, long-run marginal cost will serve as an effective “floor” on prices, for the simple reason that

⁶⁰ Del Monte’s subsidiary contention that it was inappropriate to maintain the downward adjustment for subsequent time periods defies both common sense and economic theory, because the effect of entry would be to cause a continued erosion from monopoly prices after the time of entry.

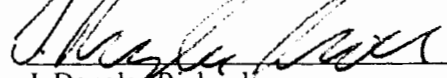
pineapple growers, like other businesses, will do business only at prices that permit them to operate profitably.⁶¹

CONCLUSION

For the foregoing reasons, Del Monte's motion for summary judgment and exclusion of expert testimony should be denied in its entirety

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Respectfully submitted,



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⁶¹ Del Monte also criticizes Dr. Cotterill for having obtained help from others in his quantitative analysis, and for lacking instant recall of answers to some minor quantitative questions on the spot at his deposition. DM Br. at 40 n. 35, 42. Given that Dr. Cotterill offered in the deposition to provide the relevant information to Del Monte after consulting underlying information and that Del Monte does not claim to have been unable to obtain the information, these matters have no significance.