

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

ABBVIE INC., et al.,

Defendants.

Case Number: 2:14-CV-5151-HB

PUBLIC VERSION

**PLAINTIFF FEDERAL TRADE COMMISSION'S
OPPOSITION TO DEFENDANT'S MOTION IN LIMINE TO PRECLUDE CERTAIN
TESTIMONY OF FTC'S EXPERT CARL SHAPIRO**

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Defendants' *Daubert* motion is not about Professor Carl Shapiro's expertise, his economic model, the economic principles on which he relies, or his extensive review of and reliance on the record in this case; instead, it is rooted in the fact that Defendants dislike two assumptions upon which Professor Shapiro relies to calculate Defendants' ill-gotten gains. Specifically, Defendants accept that Professor Shapiro may rely on a June 2012 BX-rated entry assumption for Teva and a June 2013 AB-rated entry assumption for Perrigo.¹ But they insist that Professor Shapiro may not explain *why* he decided to rely on those assumptions. Their request has no basis in the law and would be wholly unworkable in practice.

Under Federal Rule of Evidence 702, an expert witness's testimony is admissible if the opinions will "help the trier of fact to understand the evidence or to determine a fact in issue" and are based on "sufficient facts" and "reliable principles" that the expert has "reliably applied" to the "facts of the case." Contrary to these express provisions, Defendants ask this Court to divorce Professor Shapiro's opinions from the record evidence on which he relies to reach those opinions. Courts routinely permit economists to testify regarding the basis of their opinions, and Professor Shapiro's testimony regarding inputs in his economic model should be no exception.

Defendants' concern appears to stem from an unfounded belief that this Court will allow Professor Shapiro's testimony to invade the Court's province as the ultimate finder of fact. But as the Court explained at the October 2017 status conference, it needed neither *Daubert* motions generally nor a motion addressing the opinions of Professor Shapiro specifically.

¹ Defendants do not seek to strike the following opinions:

[REDACTED]

See Proposed Order, (Dkt. 332).

Professor Shapiro is permitted to offer opinions on the inputs underlying his economic model and to explain the economic and factual basis for those inputs. This testimony will no doubt assist the Court in determining the amount of Defendants' ill-gotten gain.

BACKGROUND

Professor Shapiro has more than forty years of professional experience teaching and studying economics, twenty years of experience studying pharmaceutical markets, and has served as a Senate-confirmed member of the President of the United States' Council of Economic Advisors. He has published extensively in peer-reviewed journals on a wide range of topics including industrial organization, competition policy, patents, pharmaceuticals, the economics of innovation, and competitive strategy. In connection with his work on this case, Professor Shapiro built an economic model to calculate Defendants' ill-gotten gains from their filing of objectively baseless lawsuits. That model relies on numerous inputs based on a counterfactual in which Defendants had not filed their objectively baseless lawsuits. Professor Shapiro derived those inputs from an application of economic principles to contemporaneous record evidence.

ARGUMENT

Experts must reliably apply their expertise to "the facts of the case." Fed. R. Evid. 702(d); *United States v. 0.161 Acres of Land*, 837 F.2d 1036, 1040 (11th Cir. 1988) (noting that an expert's opinion is admissible "provided that he states the assumptions on which his opinions are based," even if those assumptions omit certain evidence). An "expert is permitted to make reasonable assumptions and explain them." *In re Delta/Airtran Baggage Fee Antitrust Litig.*, 245 F. Supp. 3d 1343, 1361-62 (N.D. Ga. 2017) (admitting an economic expert's game-theory analysis because he set out the record evidence on which he bases his opinions in his reports and testimony). For that reason, economists routinely incorporate documentary evidence into their

analysis, and courts just as routinely allow testimony on it. “[I]t is consistent with sound economic practice to review the factual record and formulate a hypothesis that can then be tested using economic theory—the examination of the factual record is necessary to determine which tests to run and to confirm that the stories drawn from the data and from the factual record are consistent.” *In re Processed Egg Prods. Antitrust Litig.*, 81 F. Supp. 3d 412, 424 (E.D. Pa. 2015).

I. Professor Shapiro’s Opinion about Defendants’ Ill-Gotten Gains Is Appropriately Rooted in Economic Principles and Contemporaneous Record Evidence

Professor Shapiro opines on, among other things, Defendants’ financial gains from their sham litigations against Teva and Perrigo. Professor Shapiro summarized the three main aspects of his approach as follows: [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (Ex. R (Shapiro Report) at 41 (emphasis added).)² As Professor Shapiro explains, this process involves construction of a counterfactual world, which is necessary where Defendants’ illegal conduct precludes knowing for certain what would have been.³

² All page cites to Defendants’ motions are to the memoranda of law. All citations to any docket entry are to sealed versions. The exhibits cited in this memorandum are attached to the Declaration in Support of Plaintiff Federal Trade Commission’s Oppositions to Defendants’ Motions in Limine, which Plaintiff has filed separately today.

³ Ex. R (Shapiro Report) at 42 [REDACTED] *see also* Franklin Fisher, *Economic Analysis and Antitrust Damages*, 29 *World Competition L. & Econ. Rev.* 383, 392 (2006) (“[W]e cannot know precisely what the world would have been like in the absence of the defendant’s illegal acts. Hence, while damages cannot be estimated using guesswork, those acts should not be allowed to destroy all ability to measure them.” (attached as Ex. T)).

Professor Shapiro identifies three key variables that affect the development of the counterfactual world, and consequently his opinions about Defendants' ill-gotten gains: [REDACTED]

[REDACTED] (Ex. R (Shapiro Report) at 42-43.) Professor Shapiro applies the same basic approach for each input to his analysis. He independently reviewed and assessed record evidence and then applied economic analysis to approximate each input. This process involves consideration of the economic incentives of firms in the market, the state of the market at the time of likely entry, evolution of the market over time, and the probable effects of the entry. Defendants' own economic expert largely agrees with Professor Shapiro's method for calculating Defendants' financial gain,⁴ and Defendants have not challenged that method (*see* Dkt. 333 at 9.) Nor could they. Professor Shapiro's approach conforms to the standard economic approach in assessing harm in a counterfactual world.⁵

Professor Shapiro explains: [REDACTED]

[REDACTED] (Ex. U (Shapiro Dep. Tr.) at 45:13-19.) This process involves "a reasoned and

⁴ Defendants' expert Dr. Pierre Crémieux testified in his deposition that [REDACTED]

⁵ *Main St. Mortgage, Inc. v. Main St. Bancorp., Inc.*, 158 F. Supp. 2d 510, 515 (E.D. Pa. 2001) ("Such calculations require one to make a few assumptions. This does not render all such calculations unreliable.") And in assessing lost profits, economists point out: "Ideally, there would be contemporaneous documents showing what the plaintiff reasonably expected to gain in a violation-free world. Sometimes this is true, and sometimes not. Even when such documents exist, however, they need to be examined for reasonableness." Fisher, *supra* note 3, at 392 (footnote omitted).

educated attempt to describe reality by accepted methods of statistical analysis using available world observations, data, and knowledge.” *In re Mushroom Direct Purchaser Antitrust Litig.*, 2015 WL 5767415, at *12 (E.D. Pa. July 29, 2015) (quoting *Falise v. Am. Tobacco Co.*, 258 F. Supp. 2d 63, 67 (E.D.N.Y. 2000)).

II. Professor Shapiro Applies Economic Principles to the Record Evidence to Reach His Opinions Regarding Teva’s and Perrigo’s Counterfactual Entry Dates

A. Professor Shapiro’s Opinion Regarding Teva’s Entry Date Is Based on Economic Incentives in the Counterfactual and the Parties’ Own Contemporaneous Documents

As the Third Circuit has explained, in constructing an “offense-free world,” an expert may rely on relevant documents such as the internal projections of a company. *LePage’s Inc. v. 3M*, 324 F.3d 141, 165-66 (3d Cir. 2003) (en banc). Professor Shapiro relies on Teva’s own documents to estimate the most likely date Teva would have launched absent the sham litigation:

[REDACTED]

[REDACTED] (Ex. R (Shapiro Report) at 42.) As he explains in detail in the sections of his report Defendants seek to strike,

[REDACTED]

[REDACTED]

[REDACTED]

Professor Shapiro [REDACTED]

[REDACTED]

[REDACTED]

⁶ See Ex. R (Shapiro Report) at 42-43 (contrasting the counterfactual incentives with those in the real world); Ex. S (Shapiro Rebuttal Report) at 18-21 [REDACTED]

[REDACTED] ootnote omitted))

[REDACTED]

Defendants apparently disagree that these documents should be credited. They are free to cross-examine Professor Shapiro about why he chose to rely on these documents to support his assumptions and not others.¹⁰ But their dispute about the weight afforded to this evidence is no reason to preclude Professor Shapiro from providing the basis of his opinion. “[I]t is not the district court’s role under *Daubert* to evaluate the correctness of facts underlying an expert’s testimony.” *Mushroom Direct Purchaser*, 2015 WL 5767415, at *12 (quotation marks omitted); *see also Processed Egg Prods.*, 81 F. Supp. 3d at 425 (“[T]he Court rejects Defendants’ contention that [the expert’s] testimony should be excluded because he failed to consider certain aspects of the record This contention goes to the weight of [the expert’s] testimony, not its admissibility.”). “[W]hen facts are in dispute experts sometimes reach different conclusions

⁷ [REDACTED]

⁸ [REDACTED]

⁹ *See id.*

¹⁰ *E.g., Synergetics, Inc. v. Hurst*, 477 F.3d 949, 955 (8th Cir. 2007) (“As a general rule, the factual basis of an expert opinion goes to the credibility of the testimony, not the admissibility, and it is up to the opposing party to examine the factual basis for the opinion in cross-examination.” (quotation marks omitted)); *Ramirez v. Olympic Health Mgmt. Sys., Inc.*, 610 F. Supp. 2d 1266, 1278 (E.D. Wash. 2009) (denying motion to preclude testimony by economist because her assumptions underlying a damages calculation were allegedly arbitrary and unreliable and noting that such issues are “appropriately addressed through vigorous cross-examination and presentation of contrary evidence.”) (citing *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 596 (1993)).

based on competing versions of the facts. The emphasis in [Rule 702] on ‘sufficient facts or data’ is not intended to authorize a trial court to exclude an expert’s testimony on the ground that the court believes one version of the facts and not the other.” *Mushroom Direct Purchaser*, 2015 WL 5767415, at *14 (quoting Fed. R. Evid. 702 advisory committee’s notes (2000)).

Defendants’ suggestion that this operational readiness timeline is “wholly unsupported” (Dkt. 333 at 4) is likewise controverted [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (Ex. Y (PLX188) at 029.)

[REDACTED]

[REDACTED]

Defendants’ suggestion that Professor Shapiro’s analysis was limited to “reading and recounting . . . a couple of company documents” (Dkt. 333 at 4) is wrong, as is their assertion that Professor Shapiro merely summarized the FTC’s “cherry-picked” documents (*id.* at 1). Professor Shapiro testified that to begin his analysis, he identified lines of inquiry and then reviewed data and documents relevant to answering those inquiries.¹¹ This process is in line with what any independent economist would do and largely the same process used by Defendants’ expert. And Professor Shapiro discusses at length in his report the numerous documents that

[REDACTED] (Ex. S (Shapiro

Rebuttal Report) at 18-21.) He applied his expertise in the economic behavior of profit-

maximizing firms to the factual record, considered [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (Ex. S (Shapiro Rebuttal Report) at 20-21 (footnote omitted).)

“[E]xperts are expected to make inferences and state opinions and they are granted wide latitude in determining what data is needed to reach a conclusion.” *Brill v. Marandola*, 540 F. Supp. 2d 563, 568 (E.D. Pa. 2008) (internal quotation marks omitted). These assumptions must only “have a reasonable basis in the available record and [be] disclosed to the finder of fact.” *Id.*; *see also TransWeb, LLC v. 3M Innovative Props. Co.*, 2012 WL 10634568, at *4 (D.N.J. Jul. 13, 2012) (same). To assist the trier of fact, Professor Shapiro did exactly what an economist is expected to do in this type of situation: analyze the contemporaneous evidence, apply economic principles, and assess the reasonableness of his assumptions.

B. Professor Shapiro’s Opinion Regarding Perrigo’s Entry Date Is Based on the Company’s Economic Incentives in the Counterfactual

In support of Perrigo’s likely entry date, Professor Shapiro applies cost-benefit analysis.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (Ex. S (Shapiro Rebuttal Report) at 24-26.) His analysis proceeds in logical fashion:

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

(Ex. S (Shapiro Rebuttal Report) at 25-26.)

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (Ex. S (Shapiro

Rebuttal Report) at 25.)

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

III. Professor Shapiro’s Explanation of the Factual Basis of His Analysis Is Permissible and not Improper “Case Narration”

Economic experts are permitted to “put events into an economic context.” *In re Urethane Antitrust Litig.*, 2012 WL 6681783, at *3 (D. Kan. Dec. 21, 2012). The fact that an economist attempts to “map the factual record of the case onto the empirical data from his calculations is not a reason to exclude his opinions.” *In re Lithium Ion Batteries Antitrust Litig.*, 2017 WL 1391491, at *17 (N.D. Cal. Apr. 12, 2017). In that case, the court held that an expert’s “economic expertise permits him to state a factual basis and offer opinions about whether such facts would indicate market conditions susceptible to collusive activity, and other indicators of

collusion.” *Id.* at *17. The court admitted opinion that “outlines the communications and documents [the expert] reviewed relating to the alleged collusion to support his goal of ‘construct[ing] a regression model that would detect the anticompetitive effects of collusion only for firms, products, and time periods for which evidence of collusion exists.’” *Id.* Such testimony by economists concerning economic behavior intended to “explain whether economic indicia of collusion were present during the class period,” are considered admissible “testimony concerning mixed questions of fact and law.” *In re Titanium Dioxide Antitrust Litig.*, 2013 WL 1855980, at *4 (D. Md. May 1, 2013). These opinions are neither “case narration” (Dkt. 333 at 13) nor “gloss” (*id.* at 14) as Defendants contend. Instead, they are normal parts of economic analysis.

Professor Shapiro should be permitted to provide an economic context for the record evidence and to use the facts in the record to support the inputs to his calculation of Defendants’ financial gain. *See, e.g., Lithium Ion Batteries*, 2017 WL 1391491 at *17, *Titanium Dioxide*, 2013 WL 1855980 at *4. For example, [REDACTED]

[REDACTED] Professor Shapiro does not simply recite the facts in the record. (*See Ex. R (Shapiro Report) at 42-43.*) Rather, he explains the significance of certain facts from an economic perspective to justify his reliance on those facts in his calculations. As he testified, [REDACTED]

[REDACTED] (Ex. U (Shapiro Dep. Tr.) at 145:13-17.) As an economic expert, Professor Shapiro’s role is to explain the variables incorporated in his analysis and the economic support for those variables. *See Louis Vuitton Malletier S.A. v. Sunny Merch. Corp.*, 97 F. Supp. 3d 485, 507 (S.D.N.Y. 2015) (allowing expert

testimony because the expert “synthesizes this material and pulls together common themes in reaching his conclusions” (citation and quotation marks omitted)).

IV. Professor Shapiro’s Opinions Are Not Improper Testimony on the “Motivation” of Others; They Are Opinions about Economic Incentives in the Counterfactual World

Defendants variously deride Professor Shapiro’s testimony as “knowledge” opinion or “motivation” opinion, not based on “rigorous economic analysis” (Dkt. 333 at 14-15), and outside the “scope” of Professor Shapiro’s expertise (*id.* at 10-12). Those same complaints could be lodged against any economist who attempts to answer the question of what a counterfactual world might reasonably look like absent a defendant’s misconduct. Professor Shapiro’s opinion is grounded in forty years of economic expertise and twenty years of study of pharmaceutical markets applied to ample record evidence. Professor Shapiro’s analysis is entirely consistent with basic principles of antitrust economics and how economists generally approach the problem of creating a counterfactual.¹²

Professor Shapiro ties the factual evidence in the case to well-established economic principles and does not opine on others’ state of mind. For example, Professor Shapiro’s opinion is not that Perrigo would have sued on a certain date. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] *See, e.g., In re Fosamax Prod. Liab. Litig.*, 645 F.2d 164, 192 (S.D.N.Y. 2009) (allowing a pathologist with FDA experience to explain the

¹² Fisher, *supra* note 3, at 392; *see Urethane*, 2012 WL 6681783; *Processed Egg Prods.*, 81 F. Supp. 3d 412; *Delta/Airtran*, 245 F. Supp. 3d 1343; *Mushroom Direct Purchaser*, 2015 WL 5767415.

regulatory context in which certain documents and exhibits in evidence are created, “drawing inferences that would not be apparent without the benefit of experience or specialized knowledge,” but prohibiting the expert from merely reading the evidence and testifying as to the state of mind of others). To the extent there is a credibility question as to the facts, the Court will make the ultimate decision as to the weight it will prescribe to such evidence.

In making this argument and those discussed above, Defendants largely ignore the task Professor Shapiro has been asked to do and the process necessary to accomplish that task. The cases they cite are inapposite. They do not cite a single case in which an economist is prevented from explaining the basis for relying on various assumptions in a counterfactual world. Nor could they. The cases they do cite are readily distinguishable, because they either do not address economic testimony or do so in an entirely different context.¹³

V. Professor Shapiro’s Opinions Will Assist the Trier of Fact to Understand the Evidence and Determine the Facts at Issue

Defendants contend that Professor Shapiro should not be permitted to explain “why he thinks the assumptions underlying his scenarios are ‘reasonable.’” (Dkt. 333 at 1-2.) And they suggest that “the same rule would apply” with respect to their own economists’ testimony. (*Id.* at

¹³ See, e.g., *In re TMI Litig.*, 193 F.3d 613, 677 (3d Cir. 1999) (where a physicist’s assumption about gross activity in soil samples was not supported by his own methodology, exclusion of the soil sample analyses is not an abuse of discretion.); *In re Rezulin Prods. Liab. Litig.*, 309 F. Supp. 2d 531, 551 (S.D.N.Y. 2004) (where a doctor provided a narrative reciting certain regulatory events that did not implicate his expertise or first-hand experience, exclusion of his testimony is appropriate.); *In re Lyondell Chemical Co.*, 558 B.R. 661, 668 (Bankr. S.D.N.Y. 2016) (where an expert on corporate solvency created a chronology that bears no relation to the financial metrics in which he is an expert, that chronology is inadmissible); *In re Live Concert Antitrust Litig.*, 863 F. Supp. 2d 966, 994-95 (C.D. Cal. 2012) (where an economist did not conduct any discernible economic analysis, and instead, in his own words, did the work of a music analyst based on insufficient data, Rule 702 is not satisfied); *Fleischman v. Albany Med. Ctr.*, 728 F. Supp. 2d 130, 167-68 (N.D.N.Y. 2010) (admitting, in a jury trial, an expert’s economic analysis of whether there was a causal link between information exchanges and changes in nurse compensation, but excluding his testimony on whether the information exchanges contributed to the motivations behind the compensation decisions).

2 n.3.) But they have not parsed their own economists' testimony to separate the assumptions from the reasons for the assumptions, and their one-sided parsing of Dr. Shapiro's testimony underscores the absurdity of this request. Specifically, the seek to permit Professor Shapiro to respond Dr. Crémieux, but blunt the testimony so that Professor Shapiro is precluded from giving the full basis for his disagreement with Dr. Crémieux. As one example, Defendants would allow all but the testimony in bold below:

[REDACTED]

(Ex. S (Shapiro Rebuttal Report) at 1-2) (emphasis added). Defendants' unworkable request would preclude Professor Shapiro from providing a full economic rationale for his disagreement with Dr. Crémieux, and leave the Court with only a partial understanding of Professor Shapiro's opinions.

That outcome would not assist the Court. The core question at issue in determining the appropriate amount of equitable monetary relief is whether the FTC has offered a "reasonable approximation" of Defendants' ill-gotten gains. *See FTC v. Teo*, 746 F.3d 90, 107 (3d Cir. 2014). The Court will determine what constitutes a reasonable approximation. Professor Shapiro opines that in the counterfactual, [REDACTED]

[REDACTED] (Ex. R (Shapiro Report) at App. E p.2.) Defendants'

economic expert disagrees and concludes that [REDACTED]

[REDACTED] Defendants ask this Court to preclude both of these experts from explaining the bases for those opinions. As nobody knows for certain what would have happened had Defendants not filed their objectively baseless lawsuits, the Court will benefit from an economic perspective on the record evidence in making a legal determination regarding the “reasonable approximation” of Defendants’ ill-gotten gains.

CONCLUSION

For the foregoing reasons, Defendants’ motion to preclude certain testimony of FTC’s Expert Carl Professor Shapiro’s testimony should be denied.

Dated: January 24, 2018

Respectfully submitted,

/s/ Patricia M. McDermott
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Certificate of Service

I hereby certify that on January 24, 2018, I caused Plaintiff Federal Trade Commission's Opposition to Defendants' Motions in Limine to Preclude Certain Testimony of FTC's Expert Carl Shapiro and accompanying materials to be filed with the United States District Court for the Eastern District of Pennsylvania using the ECF system. I certify that I also caused these filings to be served on all counsel of record via electronic mail.

/s/ Patricia M. McDermott
Patricia M. McDermot