No. 14-

IN THE

Supreme Court of the United States

DEAN FOODS COMPANY, DAIRY FARMERS OF AMERICA, INC., AND NATIONAL DAIRY HOLDINGS, LP,
Petitioners,

v.

FOOD LION, LLC AND FIDEL BRETO, on behalf of themselves and all others similarly situated,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, in antitrust or other cases in which the plaintiff must prove causation in fact as an element of the claim, a plaintiff must produce evidence of causation to defeat a motion for summary judgment, or whether a court may instead presume causation at summary judgment and permit the case to proceed to trial based on that presumption.

PARTIES TO THE PROCEEDING

All parties named in the caption of this petition were parties to the proceeding in the court of appeals. In addition, Dairy Marketing Services, LLC and Southern Marketing Agency, Inc. were defendants in the district court and were named as defendants-appellees in the court of appeals, but they are not parties in this Court and have no interest in the outcome of the petition.

CORPORATE DISCLOSURE STATEMENT

Dean Foods Company has no parent corporation, and no publicly held company owns 10 percent or more of Dean Foods Company's stock.

Dairy Farmers of America, Inc. has no parent corporation, and no publicly held company owns 10 percent or more of Dairy Farmers of America, Inc.'s stock.

After this litigation commenced, as the result of a 2009 transaction between Dairy Farmers of America, Inc. and Grupo Industrial Lala, S.A. de C.V. ("Grupo Lala"), National Dairy Holdings, LP was split into two companies. One of those companies, also called National Dairy Holdings, LP, assumed the liability (if any) of former National Dairy Holdings, LP in connection with this litigation and was then merged into Dairy Farmers of America, Inc. and ceased to exist as a separate legal entity. The other company, National Dairy LLC, became a subsidiary of Grupo Lala and has no interest in this litigation and was not a party in the lower courts.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Dean Foods Company, Dairy Farmers of America, Inc., and National Dairy Holdings, LP respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-38a) is reported at 739 F.3d 262. The order of the court of appeals denying rehearing (App. 109a-110a) is unreported. The opinion of the district court (App. 39a-63a) is unreported but is available at 2012 WL 1032797.

JURISDICTION

The court of appeals entered judgment on January 3, 2014, and denied a timely rehearing petition on March 4, 2014. On April 29, 2014, Justice Kagan extended the time to file the petition for certiorari until July 2, 2014, and, on June 17, 2014, Justice Kagan further extended the time to file the petition until August 1, 2014. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AND RULES

Pertinent provisions of the Sherman Act, 15 U.S.C. §§ 1 *et seq.*, the Clayton Act, 15 U.S.C. §§ 12 *et seq.*, and Rule 56 of the Federal Rules of Civil Procedure are reproduced in the Appendix.

STATEMENT

In *Bell Atlantic Corp.* v. *Twombly*, 550 U.S. 544 (2007), and *Comcast Corp.* v. *Behrend*, 133 S. Ct. 1426 (2013), this Court found it necessary to model the proper application of the standards governing two critical stages of the pretrial sequence—pleading and class certification. Review is necessary here to provide similar instruction on the standard governing motions for summary judgment and to resolve disagreement in the lower courts as to the showing a plaintiff must make to defeat summary judgment on the element of causation.

This Court addressed the standard for summary judgment in a landmark trilogy of cases in 1986. *See Celotex Corp.* v. *Catrett*, 477 U.S. 317 (1986); *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574 (1986). Twenty-eight years later, although lower courts generally *recite* the standard correctly, confusion and

disagreement persist in their application of that standard, particularly with respect to the element of causation in antitrust and other complex civil cases. As relevant here, some circuits correctly require an antitrust plaintiff opposing summary judgment to produce not only evidence of the defendants' alleged anticompetitive conduct and evidence of injury to the plaintiff, but also evidence of a causal link between the two. Other circuits—including the Sixth Circuit in this case—permit a plaintiff to reach a jury without any evidence of that causal link, effectively presuming causation and foreclosing summary judgment unless the defendant disproves it. That division among the circuits reflects significant confusion with respect to summary judgment generally, including whether the procedure is "disfavored"—a view that several courts, including the Sixth Circuit below, continue to maintain despite this Court's clear instruction to the contrary.

Improper application of the summary judgment standard imposes significant costs on litigants and the courts. Summary judgment serves as a final gatekeeper before the expense, burdens, and risk of trial. By permitting a claim to reach a jury without requiring the plaintiff to produce evidence of causation, the decision below undermines that gatekeeping function and effectively shifts the burden of proof to defendants. This result contravenes this Court's precedent, which mandates the entry of summary judgment against a plaintiff that fails to produce evidence supporting each element of its claim. As in *Twombly* and *Comcast*, this Court should grant review to demonstrate the correct application of this critical pretrial standard.

A. Factual Background

This case is a putative class action alleging a violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. Respondents, two retail sellers of processed milk, allege that petitioners, a raw-milk supplier and two milk processors, conspired to raise the price of processed milk. The conspiracy allegedly began around the time of an unchallenged merger that transformed the structure of the milk-processing market.

Petitioner Dairy Farmers of America, Inc. ("DFA") is a dairy-marketing cooperative owned and managed by its dairy-farmer members. App. 69a. DFA markets the raw milk its members produce and distributes the proceeds from sales of raw milk among its members. *Id.* Petitioner Dean Foods Company ("Dean") purchases raw milk from dairy farmers and cooperatives and processes that raw milk into consumable dairy products. App. 68a-69a. Dean was formed in December 2001, when Suiza Foods Corporation ("Suiza") acquired the previously existing Dean Foods Company ("Legacy Dean"). App. 69a-70a. Before the merger, Suiza and Legacy Dean were the two largest milk processors in the United States, and they competed to process and sell bottled milk to retailers. *Id.* DFA was the primary supplier of raw milk to Suiza—as well as a significant investor in Suiza—and also supplied raw milk to Legacy Dean.

The U.S. Department of Justice reviewed the proposed merger. App. 70a. As part of its investigation, DOJ assessed the likely competitive effects of the merger using a "spatial-effects" regression model that compared distances between separately owned milk-processing plants before and after the proposed merger and predicted how the merger would affect milk prices.

App. 50a; R.1086-1 ¶ 109.[1] Using this model, DOJ estimated that Suiza's acquisition of Legacy Dean would result in an average price increase of 2.5% in the geographic region analyzed. App. 50a.

To alleviate concerns that the merger would lessen competition and increase prices, DOJ conditioned its approval on divestiture of 11 milk-processing plants and related assets. App. 70a. DOJ accepted petitioner National Dairy Holdings, LP ("NDH"), a partnership formed to compete with Dean after the merger, as the buyer of the divested plants. *Id.* The merger-related transactions divested DFA of its ownership interest in Suiza, but left it as a 50% shareholder in Dean's newly formed competitor, NDH. *Id.* DOJ also reviewed and accepted, with some modifications, DFA's continuing role as the primary supplier of raw milk to Dean. *Id.*

On December 18, 2001, DOJ approved the merger and divestitures to NDH. The transaction closed on December 21, 2001.

B. District Court Proceedings

1. Almost six years later, on August 9, 2007, respondent Fidel Breto, a retail seller of processed milk doing business as Family Foods, filed a class action complaint against petitioners, alleging a conspiracy to increase prices for processed milk. In 2008, Breto, joined by respondent Food Lion, LLC, filed an amended complaint. R.34. In Count I—the only claim at issue here—respondents alleged that petitioners engaged in a conspiracy "to lessen competition for sales of pro-

[1] "R." refers, by district court docket number, to the record materials the parties designated in the Sixth Circuit, most of which were filed under seal.

cessed milk to retailers in the Southeast," in violation of Section 1 of the Sherman Act. *Id.* ¶ 86.[2]

Section 1 of the Sherman Act states that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1. To recover damages under Section 1, a private plaintiff must prove that it suffered injury "by reason of" an unlawful conspiracy. *Id.* § 15(a); *see Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

Here, the purported conspiracy alleged in Count I involved "a complex relationship" among petitioners in which vertical supply arrangements provided a payoff for allegedly anticompetitive behavior. App. 11a. Respondents alleged that petitioners closed plants and allocated customers and territories to weaken NDH as a competitor. R.34 ¶¶ 50-62. In exchange, according to respondents, Dean agreed to retain DFA as Dean's primary raw-milk supplier. *Id.* "[T]he reason NDH

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[2] The amended complaint originally asserted five causes of action. R.34 ¶¶ 78, 85-125. In addition to the conspiracy claim in Count I and two other conspiracy claims, respondents challenged certain unilateral conduct under Section 2 of the Sherman Act. *Id.* ¶¶ 100-109 (Count III) (unlawful monopolization); ¶¶ 110-119 (Count IV) (attempt to monopolize). The district court granted summary judgment on all five counts and did not reach the issue of class certification. App. 107a (granting summary judgment on Counts II, III, and IV); App. 40a (granting summary judgment on Counts I and V). Respondents limited their appeal to Count I (*see* Appellants' C.A. Br. 4 n.3 (Feb. 14, 2013)), which is therefore the only claim remaining in this case.

Respondents' suit originally named two other defendants, Dairy Marketing Services, LLC and Southern Marketing Agency, Inc. Neither defendant was named in Count I and, therefore, neither is a party in this Court.

would agree to weaken itself," respondents claimed, was "only because DFA owned and controlled NDH, and because the conspiracy served DFA's purposes." App. 11a.

Respondents conceded that they did not challenge the Suiza-Legacy Dean merger. *See, e.g.*, R.1129, at 2 ("[u]ndisputed" that respondents "do not challenge the 2001 merger between [Legacy] Dean and Suiza"); App. 48a n.4 ("Plaintiffs have expressly disclaimed any legal challenge to the merger[.]").[3] Nevertheless, the start of respondents' alleged conspiracy period coincided with the merger. R.34 ¶ 6; R.1086-1 ¶ 145.

2. On September 18, 2009, petitioners moved for summary judgment on Count I, arguing that respondents could not establish the existence of a conspiracy. App. 73a. As petitioners contended, the record showed intense competition between Dean and NDH and no evidence that petitioners conspired to allocate customers or territory or close plants. R.462, at 9-33.

The district court found "[m]any of [respondents'] arguments … unconvincing on their merits" and further found that petitioners "rather convincing[ly] respond[ed] to many of the individual allegations made." App. 78a. But it concluded that respondents had produced evidence that created a genuine issue of material fact on the element of conspiracy. App. 79a. The court therefore denied petitioners' motion on Count I, and discovery continued.

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[3] Respondents also conceded that any challenge to the merger would be time-barred. App. 48a n.4; *see also* Dec. 1, 2010 Hr'g Tr. 55 ("[W]e would be out of time on that seeking to unscramble the merger.").

3. After the close of discovery, petitioners moved again for summary judgment on additional grounds. As relevant here, petitioners argued that respondents could not establish a genuine issue of material fact on the issue of causation, an essential element of respondents' claim. *See* 15 U.S.C. § 15(a) (injury must be "by reason of" the antitrust violation); *Matsushita*, 475 U.S. at 586 (antitrust plaintiffs "must show an injury to them *resulting from* the illegal conduct" (emphasis added)).

In opposing petitioners' motion on the element of causation, respondents relied solely on their expert, Professor Ronald Cotterill, who performed a regression analysis purporting to show that prices of processed milk during the relevant period were 7.9% higher than he expected based on supply-and-demand factors. R.1086-1 ¶¶ 143, 157; R.1157-2 ¶ 40. Cotterill admitted, however, that he had not analyzed, and therefore could not say, whether the higher prices he observed were caused by the alleged conspiracy, by the unchallenged merger, or by other lawful, unilateral conduct. *See*, *e.g.*, R.1086-2, at 259:5-8, 260:3-7; *infra* pp. 8-10.

Petitioners accordingly argued that Cotterill's analysis provided no evidence of causation, emphasizing three main points:

First, Cotterill designed his analysis in such a way that any price effects he observed were as likely to have resulted from the merger as from the conspiracy respondents allege. A proper analysis of the impact of an alleged conspiracy compares actual prices to the prices that would have prevailed but for the conspiracy, holding all else equal—*i.e.*, the "but-for world." Here, because petitioners did not challenge the merger, that benchmark should have been a "but-for world" in which the merger and related divestitures occurred, but the

alleged conspiracy did not. Instead, Cotterill defined the "but-for world" as if the merger never happened:

> For all Defendant facilities involved in the Dean-Suiza merger, I define but-for world competition based on a plant's pre-conduct owner's competitive impact (Legacy Dean or Suiza), *assuming no other ownership or operation changes, i.e., all plants remain open and do not change owners*.

R.1086-1 ¶118 (emphasis added); *see id.* ¶ 145.

This was intentional. Cotterill explained in his deposition that he was instructed in part to measure the competitive impact of the merger. R.1086-2, at 267:15-20 ("I have been asked to analyze whether in fact the creation of NDH and the assertion [to DOJ] that there would be economies of size and lower prices through efficiencies generated by that creation from January 1, 2002 going forward, whether that in fact was true or not[.]"). Rather than considering a benchmark in which the alleged conspiracy never occurred, Cotterill accordingly considered a benchmark in which the unchallenged merger never occurred.

Second, Cotterill characterized his approach as "similar to the [one] employed by the [DOJ] in its analysis of potential anticompetitive effects of the 2001 Dean-Suiza merger." R.1086-1 ¶ 114. The question DOJ examined was whether prices for processed milk would increase if processing plants that formerly competed with one another came under common ownership as a result of the merger. Cotterill acknowledged that his analysis mimicked that approach. As he put it, "[t]he application in this litigation is largely the same: the DOJ used a spatial model to predict the price impact of *future* conduct, while I use a spatial model to

predict the price impact of *past* conduct." *Id.* Because Cotterill's approach simply measured the price effects that followed ownership changes caused by the merger, his analysis could not answer the relevant question—whether the alleged conspiracy caused respondents to pay more for milk than they would have paid after the merger absent the alleged conspiracy.

Third, Cotterill admitted that his model could not distinguish between the effects of lawful, unilateral conduct and the effects of any unlawful concerted action. As Cotterill acknowledged in his deposition, his model "d[id] not distinguish between" the effects of "market power that is … unilateral [or] coordinated." R.1086-2, at 259:4-8. In fact, Cotterill claimed this distinction was unnecessary because respondents' claims at that juncture challenged both unilateral and coordinated conduct and effects. *See id.* at 260:3-7; *supra* n.2. But the district court ultimately granted summary judgment to petitioners on the unilateral-conduct claims (*see* App. 107a), and respondents did not appeal that determination. *Supra* n.2. Cotterill nonetheless never attempted to isolate any price impact caused by coordinated conduct, even after that became the only theory of liability remaining in the case. To the contrary, he simply assumed that any price changes arose from some alleged anticompetitive conduct. *See* R.1086-2, at 259:4-8; R.1157-2 ¶ 40.

As a result, while Cotterill's model claimed a 7.9% price increase, petitioners argued that the model could not support any inference that the observed increase resulted from the alleged conspiracy, as opposed to the unchallenged, DOJ-approved merger or unchallenged, lawful unilateral conduct by Dean or others. Yet respondents produced no other evidence to support the causation element of their claim.

4. After extensive briefing and oral argument, the district court granted petitioners' motion for summary judgment on Count I.[4] On the issue of causation, the court agreed with petitioners that "Cotterill's analysis d[id] not create a material issue of fact on the question of whether the price increases were 'by reason of' an illegal conspiracy." App. 51a. And without evidence of causation, respondents could not "establish antitrust injury." *Id.*[5]

Citing Cotterill's own testimony, the court found that measuring the impact of the merger was "precisely what [Cotterill] did." App. 50a. The court relied on Cotterill's description of his assignment, which specifically included the task of measuring merger-related ef-

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[4] Concurrent with the summary judgment briefing, petitioners filed a *Daubert* motion to exclude Cotterill's testimony. R.1084, at 1. A magistrate judge denied that motion in part and granted it in part. R.1187, at 6. Both sides filed objections (R.1208; R. 1213), but the district court granted petitioners' motion for summary judgment without reaching those objections.

[5] The lower courts discussed causation in connection with "antitrust injury" because establishing antitrust injury requires a plaintiff to prove an "injury of the type the antitrust laws were intended to prevent *and that flows from* that which makes defendants' acts unlawful." *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977) (emphasis added). To establish that an injury "flows from" the challenged conduct, as in any other damages claim, a plaintiff must prove both injury in fact and a causal link between that injury and the challenged conduct. *See id.*; *see also, e.g.*, *Blue Tree Hotels Inv. (Canada), Ltd.* v. *Starwood Hotels & Resorts Worldwide, Inc.*, 369 F.3d 212, 220 (2d Cir. 2004) ("To establish antitrust injury, a private litigant … must show (1) an injury-in-fact; (2) that has been caused by the violation; and (3) that is the type of injury contemplated by the statute." (citing *Brunswick Corp.*, 429 U.S. at 489)); *cf. Burrage* v. *United States*, 134 S. Ct. 881, 889 (2014) ("the phrase, 'by reason of,' requires at least a showing of 'but for' causation" (internal quotation marks omitted)).

fects. *Id.* And the court found Cotterill's report to be "even clearer" in acknowledging that he used a model "'largely the same'" as the DOJ's model—one that was designed to measure the potential price impact of the merger. *Id.*

The court therefore found it "largely beyond question" that Cotterill "measured the price impact of the merger itself" and further found it "inescapable that the price increases he identifie[d] as injury to [respondents] are related, if not totally, then at least in part, to the merger itself, conduct which is not challenged in this case." App. 50a. Cotterill "simply compare[d] pre-merger prices to post-merger prices," accounting only for supply and demand factors, and failed to address the key question on the issue of causation—*i.e.*, "how prices would have increased in the absence of a conspiracy." App. 50a-51a.

C. The Court Of Appeals' Decision

1. The U.S. Court of Appeals for the Sixth Circuit reversed. The court did not take issue with any of the facts on which the district court relied. App. 34a. But the court of appeals concluded that respondents' claim could proceed to trial because, in its view, the fact that Cotterill's model might have reflected the impact of the merger or other unchallenged conduct did "not necessarily mean" that the price increase he observed "was due to legal causes." App. 36a.

The court of appeals began by expressing its general "'reluctan[ce] to use summary judgment dispositions in antitrust actions'" and observing that, "[u]nfortunately, there is no general agreement on the exact standards to use when resolving antitrust cases." App. 6a. Although the court acknowledged that "anti-

trust plaintiffs must … prove that the restraint at issue caused them to suffer an antitrust injury" (App. 31a-32a), it framed the requirements applicable at summary judgment in terms of the sufficiency of the pleadings, stating that "[a]ntitrust plaintiffs cannot survive motions for summary judgment without adequately *alleging* an antitrust injury" (App. 33a (emphasis added)).

The court acknowledged that Cotterill "stated that the purpose of his calculation" was to analyze the price impact of the merger. App. 34a-35a. But it then noted Cotterill's testimony that he "was also charged with discerning" whether petitioners engaged in collusive decisions that "'resulted in elevated prices to the plaintiffs in this case.'" App. 35a. The court stated that "[a]nswering that question"—had Cotterill done so—"would expose the precise sort of injury and causation that is required, especially when [respondents] must benefit from all reasonable inferences." App. 35a-36a.

The court also acknowledged that Cotterill used a regression model similar to the one designed by DOJ. App. 36a. But the court concluded that "[u]se of that same widely-accepted model does not necessarily mean that the [price] increase was due to legal causes." *Id.*

Based on this discussion, the court concluded that "Cotterill's model, as applied to the facts, reveals three conclusions which, taken together, can be viewed as evidence of antitrust injury":

> First, it is clear that [respondents] purchased processed milk from [petitioners]. Second, Cotterill's model indicates that after the merger [respondents] were charged 7.9% more for milk than an econometric analysis could justify. And third, the district court found that evidence indicated that Dean Foods and NDH, due to the

> influence of DFA, conspired to avoid competing vigorously.

App. 36a-37a. This, the court held, sufficed to defeat summary judgment. App. 37a.[6]

2. Petitioners filed a timely petition for rehearing or rehearing en banc, arguing, among other things, that the panel's decision improperly excused respondents from their burden to offer evidence creating a genuine issue of material fact on the causation element of their claim, in conflict with this Court's precedent as well as precedent of other circuits. The court of appeals denied the petition. App. 109a-110a.

Petitioners moved for a stay of the mandate pending the filing and disposition of their petition for certiorari. Petitioners again argued that the court improperly excused respondents' failure to offer any evidence of causation. The court of appeals denied the stay.

REASONS FOR GRANTING THE PETITION

In 1986 this Court decided three landmark cases addressing the standard governing motions for summary judgment. *See Celotex Corp.* v. *Catrett*, 477 U.S.

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[6] The court of appeals also addressed other aspects of the district court's ruling, holding that the district court was correct to apply the rule of reason rather than the *per se* standard (App. 14a), that the district court erred in requiring respondents to prove a relevant geographic market without considering whether an abbreviated "quick-look analysis" would be appropriate (App. 16a-17a), and that the district court should not have excluded the testimony of respondents' expert on the definition of the relevant geographic market (App. 18a). While the court erred in the latter two rulings, this petition does not address them. Although the court of appeals remanded for further consideration in light of those rulings, a decision by this Court reversing the court of appeals' judgment on the issue of causation would obviate those proceedings.

317 (1986); *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574 (1986). In that trilogy, the Court emphasized the importance of summary judgment as the "principal tool[]" for the disposition of "factually insufficient claims" before trial, *Celotex*, 477 U.S. at 328, holding that the "plain language" of Rule 56 "mandates the entry of summary judgment … against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden at trial," *id.* at 322. A plaintiff thus cannot defeat summary judgment "without offering any concrete evidence from which a reasonable juror could return a verdict in his favor." *Anderson*, 477 U.S. at 256.

In explicating this standard, the Court dispelled the older notion that summary judgment "should be used sparingly," *Poller* v. *Columbia Broad. Sys., Inc.*, 368 U.S. 464, 473 (1962), or was a "disfavored" practice, *Fortner Enters., Inc.* v. *U.S. Steel Corp.*, 394 U.S. 495, 505 (1969) (citing *Poller*). Rather, the Court explained that the "[s]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole." *Celotex*, 477 U.S. at 327.

Notwithstanding this Court's clear instructions, numerous areas of conflict and confusion regarding summary judgment persist in the lower courts. *See, e.g.*, Epstein, Bell Atlantic v. Twombly: *How Motions to Dismiss Become (Disguised) Summary Judgments*, 25 Wash. U. J.L. Pol'y 61, 94 (2007) ("strongly different approaches to summary judgment … have emerged in the circuit courts"); Mullenix, *The 25th Anniversary of the Summary Judgment Trilogy: Much Ado About Very Little*, 43 Loy. U. Chi. L.J. 561, 568 (2012) (appli-

cation of trilogy "seems sketchy, incomplete, or less-than-rigorous, at best"). In both antitrust cases and other contexts, courts remain divided on such basic questions as whether summary judgment is "disfavored." *See* Brunet, *Six Summary Judgment Standards*, 43 Akron L. Rev. 1165, 1172 n.33 (2010) ("[C]ourts occasionally recite the *Poller* dictum as though it were contemporary gospel.").[7] Indeed, notwithstanding the

[7] Some circuits persist in the view that summary judgment is disfavored or should be used sparingly in antitrust and other cases. *See, e.g.*, *Smith Wholesale Co.* v. *R.J. Reynolds Tobacco Co.*, 477 F.3d 854, 862 (6th Cir. 2007) ("motions for summary judgment are disfavored in antitrust litigation"); *Toscano* v. *Professional Golfers Ass'n*, 258 F.3d 978, 982-983 (9th Cir. 2001) (same); *see also, e.g.*, *His & Her Corp.* v. *Shake-N-Go Fashion, Inc.*, 2014 WL 1877082, at *1 (9th Cir. May 12, 2014) ("'summary judgment is generally disfavored in the trademark arena'"); *Doe* v. *C.A.R.S. Protection Plus, Inc.*, 527 F.3d 358, 369 (3d Cir. 2008) ("Summary judgment is to be used sparingly in employment discrimination cases[.]"); *Ferrell* v. *Leake & Watts Servs., Inc.*, 83 F. App'x 342, 344 (2d Cir. 2003) ("as we have repeatedly held, district courts should employ summary judgment sparingly in discrimination cases"); *Kohus* v. *Mariol*, 328 F.3d 848, 853 (6th Cir. 2003) ("In copyright infringement cases, 'granting summary judgment, particularly in favor of a defendant, is a practice to be used sparingly[.]'"); *Cain* v. *Bovis Lend Lease, Inc.*, 817 F. Supp. 2d 1251, 1282 (D. Or. 2011) ("Summary judgment generally is disfavored in negligence actions[.]"). In contrast, other circuits have identified summary judgment as an "essential" tool in antitrust cases. *See, e.g.*, *Geneva Pharm. Tech. Corp.* v. *Barr Labs. Inc.*, 386 F.3d 485, 495 (2d Cir. 2004) (summary judgment "is an essential tool in the area of antitrust law"); *DSM Desotech Inc.* v. *3D Sys. Corp.*, 749 F.3d 1332, 1345 (Fed. Cir. 2014) ("'summary judgment is not only permitted but encouraged in certain circumstances, including antitrust cases'"); *see also Race Tires Am., Inc.* v. *Hoosier Racing Tire Corp.*, 614 F.3d 57, 73 (3d Cir. 2010); *Thompson Everett, Inc.* v. *National Cable Advertising, L.P.*, 57 F.3d 1317, 1322 (4th Cir. 1995); *Stearns Airport Equip. Co.* v. *FMC Corp.*, 170 F.3d 518, 521 (5th Cir. 1999); *McGahee* v. *Northern Propane Gas Co.*, 858 F.2d 1487, 1493 (11th Cir. 1988).

plain language of Rule 56, courts do not even agree on whether summary judgment is mandatory when the rule's requirements have been met.[8]

Against this backdrop, this Court's intervention is needed to resolve division in the lower courts as to the showing a plaintiff must make to defeat a motion for summary judgment on the element of causation. In particular, the courts are divided on whether an antitrust plaintiff must produce at least some direct or circumstantial evidence of a causal connection between the alleged antitrust violation and the alleged injury, or whether instead a court may presume causation, as occurred in this case. Such a presumption contravenes this Court's precedent, permitting claims to proceed to trial even where a plaintiff has not identified a genuine issue of material fact on an essential element of its claim. This result imposes needless costs on litigants and the courts, and the divergence across different courts promotes forum-shopping. Just as the Court

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[8] *Compare, e.g.*, *Confederated Tribes of Colville Reservation* v. *United States*, 964 F.2d 1102, 1109 (Fed. Cir. 1992) ("courts have discretion to deny summary judgment on issues in which it might otherwise be appropriate"), *and United States* v. *Certain Real & Personal Property Belonging to Hayes*, 943 F.2d 1292, 1297 (11th Cir. 1991) ("A trial court is permitted, in its discretion, to deny even a well-supported motion for summary judgment, if it believes the case would benefit from a full hearing."), *with Jones* v. *Johnson*, 26 F.3d 727, 728 (7th Cir. 1994) (per curiam) ("Summary judgment is not a discretionary remedy. If the plaintiff lacks enough evidence, summary judgment must be granted."); *see also* Friedenthal & Gardner, *Judicial Discretion to Deny Summary Judgment in the Era of Managerial Judging*, 31 Hofstra L. Rev. 91, 104 (2002) ("Federal courts of appeals are currently split over whether judges must grant summary judgment if it is technically appropriate. Astonishingly, federal courts often do not provide a policy rationale for their positions and have failed to recognize that a contrary position exists.").

stepped in to clarify and model the standards governing the pleading and class-certification stages, *see Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544 (2007); *Comcast Corp.* v. *Behrend*, 133 S. Ct. 1426 (2013), it should do so here to provide similar guidance on summary judgment.

I. COURTS ARE DIVIDED ON WHETHER A PLAINTIFF MUST PRODUCE EVIDENCE OF CAUSATION AT SUMMARY JUDGMENT

The courts of appeals are divided on whether defendants are entitled to summary judgment when an antitrust plaintiff has offered evidence of injury but no evidence that the defendants' challenged conduct caused the injury. Some courts require evidence of causation and grant summary judgment where the plaintiff fails to satisfy that burden. Other courts permit a plaintiff to survive summary judgment absent such evidence by presuming causation. And other courts either fall somewhere in the middle or apply conflicting standards—even within the same circuit—depending on the context.

In this case, the Sixth Circuit permitted respondents' claim to proceed to trial based only on evidence of conspiracy and evidence of higher prices in the relevant market, without any evidence of a causal link between the two. App. 36a-37a.[9] The court of appeals did not disagree with the district court's finding that the price impact Cotterill observed could just as easily reflect the unchallenged merger or other unchallenged, lawful conduct. *See supra* pp. 11-12. Indeed, respondents admitted in briefing before the court of appeals that Cotterill's model—the sole evidence they submitted on

[9] As discussed, *supra* p. 7, petitioners disputed the evidence of conspiracy as well, but that question was not at issue on appeal and is not presented here.

causation—"does not differentiate between higher prices caused by unilateral conduct (for example, if Dean and NDH decided on their own not to compete with each other) and higher prices caused by collusion." Appellants' C.A. Reply 12 (Apr. 5, 2013).[10] The court nonetheless held that nothing more was required to survive summary judgment. The fact that Cotterill had used a model designed in part to measure the impact of the merger, the court held, "d[id] *not necessarily* mean that the [observed impact] was due to legal causes." App. 36a (emphasis added). Thus, because petitioners had not *disproved* that the observed higher prices were caused by the alleged conspiracy, the court in effect presumed it to be so. *See id.*; *supra* pp. 12-14.

The Second Circuit has followed a similar approach. *See In re Publication Paper Antitrust Litig.*, 690 F.3d 51 (2d Cir. 2012), *cert. denied sub nom. Stora Enso N. Am.* v. *Parliament Paper, Inc.*, 133 S. Ct. 940 (2013). In *Publication Paper*, the plaintiffs alleged a price-fixing conspiracy between senior officials at two companies. Defendants argued on summary judgment that any agreements between the officials could not have caused injury, because junior employees had suggested and implemented the observed price increases without knowledge of the conspiracy. *Id.* at 67. The district court granted summary judgment, but the court of appeals vacated, holding that causation could be presumed merely from evidence of a price-fixing conspiracy and price increases. The court reasoned that such conspiracies are illegal precisely because of their ten-

[10] *See also* Appellants' C.A. Reply 12-13 (admitting that Cotterill's model "does not explain *why* the plants were not competing vigorously"); *id.* at 13 (admitting that Cotterill's model offered "only evidence that is 'consistent with' conspiracy").

dency to increase prices, and that this eliminated the need for actual evidence of causation. *Id.* at 66-67.

In contrast, the Third, Fourth, Fifth, and Eighth Circuits do not presume causation, but instead require plaintiffs to submit evidence that any antitrust injury was caused by the challenged conduct. For example, in *Concord Boat Corp.* v. *Brunswick Corp.*, the Eighth Circuit entered a directed verdict for defendants—on facts very similar to those here—because, among other things, the plaintiffs were unable to prove a causal connection between the alleged violations and their injuries. 207 F.3d 1039, 1060 (8th Cir. 2000).[11] The court explained that "antitrust injury, causation, and damages all are necessary parts of the proof," and it examined the evidence with that principle in mind. *Id.* at 1054-1055. To prove causation and damages, the plaintiffs offered an expert report that attempted to compare actual market conditions to the expert's estimate of what market conditions would have been but for the challenged conduct. The court rejected the expert's model because the estimated "but-for world" "failed to account for market events that both sides agreed were not related to anticompetitive conduct," including the merger of two competitors. *Id.* at 1056. The court held that the report's failure to "separate lawful from unlawful conduct" rendered it speculative, and that it accordingly could not "sustain a jury's verdict." *Id.* at 1057. Similarly, other circuits have affirmed the entry of summary judgment where a plaintiff fails to come forward with evidence of the requisite causal connection.[12]

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[11] The summary judgment standard "mirrors the standard for a directed verdict." *Anderson*, 477 U.S. at 250.

[12] *See, e.g.*, *In re Baby Food Antitrust Litig.*, 166 F.3d 112, 125 (3d Cir. 1999) ("[T]o survive summary judgment, there must be

Falling somewhere between these two lines of cases, the First, Seventh, and Ninth Circuits have followed inconsistent approaches to issues of causation arising in different contexts. These courts have at times required evidence of causation before permitting a case to proceed past summary judgment, but have also issued decisions to the contrary. The Seventh Circuit, for example, has held in the antitrust context that a plaintiff must produce evidence of causation to survive summary judgment. *See, e.g.*, *Greater Rockford Energy & Tech. Corp.* v. *Shell Oil Co.*, 998 F.2d 391, 401-404 (7th Cir. 1993) (summary judgment appropriate where numerous unchallenged economic and market factors might have caused the relevant injury rather than the challenged conduct). In contrast, in the civil RICO context, the Seventh Circuit has held that "[o]nce a plaintiff presents evidence that he suffered the sort of injury that would be the expected consequence of the defendant's wrongful conduct, he has done enough to withstand summary judgment on the ground of absence of causation." *BCS Servs., Inc.* v. *Heartwood 88, LLC*, 637 F.3d 750, 758 (7th Cir. 2011).[13] The Second Circuit re-

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evidence that the [challenged conduct] had an impact on pricing[.]"); *Abcor Corp.* v. *AM Int'l, Inc.*, 916 F.2d 924, 931 (4th Cir. 1990) (affirming grant of summary judgment; "[w]hile … profit margin may have declined, the plaintiffs have failed to show a causal link to anticompetitive activity"); *El Aguila Food Prods., Inc.* v. *Gruma Corp.*, 131 F. App'x 450, 454-455 (5th Cir. 2005) ("Though jury inferences of causation are in some instances permissible, the required causal link must be proved as a matter of fact and with a fair degree of certainty.").

[13] The statutes authorizing civil RICO suits and antitrust suits both require the plaintiff to have been injured "by reason of" the statutory violation, suggesting that the same causation standards should apply in both contexts. *Compare* 18 U.S.C. § 1964(c) ("Any person injured in his business or property *by reason of* a violation of section 1962 of this chapter may sue therefor" (empha-

lied on that holding when it adopted a presumption of causation in *Publication Paper*. 690 F.3d at 66-67. Decisions in the First and Ninth Circuits similarly run in both directions, depending on the context.[14]

II. A PRESUMPTION OF CAUSATION CONFLICTS WITH THIS COURT'S PRECEDENT

The court of appeals' presumption of causation conflicts with this Court's precedent on the summary judgment standard. A defendant need not negate the plaintiff's case to obtain summary judgment. *Celotex*, 477 U.S. at 319; *see id.* at 323. Yet by presuming causation in the absence of any evidence—a presumption that is found nowhere in substantive antitrust law and

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sis added)), *with* 15 U.S.C. § 15(a) ("any person who shall be injured in his business or property *by reason of* anything forbidden in the antitrust laws may sue therefor" (emphasis added)).

[14] *Compare, e.g., Sterling Merch., Inc.* v. *Nestlé, S.A.*, 656 F.3d 112, 122-123 (1st Cir. 2011) (affirming summary judgment for defendants; "[e]ven had [plaintiff] made an adequate showing of harms to competition … , [plaintiff] would have to show those market impairments were the result of antitrust violations"), *and In re eBay Seller Antitrust Litig.*, 433 F. App'x 504, 506 (9th Cir. 2011) (affirming summary judgment where plaintiffs' evidence failed to "connect the allegedly anticompetitive acts with the charging of supracompetitive fees"), *with In re Neurontin Mktg. & Sales Practices Litig.*, 712 F.3d 60, 68 (1st Cir. 2013) (concluding, in civil RICO case, that "'[o]nce a plaintiff presents evidence that he suffered the sort of injury that would be the expected consequence of the defendant's wrongful conduct,' the burden shifts to the defendant to rebut this causal inference"), *and Pacific Shores Props., LLC* v. *City of Newport Beach*, 730 F.3d 1142, 1168 (9th Cir. 2013) (concluding, in Fair Housing Act case, that "'[o]nce a plaintiff presents evidence that he suffered the sort of injury that would be the expected consequence of the defendant's wrongful conduct, he has done enough to withstand summary judgment on the ground of absence of causation'").

thus would not apply at trial—the court of appeals required defendants to do just that.

a. A plaintiff's evidentiary burden in opposing a motion for summary judgment turns on the substantive law governing its cause of action. *Anderson*, 477 U.S. at 248. Here, causation is an essential element of respondents' antitrust claim. Private plaintiffs seeking damages under Section 1 of the Sherman Act must demonstrate that their alleged injury was caused "by reason of" the defendant's alleged anticompetitive conduct. 15 U.S.C. § 15(a); *see also Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 126 (1969). Plaintiffs "need not exhaust all possible alternative sources of injury," but they must show that the illegality is "a material cause of the injury." *Id.* at 114 n.9; *see also Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977). Doing so requires direct or circumstantial evidence; a plaintiff cannot rely on "speculation or guesswork." *Zenith Radio Corp.*, 395 U.S. at 124. And if an injury "[i]s attributable to … other factors independent of" the challenged unlawful conduct, the plaintiff "would not have met its burden." *Id.* at 126-127; *see also Matsushita*, 475 U.S. at 585; *Brunswick Corp.*, 429 U.S. at 489.

Because causation is an element of the substantive claim, a plaintiff opposing summary judgment must produce "significantly probative" evidence "from which a reasonable juror could return a verdict in [its] favor" on that element. *Anderson*, 477 U.S. at 249-250, 256; *see Matsushita*, 475 U.S. at 586 (plaintiffs "must do more than simply show that there is some metaphysical doubt as to the material facts"). In *Matsushita*, for example, the Court held that to defeat summary judgment on the element of conspiracy, plaintiffs must come forward with evidence tending to exclude the possibil-

ity that defendants were acting independently. 475 U.S. at 588, 597-598. Because "antitrust law limits the range of permissible inferences from ambiguous evidence" in a Sherman Act § 1 case, the Court explained, evidence of conduct consistent with either conspiracy or independent action—*i.e.*, evidence that shows only the *possibility* of conspiracy—is insufficient to establish a genuine issue for trial. *Id.* at 588.

Respondents failed to produce the requisite "significantly probative" evidence here. After years of extensive discovery, respondents relied solely on their expert, Cotterill, for "evidence" of causation. But by his own admission, Cotterill could not say whether the price increase he observed was caused by conspiracy, by effects of unchallenged, merger-related changes in the structure of the market, or by other lawful, unilateral conduct. *See supra* pp. 8-10. Although Cotterill could have performed a different analysis to explore the price effects of a world in which the merger occurred but the alleged conspiracy did not, Cotterill did not investigate or show what caused the higher prices he observed.[15] Respondents thus produced no evidence of causation, and summary judgment was warranted.

b. Permitting a claim to survive summary judgment based on a presumption of causation despite the absence of actual evidence, as the court of appeals did

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[15] The court of appeals noted that Cotterill "was also charged with discerning" whether petitioners' allegedly collusive decisions "'resulted in elevated prices'" (App. 35a), and that "[a]nswering that question would expose the precise sort of injury and causation that is required, especially when [respondents] must benefit from all reasonable inferences" (App. 35a-36a). But the court ignored that Cotterill's analysis in fact did not and could not "[a]nswer[] that question" because he did not isolate any impact caused by the alleged collusion from the impact of other factors.

here, contravenes this Court's precedent and turns the summary judgment standard upside down. A moving party is not required to produce evidence "tending to *negate*" the opponent's claim. *Celotex*, 477 U.S. at 319; *see id.* at 323. Rather, where the nonmoving party bears the burden of proof on an element at trial, it is that party's obligation to produce "affirmative evidence" establishing a genuine issue of material fact. *Anderson*, 477 U.S. at 257; *see also id.* at 249-250, 256-257; *Celotex*, 477 U.S. at 323-324; *Matsushita*, 475 U.S. at 586-587. By denying summary judgment on the ground that Cotterill's analysis did "not necessarily mean" that the price increase he observed "was due to legal causes" (App. 36a), the court of appeals improperly imposed a burden on petitioners to produce evidence negating causation.

A presumption of causation also contravenes this Court's holding in *Comcast*.[16] There, the Court emphasized that "at the class-certification stage (as at trial), any model supporting a 'plaintiff's damages case must be consistent with its liability case, particularly with respect to the alleged anticompetitive effect of the violation.'" 133 S. Ct. at 1433. An expert's model must be able "to bridge the differences between supra-competitive prices in general and supra-competitive prices attributable to the [challenged conduct]." *Id.* at 1435. The same principles should apply at summary judgment. Here, as in *Comcast*, Cotterill failed to "translat[e] … the legal theory of the harmful event into an analysis of the economic impact of that event,"

[16] This Court decided *Comcast* after petitioners filed their principal brief in the court of appeals. Petitioners filed a letter under Rule 28(j) to alert the court of appeals to the decision, which respondents addressed in their reply brief. *See* Appellants' C.A. Reply 15 n.12. The court of appeals did not address the decision.

id.—*i.e.*, the alleged conspiracy. Instead, as in *Comcast*, Cotterill's model reflected not only the merger, but also alternative theories of liability based on alleged unilateral conduct that the district court had rejected and respondents did not appeal. *Supra* p. 10 & n.2. His model was therefore useless for purposes of establishing causation. The court of appeals nevertheless excused this gap in the evidence by effectively presuming causation based solely on disputed evidence of conspiracy and evidence of higher prices, contrary to *Comcast*.

Finally, presuming causation for purposes of summary judgment cannot be justified by resort to general "'reluctan[ce] to use summary judgment dispositions in antitrust actions.'" App. 6a. Like other circuits that treat summary judgment as "disfavored," *supra* p. 16 & n.7, the court of appeals invoked that "'reluctan[ce]'" in reliance on a line of circuit precedent tracing back to this Court's long-discarded dicta in *Poller*, 368 U.S. at 473. App. 6a. But this Court has rejected the view that summary judgment is "disfavored" and made clear that a plaintiff's "complete failure of proof concerning an essential element of [the plaintiff's] case necessarily renders all other facts immaterial" and "mandates the entry of summary judgment." *Celotex*, 477 U.S. at 322. That principle precludes any presumption of causation and should have led the court of appeals to affirm the grant of summary judgment in this case.

c. Respondents' arguments below do not justify the result. In the court of appeals, respondents acknowledged that they could not "blindly ascribe all price increases to unlawful conduct." Appellants' C.A. Reply 8. But they then argued that "[a]ll that is necessary to avoid summary judgment is a showing of 'some admissible evidence that higher prices during the peri-

od of the alleged conspiracy cannot be fully explained by causes consistent with active competition.'" *Id.* (quoting *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 660 (7th Cir. 2002)). The antitrust laws, however, require a plaintiff to show that the challenged conduct is "a material cause of the injury." *Zenith Radio Corp.*, 395 U.S. at 114 n.9. Accordingly, whether the plaintiff seeks to do so by using "'direct and positive proof'" or by supporting an inference with circumstantial evidence, *id.* at 124 (quoting *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251, 264-265 (1946)), Rule 56 requires the plaintiff to come forward with that evidence to show that there is a genuine issue for trial, *Anderson*, 477 U.S. at 256-257. Assuming that 7.9% of the observed price increase must have been caused by the challenged conspiracy simply because Cotterill's model could not attribute it to market forces does not meet that requirement.

In the alternative, respondents argued as a matter of substantive antitrust law that their evidence of higher prices and their evidence of conspiracy—which had barely survived summary judgment even as to that element, *supra* p. 7—sufficed to support an inference of causation. *See* Appellants' C.A. Br. 35-36; Appellants' C.A. Reply 11, 13-14. "Given th[e] evidence" of conspiracy, respondents contended, it was no "leap of faith" for Cotterill to conclude that any price increase he could not attribute to market factors must have been caused by the alleged conspiracy. *Id.* at 13. But even where evidence of conspiracy exists, plaintiffs must prove causation at trial and therefore must create a genuine issue of fact as to causation to defeat a motion for summary judgment. *See Celotex*, 477 U.S. at 322; *see also, e.g.*, *Todorov* v. *DCA Healthcare Auth.*, 921 F.2d 1438, 1459 (11th Cir. 1991) (defendants are "not

liable under section 1, even if they conspired," where a plaintiff fails to "show that the defendants caused the alleged injury").

As this Court's decision in *Zenith* confirms, that is so even when the injury plaintiffs allege (here, higher prices) is the type of injury one would expect the alleged conspiracy to cause. There, Zenith alleged a conspiracy between the defendants and patent pools in three countries, in which the conspirators refused to license certain patents in an effort to exclude competitors from their markets. 395 U.S. at 105. This Court did not disturb the lower courts' findings of a conspiracy with respect to each market. *Id.* at 113 n.8, 132 n.26. And Zenith claimed the same injury—lost profits based on diminished market shares—with respect to each market. *Id.* at 106 n.1, 116 n.11. The Court nonetheless held that, with respect to two of the markets, Zenith had not proven damages caused by reason of the conspiracy as opposed to other possible explanations. *Id.* at 125-129. Thus, no presumption of causation saved Zenith's claims at trial in that case. Under this Court's summary judgment precedent, it should follow that no presumption of causation can relieve a plaintiff of its evidentiary burden at summary judgment.

III. Lax Enforcement Of The Summary Judgment Standard Has Significant Negative Consequences

Litigation of antitrust and other complex civil claims is frequently "a sprawling, costly, and hugely time-consuming undertaking." *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 560 n.6 (2007). Summary judgment plays a critical, and often final, gatekeeping role in limiting those costs. *See Matsushita*, 475 U.S. at 594. As one court has observed, "'[t]he ultimate deter-

mination, after trial, that an antitrust claim is unfounded may come too late to guard against the evils that occur along the way.'" *Valley Liquors, Inc.* v. *Renfield Imps., Ltd.*, 822 F.2d 656, 660 n.4 (7th Cir. 1987). Rule 56 is thus the "principal tool[]" for preventing "factually insufficient claims … from going to trial with the attendant unwarranted consumption of public and private resources." *Celotex*, 477 U.S. at 327; *see id.* at 323-324. Permitting factually insufficient claims to proceed to trial by presuming causation in the absence of evidence eliminates that gatekeeping function, imposing significant burdens on both litigants and the judiciary.

As discussed, although the lower courts are generally consistent in reciting the summary judgment standard properly, significant conflict persists about the proper application of that standard. *Supra* pp. 14-18 & nn.7-8. Despite broad acknowledgment that this Court "pave[d] the way toward mainstream acceptance of the summary judgment procedure with its trilogy" in 1986, *Rand* v. *Rowland*, 154 F.3d 952, 956-957 (9th Cir. 1998), courts in practice "more widely ignore than honor" the "analytical framework so elaborately set forth" by this Court, Mullenix, 43 Loy. Univ. Chi. L.J. at 568. As a result, as recent studies reveal, the 1986 trilogy has had "scant impact" on lower courts' use of the summary judgment procedure. *Id.* at 561; *see* Eisenberg & Lanvers, *Summary Judgment Rates Over Time, Across Case Categories, and Across Districts: An Empirical Study of Three Large Federal Districts*, at 19 (Cornell Law Sch. Legal Studies Research Paper Series, Paper No. 08-022, 2008) (finding "no evidence of a broad-based increase in summary judgment rates after the Supreme Court's 1986 trilogy"), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1138373.

The court of appeals' decision here illustrates the problem. By permitting a claim with "no factual basis" supporting a key element to proceed to trial, the court's approach gives rise to the "attendant unwarranted consumption of public and private resources" that this Court sought to prevent in *Celotex*, 477 U.S. at 327. Allowing a factually insufficient claim to survive summary judgment based on a presumption of causation burdens litigants and courts with "'a great deal of expensive and time consuming … trial work,'" *Valley Liquors, Inc.*, 822 F.2d at 659 n.4. Moreover, such an approach, when combined with the availability of treble damages, increases the leverage of plaintiffs with meritless claims in settlement negotiations. *See id.* ("'the statutory private antitrust remedy of treble damages affords a special temptation for the institution of vexatious litigation'"); *see also* Hovenkamp, *The Antitrust Enterprise: Principle and Execution* 59 (2005) ("many marginal and even frivolous antitrust cases are filed every year, and antitrust litigation is often used as a bargaining chip").

Presuming causation at summary judgment also presents risks for jury decisionmaking at trial. "The problems with jury decisionmaking in technical areas have been well documented, especially in the antitrust context." Haw, *Adversarial Economics in Antitrust Litigation: Losing Academic Consensus in the Battle of Experts*, 106 Nw. U. L. Rev. 1261, 1293 (2012). The court's approach here heightens the likelihood that juries will presume causation at trial when presented with an expert's report showing only higher prices—a prospect that "introduce[s] considerable risk into all business decisions." Easterbrook, *On Identifying Exclusionary Conduct*, 61 Notre Dame L. Rev. 972, 979 (1986).

Finally, unless resolved by this Court, the divergent approaches to summary judgment in the lower courts could lead to "unfortunate dynamic consequences that undermine the effectiveness of the antitrust laws." Epstein, 25 Wash. U. J.L. & Pol'y at 95. Plaintiffs will often be able to fashion their complaints to avoid certain circuits and flock to others, like the Sixth, that apply more permissive summary judgment standards, leading to forum-shopping and inconsistent decisions. *See id.* "Setting the bar too low"—as the Sixth Circuit's decision does—"raises the direct prospect of opening a set of floodgates that should be tightly fastened." *Id.*

Faced with similar uncertainty, this Court has found it appropriate to model the proper application of the standards governing two critical stages of the pretrial sequence. In *Twombly* and *Comcast*, the Court underscored the importance of rigorous enforcement of the standards governing pleading and class certification in antitrust and other civil cases.

In *Twombly*, the Court held that, at the pleading stage, antitrust plaintiffs must make factual allegations that would plausibly establish their right to relief. *See* 550 U.S. at 555-557; *see also Ashcroft* v. *Iqbal*, 556 U.S. 662, 679 (2009) ("[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'—'that the pleader is entitled to relief.'"). Recognizing the costs of an overly lax application of this standard, the Court emphasized the importance of "hedg[ing] against false inferences" in antitrust cases, and reiterated *Matsushita*'s requirement that "proof of a § 1 conspiracy must include evidence *tending to exclude* the possibility of independent action." 550 U.S. at 553 (emphasis added); *see id.* at 553-554, 557; *see also*

Iqbal, 556 U.S. at 684 (affirming that *Twombly* "expounded the pleading standard for 'all civil actions'").

Shortly thereafter, the Court stepped in to demonstrate the proper application of the Rule 23 class-certification standard and to emphasize the importance of "'rigorous analysis'" at that stage. *Comcast*, 133 S. Ct. at 1432; *see also Wal-Mart Stores, Inc.* v. *Dukes*, 131 S. Ct. 2541, 2551 (2011). Rule 23, the Court made clear, sets forth "'no mere pleading standard"; rather, plaintiffs must "'prove … *in fact*'" that the requirements of the rule have been satisfied. *Comcast*, 133 S. Ct. at 1432 (quoting *Wal-Mart Stores*, 131 S. Ct. at 2551). *Comcast*, moreover, established that an expert's "model purporting to serve as evidence of damages in [a] class action must measure only those damages attributable to that theory." *Id.* at 1433. "If the model does not even attempt to do that, it cannot possibly" satisfy Rule 23. *Id.*

There is a similar need for the Court's intervention here. Given the disagreement and confusion that characterizes the lower courts' application of the summary judgment standard, the error in the court of appeals' approach below, and the pernicious consequences of a presumption of causation that allows factually insufficient claims to proceed to trial, the Court should grant review as it did in *Twombly* and *Comcast* to clarify and apply the summary judgment standard.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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AUGUST 2014

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

IN RE: SOUTHEASTERN MILK ANTITRUST LITIGATION

FOOD LION, LLC and FIDEL BRETO, on behalf of himself and all others similarly situated,
Plaintiffs-Appellants,
v.

DEAN FOODS COMPANY, NATIONAL DAIRY HOLDINGS, L.P., DAIRY FARMERS OF AMERICA, INC., DAIRY MARKETING SERVICES, LLC, and SOUTHERN MARKETING AGENCY, INC.,
Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Tennessee at Greeneville.
Nos. 2:07-cv-00188; 2:08-md-01000—J. Ronnie Greer, District Judge

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No. 12-5457
Argued: July 25, 2013
Decided and Filed: January 3, 2014

Before: ROGERS and COOK, Circuit Judges; VAN TATENHOVE, District Judge.*

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* The Honorable Gregory F. Van Tatenhove, United States District Judge for the Eastern District of Kentucky, sitting by designation.

OPINION

GREGORY F. VAN TATENHOVE, District Judge. Dean Foods Company and Suiza Foods Corporation were the two largest processed milk bottlers in the country in 2001. At that time, they announced plans to merge their operations, which the Department of Justice approved subject to divestment of particular milk processing plants. The merged company, now known as Dean Foods, is accused of violating 15 U.S.C. § 1 of the Sherman Antitrust Act by conspiring with a raw milk supplier/milk processor and the purchaser of the divested processing facilities to divide markets and restrict output. The district court granted summary judgment for Defendants, ruling that Plaintiffs could not provide sufficient proof of injury, nor could they establish the relevant antitrust geographic market, primarily because their expert's testimony was excluded. Two retailers of processed milk, Food Lion LLC and Fidel Breto, appeal both of these conclusions. For the following reasons, we **REVERSE** and **REMAND**.

I

A

Prior to 2001, Dean Foods Company and Suiza Foods Corporation competed to process and sell bottled milk to retailers. Suiza was the largest processor of milk in the United States, and Dean Foods was the second largest. Both processors purchased their raw milk from other entities. Dairy Farmers of America ("DFA"), a dairy farmer cooperative, was Suiza's primary supplier and business partner, owning almost 34% of Suiza Dairy Group, which was a subsidiary of

Suiza's. Dean Foods obtained its raw milk predominantly from independent farmers.

Dean Foods and Suiza merged in 2001 under the name Dean Foods, hoping to obtain "distribution efficiencies and economies of scale," which would result in millions of dollars in cost savings. As they began consolidating, certain agreements were negotiated, with input from the Department of Justice, to avoid antitrust problems. To secure financing for the merger, Suiza purchased DFA's ownership interest in exchange for cash, six dairy processing plants, and two contractual provisions related to DFA's ability to provide raw milk to the merging companies' processing plants. One provision promised DFA a specific sum of money if its supply contracts for plants previously owned by Suiza were terminated within twenty years. The other provision stipulated that Dean Foods would owe DFA liquidated damages if DFA were not provided an opportunity to supply raw milk for the plants Dean Foods owned prior to the merger.

The six processing plants that DFA received from Suiza were quickly transferred to a newly formed partnership called National Dairy Holdings ("NDH"), which DFA partly owned. NDH was formed to compete with Dean Foods, and after it added five more processing plants Dean Foods divested, it became the second largest milk bottler in the southeast. NDH had four owners. Two owners were former Suiza executives, and one was a former business partner of DFA's chief executive officer. Together, they owned a 50% equity interest. DFA owned the other 50% equity interest, and it possessed the power to "veto any agreement that would substantially affect the operation of NDH, contracts, or capital expenditures greater than $50,000, and the acquisition, expansion or disposal of NDH's fa-

cilities." The Department of Justice's Antitrust Division approved NDH's purchase and operation of the eleven plants.

These facts set the stage for the illegal conspiracy that Food Lion and Fidel Breto ("Plaintiffs"), two retailers of processed milk, have alleged — a conspiracy in which DFA serves as the keystone. With NDH as Dean Foods' largest competitor, it would stand to reason that if NDH were weakened, Dean Foods would enjoy a stronger position in the marketplace for selling processed milk. Although DFA's ownership stake provides an obvious incentive to fully support NDH's fledgling enterprise, DFA's raw milk supply agreements with the merged company create fertile soil for the development of a conflict of interest. Supported by several disputed factual allegations, the essence of Plaintiffs' conspiracy claim is as follows:

> NDH knowingly accepted 'second best' plants, operated those plants at losses and eventually shuttered some of those plants in an unlawful agreement with its competitor Dean/Suiza because, in return, its parent company, DFA, received a commitment from Dean/Suiza to allow it to supply raw milk to each Dean/Suiza bottling plant, including the premerger Dean plants previously supplied by independent dairy farmers.

[Appellant Br. at 15.]

B

The Plaintiffs originally brought suit in the district court based on five claims, alleging violations of Sections 1 and 2 of the Sherman Antitrust Act and Section 3 of the Clayton Act. The district court granted sum-

mary judgment to the Defendants on Counts II, III, and IV, but denied summary judgment on Counts I and V. After the close of discovery, the Defendants again moved for summary judgment on several additional grounds that had not been raised previously. The district court found the additional arguments Defendants raised to be convincing and granted summary judgment in favor of Defendants on Counts I and V, ruling that the Plaintiffs failed to meet the requirements for establishing an antitrust violation under Section 1 of the Sherman Antitrust Act. Plaintiffs now appeal the district court's ruling on Count I.

In Count I, the Plaintiffs allege that the Defendants engaged in a conspiracy not to compete, in violation of 15 U.S.C. § 1. For a plaintiff to successfully bring an antitrust claim under Section 1 of the Sherman Act, the plaintiff must establish that the defendant's actions constituted an unreasonable restraint of trade which caused the plaintiff to experience an antitrust injury. *Expert Masonry, Inc. v. Boone County, Kentucky*, 440 F.3d 336, 342 (6th Cir. 2006) (quoting *Crane & Shovel Sales Corp. v. Bucyrus-Erie Co.*, 854 F.2d 802, 805 (6th Cir. 1988)). In its second summary judgment opinion, the district court found that: 1) Plaintiffs failed to establish that the restraint on trade was unreasonable, largely because the court excluded the testimony of Plaintiffs' expert; and 2) that Plaintiffs failed to establish the requisite element of injury. *In re Southeastern Milk Antitrust Litig.*, 2:08-MD-1000, 2012 WL 1032797, at *6, 12 (E.D. Tenn. Mar. 27, 2012). Those decisions are the subject of this review.

II

This Court reviews the district court's grant of summary judgment *de novo*. Yet it must be mindful

that "[i]n this circuit, courts are generally reluctant to use summary judgment dispositions in antitrust actions due to the critical 'role that intent and motive have in antitrust claims and the difficulty of proving conspiracy by means other than factual inference.'" *Expert Masonry, Inc. v. Boone County, Kentucky*, 440 F.3d 336, 341(6th Cir. 2006) (quoting *Smith v. N. Mich. Hosp., Inc.*, 703 F.2d 942, 947 (6th Cir. 1983)).

A

Unfortunately, there is no general agreement on the exact standards to use when resolving antitrust cases. As much as we might wish that a precise process with clear elements existed, antitrust cases in this circuit, and in others, apply various approaches to adjudicating antitrust claims. There are some areas of consensus, however. A good starting point is the statute itself. Section 1 of the Sherman Act states that "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1. The plaintiffs must first show, therefore, that an agreement between two or more economic entities exists since unilateral conduct would not violate this statute. *Nat'l Hockey League Players Ass'n v. Plymouth Whalers Hockey Club*, 419 F.3d 462, 469 (6th Cir. 2005).

Next, because nearly every agreement between parties could be considered a restraint of trade, the Supreme Court has limited Section 1 to apply only to "unreasonable" restraints of trade. *Nat'l Hockey League Players*, 419 F.3d at 469 (citing *Nat'l Collegiate Athletic Ass'n v. Board of Regents of Univ. of Okla.*, 468 U.S. 85, 98 (1984)). Whether the restraint is "unreasonable" is determined by one of two approaches — either the

per se rule or the "rule of reason." *Id.* at 469; *Care Heating & Cooling, Inc. v. American Standard, Inc.*, 427 F.3d 1008, 1012 (6th Cir. 2005). If the rule of reason is used, plaintiffs must additionally show that the restraint produced anticompetitive effects within the relevant product and geographic markets, while the *per se* rule is reserved for restraints that are so clearly unreasonable that their anticompetitive effects within geographic and product markets are inferred. *Expert Masonry*, 440 F.3d at 342-43. Finally, regardless of which approach is used, the plaintiff must also establish that the illegal conspiracy caused injury to the plaintiff. *Id.* at 342, 345 (quoting *Crane & Shovel Sales Corp. v. Bucyrus-Erie Co.*, 854 F.2d 802, 805 (6th Cir. 1988)); *see also In re Cardizem CD Antitrust Litigation*, 332 F.3d 896, 909 n.15 (6th Cir. 2003) (noting that the *per se* rule does not negate the need for plaintiffs to establish antitrust injury).

In the case at hand, the parties do not contest the first required element — the existence of a conspiracy. The district court found enough evidence of a conspiracy for Plaintiffs to persist past summary judgment on that element of their § 1 claim, and accordingly, that issue is not challenged here. The dispute instead centers on whether the district court erred in applying the rule of reason instead of the *per se* rule. Even if the conspiracy at issue is not a *per se* violation, Plaintiffs maintain that proof of a geographic market was unnecessary, and thus contest the district court's finding that they failed to provide sufficient evidence of an appropriate geographic market. Finally, the parties also dispute the district court's finding that Plaintiffs have not provided sufficient evidence of antitrust injury.

B

As explained above, the Plaintiffs must present evidence showing that the Defendants' agreement "unreasonably restrains trade" in order to satisfy the second requirement of an antitrust claim. *Re/Max Intern., Inc. v. Realty One, Inc.*, 173 F.3d 995, 1012 (6th Cir. 1999). In the case at hand, the district court applied the rule of reason to determine whether the alleged restraint was unreasonable, a decision which Plaintiffs now contest. The district court's decision to use the rule of reason is a question of law, *see Expert Masonry*, 440 F.3d at 342, which we review *de novo*. *See Associated Gen. Contractors of Ohio, Inc. v. Drabik*, 250 F.3d 482, 484 (6th Cir. 2001) (citation omitted).

1

A restraint may be deemed unreasonable "either because it fits within a class of restraints that has been held to be 'per se' unreasonable, or because it violates what has come to be known as the 'Rule of Reason.'" *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 457-58 (1986) (quoting *Chicago Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918)). The less common method of determining whether the restraint is unreasonable is the *per se* rule. "Certain agreements, such as horizontal price fixing and market allocation, are thought so inherently anticompetitive that each is illegal *per se* without inquiry into the harm it has actually caused." *In re Cardizem CD*, 332 F.3d at 907 (quoting *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768 (1984)). The *per se* rule should only be used when the restraint has "such predictable and pernicious anticompetitive effect," that there is "limited potential for procompetitive benefit." *Id.* (quoting *State Oil Co.*, 522 U.S. at 10). Once applied, "no consideration is given to

the intent behind the restraint, to any claimed procompetitive justifications, or to the restraint's actual effect on competition." *Id.* at 906-07 (quoting *Nat'l College Athletic Ass'n v. Board of Regents*, 468 U.S. 85, 100 (1984)). Applying this standard, then, should be done reluctantly and infrequently, informed by other courts' review of the same type of restraint, and only when the rule of reason would likely justify the same result. *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877, 886-87 (2007) (citations omitted); *see also Nat'l Hockey League Players*, 325 F.3d at 718-19 (cautioning that the Supreme Court has described the *per se* rule as a "demanding" rule that should be applied "only in clear cut cases") (citations omitted).

Unless the restraint falls squarely into a *per se* category, the rule of reason should be used instead. *Expert Masonry*, 440 F.3d at 343. Unlike the *per se* rule, the rule of reason utilizes a burden-shifting framework that allows the court to "analyze the history of the restraint and the restraint's effect on competition." *Nat'l Hockey League Players*, 325 F.3d at 718. First, the plaintiff must establish a *prima facie* case by showing five elements: (1) a conspiracy (2) that produced anticompetitive effects; (3) that the scheme "affected relevant product and geographic markets"; (4) that the conspiracy's goal and related conduct was illegal; (5) and that the restraint was the proximate cause of the plaintiff's antitrust injury. *Expert Masonry*, 440 F.3d at 343 (citing *Care Heating & Cooling*, 427 F.3d at 1014). If a plaintiff passes over these hurdles, the burden then shifts to the defendant to produce evidence that the restraint in question has "procompetitive effects" that are sufficient "to justfi[y] the otherwise anticompetitive injuries." *Expert Masonry*, 440 F.3d at 343 (quoting *Nat'l Hockey League Players*, 325 F.3d at 718). Final-

ly, if the defendant meets this burden, the plaintiff may still prevail by showing that "any legitimate objectives can be achieved in a substantially less restrictive manner." *Id.* (quoting *Nat'l Hockey League Players*, 325 F.3d at 718) (quotation marks omitted).

When determining whether to use the *per se* rule or the rule of reason, courts must consider the type of restraint at issue — whether it is horizontal or vertical. *Expert Masonry*, 440 F.3d at 344. An agreement "between competitors at the same level of the market structure" is horizontal. *Sancap Abrasives Corp. v. Swiss Indus. Abrasives*, 19 F. App'x 181, 191 (6th Cir. 2001) (quoting *Crane & Shovel Sales Corp. v. Bucyrus-Erie Co.*, 854 F.2d 802, 805-06 (6th Cir. 1988)). Horizontal restraints are considered to be more threatening, and thus result in *per se* treatment more regularly. *See Expert Masonry*, 440 F.3d at 344 (citing examples from cases). Vertical restraints — agreements between parties "at different levels of the market structure, such as manufacturers and distributors"— have more redeeming qualities (e.g., allowing for distribution efficiencies) and are subjected to the rule of reason. *Total Benefits Planning Agency, Inc. v. Anthem Blue Cross & Blue Shield*, 552 F.3d 430, 435 (6th Cir. 2008) (quoting *Leegin Creative Leather Products*, 551 U.S. 877); *see also Expert Masonry*, 440 F.3d at 344-45.

2

After careful consideration, the district court concluded that the agreement at issue in this case should be scrutinized under the rule of reason because "the essence of the agreement alleged by the Plaintiffs is one between Dean in its role as a processor of bottled milk and DFA in its role as a supplier of raw milk, and that the [ ] supply agreements for raw milk are central to

the completion of the alleged conspiracy." *In re Southeastern Milk Antitrust Litig.*, 2012 WL 1032797, at *12. The "substantial vertical elements" were too significant for the district court to agree with Plaintiffs that the essence of the conspiracy was horizontal. [*Id.*]

Plaintiffs have previously characterized the conspiracy as a complex relationship among DFA, Dean Foods, and NDH. That arrangement, however, necessarily involves vertical elements in the relationship between DFA and Dean Foods. Yet now on appeal, Plaintiffs contend that the conspiracy is much simpler than previously alleged, and urge this Court to find that Defendants have committed a *per se* violation of the Sherman Act. In support of this contention, Plaintiffs reassert that the Defendants' agreement is horizontal, arguing that "the conspiracy here is the agreement between Dean/Suiza and NDH not to compete." This argument, however, is unavailing. Plaintiffs should not be able to change their characterization of the conspiracy midstream in order to gain a more favorable outcome.

Plaintiffs concede that the reason NDH would agree to weaken itself is unclear until NDH's ownership structure is disclosed. Plaintiffs explain that NDH conspired with Dean Foods only because DFA owned and controlled NDH, and because the conspiracy served DFA's purposes. Assuming Plaintiffs' theory of their injury is true, they suffered harm because of the result from the agreement between Dean Foods and DFA. The conspiracy's effect on the plaintiff, however, is not the sole means of determining whether a restraint is horizontal or vertical. The agreement which causes the effect is determinative. *See Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 730 n.4 (1988). For example, "a facially vertical restraint imposed by a manufacturer only because it has

been coerced by a 'horizontal cartel' agreement among his distributors is in reality a horizontal restraint." *Id.* In this case, the agreement was between Dean Foods and DFA — Dean Foods agreed to buy the raw milk it needed from DFA, thus creating a vertical relationship, in exchange for DFA's hampering NDH's ability to effectively compete.

Plaintiffs' explanation that NDH acted as it did because of a horizontal agreement between Dean Foods and NDH has no logical basis because such an arrangement would present an agreement whereby Dean Foods simply benefits and NDH is harmed. Rather, DFA is the *sine qua non* for this conspiracy; NDH would compete but for DFA and the non-price restrictions it allegedly imposed on NDH.

"Courts cannot act perfunctorily when distinguishing restraints that merit a *per se* approach from those that deserve rule of reason analysis," and the court may apply the *per se* rule "only if a restraint clearly and unquestionably falls within one of the handful of categories that have been collectively deemed *per se* anticompetitive." *Expert Masonry*, 440 F.3d 336, 343-44. Here, Plaintiffs have not alleged facts that would place this situation into one of those limited categories. Rather, the restraint at issue appears to involve a vertical relationship, thus requiring the Court to apply the rule of reason. *See Care Heating*, 427 F.3d at 1013-14.

Moreover, even if the agreement is horizontal in the way Plaintiffs now claim, applying the rule of reason is the default position and can be applied to horizontal restraints as well if they do not fit into existing categories of *per se* violations. *E.g.*, *F.T.C. v. Indiana Fed'n of Dentists*, 476 U.S. at 458-59 (applying the rule of reason to a horizontal agreement where "the eco-

nomic impact" of a business practice was "not immediately obvious"). Indeed, the Sixth Circuit has an "automatic presumption in favor of the rule of reason standard," *Care Heating*, 427 F.3d at 1012 (citing *Bus. Elecs. Corp.*, 485 U.S. at 726), while the *per se* rule is reserved only for those infrequent occasions of "clear cut cases" in which the trade restraint is "so unreasonably anticompetitive that they present straightforward questions for reviewing courts." *Id.* at 1012.

Finally, summary judgment is only appropriate when there are no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-25 (1986). Here, when considering the allegations contained in the parties' briefs, it appears that a factual dispute exists as to the exact nature of the conspiracy, and as to whether it was obviously anticompetitive. For instance, the Defendants have produced evidence that the agreement at issue may have had procompetitive aspects, which would indicate that this situation would not fall into the categories of *per se* unreasonable restraints on trade. [*E.g.*, Appellee Br. at 42 n.16 (presenting evidence that plant closures reduced costs and rationalized assets, resulting in cost savings).] Another factual dispute exists as to whether NDH was truly weakened due to the agreement between Dean Foods and DFA. [Appellee Br. at 12-13 (referencing evidence of active competition between Dean and NDH after the merger)]. Depending on the situation, full supply contracts such as those involved in this case "may well be of economic advantage to buyers as well as to sellers, and thus indirectly of advantage to the consuming public." *Standard Oil Co. v. United States*, 337 U.S. 293, 306 (1949). Additionally, the Department of Justice fully reviewed and sanctioned the

agreement at issue here, which presumably would not have occurred if the agreement was a *per se* unreasonable restraint on trade. Therefore, especially at the summary judgment stage, this is not a "clear cut" case of an obviously anticompetitive trade restraint, and thus the district court was correct to apply the default standard of the rule of reason.

3

As explained above, when applying the rule of reason analysis, plaintiffs generally must establish the effect on the relevant geographic and product markets. However, courts have recently begun to view the rule of reason in a broader manner in certain cases. Plaintiffs contend that even if the Court applies the rule of reason to their case, under the so-called "quick look" rule of reason analysis, they still should not be required to prove geographic market because the adverse market effects are implied by the obvious violation of the Defendants. Once the district court decided that the rule of reason applied, it granted summary judgment to the Defendants, without addressing whether a quick-look analysis might be appropriate. "[T]he alleged agreements challenged by Plaintiffs ought to be subject to the rule of reason analysis, requiring that Plaintiffs establish the relevant geographic antitrust market, something they cannot do. For this reason, Defendants are entitled to summary judgment as to Count I of Plaintiffs' complaint." *In re Southeastern Milk Antitrust Litig.*, 2012 WL 1032797, at *12. Plaintiffs submit that this simple logic equation overlooks the recent deterioration of clearly defined types of market analyses in favor of a more case-by-case approach. *Realcomp II, Ltd. v. FTC*, 635 F.3d 815, 826 (6th Cir. 2011) ("The Court has moved away from … reliance upon fixed categories and toward a continuum, within which the ex-

tent of the inquiry is tailored to the suspect conduct in each particular case.") (quoting *Polygram Holding, Inc. v. FTC*, 416 F.3d 29, 34-34 (D.C. Cir. 2005)) (internal quotation marks omitted).

This Court has characterized "quick look" analysis as a third type of category arising from the blurring of the line between *per se* and rule of reason cases. *See Expert Masonry*, 440 F.3d at 343. This less-rigid approach aligns with the Supreme Court's recognition of the value of the "quick look" approach as an abbreviated form of the rule of reason analysis used for situations in which "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets." *Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 770 (1999). Applying this test is useful when the anticompetitive nature of an agreement is so blatant that a detailed review of the surrounding marketplace would be unnecessary. *Id.* at 769-70. In the same way that this analysis occupies territory between the *per se* and rule of reason tests, so the burdens and presumptions do as well. Once anticompetitive behavior is shown to a court's satisfaction, even without detailed market analysis, the burden shifts to the defendant who must justify the agreement at issue on procompetitive grounds by providing some "competitive justification" for the restraint at issue. *Realcomp*, 635 F.3d at 825.

Whatever tool is used to judge an agreement, "the essential inquiry remains the same — whether or not the challenged restraint enhances competition." *Cal. Dental Ass'n*, 526 U.S. at 780 (quoting *Nat'l College Athletic Ass'n*, 468 U.S. at 104).

> [T]here is generally no categorical line to be drawn between restraints that give rise to an intuitively obvious inference of anticompetitive effect and those that call for more detailed treatment. What is required, rather, is an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint. The object is to see whether the experience of the market has been so clear, or necessarily will be, that a confident conclusion about the principal tendency of a restriction will follow from a quick (or at least quicker) look, in place of a more sedulous one.

Cal. Dental Ass'n, 526 U.S. at 780-81.

Here, using the quick-look analysis, Plaintiffs do not necessarily need to show geographic market evidence to defeat summary judgment. The district court did not distinguish between the two types of rule of reason analysis as explained above — the full rule of reason analysis and the quick-look form of analysis. *See Cal. Dental Ass'n*, 526 U.S. at 769-70. Under the quick-look standard, the Plaintiffs have met their burden of raising a genuine issue of material fact as to whether Dean Foods violated the antitrust laws even without establishing the relevant geographic market. In applying the summary judgment standard, the Court must review the facts and draw all reasonable inferences in favor of the non-moving party. *Logan v. Denny's, Inc.*, 259 F.3d 558, 566 (6th Cir. 2001) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986)). Accordingly, when construing the facts and record evidence in Plaintiffs' favor, the alleged unlawful conduct has obviously adverse, anticompetitive effects; and for purposes of summary judgment, the district court should have at least considered the fact that a more detailed market

analysis may not have been required under these circumstances. *See Realcomp*, 635 F.3d at 825. While it is true that the vertical elements of the Defendants' agreement require a rule of reason analysis, the agreement between the horizontal competitors for the express purpose of limiting competition between them could be viewed as a "facially anticompetitive restraint," and the district court should consider this possibility on remand. *Realcomp*, 635 F.3d at 827. Even though Dean Foods' alleged conduct is not illegal *per se*, the evidence in the record and the allegations in Plaintiffs' complaint are sufficient to shift the burden to Dean Foods to present some procompetitive benefits of the alleged conduct. *See Expert Masonry*, 440 F.3d at 343.

C

Under a quick-look analysis, the Plaintiffs do not necessarily need to establish either product or geographic[1] market evidence in order to defeat summary judgment. In that event, the exclusion of their expert's testimony would no longer be relevant. However, the district court may yet determine that a full rule of reason analysis is still required, in which case Plaintiffs would not be able to establish the relevant market apart from the testimony of Professor Froeb, whose testimony was excluded by the district court. Thus, on remand, Professor Froeb's testimony about geographic market may yet return to prominence, and therefore we review the decision to exclude it.

In applying the rule of reason to the case at hand, the district court required the Plaintiffs to establish and define the relevant geographic market, but also held that Plaintiffs' expert witness, Professor Luke

[1] The definition of product market is not at issue on appeal.

Froeb, formed his opinion concerning geographic market by using an unreliable method. *In re Southeastern Milk Antitrust Litig.*, 2012 WL 1032797, at *12. As a result, Plaintiffs lacked a required element of a rule-of-reason claim, and Defendants were granted summary judgment. *Id.* Plaintiffs contend that the exclusion of Froeb's testimony was improper.

The district court's decision to exclude Froeb under the standard required by *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993), is reviewed for abuse of discretion. *Ky. Speedway, LLC v. Nat'l Ass'n of Stock Car Auto Racing*, 588 F.3d 908, 915 (6th Cir. 2009). "A district court abuses its discretion when it 'applies the wrong legal standard, misapplies the correct legal standard, or relies on clearly erroneous findings of fact.'" *Romberio v. UnumProvident Corp.*, 385 F. App'x 423, 428 (6th Cir. 2009) (quoting *Schachner v. Blue Cross & Blue Shield of Ohio*, 77 F.3d 889, 895 (6th Cir. 1996)). This Court will not find an abuse of discretion unless it has a 'definite and firm conviction that the trial court committed a clear error of judgment.'" *Id.* (quoting *Miami Univ. Wrestling Club v. Miami Univ.*, 302 F.3d 608, 613 (6th Cir. 2002)). This issue was clearly appealed and briefed extensively, and for the reasons explained below the district court should not have excluded Froeb's testimony. *See Ky. Speedway*, 588 F.3d at 918.

1

Admissibility of expert testimony is governed by Federal Rule of Evidence 702[2] and informed by the

[2] "A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: **(a)** the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; **(b)** the testimony is

seminal case applying Rule 702, *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). In *Daubert*, the Supreme Court explained that "[u]nlike an ordinary witness … an expert is permitted wide latitude to offer opinions, including those that are not based on firsthand knowledge or observation." *Daubert*, 509 U.S. at 593. The Supreme Court also recognized that implicit in the rule is a district court's gatekeeping responsibility, "ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand." *Id.* at 597.

Geographic market is defined as "the region in which the seller operates, and to which the purchaser can practicably turn for supplies." *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 327 (1965); *see E.I. DuPont de Nemours & Comp. v. Kolon Indus., Inc.*, 637 F.3d 435, 442 n.2 (4th Cir. 2011) (explaining that this standard applies to § 1 Sherman Act claims); *see also Spirit Airlines, Inc. v. Northwest Airlines, Inc.*, 431 F.3d 917, 932-33 (6th Cir. 2005). Outlining a geographic market entails mapping an area "within which the defendant's customers who are affected by the challenged practice can practicably turn to alternative suppliers if the defendant were to raise its prices or restrict its output." *Kolon Indus.*, 637 F.3d at 441-42 (citations omitted). This process is fact-intensive and focused on the "commercial realities of the industry." *Brown Shoe Co. v. United States*, 370 U.S. 294, 336 (1962). These include considerations of areas where products are marketed, or where the defendant per-

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based on sufficient facts or data; **(c)** the testimony is the product of reliable principles and methods; and **(d)** the expert has reliably applied the principles and methods to the facts of the case." Fed. R. Evid. 702.

ceives that it is competing; any applicable regulatory standards; transportation costs and challenges such as risk of spoilage, size, or weight; and "other factors bearing upon where customers might realistically look to buy the product." *Kolon Indus.*, 637 F.3d at 442-43 (citations omitted). Finally, a geographic market must be sizeable enough to be "economically significant." *Brown Shoe*, 370 U.S. at 336-37.

The purpose of defining a geographic market is to reveal whether, or to what extent, market power exists. *Thompson v. Metro. Multi-List, Inc.*, 934 F.2d 1566, 1573 (11th Cir. 1991). Market power is defined as the ability to charge a supracompetitive price — a price above a firm's marginal cost. Herbert Hovenkamp, Federal Antitrust Policy: The Law of Competition and Its Practice, §§ 3.1, 3.1a (4th ed. 2011). Such power could cover the nation, but it may exist in much smaller areas as well. *Compare United States v. Grinnell Corp.*, 384 U.S. 563, 575 (1966) (finding a national market), *with United States v. Phila. Nat'l Bank*, 374 U.S. 321, 361 (1963) (finding a four-county region a market). In either case, a geographic market must be drawn to consist of the smallest area of overlap of Plaintiffs' and Defendants' locations, and in which prices could be increased without retailers turning to alternative suppliers or other milk processors entering the area. *See* Hovenkamp, *supra*, § 3.6.

The hypothetical monopolist is a related concept. *See* U.S. Dep't of Justice and Fed. Trade Comm'n, 1997 Horizontal Merger Guidelines ("Merger Guidelines"); *see also FTC v. Whole Foods Market, Inc.*, 548 F.3d 1028, 1038 (D.C. Cir. 2008) (acknowledging the use of this construct when examining a market); *Ky. Speedway*, 588 F.3d at 918 (same). Using the hypothetical monopolist as an entity that controls all the suppliers in

a proposed market,[3] a question is posed: could a monopolist profit if it imposed a "small but significant nontransitory increase in price" ("SSNIP")? *Id.* Typically, the increase that is posited is five percent. *Ky. Speedway*, 588 F.3d at 918. If buyers in a defined area would respond to a small, lasting increase in price — a SSNIP — by purchasing from another supplier, rendering the SSNIP unprofitable, the market has been too narrowly defined. *See FTC v. Tenet Healthcare Corp.*, 186 F.3d 1045, 1053, n.11 (8th Cir. 1999) (citing Merger Guidelines § 1.21)). Similarly, a market is too small if additional suppliers would enter a market in response to one firm's price increase. *Id.* at 1052 (citing *Bathke*, 64 F.3d at 346). In either of those cases, the question about a SSNIP must be reconsidered and applied to a wider area.

This should continue only until buyers in the relevant market respond to a SSNIP by purchasing regardless of the increase. Merger Guidelines § 1.0. Although the Merger Guidelines, including the hypothetical monopolist, are useful and informative for courts in analyzing some antitrust violation claims, *Ky. Speedway*, 588 F.3d at 918 (citing *Whole Foods*, 548 F.3d at 1038), they were written to "describe the analytical process that the [Department of Justice and Federal Trade Commission] will employ in determining whether to challenge a horizontal merger." Merger Guidelines § 0.2.

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[3] "A market is defined as a product or group of products and a geographic area in which it is produced or sold such that a hypothetical profit-maximizing firm, not subject to price regulation, that was the only present and future producer or seller of those products in that area would likely impose at least a 'small but significant nontransitory' increase in price, assuming the terms of sale of all other products are held constant." Merger Guidelines § 1.0.

The process for excluding Professor Froeb's testimony involved two orders from the district court and one from the magistrate judge. This circuitous path warrants explanation. In August, 2010, the district court initially denied summary judgment to Defendants on Count I — violation of 15 U.S.C. § 1 by conspiring to restrain trade — but granted summary judgment on Counts III and IV, which alleged monopolization in violation of 15 U.S.C. § 2. *In re Southeastern Milk Antitrust Litig.*, 730 F. Supp. 2d 804, 825, 826, 828 (E.D. Tenn. 2010) *on reconsideration in part*, 2:08-MD-1000, 2012 WL 1032797 (E.D. Tenn. Mar. 27, 2012). Froeb's evidence played no part in the district court's conclusion as to Count I, but it was the decisive factor in ruling against Plaintiffs on Counts III and IV, both of which require a party to establish a geographic market. *Id.* at 825-28.

Froeb had marked out the geographic market for Counts III and IV by looking at regions where Dean Foods sells, and Food Lion buys, processed milk. He examined the states of Georgia, North Carolina, and Virginia as possible markets, but individually each state was too small for the imposition of a profitable price increase because suppliers would prevent a price increase by shipping cheaper milk into the affected area. A regional market including Georgia, North Carolina, Virginia, South Carolina, and the eastern part of Tennessee, however, was found to be sizeable enough. In making that determination, Froeb relied on estimates of transportation costs and elasticity of demand.

In reaching its conclusion, the district court did not evaluate Froeb's methods under Rule 702 and *Daubert*. Instead, while assuming that Froeb's testimony was re-

liable and relevant, the court identified four ways that Froeb's methodology was not in compliance with the Supreme Court's requirements for discerning geographic market; because of this, the court held that Plaintiffs failed to establish a genuine issue of material fact on this required element. *In re Southeastern Milk Antitrust Litig.*, 730 F. Supp. 2d at 825. In support of this conclusion, the district court first cited two Supreme Court cases for the proposition that raising a genuine issue of material fact cannot be done solely through expert testimony unsupported by facts in the record. *Id.* at 28 (citing *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 242 (1993) and *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 581 n.5 (1986)). Second, the court cited testimony from Froeb's deposition, finding that he clearly testified that the proposed geographic market was founded on something other than the *Tampa Electric* standard — that is, the market area "in which the seller operates, and to which the purchaser can practicably turn for supplies."[4] *Id.* (citing *Tampa Electric*, 365 U.S. at 327). Third, Froeb did not consider "commercial realities." *Id.* Finally, the court claimed that Froeb mistakenly premised the geographic market on only one customer — Food Lion. *Id.* (citing *Apani Southwest, Inc. v. Coca-Cola Enters., Inc.*, 300 F.3d 620, 632-33 (5th Cir. 2002)).

Four months later, the magistrate judge assigned to this case issued an order excluding Froeb's geographic market testimony pursuant to Rule 702. The order explained that Defendants had to prevail on their motion to exclude Froeb's testimony because the sum-

[4] It is unclear whether Froeb's statement applies to the geographic market created for the monopoly claims in Counts 3 and 4, the conspiracy claim in Count 2, or both.

mary judgment decision previously issued by the district court established the law of the case. This was most clearly true for Froeb's testimony pertaining to the monopoly claims, but the magistrate judge concluded likewise for the conspiracy claim, using different deposition testimony from Froeb to support this conclusion. Froeb had testified that the same analytic framework was used to demarcate the geographic markets for both claims, and the magistrate judge reasoned that if the framework was unreliable for the monopoly claims, it must also be so for the conspiracy claim.

This lengthy journey to exclusion finally culminated with the district court's order on Plaintiffs' motion to reconsider the magistrate judge's decision, in which the court affirmed the magistrate judge's decision to exclude Froeb's testimony. The district court was skeptical that it needed to rule on the same issue again, but it decided the cautious approach was most prudent and considered Defendants' *Daubert* motion anew, but as an alternative holding to the prior order. Nevertheless, Froeb's opinions were excluded again on similar grounds as before. Once again, the district court found that Froeb's deposition testimony did not satisfy the *Tampa Electric* standard because he had used the hypothetical monopolist construct improperly. The court reemphasized the lack of consideration of commercial realities — e.g., information about Plaintiffs' purchasing behavior or pricing, how retailers in the prescribed markets currently obtain supplies, or actual elasticity of demand — and the lack of reliance on facts in the record. Froeb's model, based only on Food Lion's locations, was again disparaged according to the principle that "a geographic market cannot ordinarily be defined by reference to a single customer." *Id.* (citing *Apani Southwest Inc.*, 300 F.3d at 632-33).

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The district court's reasoning in its decision to exclude Froeb's testimony rests on an incomplete review of the facts and the application of incorrect legal standards. *See Romberio*, 385 F. App'x at 428. First, the blanket exclusion of Froeb's testimony was not warranted by his alleged use of one customer when defining a market. Froeb defined his markets differently for the monopoly claims and the conspiracy claim. For the monopoly claims, Froeb clearly stated, "[m]y analysis is motivated by including regions where Dean and Food Lion engage in the sale and purchase of milk." [R. 1159-5 at 39.] In contrast, for the conspiracy (or coordinated action) claim, "the candidate area should include plants owned by all the alleged conspirators." *Id.* at 33. Froeb proceeded to draw a map encompassing the processing locations owned by Dean Foods, NDH, and DFA while making assumptions about the locations of "customers." The result was a more expansive footprint than that which Food Lion occupies.[5] This error began with the magistrate judge's order, which quoted Froeb's deposition. The magistrate judge focused on Froeb's explanation that he used "the same analytic framework"; but the judge did not refer to the surrounding context, in which Froeb explains that he is struggling to answer the questions posed to him, in

[5] Orders 5 and 7 cover all or part of fourteen states: Alabama, Arkansas, Florida, Georgia, Indiana, Kentucky, Louisiana, Mississippi, Missouri, North Carolina, South Carolina, Tennessee, Virginia, and West Virginia. Plaintiff Fidel Breto has one store located in Tennessee, and Food Lion has 1,300 stores in 11 states: Delaware, Florida, Georgia, Kentucky, Maryland, North Carolina, Pennsylvania, South Carolina, Tennessee, Virginia, and West Virginia. The states in Orders 5 and 7 in which Plaintiffs are located are as follows: Florida, Georgia, Kentucky, North Carolina, South Carolina, Tennessee, Virginia, and West Virginia.

part because he is unsure of what the questioner was asking. Clearly, the methods for creating geographic markets for the monopoly claims and the conspiracy claim were built on different foundations. Consequently, the exclusion of one does not necessitate the exclusion of the other.

Second, the requirement that an expert base his findings on facts in the record is a proper legal proposition, but it was misapplied. In the district court's order on summary judgment, it emphasized that "[t]here is nothing in this record to illustrate that Professor Froeb has based his opinions on evidence in the record; in fact, he appears to admit that he did not do so, relying instead on a theoretical model he constructed for the purpose of the analysis." *In re Southeastern Milk Antitrust Litig.*, 730 F. Supp. 2d at 825. In support of that criticism, the district court cited two Supreme Court decisions. *Id.* In *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), the Court affirmed the lower court's decision to exclude an expert report that utilized assumptions about a competitor's costs because the study used assumptions and estimates as inputs that were "implausible and inconsistent with record evidence." *Id.* at 594 & n.19. In *Brooke Group Ltd.*, the Supreme Court reiterated its prior message: an expert's opinion must use valid facts to be reliable. 509 U.S. at 242. Facts can be undependable for numerous reasons, including actual information that is of poor quality, and contradictory facts present in the record. *Id.* (citing *J. Truett Payne Co., Inc. v. Chrysler Motors Corp.*, 451 U.S. 557, 564-65 (1981)). None of those reasons, however was relied on by the district court in the case at hand. Rather, the sole reason for excluding Froeb's testimony was the absence of facts in

the record. Thus, the cited precedent does not adequately support the district court's conclusion.

Froeb's report is bereft of citations to an underlying document or report as he opines on the relatively elementary economic concepts of competition between processing plants and the benefits one firm could garner by eliminating competition. [R. 1159-5 at 15.] Following that explanation, Froeb extensively cited facts from government studies, academic publications, and the record itself as he created a geographic market. [*See, e.g.*, *id.* at 19 n.34 (citing data showing demand for milk is relatively insensitive to price); *see also id.* at n.35 (citing information in the record showing the same result);[6] *id.* at 25 n.48 (citing record evidence regarding transportations costs; *id.* at 26 n.50 (same); *id.* at 26-27 n.51 (citing reports and record evidence as inputs for factoring transportation costs).] In sum, expert reports must be based on proper facts, but each of those facts does not have to occupy an independent part of the record for an expert to be able to use them when crafting an opinion.

Third, lack of reliance on evidence in the record was combined with criticism that "commercial realities" were not considered. Commercial realities should be contemplated when a geographic market is being created. *See Kolonn Indus.*, 637 F.3d at 442-443. The district court was troubled by the absence of actual information from Food Lion, such as Food Lion's purchasing habits, where it actually sought out supplies, and data about price elasticity. The hypothetical monopolist test and *Tampa Electric* both require data based on actual circumstances, e.g., where a buyer and/or seller is lo-

[6] Price elasticity is noted as a foundational element in Froeb's definition of a geographic market.

cated. Both inquiries, however, also require estimates, and even discount the value of data based on actual behaviors. The question about buyers in *Tampa Electric*, for instance, focuses on where they can "practicably" turn for supplies — not where they actually do. *See Morganstern v. Wilson*, 29 F.3d 1291, 1296-97 (8th Cir. 1994); *Bathke v. Casey's General Stores, Inc.*, 64 F.3d 340, 346 (8th Cir. 1995). Moreover, the hypothetical monopolist construct requires speculation about a buyer's likely reaction to a supplier's price increase. Merger Guidelines § 1.21. Quite obviously, the estimate should be informed by actual evidence when possible, *id.*, but actual evidence does not have to be based on the particular parties' behaviors. In other words, a nationwide estimate of demand elasticity that is used to predict the reaction of retailers in the southeast to a price increase would be a reliable method of calculation. Thus, the hypothetical monopolist test does not require Froeb to use data from Food Lion in place of data gleaned from a broader sample.

Furthermore, Froeb did not completely ignore commercial realities. He may have neglected to include important facts; and those identified by the district court may have more closely aligned his analysis with that explained in the Merger Guidelines. *See* Merger Guidelines § 1.21 ("In considering the likely reaction of buyers to a price increase, the Agency will take into account all relevant evidence, including, but not limited to, the following: evidence that buyers have shifted or have considered shifting purchases between different geographic locations in response to relative changes in price or other competitive variables … ."). But actual inputs were considered, most notably transportation costs and plant locations inside and outside of the proposed geographic market. Including some facts while

omitting others goes to the "accuracy of the conclusions, not to the reliability of the testimony." *In re Scrap Metal Antitrust Litigation*, 527 F.3d 517, 530-31 (6th Cir. 2008) (quoting *Jahn v. Equine Servs., PSC*, 233 F.3d 382, 390-93 (6th Cir. 2000)).

Finally, the district court found that Froeb did not apply the *Tampa Electric* standard when forming the geographic market. Quoting Froeb's deposition testimony, the district court found that he denied that his market analysis looked at the area "in which the seller operates and to which the purchaser can practically turn for supplies." When a similar question was posed again, Froeb repeated his disclaimer that his model was based on a different approach. Because Froeb's version of the hypothetical monopolist test was applied unconventionally — or at least purportedly so, based on his deposition testimony — his opinion was categorized as unreliable.

At its most basic, the hypothetical monopolist construct requires selection of the smallest area in which a SSNIP could be successfully imposed. For that construct to be valuable in a case, the area at issue must encompass at least some of the locations of the seller (Defendants) and the buyer (Plaintiffs), including where the buyer could turn for supplies if prices increased. *See* Merger Guidelines §§ 1.21, 1.22. The availability of suppliers that are actually alternatives is limited by the economic realities of the industry at issue. *See id.* at § 1.21. Applied in that way, the hypothetical monopolist and the *Tampa Electric* standard are practically equivalent: the hypothetical monopolist is "a useful framework for organizing the factors the courts have applied in geographic market definition." 2 Earl W. Kinter et al., Federal Antitrust Law § 10.15 (2013).

Notwithstanding Froeb's disclaimer, he also states in his deposition that he "started with areas 5 and 7 because that seemed to include all three of the defendants." [R. 1159-5 at 27.] Fidel Breto's one location was within that area, as were some of Food Lion's stores.[7] Practicable alternative suppliers were also considered,[8] extending as far away as 300 miles from Milk Orders 5 and 7 and including all "regulated, non-captive" plants. Opposing counsel asked if a smaller market were contemplated, and Froeb replied that the market he described in his report was the only one considered. In

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[7] With regard to Plaintiffs' locations, Froeb graphs Orders 5 and 7, including many locales lacking any stores owned by Plaintiffs, and makes the following assumption:

> Customers locate stores near population centers and locate distribution centers to minimize the cost of distribution to stores. In the model, customer locations are represented by a grid of 119 evenly-spaced customer locations within Order Nos. 5 and 7. The total measure of demand at each location is proportional to the census population nearest that point.

[*Id.* at 32 n.60.] Froeb's reason for doing this rather than mapping Plaintiffs' locations is unclear, but his more extensive (and, albeit, hypothetical) rendering may be reliable under the principle that the greater includes the lesser. Froeb's model includes the actual locations of Defendants' (sellers) processing plants and, arguably at least, the practicable alternatives for Plaintiffs (buyers). His inclusion of additional (perhaps superfluous) buyers does not undermine his conclusion that prices could be manipulated. It should not be inferred that we are opining on the correctness of Froeb's conclusions, we merely note that his method harmonizes with the *Tampa Electric* standard.

[8] "The model specifically considers (1) the locations of plants and customers, (2) the elasticity of demand for milk, determined by parameters that measure both demand and cost characteristics of the milk industry, and (3) the costs of transporting bottled milk." [R. 1159-5 at 31.]

their response on appeal, Defendants criticize Froeb's market delineation and suggest that the market is "much smaller." Multiple courts of appeal have held that market definition is a question of fact. *Kolon Indus.*, 637 F.3d at 442 (citing cases from the First, Second, Third, Fifth, Ninth, and Tenth Circuits[9]). Accordingly, that question is better left for a jury to decide.[10]

In conclusion, Froeb's testimony should not have been excluded on the grounds relied upon by the district court.

D

As explained above, regardless of whether the court uses the rule of reason or the *per se* rule, antitrust plaintiffs must still prove that the restraint at is-

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[9] *Coastal Fuels of Puerto Rico, Inc. v. Caribbean Petroleum Corp.*, 79 F.3d 182, 196 (1st Cir. 1996); *Todd v. Exxon Corp.*, 275 F.3d 191, 199 (2d Cir. 2001); *Weiss v. York Hosp.*, 745 F.2d 786, 825 (3d Cir. 1984); *Heatransfer Corp. v. Volkswagenwerk, A.G.*, 553 F.2d 964, 979 (5th Cir. 1977); *Oahu Gas Serv., Inc. v. Pac. Res. Inc.*, 838 F.2d 360, 363 (9th Cir. 1988); *Westman Comm'n Co. v. Hobart Int'l, Inc.*, 796 F.2d 1216, 1220 (10th Cir. 1986); *see also Thompson v. Metro. Mutli-List, Inc.*, 934 F.2d 1566, 1573-74 (11th Cir. 1991) (citing *Graphic Products Distributors, Inc., v. Itek Corp.*, 717 F.2d 1560 (11th Cir. 1983)).

[10] Plaintiffs urge us to hold that the district court erred when it relied on Froeb's deposition testimony more heavily than the contents of his expert report. Traveling down that line of argument is unnecessary. Simply reiterating a long-standing and unremarkable principle is sufficient: the law establishes burdens of persuasion, and parties must bear those burdens. Clear deposition testimony that contradicts one's own expert report may make bearing that burden more difficult, and that challenge may grow more daunting when the testimony and report are related to a difficult legal issue. Ultimately, we trust that courts vigorously endeavor to rule properly by reviewing the evidence put before them. The onus is on the parties to advocate clearly.

sue caused them to suffer an antitrust injury. *Expert Masonry*, 440 F.3d at 342, 343. In its second summary judgment opinion, the district court found that Plaintiffs had failed to "allege an injury of the kind which the antitrust laws are designed to prevent." *In re Southeastern Milk Antitrust Litig.*, 2012 WL 1032797, at *6. The district court's justification for this conclusion was that Plaintiffs' injury expert, Professor Ronald Cotterill, had conducted an econometric analysis which partly attributed an increase in the price of milk to the merger itself rather than to any anticompetitive conduct. *Id.* The Defendants had previously filed a *Daubert* motion, objecting to Cotterill's testimony; and the matter was referred to the magistrate judge, who denied Defendants' motion and ruled that Cotterill's testimony was admissible. The district court never formally ruled on the objection, but when granting summary judgment to Defendants on the injury element, the wording of the opinion led the Plaintiffs to believe that the district court was agreeing with the Defendants' objection, contrary to the ruling of the magistrate judge. Because of that conclusion, the Plaintiffs have argued that the district court erred in not giving proper deference to the magistrate judge's findings, and that this Court should now review the decision concerning the admissibility of expert testimony for abuse of discretion. *See KY Speedway*, 588 F.3d at 915 (citing *Hardyman v. Norfolk & W. Ry. Co.*, 243 F.3d 255, 258 (6th Cir. 2001)).

However, although the district court never explicitly addressed Defendants' objections to Cotterill's testimony, the summary judgment opinion strongly suggests that the district court concurred with the magistrate judge. The court did not exclude Cotterill's testimony, but simply concluded that it "does not create a material issue of fact." *In re Southeastern Milk Anti-*

trust Litig., 2012 WL 1032797, at *6. Federal Rule of Civil Procedure 56 on Summary Judgment contains similar language, and legions of cases do likewise when discussing the summary judgment standard. *See e.g.*, *In re Cardizem CD*, 332 F.3d at 906. No doubt it would have been clearer for the district court to explain with particularity why Defendants' objections were not compelling. Nevertheless, it is obvious that the district court considered Cotterill's testimony in light of the magistrate judge's opinion and after independent examination of the evidence. *In re Southeastern Milk Antitrust Litig.*, 2012 WL 1032797, at *5-6.[11] Consequently, we review the district court's grant of summary judgment concerning the issue of antitrust injury *de novo*. *In re Cardizem CD*, 332 F.3d at 905-06 (citation omitted).

Antitrust plaintiffs cannot survive motions for summary judgment without adequately alleging an antitrust injury. *Expert Masonry, Inc.*, 440 F.3d at 345. In addition to having to show injury-in-fact and proximate cause, antitrust plaintiffs must specifically establish "antitrust injury." *In re Cardizem CD*, 332 F.3d at 909. It is not enough to simply allege that an individual

[11] In the context of reviewing a magistrate judge's decision as to a dispositive motion and after a party's objection, three other courts of appeal have held that a presumption should exist that a district court properly reviewed the motion. *United States v. Hamell*, 931 F.2d 466, 468 (8th Cir. 1991) (explaining that unless contrary evidence is presented, the appellate court should assume a district court engaged in appropriate review); *Brunig v. Clark*, 560 F.3d 292, 295 (5th Cir. 2009) ("[W]e will not assume that the district court did not conduct the proper review."); *Garcia v. City of Albuquerque*, 232 F.3d 760, 766 (10th Cir. 2000) ("[N]either 28 U.S.C. § 636(b)(1) nor Fed. R. Civ. P. 72(b) requires the district court to make any specific findings; the district court must merely conduct a *de novo* review of the record.").

competitor suffered adverse effects from the defendants' contract or conspiracy. *Care Heating & Cooling, Inc.*, 427 F.3d at 1014-15. Rather, "[a]ntitrust injury is (1) injury of the type the antitrust laws were intended to prevent and (2) injury that flows from that which makes defendants' acts unlawful." *In re Cardizem CD*, 332 F.3d at 909 (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977)) (internal quotation marks omitted). The antitrust injury requirement is critical because it ensures that "the injury should reflect the anticompetitive effect" of the defendant's actions. *Brunswick Corp.*, 429 U.S. at 489. This "ensures that a plaintiff can recover only if the loss stems from a competition-*reducing* aspect or effect of the defendant's behavior." *In re Cardizem CD*, 332 F.3d at 909-10 (quoting *Atlantic Richfield Co. v. USA Petroleum*, 495 U.S. 328, 342-43 (1990)).

In the case at hand, the district court concluded that Plaintiffs had not created a genuine issue of material fact as to either aspect of antitrust injury. *In re Southeastern Milk Antitrust Litig.*, 2012 WL 1032797, at *6. The court reasoned that Cotterill's multiple regression analysis was too simplistic. *Id.* Instead of measuring the injury Defendants' conspiracy inflicted, Cotterill merely discerned that after controlling for natural cost increases, prices rose an additional 7.9% between 2002 and 2007. This time period coincides with the timing of the merger, and the court accordingly concluded that Cotterill's calculations only revealed the impact of the merger, which was not contested. *Id.*

In reaching that conclusion, the court relied on two facts. First, in Cotterill's deposition testimony he stated that the purpose of his calculation was "to analyze whether in fact the creation of NDH and the assertion that there would be economies of size and lower prices

through efficiencies generated by that creation from January 1, 2002 going forward, whether that in fact was true or not." *Id.*, at *6 (quoting Cotterill Depo. April 12, 2010, at 17). Second, during the Department of Justice's review of the merger, it created a model to estimate the potential merger's price-effect. *Id.* In Cotterill's expert report, he explained that his model was similarly designed to that of the Department of Justice, and consequently, the court concluded that Cotterill's regression analysis must have measured the effect of the merger as well. *Id.*

That conclusion, however, was based on flawed propositions, and summary judgment was not warranted on the issue of injury. Although Cotterill made the statement quoted above, he added — in the same sentence as the testimony was transcribed — that he was also charged with discerning "whether in fact there is a reliable economic model of collusion rather than independent self-interest that says, yes, they did engage in actions that in fact are consistent only with collusive decisions by Dean, DFA, and NDH, and [those] decisions resulted in elevated prices to the plaintiffs in this case." Cotterill Depo. at 17-18.[12] Answering that ques-

[12] The entire quote reads as follows:

> As I understand it, I have been asked to analyze whether in fact the creation of NDH and the assertion that there would be economies of size and lower prices through efficiencies generated by that creation from January 1, 2002 going forward, whether that in fact was true or not, and whether in fact there is a reliable economic model of collusion rather than independent self-interest that says, yes, they did engage in actions that in fact are consistent only with collusive decisions by Dean, DFA, and NDH, and that decisions resulted in elevated prices to the plaintiffs in this case.

tion would expose the precise sort of injury and causation that is required, especially when Plaintiffs must benefit from all reasonable inferences. *See Logan v. Denny's, Inc.*, 259 F.3d 558, 566 (6th Cir. 2001) (citing *Anderson v. Liberty Lobby*, 477 U.S. 242, 255 (1986)).

The district court's concerns regarding Cotterill's regression analysis also do not support summary judgment. A multiple regression analysis is useful in quantifying the relationship between a dependent variable (e.g., the price of milk) and independent variables (e.g., energy costs and/or demand factors). *Wiesfeld v. Sun Chemical Corp.*, 84 F. App'x 257, 261 n.3 (3rd Cir. 2004). This type of model can also "control for other independent variables so as to isolate and identify the effect of a single independent variable on the dependent variable." *Wiesfeld*, 84 F. App'x at 261 n.3. The Department of Justice used a regression model to predict that post-merger prices would rise by 2.5%. Cotterill used a similar model and found that post-merger prices actually increased by 7.9%. Use of that same widely-accepted model does not necessarily mean that the increase was due to legal causes.

Cotterill's model, as applied to the facts, reveals three conclusions which, taken together, can be viewed

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> Now, that was a hypothesis, sir.
>
> First of all, there is a story that can be told that supports the defendants—or the plaintiffs. There is a story. There is a hypothesis that supports them.
>
> There is a counter-hypothesis, that is what Dean and Suiza represented to Justice, which in fact there [are] economies of size, there [are] efficiencies, we are going to pass those on and the plaintiffs in this case are going to enjoy the lower prices. That is what we looked at.

Cotterill Depo. at 17-18.

as evidence of antitrust injury. First, it is clear that Plaintiffs purchased processed milk from the Defendants. Second, Cotterill's model indicates that after the merger Plaintiffs were charged 7.9% more for milk than an econometric analysis could justify. And third, the district court found that evidence indicated that Dean Foods and NDH, due to the influence of DFA, conspired to avoid competing vigorously. *In re Southeastern Milk Antitrust Litig.*, 730 F. Supp. 2d at 815-16 (holding that there was enough evidence of a conspiracy to deny summary judgment); *In re Southeastern Milk Antitrust Litig.*, 2012 WL 1032797, at *6 ("The Court has previously held and now reaffirms that the evidence as a whole creates genuine issues of material fact as to whether Defendants entered into the alleged agreement."). This is precisely the kind of injury that the Sherman Act was designed to prevent. *In re Cardizem CD*, 332 F.3d at 910-11 (quoting *Associated Gen. Contractors v. Cal. State Council*, 459 U.S. 519, 538 (1983)) ("Preventing that kind of injury was undoubtedly a *raison d'etre* of the Sherman Act when it was enacted in 1890.").

This conclusion also resolves the question of whether Plaintiffs' injuries "flow from that which makes defendants' acts unlawful." *In re Cardizem CD*, 332 F.3d at 909. The *In re Cardizem CD* court explained that when competition is limited pursuant to an agreement and customers are punished through higher prices, the injury clearly results from anticompetitive conduct. 332 F.3d at 909. Accordingly, summary judgment was not warranted based on the lack of antitrust injury.

III

For the aforementioned reasons, the district court's opinion is reversed, and this case is remanded for further proceedings consistent with this opinion.

APPENDIX B

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

IN RE: SOUTHEASTERN MILK ANTITRUST LITIGATION

THIS DOCUMENT RELATES TO:
Food Lion, LLC, et al.
v. Dean Foods Company, et al.,
No. 2:07-CV-188

Master File No. 2:08-MD-1000
Judge J. Ronnie Greer
Inman
Filed: March 27, 2012

MEMORANDUM OPINION AND ORDER

Plaintiffs are retail sellers of processed milk who purchase directly from defendants Dean Foods Company ("Dean") and/or Dairy Farmers of America, Inc. ("DFA") who bring this purported class action under Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1-2 and Section 3 of the Clayton Act, 15 U.S.C. § 14.[1] Plaintiffs' complaint alleges causes of action for violation of Section 1 of the Sherman Act against Dean, DFA, and National Dairy Holdings, LP ("NDH") (agreement not to compete) (Count I); violation of Section 1 of the Sherman Act and Section 3 of the Clayton Act against Dean, DFA, NDH, Southern Marketing Agency, Inc. ("SMA") and Dairy Marketing Services, LLC ("DMS")

[1] Although there is a pending class certification motion, no class has been certified in this case.

(conspiracy to unreasonably restrain trade) (Count II); violation of Section 2 of the Sherman Act against Dean (unlawful monopolization) (Count III); violation of Section 2 of the Sherman Act against Dean (attempt to monopolize) (Count IV); and violation of Section 2 of the Sherman Act against Dean, DFA, and NDH (conspiracy to monopolize) (Count V).

On August 4, 2010, the Court granted Defendant's motion for summary judgment on Counts II, III and IV and denied the motion as to Counts I and V, [Doc. 863]. Currently pending before the Court are two related motions which this order will address: (1) Defendants' motion for reconsideration of the Court's August 4, 2010 order denying summary judgment as to Counts I and V, [Doc. 952], and (2) Defendants' supplemental motion for summary judgment as to Counts I and V, [Doc. 1026]. The parties have now exhaustively briefed the pending motions, the Court has heard oral argument and the motions are ripe for disposition. For the reasons which follow, defendants' motion for reconsideration will be GRANTED IN PART (as to Count V) and DENIED IN PART (as to Count I) and the supplemental motion for summary judgment will be GRANTED, Counts I and V of plaintiffs' complaint will be DISMISSED, and judgment will be entered on the Court's orders in favor of defendants.

I. The Motion For Reconsideration, [Doc. 952]

A. Count I

Defendants argue that the Court erroneously held that disputed issues of material fact require trial of the conspiracy count (Count I) of the plaintiffs' complaint under § 1 of the Sherman Act. Defendants acknowledge that the Court recognized the correct standards but they say that the Court failed to properly

apply them. They specifically argue that the Court clearly erred when it found that the parties' competing views of the evidence and the inferences to be drawn from that evidence create material issues of fact for trial without requiring plaintiffs to produce "evidence that tends to exclude the possibility" that the challenged conduct was the result of independent action. *See Monsanto Co. v. Spray Rite Serv. Corp.*, 465 U.S. 752, 764 (1984). Plaintiffs, of course, disagree.

Although the Court will grant Defendants' pending supplemental motion for summary judgment as to Count I, the Court believes that it both correctly stated and correctly applied the proper standards in its prior memorandum opinion. The motion for reconsideration as to Count I, therefore, will be DENIED. Because the Court may not have articulated its views as clearly as it could have in the prior order, the Court will briefly discuss two of the issues raised by the motion and response.

The first deals with the proper application of the summary judgment standard in antitrust cases. Although the parties appear to agree on the definition of the standard, they disagree strenuously on the manner in which it is applied. Defendants seem to argue that the standard is met when they respond to Plaintiffs' ambiguous evidence with evidence of their own unilateral, independent business decisions related to the conduct. In other words, they seem to argue that they meet the standard whenever they offer any argument from which the jury could draw from their conduct an inference of independent business decision, as well as an inference of action in furtherance of an antitrust conspiracy. They then appear to argue, not that Plaintiffs must show a jury question, but that Plaintiffs must prove that the action was not taken unilaterally, but in

concert with others in an illegal conspiracy. Plaintiffs describe Defendants' efforts as an "upside down view" of the standard because Defendants urge the Court to require Plaintiffs to produce "overwhelming evidence" of joint illegal conduct. The Court agrees with Plaintiffs on this point and an example will illustrate the point.

Plaintiffs have offered evidence which, if believed by the jury, establishes that Defendants have acted contrary to their independent economic interest, for instance, that DFA/NDH acquired spin-off plants from the Dean/Suiza merger which were doomed to failure from the outset. Defendants respond that acquisition of the plants satisfied a legitimate business purpose, *i.e.*, satisfaction of the government's concern about the merger, and that DFA had an interest in supplying raw milk to these plants. From this circumstantial evidence the jury could draw one of two inferences—the one argued by plaintiffs or the one urged by defendants. Yet, one of these inferences, if accepted by the jury, "tends to exclude the possibility" that the conduct was the result of independent action. Defendants want the Court to decide this dispute in the summary judgment motion context, not at trial by a jury. That is not the proper standard. If it is, then no antitrust case would ever reach the jury as long as the defendant could merely suggest a plausible business reason for complained of conduct.

Secondly, Defendants argue that the Court erroneously considered the "cumulative effect" of the evidence, violating both Supreme Court and Sixth Circuit standards against aggregating such evidence. In the prior memorandum opinion, the Court observed:

Defendants rather convincing respond to many of the individual allegations made by plaintiffs and the Court would be constrained to agree with defendants on many of the individual issues raised by the respective parties in their briefs, if the Court viewed each separate document or transcript of testimony in isolation. Defendants appear to invite the Court to do just that; however, the Court must view the record as a whole and, while testimony or documentary exhibits viewed in isolation might not create a genuine issue of material fact, the cumulative effect of such evidence does so. *See American Tobacco Co. v. United States*, 147 F.2d 93, 107 (6th Cir. 1945) ("Acts done to give effect to the conspiracy may be, in themselves, wholly innocent acts. Yet, if they are part of the sum of the acts which are relied upon to effectuate the conspiracy which the statute forbids, they come within its prohibition.").

That the parties have many disputes about the appropriate inferences which could be drawn by a reasonable jury with respect to such a large volume of evidence simply illustrates the existence of genuine issues of material fact with respect to the conspiracy claim. It is not the strength of the plaintiffs' case on the merits that is being tested by this motion; rather, the Court must determine only whether or not there are genuine issues of material fact without weighing the evidence, resolving issues of credibility of witnesses or resolving factual disputes. Simply put, that is a matter for a jury.

[Doc. 863, at 12-13]. The Court simply observed the established rule that separate acts legal in themselves may be part of the sum of the acts relied upon to effectuate the conspiracy. None of the cases cited by Defendants change that rule.

B. Count V

As noted above, the Court previously denied Defendants' motion for summary judgment as to Count V, the claim of conspiracy to monopolize against Dean, DFA and NDH. Relying on cases from other circuits, the Court held that "[i]t is doubtful that the contours of the geographic market must be as precisely defined, if at all, in a conspiracy to monopolize claim as opposed to a monopolization or attempt to monopolize claim." [Doc. 863, at 36]. Defendants suggest in this motion that the cases relied upon by the Court predated the United States Supreme Court decision in *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447 (1993) and are contrary to clear Sixth Circuit precedent. Plaintiffs respond that Defendants are "wrong about the law." First, they argue that the *Spectrum Sports* case did not hold, as Defendants argue, that a determination of the relevant geographic market is an element of a conspiracy to monopolize claim and, secondly, that none of the Sixth Circuit cases cited by Defendants so hold.

In *Spectrum Sports*, a jury verdict was returned finding that Spectrum Sports had, among other things, "monopolized, attempted to monopolize, and/or conspired to monopolize." *Id.* at 448. The Ninth Circuit, noting that the jury had found a violation of § 2 without specifying whether the basis of its verdict was monopolization, attempt to monopolize or conspiracy to monopolize, concluded that a case of attempted monopolization had been established and affirmed. *Id.* at 452.

More specifically, the Ninth Circuit held that it was not necessary for a plaintiff to present evidence of a dangerous probability of monopolization in a relevant market, a holding in conflict with the holding of all other circuit courts of appeals. The Supreme Court reversed. *Id.* at 453. This Court agrees with Plaintiffs that *Spectrum Sports* cannot clearly be interpreted to hold that plaintiffs must prove a relevant geographic market to succeed on its conspiracy to monopolize claim.

The Sixth Circuit, however, appears to have been relatively clear about the rule in this circuit. The Sixth Circuit most recently addressed the issue in *Kentucky Speedway, LLC v. NASCAR, Inc.*, 588 F.3d 908 (6th Cir. 2009). In that case, Kentucky Speedway sued NASCAR alleging a violation of § 1 of the Sherman Act and made claims for monopolization, attempt to monopolize and conspiracy to monopolize under § 2. The district court granted summary judgment on all claims and the Sixth Circuit affirmed, holding that a plaintiff alleging a violation of § 2 must define "the relevant market within which the alleged anti-competitive effects … occur," and that Kentucky Speedway's claim failed because it "lacks the ability to define the relevant markets." *Id.* at 916, 919.[2]

Likewise, in *Re/Max Int'l, Inc. v. Realty One, Inc.*, 173 F.3d 995 (6th Cir. 1999), the Sixth Circuit affirmed

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[2] Plaintiffs acknowledge the holding of the *Kentucky Speedway* case, as they must. They claim, however, that the Sixth Circuit "did not explicitly consider the question of whether market definition is a necessary element of a conspiracy-to-monopolize claim." The record here establishes, however, that plaintiffs in the *Kentucky Speedway* case expressly argued in their brief that their conspiracy to monopolize claim did not require proof of a relevant market, a position the Sixth Circuit rejected.

the dismissal of a conspiracy to monopolize claim for failure to establish the relevant geographic market. Plaintiffs acknowledge this but argue that the Sixth Circuit "appears to have merely assumed the answer without explicitly considering" the issue. Nevertheless, the result in *Re/Max* is clear. Counter-plaintiff's claim of conspiracy to monopolize was dismissed because counter-plaintiff could not establish the relevant market.[3]

It thus appears that this Court erred in failing to apply these controlling Sixth Circuit precedents. It seems rather clear that definition of the relevant geographic market by plaintiffs for all their § 2 claims is required. Under these circumstances, justice requires that the Court reconsider its prior ruling and grant the motion for summary judgment as to the conspiracy to monopolize claim to avoid "a manifest error of law," unless defendants have waived their argument as claimed by plaintiffs.

Plaintiffs argue that defendants have waived any argument that market definition is required for plaintiffs' § 2 conspiracy claims by not making the claim in their opening brief, citing *Rich v. Gobble*, 2009 WL 801774 at *22 (E.D. Tenn. Mar. 24, 2009) ("parties generally waive issues in the district court when they are raised for the first time in motions for reconsideration

[3] Defendants also cite *Michigan Division-Monument Bldrs. of America v. Mich. Cemetery Ass'n.*, 524 F.3d 726 (6th Cir. 2008) as a Sixth Circuit case affirming dismissal of a claim of conspiracy to monopolize for failure to establish a relevant geographic market. The Court agrees with Plaintiffs that it is not entirely clear that the case involved such claim. It is clear, however, that the complaint alleged a "conspiracy to restrain trade and/or to monopolize" in violation of § 2 of the Sherman Act but the Sixth Circuit does not further expand upon the matter.

or reply briefs."). Plaintiffs, however, overlook that defendants did in fact raise the argument in their opening brief in connection with all of plaintiffs' § 2 claims and the Court specifically considered those claims. Defendants have not waived their argument.

II. The Supplemental Motion For Summary Judgment, [Doc. 1026].

In addition to the reasons advanced by Defendants in the motion for reconsideration, they urge additional grounds on which the Court should grant summary judgment as to Counts I and V: (1) Counts I and V fail because Plaintiffs cannot establish antitrust injury; (2) Count I fails because Plaintiffs cannot establish the relevant geographic and product market; and (3) Count V fails because Plaintiffs cannot establish specific intent to monopolize. As necessary, the Court will address these grounds one at a time.

A. Antitrust Injury

The antitrust laws generally afford a private right of action to "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws." 15 U.S.C § 15. The Sixth Circuit has established a two part test to determine whether a plaintiff has adequately alleged antitrust standing: (1) Whether the plaintiff has asserted a cognizable "antitrust injury," and (2) whether the plaintiff is a proper plaintiff to assert a violation of the antitrust laws. *Indeck Energy Servs. v. Consumers Energy Co.*, 250 F.3d 972, 976 (6th Cir. 2000). Plaintiffs must establish both parts of this test; otherwise, they lack antitrust standing.

Here, Defendants argue that Plaintiffs have not established antitrust injury of the type antitrust laws

were intended to prevent. "An antitrust claimant must show more than merely an 'injury casually linked' to a competitive practice; it 'must prove an antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful.'" *NicSand, Inc. v. 3M Company*, 507 F.3d 442, 450 (6th Cir. 2007) (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977)). In other words, plaintiffs in antitrust cases must prove that the harm for which they seek recovery flows from that which makes defendants' conduct anti-competitive. *Brunswick*, 429 U.S. at 489.

Defendants focus primarily on the expert opinions of Professor Ronald Cotterill, upon whom plaintiffs rely for proof of injury and damages in this case. Professor Cotterill, they claim, "does not offer evidence of injury caused by the alleged anti-competitive conduct that is the focus of Plaintiffs' Complaint." Defendants argue that the damages model used by Professor Cotterill measures the impact of the Dean-Suiza merger rather than the alleged anti-competitive conduct. More specifically, they argue that Professor Cotterill's primary damages model compares actual prices during the relevant period to what he estimates prices would have been if the Dean-Suiza merger had not occurred.[4] Professor Cotterill's alternative damages models built on what defendants see as a flawed primary model and also estimates the impact of individual plant closings,

[4] The Dean-Suiza merger closed in December 2001. The instant lawsuit was filed in August, 2007. Plaintiffs have expressly disclaimed any legal challenge to the merger, clearly recognizing that such a challenge is time barred by the four year limitations period of 15 U.S.C. § 15b.

which defendants argue are not anti-competitive. Furthermore, Defendants argue that even if there were a conspiracy to lessen competition for sales of processed milk, Plaintiffs cannot show that such a conspiracy injured Food Lion because the prices Food Lion paid Dean for processed milk were determined pursuant to a negotiated formula, the components of which were based on objective factors having nothing to do with the alleged anti-competitive behavior. Thus, they argue that any increased prices to Food Lion occurred "by reason of" the negotiated formula, not any alleged anti-competitive behavior.

Plaintiffs' response is predictable. They generally argue that Professor Cotterill's opinions, using reliable and widely accepted methodology, properly establish both injury and damages. In response to Defendants' specific claim that Professor Cotterill is measuring damages caused by the Dean-Suiza merger, Plaintiffs respond that Professor Cotterill "is comparing the before period with the conspiracy period," and they define the "before" period as the period of time immediately before the merger. Plaintiffs spend a good part of their response on an argument that a methodology comparing the period before the alleged conspiracy with the conspiracy period is an accepted methodology. As the Court understands it, Defendants do not quarrel with the methodology itself. While acknowledging that customers like Breto and Food Lion purchase through negotiated list prices, they argue that everyone who purchases milk, whether through negotiated prices or otherwise, suffers harm when parties succeed in conspiring to fix prices and they point to Professor Cotterill's opinion that formula pricing did not insulate Food Lion and Breto from overcharges.

On the issue related to Professor Cotterill, this Court agrees with the Defendants. While Defendants insist that Professor Cotterill has not measured impact caused by the merger, Professor Cotterill himself acknowledged, as Defendants point out, that that is precisely what he did. Professor Cotterill testified in his deposition that his task was "to analyze whether in fact the creation of NDH [through the merger] and the assertion [to DOJ] that there would be economies of size and lower prices through efficiencies generated by that creation from January 1, 2002 going forward [*i.e.* from merger], whether that in fact was true or not …" [Doc. 1149, Ex. 12, Cotterill depo. April 12, 2010, p. 267 ll. 15-20]. Professor Cotterill's expert report is even clearer. He states in that report that "the model I estimate is similar to the approach employed by the Department of Justice in its analysis of potential anticompetitive effects from the 2001 Dean-Suiza ***merger***." [Cotterill report, March 5, 2010, ¶ 114] (emphasis added). Further, he stated that "the DOJ used this model to estimate the price impact of the proposed merger between Dean and Suiza, finding a predicted average price increase of six cents per gallon, or 2.5%, for affected Suiza customers in the sixteen state region analyzed. The application in this litigation is largely the same …" [*Id.*].

Thus, in this Court's view, it is largely beyond question that Professor Cotterill has measured the price impact of the merger itself and it is inescapable that the price increases he identifies as injury to the Plaintiffs in this case are related, if not totally, then at least in part, to the merger itself, conduct which is not challenged in this case. Further, it appears to the Court that Professor Cotterill cannot, and did not, measure how prices would have increased in the ab-

sence of a conspiracy. He simply compared pre-merger prices to post-merger prices. In short, Professor Cotterill's analysis does not create a material issue of fact on the question of whether the price increases were "by reason of" an illegal conspiracy in violation of the antitrust laws and Plaintiffs do not allege an injury of the kind which the antitrust laws are designed to prevent.[5]

Because Plaintiffs cannot establish antitrust injury, i.e., there is not a genuine issue for trial on the issue, Counts I and V fail and defendants are entitled to summary judgment as to Counts I and V on this basis alone.[6]

B. Relevant Geographic Market

The Court has previously stated that "Plaintiffs allege a horizontal agreement among Dean, DFA and NDH to lessen competition for sales of processed milk to retailers in the southeast and, in fact, not to compete for such sales." [Doc. 863 at 8]. Plaintiffs describe the conspiracy as a *quid pro quo* agreement between Dean and DFA (they allege that NDH was a false competitor controlled by DFA) in which Dean agreed to buy raw milk only from DFA in exchange for DFA's agreement to lessen competition in the bottled milk market. They further claim that full supply agreements were the

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[5] Professor Cotterill himself appears to admit that the required causal connection is not present in his analysis. *See* [Doc. 1149, Ex. 12, at p. 66, ll. 13-14].

[6] As a result of the Court's ruling with respect to Professor Cotterill's expert opinions and the absence of any genuine issue of fact related to antitrust injury, the Court will not consider the other argument made by defendants, that is, that the prices Food Lion paid Dean for processed milk were determined pursuant to a negotiated formula and thus Plaintiffs cannot show that a conspiracy, even if it existed, injured Plaintiffs.

"means by which Dean paid off DFA for NDH's participation in the conspiracy." [Doc. 1128 at 2]. The Court has previously held that Plaintiffs lack standing to challenge these raw milk agreements and has dismissed Count II on that basis, [*see* Doc. 863], but plaintiffs continue to see these agreements as being at "the heart" of their Count I conspiracy claims. The Court has previously held and now reaffirms that the evidence as a whole creates genuine issues of material fact as to whether Defendants entered into the alleged agreement.

Defendants argue, however, in this motion that Plaintiffs' Count I claim, no matter how it is characterized or labeled by Plaintiffs, is in reality, not a claim of a horizontal, *per se* illegal conspiracy, but rather a claim of an illegal conspiracy involving contracts between firms at different levels of the distribution chain—i.e. between a bottler of processed milk and a supplier of raw milk (Dean and DFA) which is essentially vertical in nature and subject to the rule of reason analysis. Because Plaintiffs cannot prove a relevant geographic market, Defendants argue that the conspiracy claim—Count I—fails. Plaintiffs respond that the conspiracy, if proven, is *per se* unlawful and no proof of a geographic market is required. They claim, alternatively, that even if the case were judged under the rule of reason standard, there is evidence of the appropriate geographic market.

Given this Court's ruling with respect to Professor Froeb's testimony, Plaintiffs cannot prove the relevant antitrust geographic market. If, therefore, the case is judged by the *per se* standard, the case must be submitted to the jury for resolution of the fact question of whether Defendants engaged in the alleged conspiracy. If, on the other hand, the case is judged by the rule of

reason standard, Defendants are entitled to summary judgment because there is no genuine issue of fact as to the relevant geographic market. The question of whether the alleged conspiracy is horizontal and *per se* illegal or essentially vertical and judged under the rule of reason standard is, therefore, a critical one for Plaintiffs. Many of the issues related to this question have been considered and decided in relation to summary judgment motions in the coordinated case of the dairy farmer plaintiffs and the Court's analysis in that case, much of which is incorporated herein, is set out in Doc. 1639.

Section 1 of the Sherman Act provides in pertinent part:

> [e]very contract, combination … or conspiracy in restraint of trade or commerce among the several states … is declared to be illegal.

15 U.S.C. § 1. While § 1 appears to prohibit every restraint of trade, the Supreme Court has interpreted the statute as condemning only those combinations which constitute unreasonable restraints of trade. *Standard Oil Company of New Jersey v. United States*, 221 U.S. 1 (1911). In order to establish their claim under § 1 of the Sherman Act, the Plaintiffs must prove that the Defendants "(1) participated in an agreement that (2) unreasonably unrestrained trade in the relevant market." *Nat'l Hockey League Players' Assoc. v. Plymouth Whalers Hockey Club*, 325 F.3d at 712, 718 (6th Cir. 2003).

Whether an agreement unreasonably restrains trade is determined under one of two approaches: the *per se* rule or the rule of reason. *Worldwide Basketball and Sport Tours, Inc. v. National Collegiate Athletic Association*, 388 F.3d 955, 959 (6th Cir. 2004). In *per se*

cases, evidence of actual effect on competition is not required because these actions are conclusively presumed to be unreasonable. *Copperweld Corp. v Independence Tube Corp.*, 467 U.S. 752, 768 (1984); *Northern Pacific Railway Company v. United States*, 356 U.S. 1, 5-6 (1958). A restraint on trade is *per se* illegal when "the practice facially appears to be one that would almost always tend to restrict competition and decrease output." *National Collegiate Athletic Association v. Bd. of Regents of Univ. of Oklahoma*, 468 U.S. 85, 100 (1984) (citations omitted).

Examples of practices which are *per se* illegal are horizontal price fixing, market allocation, group boycotts or tying arrangements, activities which are considered inherently anti-competitive. *Copperweld Corp.*, 467 U.S. at 768; *Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc.*, 441 U.S. 1, 19-20 (1979); *Northern Pacific Railway Company*, 356 U.S. at 5-6. "Restraints imposed by agreement between competitors have traditionally been denominated as horizontal restraints, and those imposed by agreement between firms at different levels of distribution as vertical restraints." *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 1522-23 (1988). There is often no bright line separating *per se* from rule of reason analysis. *NCAA*, 468 U.S. at 104, n.26.

A *per se* rule is inappropriate where the effects of a particular restraint are unclear, even where aspects of the restraint may appear to be facially anti-competitive. *Meijer, Inc. v Barr Pharmaceuticals, Inc.*, 572 F. Supp.2d 38, 47 (D.D.C. 2008). *Per se* analysis should not be extended "to restraints imposed in the context of business relationships where the economic impact of certain practices is not immediately obvious … ." *Balmoral Cinema, Inc. v Allied Artists Pic-*

tures Corp., 885 F.2d 313, 316 (6th Cir. 1989) (quoting *FTC v Indiana Federation of Dentists*, 476 U.S. 477, 459 (1986)).

Furthermore, "there is a presumption in favor of a rule-of-reason standard," *Business Electronics*, 485 U.S. at 726. *See also Care Heating & Cooling, Inc. v. American Std., Inc.* 427 F.3d 1008, 1012 (6th Cir. 2005) ("There is an automatic presumption in favor of the rule of reason standard."). Under the rule of reason analysis, the plaintiff bears the burden of establishing that the conduct complained of "produces significant anti-competitive effects within the relevant product and geographic markets." *NHL Players' Assoc.*, 325 F.3d at 718; *Worldwide Basketball and Sport Tours*, 388 F.3d at 959 (quoting *Nat'l Hockey League Players*, 325 F.3d at 718)).

At the hearing on the supplemental motion for summary judgment on December 16, 2010, the Court posed a question to the parties—i.e., whether the question of whether the alleged conspiracy is one subject to *per se* analysis or one subject to rule of reason analysis is a question for a jury or the Court. By letter brief filed on December 30, 2010, [Doc. 1222], plaintiffs argue that the Court cannot, as a matter of law, determine whether *pro se* or rule of reason analysis applies to the case, relying almost exclusively on *In re Sulfuric Acid Antitrust Litigation*, 743 F.Supp.2d 827, (N.D. Ill. 2010), a case where defendants asked the court to hold that rule of reason analysis applied and the district court declined to do so, holding that "[it] is not the Court's task to determine whether Defendants' conduct would be subjected to the rule of reason if the facts are as they claim." *Id.* at 866-67. The court found that the evidence presented an issue of fact as to whether a *per se* violation had occurred, *e.g.* whether certain defend-

ants "stood in a horizontal, vertical, or hybrid relationship with co-defendants." *Id.* at 868.

Defendants responded to Plaintiffs' letter brief, [Doc. 1244], arguing that *Sulfuric Acid* has no application because here, unlike that case, there are no disputed issues of fact to be decided. They argue, on the contrary, that the case presents a "classic rule of reason case" based on "Plaintiffs own allegations." [*Id.* at 2]. In other words, Defendants argue that Plaintiffs' own view of the case establishes that the case is subject to rule of reason analysis. They also argue that whether Plaintiffs "*quid pro quo*" agreement should be evaluated under the rule of reason analysis is a question of law for the Court.

The question of the appropriate rule of law to be applied to the conspiracy alleged by the Plaintiffs in their complaint is to be determined by the Court or is a question of fact for the jury has not been precisely answered in the Sixth Circuit. This Court concludes, however, the *Sulfuric Acid* decision notwithstanding, that the weight of authority supports Defendants' argument that determination of the appropriate rule of law to be applied is a question of law to be decided by the Court and that approach also appears to be consistent with the Sixth Circuit's application of the legal rules involved.

A leading antitrust treatise recognizes that the selection of the mode of analysis is a question of law for the court:

> While applying any one of antitrust's modes of analysis might involve many fact questions, the selection of a mode is entirely a question of law. To be sure, the Supreme Court stated in *Maricopa* that "the rule of reason requires the fact-

> finder to decide whether under all the circumstances of the case the restrictive practice imposes an unreasonable restraint on competition." But that statement was not meant to indicate that the fact finder should determine whether the *per se* rule or the rule of reason applied to a particular set of facts. Rather, it meant that once the court decided that the rule of reason should apply, disputed factual questions about reasonableness should be left to the jury. In a footnote the court made clear that determining the rule of decision was a question of law.

XI Herbert Hovencamp, Antitrust Law ¶ 1909b at 279 (2d Ed. 2005) (citing *Perceptron, Inc. v.Sensor Adaptive Mach.*, Inc., 221 F.3d 913 (6th Cir. 2000)). This statement is also consistent with decisions of the Sixth Circuit. For instance, in *Expert Masonry, Inc. v. Boone County, Kentucky*, 440 F.3d 336 (2006), the Sixth Circuit said: "In the first instance, ***courts*** must distinguish between some types of unlawful anticompetitive restraints that [are] … *per se* illegal under the antitrust laws, and the far-larger type of restraints that should be analyzed under the rule of reason approach … ."). *Id.* at 342 (emphasis added). Likewise, in *United States v. Cooperative Theaters of Ohio, Inc.*, 845 F.2d 1367 (6th Cir. 1988), although a criminal case, the district court held as a matter of law that the alleged conduct constituted a *per se* violation of the Sherman Act, a ruling affirmed by the Sixth Circuit. *See also Care Heating & Cooling, Inc.* 427 F.3d at 1012 ("if a court determines that a practice is illegal *per se*, further examination of the practice's impact on the market or the procompetitive justifications for the practice is unnecessary for finding a violation of antitrust law," suggesting

that the decision as to whether a practice is illegal *per se* is one committed to the court).

The approach is likewise consistent with that taken by the United States Supreme Court and other circuit courts of appeals. The Supreme Court has repeatedly noted that the *per se* rule should be applied to conduct only after ***courts*** have had "considerable experience with certain business relationships." *United States v. Topco Associates, Inc.*, 405 U.S. 596, 608 (1972). Since it seems quite clear that the *per se* rule should be applied to conduct only after it has been examined carefully by the courts, not juries, it also seems rather clear that the question of whether allegedly unlawful conduct is subject to *per se* analysis or rule of reason analysis is a legal question for the court, not a question for the jury. *See also Northern Pacific Railway Company*, 356 U.S. at 5 (suggesting that the court must first determine whether the conduct alleged to be unlawful is the type of conduct that has a "pernicious effect on competition and lacks any redeeming virtue …," to be considered illegal *per se*); *Copy-Data Systems, Inc. v. Toshiba America, Inc.*, 663 F.2d 405 (2d Cir. 1981) (where the district judge had held, after hearing argument from both sides, that Toshiba had imposed a horizontal, illegal *per se* territorial restriction on Copy-Data, a holding reversed by the Second Circuit on appeal as a matter of law).

It is beyond question that Plaintiffs present their claim as a horizontal, *per se* illegal conspiracy to restrain trade and fix prices on the part of the Defendants, [*see* Complaint, Doc. 87, ¶ 162], arguing only alternatively that the agreements at issue violate § 1 of the Sherman Act under rule of reason analysis. In addition, Plaintiffs have repeatedly referred to their claim as a horizontal, *per se* claim in their pleadings and at

oral argument. The labels attached to the conduct by the Plaintiffs are not determinative, however, i.e. that Plaintiffs repeatedly state that the conspiracy they allege is a horizontal, *per se* illegal conspiracy to fix prices and allocate markets does not make it so. In fact, the Supreme Court has recognized just that. *See California Dental Ass'n. v. Federal Trade Commission*, 526 U.S. 756 (1999).

The Sixth Circuit has succinctly defined the two major types of antitrust conspiracies as follows:

> Courts have identified two major types of antitrust conspiracies to restrain trade: horizontal and vertical. *Crane & Shovel Sales Corp. v Bucyrus-Erie Co.*, 854 F.2d 802, 805 (6th Cir. 1988). Horizontal conspiracies involve agreements among competitors at the same level of market structure to stifle trade, such as agreements among manufacturers or among distributors to fix prices for a given product, and therefore may constitute *per se* violations of antitrust law. *Id.*; *see also Oreck Corp. v. Whirlpool Corp.*, 579 F.2d 126, 131 (2d Cir. 1978). Vertical conspiracies, on the other hand, involve agreements among actors at different levels of market structure to restrain trade, "such as agreements between a manufacturer and its distributors to exclude another distributor from a given product and geographic market." *Crane & Shovel Sales Corp.*, 854 F.2d at 805.

Care Heating & Cooling, 427 F.3d at 1013. Vertical restraints are analyzed under the rule of reason. *Id.* (citing *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 57-58 (1977)). To the extent there was any lin-

gering doubt about whether vertical restraints are subject to *per se* or rule of reason analysis, that suggestion was quashed by the United States Supreme Court in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007) (vertical restraints to be judged according to the rule of reason). *See also Total Benefit Planning Agency, Inc. v. Anthem Blue Cross and Blue Shield*, 552 F.3d 430 (6th Cir. 2008).

As an initial matter then, the Court must determine whether or not the agreement alleged by the plaintiffs is horizontal in nature, which may constitute a *per se* violation of antitrust law, or vertical in nature, which must be analyzed under the rule of reason. In making this determination, as set forth above, the labels used by the plaintiffs are largely irrelevant and the decision will be made against a backdrop of several well established principles. First of all, "[t]here is an automatic presumption in favor of the rule of reason standard." *Care Heating & Cooling*, 427 F.3d at 1012 (citing *Business Electronics Corp.*, 485 U.S. at 726; *Continental T.V., Inc.*, 433 U.S. at 49). Secondly, the category of agreements to be analyzed under a *per se* analysis has been shrinking over the last few years. *See Leegin*. Finally, the *per se* rule should be applied only in "clear cut cases" of trade restraints that are so unreasonably anticompetitive that they present straightforward questions for reviewing courts. *NHL Players Assoc.*, 325 F.3d at 718 (citing *Sylvana*, 433 U.S. at 49-50). *See also Balmoral Cinema*, 885 F.2d at 316 ("*per se* analysis should not be extended 'to restraints imposed in the context of business relationships where the economic impact of certain practices is not immediately obvious … .'").

As noted above, the essence of Plaintiffs' conspiracy claim is a *quid pro quo* agreement between competi-

tors at the same level of the distribution chain (Dean and NDH) almost totally carried out through the use of agreements involving the supply of raw milk among a group of firms at other levels of the distribution chain (Dean and DFA, NDH and DFA). At oral argument, Plaintiffs presented the Court with a chart illustrating their claim which showed a triangular relationship with Dean and NDH as horizontal competitors and DFA in a vertical relationship to both Dean and NDH. Plaintiffs suggest that two horizontal competitors, Dean and NDH, "are central to the argument" while at the same time arguing that it is the full supply agreements for raw milk between vertical actors that are "at the heart" of their claims.

Plaintiffs equate the arrangement among the firms sued here with those in *In re Pressure Sensitive Label Stock Antitrust Litigation*, 2007 WL 4150666 (M.D. Pa. 2007) (not reported in F.Supp.2d) and argue that the court there rejected the "exact same arguments" Defendants make in this case. In a footnote in that opinion, deciding a class certification motion, the district judge noted that Defendants had argued at oral argument that the agreement in question was not a horizontal agreement. As the Court understands the parties in that case, the plaintiffs, in the business of processing and converting pressure sensitive label stock ("PSL"), sued defendants, PSL producers, for conspiring "to fix, raise, maintain or stabilize prices for self-adhesive label stock … and to allocate and restrict output in the market for self-adhesive label stock sold in the United States." *Id.* at *1.

One of the defendants ("UPM") was a paper supplier as well as the owner of another defendant ("Raflatac"), a PSL producer. Avery, another PSL producer, competed with Raflatac, and also had a contract with

Raflatac's parent, UPM, to supply paper to Avery. The gist of the alleged illegal agreement challenged was that Avery would purchase large quantities of paper stock from UPM in consideration of UPM agreeing to refrain from competing with Avery in the PSL market through Raflatac. Thus, the paper supply agreement was a critical element of plaintiffs' antitrust claims. Defendants claimed that the antitrust arrangement was a dual distribution arrangement, not a horizontal agreement. The district court rejected that position, finding that "the agreement was between competitors and, therefore, horizontal," *Id.* at *12, FN7. The instant case, Plaintiffs argue, "mirrors *Pressure Sensitive*," and they characterize the arrangement as "3-way agreement trading vertical supply for horizontal non-competition."

Defendants here do not claim the arrangement among Dean, NDH and DFA is a dual distribution arrangement. They claim rather that the substantial vertical elements of the agreement challenged here make the case analogous to cases decided under the rule of reason. It is for this reason that the Court does not find *Pressure Sensitive* to be particularly helpful in resolving this question. The district judge in *Pressure Sensitive*, while noting that the paper supply agreement between UPM and Avery was a critical element of the alleged conspiracy, apparently never considered the nature of the agreement in the terms posed by Defendants here.

The issue presented here is a difficult one. On the one hand, Plaintiffs' argue that the essence of the agreement here is that two horizontal competitors, Dean and NDH, are central and that the agreement should therefore be subjected to *per se* analysis. On the other hand, Plaintiffs also allege that NDH is a false

competitor, completely controlled by DFA, and that the full supply agreements for raw milk are at the heart of their claims. In reality, it appears to the Court that the essence of the agreement alleged by the Plaintiffs is one between Dean in its role as a processor of bottled milk and DFA in its role as a supplier of raw milk and that the milk supply agreements for raw milk are central to the completion of the alleged conspiracy. Under these circumstances, the Court agrees with Defendants that the agreement has substantial vertical elements such that the alleged agreements challenged by Plaintiffs ought to be subject to the rule of reason analysis, requiring that Plaintiffs establish the relevant geographic antitrust market, something they cannot do. For this reason, Defendants are entitled to summary judgment as to Count I of Plaintiffs' complaint.

So ordered:

ENTER:

s/J. RONNIE GREER
UNITED STATES DISTRICT JUDGE

APPENDIX C

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

IN RE: SOUTHEASTERN MILK ANTITRUST LITIGATION

THIS DOCUMENT RELATES TO:
Food Lion, LLC, et al.
v. Dean Foods Company, et al.,
No. 2:07-CV-188

Master File No. 2:08-MD-1000
Judge J. Ronnie Greer
Inman
Filed: August 4, 2010

MEMORANDUM OPINION

I. Introduction

This multi-district class action antitrust case involves allegations by plaintiffs Food Lion, LLC ("Food Lion") and Fidel Breto, d/b/a Family Foods ("Breto"), on behalf of themselves and a class of all others similarly situated,[1] purchasers of processed milk, involving allegations against Dean Foods Company ("Dean"), Dairy Farmers of America, Inc. ("DFA"), National Dairy Holdings, L.P. ("NDH"), Dairy Marketing Services, LLC ("DMS"), and Southern Marketing Agency, Inc. ("SMA") (collectively, "defendants") for violations of §§ 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2. More specifically, Count I of the amended complaint accuses Dean, DFA and NDH of an agreement "to less-

[1] There is a pending motion for class certification.

en competition for sales of processed milk in the Southeast" in violation of § 1 of the Sherman Act; Count II of the amended complaint accuses all defendants of a conspiracy to unreasonably unrestrain trade by conspiring to lessen competition for the purchase and sale of raw milk to milk bottling and processing plants in the southeast, resulting in higher prices for processed milk paid by the plaintiffs; Counts III and IV of the amended complaint assert claims of monopolization and attempted monopolization against Dean in violation of § 2 of the Sherman Act; and Count V of the amended complaint charges a conspiracy to monopolize in violation of § 2 of the Sherman Act against Dean, DFA and NDH.

All defendants have moved for summary judgment, [Doc. 461].[2] The plaintiffs have responded to the motion for summary judgment, defendants have replied and supplemental briefs have been filed. In other words, the parties have now exhaustively briefed the issues before the Court and they are ripe for disposition. The Court heard oral argument on the motion for summary judgment on December 18, 2009, as to Counts I and II and plaintiffs were given additional time to file their full responses as to Counts III, IV and V. The Court has determined that no further oral argument on the motion is necessary. For the reasons which follow, the motion will be GRANTED IN PART and DENIED IN PART.

II. Factual Background

This Court would ordinarily set out the relevant factual findings related to the issues raised by the summary judgment motion. In this particular case,

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[2] All references to docket numbers are to the docket in No. 2:08-md-1000.

that is virtually impossible, largely because of the voluminous pleadings filed by the parties, especially the plaintiffs. The manner in which plaintiffs have presented their response to the motion for summary judgment has made it practically impossible for the Court to prepare a concise statement of *material* facts which are undisputed and, more importantly, to identify material, relevant facts which are in dispute. Plaintiffs have filed a very lengthy response to defendants' statement of facts and have, in addition, filed a lengthy statement of facts on behalf of the plaintiffs. These pleadings do not comply with paragraph 4 of the Court's January 7, 2009 amended scheduling order, nor do they comply with current Rule 56. Plaintiffs have not set out, in concise form, those facts which are material to the resolution of this motion for summary judgment but have used these pleadings to advance their allegations, and make arguments and state conclusions. These pleadings more often than not fail to provide specific record citations and they include many facts which are clearly immaterial or irrelevant.

These deficiencies were called to the attention of plaintiffs' counsel during the Court's December 18 hearing and the plaintiffs were advised, at that time, that the Court had considered striking these pleadings. Despite the Court's admonishment, plaintiffs thereafter submitted an even longer "replacement" statement of facts that does not correct the shortcomings in any of their original pleadings. Plaintiffs' conduct in this respect evidences either a lack of familiarity with the relevant Rules of Civil Procedure and/or the Court's scheduling order and displays a lack of respect for the Court's oral instructions. These actions, as well as the continued filing by plaintiffs of "supplemental" plead-

ings, one as late as July 15, 2010, have unnecessarily delayed the Court's resolution of the pending motion.[3]

Although, as set forth above, the Court will not set forth any exhaustive statement of facts, some statement about the nature and identity of the parties and some background information relevant to the issues raised in this case is important. Other facts which are relevant to the Court's determination of these issues will be discussed throughout the body of the memorandum opinion.

Food Lion is a North Carolina limited liability company which operates approximately 1,300 supermarkets in 11 southeastern and mid-atlantic states. Food Lion purchases processed milk directly from Dean and DFA for sale at retail at certain of its supermarket stores. Fidel Breto, d/b/a Family Foods, is the operator of a retail grocery store in Jonesborough, Tennessee, who regularly purchases processed milk directly from Dean for sale at his retail store.

Dean is a Delaware corporation which buys raw milk and bottles processed milk in the United States.

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[3] Plaintiffs also appear to have engaged in what was referred to during the undersigned's days of practice before state courts as a "paper dump" in response to the motion for summary judgment. In other words, it appears that part of the plaintiffs' strategy has been to file an inordinate amount of paper in this case and to address many, many immaterial and irrelevant facts as far as the motion for summary judgement is concerned. In state court parlance, plaintiffs' goal appears to have been to convince the court that, somewhere in this huge volume of paper, there must be a disputed issue of material fact sufficient to defeat defendants' motion for summary judgment. Although the Court has not chosen to strike any of plaintiffs' pleadings related to this motion, plaintiffs are forewarned that such conduct in the future may well result in having pleadings stricken from the record.

DFA is a not-for-profit Kansas corporation. DFA is a milk cooperative that markets raw milk for its members and also owns and operates its own hauling companies, processing plants and distribution centers for processed milk. NDH is a Delaware limited partnership which operates processed milk bottling plants. DFA owns a 50% equity interest and approximately 92% preferred equity interest in NDH. DMS is a Delaware limited liability company which was formed by DFA and Dairylea Cooperative, Inc. in 1999. DMS is a milk marketing organization which markets milk on behalf of its member dairy cooperatives. DMS arranges contracts with buyers of raw milk such as Dean, arranges for the transportation of raw milk, schedules deliveries, allocates marketing costs, and handles the payment of checks to cooperative member dairy farmers. Plaintiffs claim DMS is controlled by DFA. SMA is a Kentucky not-for-profit corporation which represents its member dairy cooperatives including DFA, Maryland and Virginia Milk Producers, Lone Star Milk Producers, Dairymen's Marketing Cooperative and Arkansas Dairy Cooperative Association.

Milk bottlers process raw milk purchased from cooperatives, independent dairy farmers or other supply plants into pasturized milk for human consumption. Milk bottlers then sell the processed milk to retail outlets, like Food Lion and Breto. By late 2001, Suiza, a Dallas, Texas dairy company, had become the largest fluid milk processor in the United States. Dean was the second largest buyer of raw milk and the second largest bottler of processed milk in the United States. Suiza owned 67 dairy processing plants in 29 states and Dean operated 43 plants in 19 states.

In 2001, plans were announced for a Suiza merger with Dean, with the merged company to operate under

the name Dean. To address Department of Justice ("DOJ") concerns because Dean and Suiza were the first and second largest process milk bottlers in the United States, Dean and Suiza agreed to the divestment of 11 milk bottling plants in Alabama, Florida, Indiana, Kentucky, Ohio, South Carolina, Virginia and Utah to NDH, an entity created for that purpose, and largely controlled by DFA[4], as set forth above. At the same time, Dean agreed to buy DFA's 33.8% stake in Suiza. In order to allow NDH to purchase the divested plants,[5] DFA and its subsidiaries provided more than $400,000,000.00 in financing to NDH. By 2002, Dean was the number one seller of processed milk in the southeast and NDH was second.

III. Summary Judgment Standard

Generally, summary judgment is proper where "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Fed. R. Civ. P.* 56(c); *Canderm Pharmacal, Ltd. v. Elder Pharm., Inc.*, 862 F.2d 597, 601 (6th Cir. 1988). Only

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[4] At the time of its formation, NDH had four (4) partners: (1) DFA, (2) Allen Meyer (a business partner of DFA's CEO), (3) Tex Beshears, and (4) Tracy Noll (former Suiza senior executives). DFA owned half of NDH and the individual partners collectively owned the other half

The plaintiffs premise a fair part of their argument on its allegation that DFA controlled NDH. At a minimum, this will be a matter for the jury to decide.

[5] The plaintiffs argue that DFA created NDH as a false competitor, vested it with weak assets, including "second-best" plants, and guaranteed its failure as a competitor by staffing it with unqualified managers and making decisions which were against its economic interests.

factual disputes that might effect the outcome of a lawsuit under substantive law are "material." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). To be "genuine," a dispute must involve evidence upon which a jury could find for the nonmoving party. *Id.* The burden is upon the moving party to show "that there is an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). Thereafter, the nonmoving party must present significant probative evidence in support of the complaint to defeat the motion. *Anderson*, 477 U.S. at 249-50. The nonmoving party is required to show more than a metaphysical doubt as to the existence of a genuine issue of material fact. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). In deciding the motion, "[t]he court cannot weigh the evidence, judge the credibility of witnesses, or determine the truth of any matter in dispute." *Stephens v. Koch Foods, LLC*, 667 F.Supp.2d 768, 2009 WL 3297289, *8 (E.D. Tenn. 2009) (citing *Anderson*).

The parties in this case have devoted considerable of their briefing and oral argument to the question of whether or not antitrust plaintiffs must meet a different standard from that required of other civil plaintiffs. The burden on the plaintiff in an antitrust case is the same as it is on any other civil plaintiff. *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 468-69 (1992). As in other civil cases, courts addressing summary judgment motions in antitrust cases "must … consider all the facts in the light most favorable to the non-movant and must give the non-movant the benefit of every reasonable inference." *Spirit Airlines, Inc. v. Northwest Airlines, Inc.*, 431 F.3d 917, 930 (6th Cir. 2005) (internal quotations and citations omitted).

Some special rules do apply, however, with respect to the manner in which the court views certain ambiguous circumstantial evidence. In conspiracy cases, "[t]he element of agreement, … is nearly always established by circumstantial evidence, as conspirators seldom make records of their illegal agreements." *United States v. Short*, 671 F.2d 178, 182 (6th Cir. 1982). Both the Supreme Court and the Sixth Circuit have, however, made it clear that in a case based on circumstantial evidence, an antitrust plaintiff may not reach a jury where the evidence on which he relies to prove an agreement is, at best, ambiguous. *Matsushita*, 475 U.S. 588) ("conduct as consistent with permissible competition as illegal conspiracy does not, standing alone, support an inference of agreement"). An antitrust plaintiff bears the burden of presenting evidence that "tends to exclude the possibility that the [defendants] were acting independently." *Monsanto Co. v. Spray–Rite Serv. Corp.*, 465 U.S. 752, 764 (1984). An antitrust plaintiff will be unable to demonstrate a conspiracy if, "using ambiguous evidence, the inference of a conspiracy is less than or equal to an inference of independent action." *See Riverview Investments, Inc. v. Ottawa Cmty. Imp. Corp.*, 899 F.2d 474, 483 (6th Cir. 1990) (citing *Matsushita*, 475 U.S. at 588). The Supreme Court reiterated that standard as recently as 2007 in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007):

> [P]roof of a § 1 conspiracy must include evidence tending to exclude the possibility of independent action, *see Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, ( ) (1984); and at the summary judgment stage a § 1 plaintiff's offer of conspiracy evidence must tend to rule out the possibility that the defendants were acting independently, *see Matsushita Elec. In-*

> *dus. Co. v. Zenith Radio Corp.*, 475 U.S. 574,() (1986).

550 U.S. at 554. This is consistent with the standard set forth by the Sixth Circuit in numerous cases. *See Nat'l Hockey League Players Ass'n. v. Plymouth Whalers Hockey Club*, 419 F.3d 462, 475 (6th Cir. 2005) (Sherman Act conspiracy claim fails if evidence is "equally consistent with independent conduct"); *Sancap Abrasives Corp. v. Swiss Industrial Abrasives*, 19 F. App'x. 181, 187 (6th Cir. 2001); *Super Sulky, Inc. v. United States Trotting Ass'n*, 174 F.3d 733, 740 (6th Cir. 1999); *Re/Max Int'l, Inc. v. Realty One, Inc.*, 173 F.3d 995, 1009-10 (6th Cir. 1999); *Bailey's Inc. v. Windsor America, Inc.*, 948 F.2d 1018, 1028 (6th Cir. 1991); *Nurse Midwifery Assoc. v. Hibbett*, 918 F.2d 605, 616-17 (6th Cir. 1990); *City Communications, Inc. v. City of Detroit*, 888 F.2d 1081, 1085 (6th Cir. 1989).

IV. Analysis and Discussion

A. Count I (violation of § 1 of the Sherman Act/ agreement not to compete against Dean, DFA and NDH)

In Count I of the amended complaint, plaintiffs allege a violation of § 1 of the Sherman Act by Dean, DFA and NDH. More specifically, the plaintiffs allege a horizontal agreement among Dean, DFA and NDH to lessen competition for sales of processed milk to retailers in the southeast and, in fact, not to compete for such sales.

1. Defendants' Argument

Dean, DFA and NDH argue, in support of their motion for summary judgment as to Count I, that "[t]here is no evidence of a conspiracy to lessen competition for processed milk." More specifically, defend-

ants argue that none of the conduct alleged by plaintiffs, *i.e.*, allocation of the business of "at least one major customer," failure to solicit one another's customers, closing of bottling plants, and retaliation against a competitor that took business from Dean and NDH, even if proven, violates § 1 of the Sherman Act. Quoting *Monsanto*, defendants correctly assert that plaintiffs bear the burden of producing evidence, direct or circumstantial, "that the [defendants] had a conscious commitment to a common scheme designed to achieve an unlawful objective." *Monsanto*, 465 U.S. at 768.

In response to plaintiffs' allegation that Dean and NDH did not compete with one another after the Dean-Suiza merger in 2001, Dean and NDH point to record evidence which, they argue, establishes that NDH and Dean have vigorously competed for sales of processed milk to customers in the southeast.[6] They also argue that the record contradicts plaintiffs' allegations that NDH and Dean conspired to allocate the business of a major customer, Wal-Mart, pointing to evidence in the record that Wal-Mart made its own decision because it wanted to deal with one supplier, Dean, in the southeast and had a good relationship with Dean executives.

Defendants also respond to an allegation made in plaintiffs' amended complaint that an NDH executive told another not to solicit Dean's customers. Plaintiffs allege, in their memorandum in support of their motion for class certification, that this occurred in a telephone conversation between NDH executives Tracy Noll and Rob Cottet; however, as plaintiffs point out, Messrs. Noll and Cottet both denied plaintiffs' allegation under oath. Plaintiffs also, however, point to documentary

[6] Dean and NDH list approximately 30 examples of claimed competition in support of their argument.

evidence in the record which they claim shows that NDH agreed, at Dean's instruction, not to bid for certain customer's business. Defendants painstakingly respond to each item of documentary evidence cited and argue that the allegation is implausible because plaintiffs cannot explain why NDH would agree to a deal that benefitted Dean but gave nothing to NDH. In sum, NDH and Dean argue that plaintiffs misconstrue, misread and speculate about the meaning of the various items of documentary evidence and cannot survive a motion for summary judgment.

With respect to plaintiffs' argument that the closing of certain bottling plants is evidence of an agreement to limit competition, Dean and NDH argue, and correctly so, that the closing of unprofitable plants is not evidence of violation of the antitrust laws. They further argue that the closing of milk bottling plants in the southeast has resulted from mere parallel conduct rather than any agreement that the defendants conspired to close any plants. The defendants point to significant evidence in the record that the only two plants closed by Dean in the southeast since the merger were closed for legitimate, independent business reasons.

Dean and NDH also vigorously contest the allegation of plaintiffs that Dean and NDH conspired to block competition from others. Plaintiffs point to two transactions as evidence from which the jury could infer that the defendants conspired to foreclose competition-dealings with Southeast Milk, Inc.,[7] a Florida-based dairy farmer cooperative with members in Florida and the southeast, and the plan by a group of investors for a

[7] Although plaintiffs make this allegation in their amended complaint, they do not mention it in their response to the instant motion and appear to have abandoned the argument.

new bottling plant in Baxley, Georgia, known as Red Oak. Once again, defendants argue in painstaking detail that neither of these projects may form the basis of an inference that Dean was conspiring to block competition. They describe these events as "innocuous business events" rather than evidence of a conspiracy.

Finally, defendants argue that plaintiffs have offered no proof of a horizontal price-fixing agreement. Apparently, plaintiffs rely largely on events in 2003 involving the Dairy Cooperative Marketing Association, a marketing agency to which DFA and other cooperatives belong, to support their allegation. Those events included a .33 cent per hundredweight increase in the over-order premium charged to customers for raw milk and an .11 cent per hundredweight rebate simultaneously received by some processors. Dean points out that these events involved the market for raw milk, not processed milk, and are not probative of an agreement to fix prices for processed milk.

2. Plaintiffs' Argument

Plaintiffs have filed an extensive response to the motion for summary judgment with respect to Count I of the amended complaint, committing approximately 40 pages of their responsive brief to responding to the contentions of DFA, Dean and NDH as set forth above. Simply put, plaintiffs vigorously dispute each of the contentions put forth by the defendants. For instance, while plaintiffs acknowledge certain "anecdotal instances of competition," they further argue that such anecdotal evidence is not inconsistent with their theory of recovery because the conspiracy was carried out at the highest levels of management of the defendants and various lower level managers and employees were likely not aware of the conspiracy. They further claim that

much of the anecdotal evidence is irrelevant because it occurred outside the relevant geographic market and that these sales accounted for only a "minuscule amount of sales." Plaintiffs assert that, although NDH was set up as a competitor of Dean and DFA as a result of the DOJ approved 2001 merger, NDH was in fact a false competitor, controlled by DFA for the purpose of eliminating competition for Dean. In return, plaintiffs argue, DFA got full supply rights to Dean's network of plants, leading to an expansion of DFA's "empire."

Plaintiffs cite what they see as numerous acts which were against the independent economic interests of defendants, absent a conspiracy, including acceptance by DFA/NDH of weak assets in the divestiture process, most favored nations clauses in the full supply agreements, an outsourcing agreement with DMS and the sale of certain profitable assets while keeping certain unprofitable plants open. They claim that DFA took certain acts to benefit Dean, while at the same time undercutting its subsidiary NDH. Plaintiffs also point to the close relations among the key players involved in the various entities both before and after the merger and, cite the Red Oak and "Flagship"[8] ventures as efforts by defendants to block competition in the southeast.

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[8] Flagship was a venture, in 2005, according to plaintiffs, which sought to buy the new Atlanta Dairy and provide a vehicle for disgruntled dairy farmers to enter into the southeast bottling market. According to plaintiffs, Dean officials were concerned about losing millions of dollars and Dean prevailed upon DFA to relax its full supply agreements and allow Dean to buy milk from non-DFA farmers, allowing Dean to keep those farmers within the Dean system rather than suppling Flagship. Plaintiffs cite a host of other evidence which they assert creates genuine issues of material fact as to Count I, and defendants respond to each in meticulous detail.

3. Applicable Legal Principles

Section 1 of the Sherman Antitrust Act states that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States … is declared to be illegal." 15 U.S.C. § 1. To establish a § 1 violation, a plaintiff must first show a conspiracy or agreement between at least two legally distinct economic entities, then demonstrate that the agreement constituted an unreasonable restraint of trade either *per se* or under the rule of reason. *Capital Imaging Assoc. v. Mohawk Valley Medical Assocs.*, 996 F.2d 537, 542 (2d Cir.), *cert. denied*, 114 S. Ct. 388 (1993). Section 1 requires proof of a conspiracy or concerted action and does not reach unilateral conduct. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 767-68 (1984).

4. Discussion

Plaintiffs and defendants have committed many, many pages of their briefing to their widely divergent views of the evidence put forth by plaintiffs in support of their Count I conspiracy claim. In addition, the parties have filed hundreds and hundreds of pages of exhibits, affidavits, and deposition testimony, almost all of which they see differently. Many of plaintiffs' arguments are unconvincing on their merits; however, reaching that conclusion requires the Court to weigh the evidence and resolve factual disputes, something the Court is not permitted to do on a motion for summary judgment.

Defendants rather convincing respond to many of the individual allegations made by plaintiffs and the Court would be constrained to agree with defendants on many of the individual issues raised by the respective parties in their briefs, if the Court viewed each

separate document or transcript of testimony in isolation. Defendants appear to invite the Court to do just that; however, the Court must view the record as a whole and, while testimony or documentary exhibits viewed in isolation might not create a genuine issue of material fact, the cumulative effect of such evidence does so. *See American Tobacco Co. v. United States*, 147 F.2d 93, 107 (6th Cir. 1945) ("Acts done to give effect to the conspiracy may be, in themselves, wholly innocent acts. Yet, if they are part of the sum of the acts which are relied upon to effectuate the conspiracy which the statute forbids, they come within its prohibition.").

That the parties have many disputes about the appropriate inferences which could be drawn by a reasonable jury with respect to such a large volume of evidence simply illustrates the existence of genuine issues of material fact with respect to the conspiracy claim. It is not the strength of the plaintiffs' case on the merits that is being tested by this motion; rather, the Court must determine only whether or not there are genuine issues of material fact without weighing the evidence, resolving issues of credibility of witnesses or resolving factual disputes. Simply put, that is a matter for a jury.

For these reasons, the motion for summary judgment with respect to Count I will be DENIED.

B. Count II (violation of § 1 of the Sherman Act and § 3 of the Clayton Act/conspiracy to unreasonably restrain trade against Dean, DFA, NDH, SMA and DMS)

Plaintiffs allege in Count II of their complaint a lessening of competition "for raw milk" supply through certain full supply agreements. Amended Comp., ¶¶ 63-70. More specifically, plaintiffs allege that Dean

and NDH entered into exclusive or full-supply agreements for raw milk with DFA which grant DFA the exclusive right, in a series of 20 successive one year agreements, to supply the raw milk requirements of Dean's processed milk bottling plants in the southeast. Plaintiffs also allege that Dean, NDH and DFA agreed that all raw milk supplied to Dean, NDH and DFA's milk bottling plants in the southeast must be marketed by DFA or through SMA or DMS, both of which were formed by, and are controlled by, DFA. Through these full supply agreements, plaintiffs allege, the defendants have attempted to restrain competition in the sale of raw milk in the southeast by forcing independent cooperatives and independent dairy farmers to market their raw milk through DMS to have access to the fluid milk bottling plants in the southeast. As a result, plaintiffs allege that DFA, DMS and SMA control 90% of the raw milk produced in the southeast and more than 80% of the raw milk processed by milk bottlers in the southeast. These full supply agreements are at the heart of the coordinated cases brought by dairy farmer plaintiffs alleging antitrust violations by these same defendants and others in the market for raw milk.

Count II of the Food Lion and Breto amended complaint alleges a violation of § 1 of the Sherman Act and § 3 of the Clayton Act in that Dean, DFA, NDH, SMA and DMS have entered into a conspiracy to unreasonably restrain trade. They allege that "Dean and the other Defendants have entered into exclusive supply agreements with, and have actively conspired with one another through the means described [in the complaint, summarized above], for the purpose of lessening competition among independent milk producers and cooperatives for the purchase and sale of raw milk to milk bottling and processing plants in the southeast."

Amended. Comp., ¶ 93. Plaintiffs further allege that these "full-supply agreements collectively and individually constitute unreasonable restraints of trade in the market for raw milk," Amended. Comp., ¶ 95, which have "resulted in substantial harm to competition in the Southeast for raw milk sold to milk bottling companies and have also resulted in substantial harm to competition for the sale of processed milk." *Id.*, ¶ 96. As a result, plaintiffs allege that "Food Lion, Breto and other class members, were injured in their business or property by Defendants' restraint of trade in the relevant markets" and "have been forced to pay higher prices for processed milk than they would have paid in the absence of Defendants' unlawful conduct." *Id.*, ¶ 99.

1. Defendants' Argument

Defendants argue that retailer Plaintiffs lack standing to challenge the raw milk conspiracy alleged in the dairy farmer cases; that plaintiffs cannot establish a causal connection between the alleged raw milk conspiracy and higher prices for processed milk; and that even if there were a casual relationship between the alleged violation and the alleged injury, it is too remote and speculative for Plaintiffs to have antitrust standing, [Doc. 582, pp. 2-4]. Defendants allege that these retailer plaintiffs would have benefitted from the alleged raw milk conspiracy since lower raw milk prices result in lower processed milk prices, that plaintiffs are neither consumers nor competitors in the raw milk market, that there is no connection between the alleged raw milk conspiracy and higher prices for processed milk, and that the potential for duplicative recovery is real because the dairy farmer plaintiffs seek treble damages for the same alleged conduct.

2. Plaintiffs' Argument

Plaintiffs respond to defendants' motion by arguing that they in fact "have antitrust standing to recover the overcharges they paid for bottled-milk-price increases." [Doc. 538, p. 8]. Plaintiffs suggest that there is record evidence which shows that defendants have colluded to increase "overorder premiums-the amounts that milk bottlers must pay *above* the federal minimum," a government regulated minimum price bottlers pay to producers of raw milk. Unlike the federal minimum, over-order premiums are not government regulated. Therefore, the plaintiffs' argument goes, since defendants have artificially inflated over-order premiums and, since over-order premiums increase the cost of raw milk which is "directly pegged" to the price retailers pay for processed milk, the overcharges have resulted in an increase in the amount Food Lion and others have paid for processed milk. Since Food Lion buys processed milk from Dean, it argues that it is a direct victim of the alleged conspiracy and thus has antitrust standing to recover the inflated costs of processed milk. Food Lion further argues that, even setting aside the relationship between over-order premiums and bottled milk prices, retailer plaintiffs still have standing because the evidence establishes that prices Food Lion paid for processed milk went up more than the raw milk premiums.

3. Applicable Legal Principles

The elements which plaintiffs must prove to make out a § 1 Sherman Act claim are examined in the preceding section and the Court will not repeat those here. Standing to bring an action under the Sherman Act is conferred by § 4 of the Clayton Act, which provides, in pertinent part, " … any person who shall be injured in

his business or property by reason of anything forbidden in the antitrust laws may sue therefor …, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." 15 U.S.C. § 15. "Standing, in a conventional Article III sense, requires just proof of actual injury, causation and redressability. *NicSand, Inc. v. 3M Company*, 507 F.3d 442, 449 (6th Cir. 2007) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). A determination of antitrust standing, however, requires more. "Harm to the antitrust plaintiff is sufficient to satisfy the constitutional standing requirement of injury in fact, but the court must make a further determination whether the plaintiff is a proper party to bring a private antitrust action." *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 535 n.31 (1983). Furthermore,

> Antitrust standing to sue is at the center of all antitrust law and policy. It is not a mere technicality. It is the glue that cements each suit with the purposes of the antitrust laws, and prevents abuses of those laws. The requirement of antitrust standing insures that antitrust litigants use the laws to prevent anticompetitive action and make certain that they will not be able to recover under the antitrust laws when the action challenged would tend to promote competition in the economic sense. Antitrust laws reflect considered policies regulating economic matters. The antitrust standing requirement makes certain that the laws are used only to deal with the economic problems whose solutions these policies were intended to effect.

HyPoint Tech., Inc. v. Hewlett-Packard Co., 949 F.2d 874, 877 (6th Cir. 1991).

In other words, standing under the Clayton Act requires more than mere injury proximately caused by a violation of the antitrust laws. *Brunswick Corp v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977). Instead, plaintiffs must prove

> [a]ntitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendant's acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation. It should, in short, be the type of losss that the claimed violations … would be likely to cause.

Id. (citation and quotation marks omitted). "Injury, although causally related to an antitrust violation, nevertheless will not qualify as 'antitrust injury' unless it is attributable to an anticomptitive aspect of the practice under scrutiny …" *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 334 (1990). In other words, a private plaintiff can recover on an antitrust claim only for a loss which stems from a competition reducing aspect or effect or the defendant's behavior. *Id.* Antitrust plaintiffs do not suffer antitrust injury merely because they are in a worse position than they would have been had the challenged conduct not occurred. *Brunswick*, 429 U.S. at 486-87. Even a showing of antitrust injury is not always sufficient to establish antitrust standing. *Cargill Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 110 n.5 (1986) ("a showing of antitrust injury is necessary, but not always sufficient, to establish standing under § 4 [of the Clayton Act)"].

A plaintiff must also demonstrate that he is the proper party to bring the antitrust suit. In the case of antitrust laws, the Supreme Court has interpreted the Clayton Act to limit statutory standing to parties fewer than would be allowed by the full extent of Article III. *Associated Gen. Contractors*, 459 U.S. at 534-46 and 535 n.31. In analyzing whether a plaintiff falls within the class of persons who have standing to sue under § 4, the Court considers several factors that are to balanced, with no single factor being conclusive. *Peck v. Gen. Motors Corp.*, 894 F.2d 844, 846 (6th Cir. 1990) (citing *Province v. Cleveland Publishing Co.*, 787 F.2d 1047, 1051 (6th Cir. 1986)). The factors to be considered are:

> (1) the causal connection between the antitrust violation and harm to the plaintiff and whether that harm was intended to be caused; (2) the nature of the plaintiff's alleged injury including the status of the plaintiff as consumer or competitor in the relevant market; (3) the directness or indirectness of the injury, and the related inquiry of whether the damages are speculative; (4) the potential for duplicative recovery or complex apportionment of damages; and (5) the existence of more direct victims of the alleged antitrust violation.

Bodie-Rickett & Assocs. v. Mars, Inc., 957 F.2d 287, 290 (6th Cir. 1992) (quoting *Southhaven Land Co. v. Malone & Hyde, Inc.*, 715 F.2d 1079, 1085 (6th Cir. 1983), and citing *Associated Gen. Contractors*, 459 U.S. 519)).

4. Discussion

This Court is constrained to agree with defendants on this count. Plaintiffs argue that the DFA raw milk

supply agreements with Dean and NDH, the most favored nations clauses in those agreements and Dean's outsourcing agreement with DMS constitute unreasonable restraints of trade, resulting in overcharges to the plaintiffs. They also now argue that DFA used its raw milk supply agreement with NDH to prevent NDH from acquiring two bottling plants, one within the boundaries of the proposed relevant market and the other outside the proposed relevant market, and they claim that DFA used its raw milk supply agreements "to prevent its own members from opening bottling operations that might compete with Dean." The problem with plaintiffs' arguments is that they make little or no attempt to show any direct harm to them flowing directly from the alleged antitrust violations. As noted above, they must do more than allege or show harm, the harm must result from a violation of the antitrust laws.[9]

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[9] In fact, as defendants argue, plaintiffs appear to acknowledge that they have suffered no direct harm from the alleged conspiracy involving raw milk. In their response to defendants' motion, they state:

> … Defendants' agreement was simple: DFA would help Dean raise prices for bottled (also called "processed") milk by creating and controlling a faux competitor, by collusively reducing bottled milk output, and by otherwise conspiring with Dean to artificially increase bottled milk prices. Dean, for its part, would help DFA dominate the raw-milk market by granting DFA the right to supply substantially all of Dean's raw-milk needs.
>
> It was the first half of this agreement, the portion that raised bottled milk prices, that ***directly*** harmed Retailer Plaintiffs. (emphasis added)

[Doc. 538, p. 1]. Furthermore, the "first half" of this alleged agreement appears to be the very same separate conspiracy alleged in Count I of the plaintiffs' amended complaint.

Plaintiffs have alleged that defendants have engaged in a conspiracy to ***reduce*** prices paid to dairy farmers for raw milk and they acknowledge that, as a general rule, "purchasers of processed milk pay [ ] for processed milk based on a formula-which is based in part on, and moves up and down with, changes in raw milk costs." As a consequence, defendants argue that the prices paid by retailers for processed milk have been lower, not higher, as a consequence of the alleged conspiracy involving raw milk, and retailer plaintiffs cannot show an injury from the alleged raw milk conspiracy, let alone an antitrust injury. This Court concludes that retailer plaintiffs have not met their burden of establishing antitrust standing as to the alleged raw milk conspiracy which is the focus of Count II of their amended complaint. Although the plaintiffs argue that they have been harmed by the overorder premiums charged, they do not show how that is a harm which flows directly from the antitrust violation alleged, *i.e.*, the full supply agreements for raw milk. As noted above, plaintiffs have not suffered antitrust injury just because they may be in a worse position than they would have been otherwise.

Two additional issues raised by the defendants should be addressed. The amended complaint filed by Food Lion appears to assert a claim under § 3 of the Clayton Act. Defendants have moved for summary judgment on this claim as well. Plaintiffs have never made any effort to explain how they have a cause of action under § 3 of the Clayton Act and have never responded to defendants' allegation that they are entitled to judgment as a matter of law on Count II to the extent the complaint purports to assert a claim under § 3 of the Clayton Act. It thus appears that plaintiffs do not contest that judgment should be entered in favor of

the defendants on Count II in so far as it is based on any claim under § 3 of the Clayton Act.

SMA also separately argues that it is entitled to summary judgment because it is not a party to any of the raw milk supply agreements, a matter which is undisputed. Plaintiffs furthermore do not dispute that SMA does not sell raw milk to any dairy processing plant and does not engage in the sale of processed milk products to retailers. Plaintiffs make no effort to offer any evidence which would suggest that SMA was part of a conspiracy to fix prices, for either raw or processed milk, or to otherwise not compete for sales of processed milk. For this reason as well, SMA would be entitled to summary judgment.

For the reasons set forth above, summary judgment will be GRANTED in favor of the defendants as to Count II and Court II of plaintiffs' complaint will be DISMISSED.

C. Counts III, IV (violation of § 2 of the Sherman Act/unlawful monopolization and attempt to monopolize against Dean)

In Counts III and IV of the amended complaint, plaintiffs assert claims of unlawful monopolization and attempt to monopolize in violation of § 2 of the Sherman Act against Dean. More specifically, plaintiffs allege in Count III of the amended complaint that Dean possesses monopoly power in the market for processed milk, that is, at least a 60% share of that market in the southeast, and has willfully and unlawfully used exclusionary and predatory conduct to obtain and/or illegally maintain monopoly power in the market for processed milk. In Count IV of the amended complaint, the plaintiffs make similar allegations except that they allege that Dean has the specific intent to achieve monopoly power

in the market for processed milk and that there is a dangerous probability that Dean will achieve its goal.

1. Dean's Argument

Dean argues that it is entitled to summary judgment on the monopolization claims which are brought under § 2 of the Sherman Act. Dean alleges that these claims fail because plaintiffs cannot establish the relevant geographic market and cannot establish that Dean possesses or has a dangerous probability of achieving monopoly power in the alleged market.

2. Plaintiffs' Argument

Plaintiffs' arguments are set forth in the relevant sections below.

3. Applicable Legal Principles

Section 2 of the Sherman Act, 15 U.S.C. § 2, provides: "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize any part of the trade or commerce among the several states … shall be deemed guilty of a felony … ." The offenses of monopolization, attempt to monopolize, and conspiracy to monopolize (discussed in subpart D below) are distinct causes of action and require different proofs.

To establish a monopoly under § 2 of the Sherman Act, plaintiffs must establish two elements: "1) possession of monopoly power in the relevant market[10] ; and 2) willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or his-

[10] Defendants' motion for summary judgment focuses exclusively on this element.

toric accident." *Eastman Kodak*, 504 U.S. at 481; *United States v. Grinnell Corp.* 384 U.S. 563, 570-571 (1966). An attempted monopolization occurs when a competitor, with a "dangerous probability of success," engages in anticompetitive practices, the specific design of which are to build a monopoly or exclude or destroy competition. *See Times-Picayune Pub. Co. v. United States*, 345 U.S. 594, 627 (1953); *Swift & Co. v. United States*, 196 U.S. 375, 396 (1905).

In order to succeed on either a monopolization or attempt to monopolize claim, plaintiffs must establish the relevant market in which they compete [or do business] with the alleged monopolizer. *See, e.g., Grinnell*, 384 U.S. at 571-73; *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*, 382 U.S. 172, 177 (1965); *United States v. E.I. duPont de Nemours & Co.*, 351 U.S. 377, 395-99, 396 n.23 (1956); *Times-Picayune*, 345 U.S. at 611-12. The relevant market consists of two components: product and service market and geographic market. *Brown Shoe Co. v. United States*, 370 U.S. 294, 324 (1962). The relevant product market is not at issue in this motion.[11]

A geographic market is "an area of effective competition." *Re/Max Int'l.*, 173 F.3d at 1016. The area is

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[11] As defendants note in their response to plaintiffs' supplemental brief, plaintiffs appear to have now defined a different product market than they did in their complaint. Dr. Froeb opines that the relevant product is "fresh white fluid milk, excluding such alternate beverages as flavored milk, extended shelf life milk, organic and hormone free milk, buttermilk, lactose-free and lactose-reduced milk, and soy and rice milk." In their amended complaint, plaintiffs allege that the relevant product market consists of "Grade A milk, other than school milk, which has been pasteurized and processed for human consumption and then repackaged into containers which are sold to retail outlets and other customers."

not defined by "metes and bounds," but "is the locale in which consumers of a product or service can turn for alternative sources of supply." *Id.*; *see also White and White, Inc. v. American Hosp. Supply Corp.*, 723 F.2d 495, 501 (6th Cir. 1983) ("The area of effective competition in the known line of commerce must be charted by careful selection of the market area in which the seller operates, and to which the purchaser can practicably turn for supplies.") (quoting *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320, 327 (1961)).

Thus, "[t]he first step in any action brought under § 2 of the Sherman Act is for the plaintiff to define the relevant product and geographic markets in which it competes with the alleged monopolizer, and with respect to the monopolization claim, to show that the defendant, in fact possesses monopoly power." *Conwood Co. v. United States Tobacco Co.*, 290 F.3d 768, 782 (6th Cir. 2002) (citing *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 268-69 (2d Cir. 1979)). The Supreme Court has defined monopoly power as "the power to control prices or exclude competition." *E.I. duPont de Nemours & Co.*, 351 U.S. at 391. A plaintiff may establish that a defendant holds monopoly power by presenting either 1) direct evidence of actual control over prices or actual exclusion of competitors, or 2) circumstantial evidence showing a high market share within a defined market. *Re/Max Int'l, Inc.* ,173 F.3d at 1016.

Neither the Supreme Court nor the Sixth Circuit has subscribed to a hard and fast rule of a percentage of market power that triggers monopoly power for purposes of § 2. As a general rule, however, monopoly power requires proof of more than 60% market power. *See Grinnell*, 384 U.S. at 571 (80% market power constitutes a monopoly); *American Tobacco Co. v. United States*, 328 U.S. 781, 797 (1946) (over 2/3rds of market

constitutes a monopoly); *Arthur S. Langenderfer, Inc. v. S.E. Johnson Co.*, 917 F.2d 1413, 1443 (6th Cir. 1990) ("There is substantial merit in a presumption that market shares below 50 or 60% do not constitute monopoly power.") (quoting *Areeda & Hovenkamp, Antitrust Law*, § 578.3 (1988 Supp.)).

Section 2 monopoly power "requires … something greater than market power under § 1." *Eastman Kodak*, 504 U.S. at 481. The standard for monopoly power appears to be very high, and market share is typically a determining factor. *See Grinnell*, 384 U.S. at 570. While market share might, in many instances lead to an inference of monopoly power, it is not, in and of itself, the only factor to consider. *Amer. Council of Certified Podiatric Physicians & Surgeons v. Amer. Bd. of Podiatric Surgery, Inc.*, 185 F.3d 606, 623 (6th Cir. 1999) ("[M]arket share is only a starting point for determining whether monopoly power exists, and the inference of monopoly power does not automatically follow from the possession of a commanding market share.").

"Market power is the power to force a purchaser to do something that he would not do in a competitive market," and it entails the "ability of one seller to restrict output or raise prices." *PSI Repair Servs., Inc. v. Honeywell, Inc.*, 104 F.3d 811, 817 (quoting *Eastman Kodak Co.*, 504 U.S. at 464) (quotation marks omitted). In order for a Sherman Act claim to lie against a defendant, there must be a finding of market power. *Hand v. Central Transp., Inc.*, 779 F.2d 8, 11 (6th Cir. 1985).

4. Discussion

a. The relevant geographic market

In their amended complaint, plaintiffs contend that the relevant geographic market for the sale of processed milk is the "Southeast," which they define as the geographic area within Federal Milk Marketing Orders 5 and 7. These Orders cover all or part of 14 states, North Carolina, South Carolina, Georgia, Indiana, Kentucky, Tennessee, Virginia, West Virginia, Alabama, Arkansas, Mississippi, Louisiana, Florida and Missouri. Dean claims that plaintiffs' definition of the relevant market is arbitrary and unsupported by relevant evidence. Dean cites evidence that retail customers in Orders 5 and 7 receive processed milk from plants in Ohio, Oregon, New York, Kansas, Illinois, Michigan, Texas, Arizona, Oklahoma, Minnesota, Iowa and South Florida (a portion of Florida not in Order 7). In addition, Dean points to evidence that processing plants in Orders 5 and 7 have sold to customers in Orders 1, 6 and 124.

Plaintiffs initially respond, without making any effort to support their choice of the relevant market, that it is not necessary for them to define the relevant market's contours, since genuine issues of material fact exist with respect to Dean's market power, relying on *Re/Max Int'l*. In that case, the district court, consistent with every reported and unreported Sixth Circuit decision to that date, dismissed the plaintiffs § 2 claims. The Sixth Circuit reversed, finding "that although plaintiffs failed to define the relevant market with precision and therefore failed to establish the defendant's monopoly power through circumstantial evidence, there did exist a genuine issue of material fact as to whether the plaintiff's evidence showed direct evidence of a monopoly, that is, actual control over prices

or actual exclusion of competitors," 173 F.3d at 1012, adopting the view of the First, Eighth, Ninth and Tenth Circuits. Quoting the Eighth circuit, the court said:

> Since the purpose of the inquiries into market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition, 'proof of actual detrimental effects, such as reduction of output,' can obviate the need for an inquiry into market power, which is but a 'surrogate for detrimental effects.'

Id. at 1018 (quoting *Flegel v. Christian Hosp.*, 4 F.3d 682, 688 (8th Cir. 1993) (quoting *F.T.C. v. Indiana Fed'n. of Dentists*, 476 U.S., 447, 461 (2009)).

In an effort to take advantage of the *Re/Max Int'l.* holding, plaintiffs claim they have direct evidence of Dean's ability to control pricing and exclude competition. Plaintiffs point to two pieces of evidence which, they contend, shows Dean's control over prices. First, Food Lion's outside consultant testified that he could not convince Dean to lower its margins below six percent when a competitive margin was only four percent.[12] Additionally, Dean's eastern region CEO testified that no processors could beat Dean on price unless he allowed them to do so.[13] This kind of ambiguous evidence falls far short of evidence, even when looked at favorably to plaintiffs, which would create a genuine

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[12] High prices do not necessarily suggest monopoly power. *See Bailey v. Allgas, Inc.*, 284 F.3d 1237, 1252-53 (11th Cir. 2002).

[13] The most logical inference to be drawn from this statement is that Dean would ***reduce*** its price to meet competition. At best, the statement is ambiguous.

issue of material fact on the question of Dean's ability to control prices.[14] *Re/Max Int'l.* is inapposite here.

Plaintiffs then argue that, "[e]ven if defining the relevant market were necessary," they have adequately done so. First, they argue that retailer plaintiffs' "expert report," which was not yet due at the time of plaintiffs' replacement response, "will further demonstrate that Retailer Plaintiffs can establish a relevant geographic market. If Defendants can find an expert to testify to a different geographic market, a genuine issue of material fact will exist." [Doc. 669, p. 66]. This disingenuous argument turns the respective burdens of the parties with respect to a motion for summary judgment upside down. Plaintiffs must show, to survive the defendants' motion, a genuine issue of material ***fact***, not a difference in expert opinions. Second, the burden of establishing the relevant geographic market is on plaintiffs, not Dean, and Dean is not required to provide expert testimony as to a different geographic market.[15]

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[14] Although made in a different context, plaintiffs also claim that there is other direct evidence of Dean's monopoly power. Citing the Red Oak venture and the circumstances related to the Winn-Dixie plant in High Point, N.C. and the SuperValu plant in Richmond, plaintiffs claim Dean has taken "unilateral" efforts to eliminate or block competitors. They also point to evidence of non-competition agreements, plant closings and restrictive deed covenants to keep closed bottling plants closed. If anything, this is circumstantial, not direct, evidence and is clearly ambiguous evidence when considered on this issue.

[15] Plaintiffs' shifting positions with respect to their response to defendants' motion for summary judgment on the monopolization claims has been a source of frustration and delay for the Court. When the Court initially suggested to the parties at the July 1, 2009 status conference that these issues might better be resolved through a motion for summary judgment rather than a

In their supplemental memorandum in opposition to defendants' motion for summary judgement, plaintiffs assert that "Professor Luke Froeb's[16] expert declarations present evidence that, along with other evidence in the record,[17] is sufficient to establish [geographic market and market power]." Professor Froeb concludes that the relevant geographic market for the purposes of the plaintiffs' monopolization claims "consists of North Carolina, South Carolina, Virginia, Georgia and the Eastern part of Tennessee,"[18] an area considerably smaller[19] than the geographic region covered

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motion to dismiss, the Court specifically asked plaintiffs whether they would need additional discovery to respond to such a motion. Counsel for plaintiffs responded that he "[didn't] think so." Yet plaintiffs filed, along with their response to the motion for summary judgment, the declaration of counsel "pursuant to Federal Rule of Civil Procedure 56(f)" that they could not "yet fully respond to defendants' motion for summary judgment with respect to the issues of market definition and market power," primarily because expert reports had not yet been completed. Despite the fact that expert opinions likely have little, if any, bearing on the question of whether genuine issues of material fact exist, the Court delayed ruling on the motion and allowed supplemental responses to be filed. Plaintiffs have now had a full opportunity to respond to defendants' motion.

[16] Professor Froeb is an Associate Professor of Entrepreneurship and Free Enterprise at Vanderbilt University's Owen Graduate School of Management.

[17] Plaintiffs do not identify what this additional evidence is by citation to the record.

[18] Professor Froeb's proposed market apparently includes part of order 5, part of order 7, part of order 1, and parts of Virginia that are regulated at the state level.

[19] Plaintiffs refer to Professor Froeb's definition of the relevant market as "slightly different than the one that was pleaded."

by Federal Milk Marketing Orders 5 and 7.[20] Professor Froeb reaches that conclusion based on his analysis of an economic model constructed for the purpose of his analysis. Professor Froeb's analysis, based on his constructed model, works its way from a geographic area too small to be monopolized to a larger region that includes several states. "That evidence," according to plaintiffs, "is sufficient for a jury to establish the geographic boundaries of the proposed market for processed fluid milk."

Thus, it appears, plaintiffs now concede that they cannot establish the relevant geographic market as Federal Milk Marketing Orders 5 and 7 as alleged in their amended complaint. The Court will, therefore, focus its attention on whether plaintiffs can survive summary judgment as to the different and smaller geo-

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[20] Professor Froeb also concludes that the boundaries of Federal Milk Marketing Orders 5 and 7 constitute the relevant market for purposes of plaintiffs' claims under Count II. The plaintiffs see their midstream change of direction with respect to the relevant market as no impediment to the pursuit of their claims. They argue that "numerous courts have recognized that the evidence in a case may support a market with contours that differ from those pled in a complaint once discovery has been obtained and expert analysis performed." Plaintiffs cite two district court decisions as support for their claim that numerous courts have so recognized. Dean sees this change in plaintiffs' position as an improper effort to amend their complaint and argue that there is no authority which permits a party to withstand summary judgment by fundamentally geographic market alleged in its complaint.

While it appears that the two district court cases cited by plaintiffs do not fully support the proposition asserted by the plaintiffs, the Court need not decide this issue since plaintiffs have failed to establish that any genuine issue of material fact exists on the issue of the relevant geographic market. The Court does note, however, that market definition is a fact intensive inquiry.

graphic region identified by Professor Froeb. The most obvious problem with plaintiffs' current position as to the relevant geographic market is that plaintiffs cannot satisfy their summary judgment burden through expert testimony alone, and have pointed to no facts in the record which would support their proposed definition of geographic market. *See Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 242 (1993) ("Expert testimony is useful as a guide to interpreting market facts, but it is not a substitute for them."). *See also Matsushita*, 475 U.S. 581 n.5. There is nothing in this record to illustrate that Professor Froeb has based his opinions on evidence in the record; in fact, he appears to admit that he did not do so, relying instead on a theoretical model be constructed for the purpose of his analysis.

The Supreme Court has defined the relevant antitrust geographic market as the "area in which the seller operates, and to which the purchaser can practicably turn for supplies." *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 327 (1961). In deposition, Professor Froeb admitted that he did not consider the relevant market in that context but rather that he used a "different approach" in arriving at his conclusions. Professor Froeb also admits that he did not assess the "commercial realities," *Id.*, but rather relied solely on his theoretical model. Such an approach may be academically acceptable; it does not, however, comply with the Supreme Court's dictates with respect to construction of the relevant geographic market. Furthermore, Professor Froeb's construction of his model with reference to a single customer, Food Lion, also does not comply with the relevant legal requirements. Professor Froeb admitted that he constructed his model with reference solely to "the regions where Dean and Food Lion en-

gage in the sale and purchase of milk."[21] As defendants point out, a geographic market cannot ordinarily be defined by reference to a single customer. *See Apani Southwest, Inc. v. Coca Cola Enters., Inc.*, 300 F.3d 620, 632-33 (6th Cir. 2002).

Plaintiffs, in their supplemental brief[22] filed on July 15, 2010, [Doc. 809], argue that it would be improper for the Court to discount Professor Froeb's opinions without full briefing on the *Daubert* issues raised by defendants' attacks. The deficiencies in Professor Froeb's methodology may well be subject to a *Daubert* attack; that, however, is not the issue before the Court. The issue before the Court, assuming the admissibility at this point of Professor Froeb's opinions, is whether they comply with the methodology mandated by Supreme Court precedent. They do not.

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[21] In addition, although not argued by defendants, such an approach ignores the class action allegation of the amended complaint.

[22] Plaintiffs filed their July 10 supplemental brief without leave of court long after the time for response had passed, making the dubious argument that such filing was "consistent with Magistrate Judge Inman's April 6, 2010 Order" granting leave to supplement the summary judgment record with the full expert report of Professor Froeb. Defendants have not moved to strike the brief and the Court will not do so on its own motion. Attached to the brief is a "rebuttal report" from Professor Froeb dated June 28, 2010, in the form of a declaration. In the declaration, Professor Froeb states that he "remain[s] convinced" that his earlier conclusions "are true and sound." He also defends his methodology, as noted in the body of this memorandum opinion, as the same methodology he "would have employed and would have directed [his] staff to undertake had this issue come before [him] during [his] employment at the Department of Justice or at the Federal Trade Commission."

Plaintiffs defend Professor Froeb's methodology by suggesting that defendants have not shown how his analysis would have differed had he done what case law requires[23] and that the methodology he employed is the same as he would have undertaken had the issues in this case been presented to him "during [his] employment at the Department of Justice or at the Federal Trade Commission."[24] These arguments miss the point, however. This Court is bound by existing precedent and the defendants are under no burden to show whether Professor Froeb's opinions would have been the same had he relied on applicable legal definitions rather than his theoretical ones. Moreover, that he would have instructed staff to employ the same methodology during his employment at the Department of Justice or at the Federal Trade Commission proves only that, not that such methodology is legally acceptable based upon existing precedent.

Plaintiffs have failed to establish that there is a genuine issue of material fact with respect to their definition of the relevant geographic market and defendants are entitled to summary judgment as to Counts III and IV on this basis alone.

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[23] Plaintiffs, throughout their pleadings, suggest that somehow their cause is advanced because Dean and its experts have not defined an alternative geographic market. In fact, Professor Froeb expressed "disappointment" that Professors Kolt and Elzinga "[do] not present an alternative to [his] defined markets." These arguments represent a fundamental misunderstanding of the burden of proof and the burden of opposition to a motion for summary judgment.

[24] Professor Froeb was Director of the Bureau of Economics at the Federal Trade Commission from 2003 to 2005. He was an economist at the Antitrust Division at the Department of Justice prior to his employment at Vanderbilt University.

b. Market power

Although it is not necessary for the Court to do so, the Court will also address the other issue raised by the defendants, *i.e.*, that plaintiffs cannot establish that Dean possessed or had dangerous probability of achieving monopoly power in the relevant geographic market. As noted above, monopoly power is defined as the power to raise prices or exclude competition. *Eastman Kodak*, 504 U.S. at 464. For the reasons noted above, the two pieces of evidence pointed to by plaintiffs in support of their argument that they have established that Dean has direct control over prices and competition within the relevant market, that is, that Dean's profits are above what Food Lion's consultant believes they should be and the statement of Dean's Eastern Region CEO, do not create a genuine issue of material fact as to Dean's market power.

Once again, plaintiffs point to the declaration of Professor Froeb in an effort to create a genuine issue of material fact. Plaintiffs argue that "Professor Froeb has concluded that Dean has market power over the market for fresh white fluid milk in the relevant market … ." A review of Professor Froeb's declaration reveals that he has concluded, based upon his "analytical model," that Dean has market power because it has the ability to raise prices, not that Dean has actually exercised that power. The plaintiffs correctly argue, however, that it is the ability to raise prices, not the actual exercise of that power, that is key in determining whether a defendant possesses monopoly power. *Conwood Co.*, LP., 290 F.3d at 783 n.2.

Plaintiffs also point out that Professor Froeb has noted and relied upon Professor Cotterill's calculation of Dean's market share "in Federal Milk Market Order

5."[25] Professor Froeb concludes that Dean's concentration of plant ownership within the market as he defines it is greater than it is within Order 5 itself, based upon his "extrapolation" from Professor Cotterill's calculations. Plaintiffs further argue that Professor Froeb's findings are consistent with the "anecdotal evidence in the record that Food Lion was forced to pay a price that it considered to be higher than a competitive price."

Once again, Professor Froeb's opinion cannot be relied upon by plaintiffs to create a genuine issue of material fact.[26] This is so primarily because Professor Froeb admits that he never analyzed what was actually happening and he points to no "facts" in the record upon which he relies. The plaintiffs cite a footnote in the *Conwood* case for their assertion that the Sixth Circuit has "repeatedly" held that it is the ability to raise prices, not the actual exercise of that power which is key. While the plaintiffs have correctly stated the language of the footnote in *Conwood*, it does not stand for the proposition they advance. Indeed, the very case cited in the *Conwood* footnote, *Byars v. Bluff City News Co., Inc.*, 609 F.2d 843 (1979), makes it clear that when a plaintiff is attempting to show monopoly power other

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[25] As noted above, plaintiffs have abandoned their argument that the relevant geographic market can be defined using the boundaries of Federal Milk Marketing Orders 5 and 7.

[26] Plaintiffs claim that "Professor Froeb's ***opinion*** presents direct evidence of Dean's market power …" [Doc. 765, p. 7]. It is doubtful if "opinions" can ever create a genuine issue of material ***fact***. Plaintiffs further claim that this direct evidence of market power is corroborated by indirect evidence of Dean's market power based on Dean's market share. As noted elsewhere in the opinion, the "corroborating evidence that Dean possess a market share in excess of 67%" is based on Dr. Froeb's "extrapolation."

than through market share, it is "the exercise of ***actual*** control over prices or the ***actual*** exclusion of competitors" which is relevant. *Byers*, 609 F.2d at 850.

There are two ways established in the case law for showing monopoly power. The first is by presenting direct evidence "showing the exercise of actual control over prices or the actual exclusion of competitors." *Id.* The second is by presenting circumstantial evidence of monopoly power by showing a high market share within a defined market. *Id.*; *Re/Max Int'l.*, 173 F.3d at 1016. Professor Froeb admits that he made no analysis of whether or not Dean exercises actual control over prices or has engaged in actual exclusion of competitors. As a result, his opinion that Dean has the ability to do so within the relevant geographic market as described by him is largely irrelevant.

That leaves the plaintiffs with the "shortcut" formula which involves measuring the market share possessed by the alleged monopolist. *Byers*, 609 F.2d at 850; *Re/Max Int'l.*, 173 F.3d 995. Professor Froeb does estimate Dean's market share in the different, smaller geographic market defined by him at 67%, a figure he extrapolates from Professor Cotterill's computation that Dean has an 80% market share in Order 5. Professor Froeb's extrapolation is doubtful at best. In any event, the Sixth Circuit has warned about an approach involving a more narrow definition of a geographic market in order to allow a calculation of a higher percentage share of the market. *See Byers*, 609 F.2d 843 at 850, n.17 (citing *United States v. DuPont & Co.*, 351 U.S. 377 (1956)).

Plaintiffs have failed to establish that there is a genuine issue of material fact with respect to Dean's

market power and Counts III and IV of the complaint are subject to summary judgment on this basis as well.

D. Count V (violation of § 2 of the Sherman Act/conspiracy to monopolize against Dean, DFA and NDH)

In Count V, plaintiffs allege that Dean, DFA and NDH have conspired to monopolize the market for processed milk in violation of § 2 of the Sherman Act. The plaintiffs allege that Dean, DFA and NDH each specifically intend to obtain monopoly power in the market and have committed overt acts in furtherance of that conspiracy, which include an agreement among Dean, DFA and NDH not to compete for sales of processed milk to retail stores.

1. Defendants' Argument

Defendants raise the same argument in support of their claim that they are entitled to summary judgment on the conspiracy to monopolize claim as well, that is, that plaintiffs do not define the relevant geographic market. In a footnote in their memorandum, they assert additionally that Count V fails because there is no evidence proving a conspiracy.

2. Plaintiffs' Argument

Plaintiffs assert that defendants erroneously argue that all § 2 cases require a finding with respect to the relevant geographic market and that it is not necessary for plaintiffs to establish the relevant product and geographic markets in which they compete for their conspiracy claim to succeed and that defendants' summary judgment motion does not claim that retailer plaintiffs lack intent to monopolize.

3. Applicable Legal Principles

To prove a conspiracy to monopolize, it [is] not necessary to show power and intent to exclude all competitors, or to show a conspiracy to exclude all competitors," because § 2 prohibits efforts to "monopolize any part of the trade or commerce among the several states … ." *American Tobacco Co.*, 328 U.S. at 789. Nor, in a conspiracy claim, does an antitrust plaintiff need to show defendants' dangerous probability of success as would be the case if an attempted monopolization claim were brought. *International Distribution Ctrs., Inc. v. Walsh Trucking Co., Inc.*, 812 F.2d 786, 795-96n.8 (2d Cir. 1987). Although market power need not be shown for a conspiracy claim, such power is relevant to whether a particular defendant possessed a specific intent to monopolize. *See Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc.*, 627 F.2d 919, 926-27 (9th Cir. 1980), *cert. denied*, 450 U.S. 921 (1981). "[T[he mere intention to exclude competition and to expand one's own business is not sufficient to show a specific intent to monopolize" because "[a]ll lawful competition aims to defeat and drive out competitors." *Great Escape, Inc. v. Union City Body Co., Inc.*, 791 F.2d 532, 541 (7th Cir. 1986) (citing *Pacific Eng'g & Prod. Co. v. Kerr-McGee Corp.*, 551 F.2d 790, 795 (10th Cir.), *cert. denied* 434 U.S. 879 (1997)).

Some courts have held that since "[s]pecific intent to monopolize is the heart of a conspiracy charge, … a plaintiff is not required to prove what is the 'relevant market.'" *Salco Corp. v. General Motors Corp.*, 517 F.2d 567, 576 (10th Cir. 1975). Other courts have held that a minimal showing must nonetheless be made as to the "product and geographic context" of the alleged conspiracy. *Alexander v. National Farmers Org.*, 687 F.2d 1173, 1181-82, (8th Cir. 1982), *cert. denied*, 461

U.S. 937 (1983). Another view is "that relevant market should be considered a necessary element of § 2 conspiracy claims, at least in civil cases." *Alexander*, 687 F.2d at 1182 (citing 3 Vaughn Kalinowski, *Antitrust Laws And Trade Regulation* § 9.02[4] (1982)).

In this respect, the Supreme Court's 1947 decision in *United States v. Yellow Cab Co.*, 332 U.S. 218 (1947), *overruled* on other grounds by *Copperweld*, is instructive. In that case, the Supreme Court addressed the sufficiency of a complaint alleging a conspiracy to monopolize and held that a failure by a plaintiff to allege defendants' monopoly power or to allege "[i]ts relative position in the field of taxicab production [had] no necessary relation to the ability of the [defendants] to conspire to monopolize or restrain … an appreciable segment of interstate cab sales. An allegation that such a segment has been or may be monopolized or restrained is sufficient," 332 U.S. at 226. Indeed, one circuit court of appeals has, relying upon this language in *Yellow Cab*, found that proof of a relevant market is unnecessary to a § 2 conspiracy. *See United States v. Consolidated Laundries Corp.*, 291 F.2d 563, 573 (2d Cir. 1961). Although the precedents are somewhat unclear, it would seem to this Court that at least some showing of a relevant geographic market is necessary in a conspiracy case; otherwise, the allegations of conspiracy to monopolize in a given market would make little sense.

4. Discussion

The Court is constrained to agree with plaintiffs that the only argument properly raised by defendants for summary judgment on the conspiracy to monopolize claim relates to the relevant geographic market. As set forth above, it is doubtful that the contours of the geographic market must be as precisely defined, if at all, in

a conspiracy to monopolize claim as opposed to a monopolization or attempt to monopolize claim. Defendants seem to acknowledge as much, arguing however that lack of market or monopoly power is probative of a lack of such intent. While defendants' position is likely correct, in that it does appear that some level of market power and some definition of the contours of the geographic market is necessary for a conspiracy claim to succeed, it also appears that the primary focus in a conspiracy claim has to do with the defendants' specific intent to monopolize.

Given the lack of development of the argument in defendants' filings, and since defendants' summary judgment motion does not specifically claim that there is no genuine issue of material fact as to a specific intent to monopolize, the Court will not grant the motion for summary judgment at this time, but will deny the motion, subject to its refiling on this ground as to Count V by the defendants with a more thorough examination of the record evidence in the case. For these reasons, motion for summary judgment as to Count V will be DENIED.

V. Conclusion

For the reasons set forth above, defendants' motion for summary judgment, [Doc. 461], is **GRANTED IN PART** and **DENIED IN PART**, and Counts II, III and IV of plaintiffs' amended complaint are **DISMISSED**.

So ordered.

ENTER

s/J. RONNIE GREER
UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

IN RE: SOUTHEASTERN MILK ANTITRUST LITIGATION

FOOD LION, LLC and FIDEL BRETO, on behalf of himself and all others similarly situated,
Plaintiffs-Appellants,
v.

DEAN FOODS COMPANY, ET AL.,
Defendants-Appellees.

No. 12-5457
Filed: March 4, 2014

ORDER

Before: ROGERS and COOK, Circuit Judges; and VAN TATENHOVE,* District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

* The Honorable Gregory F. Van Tatenhove, United States District Judge for the Eastern District of Kentucky, sitting by designation.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Deborah S. Hunt

Deborah S. Hunt, Clerk

APPENDIX E

EXCERPTS OF PERTINENT STATUTORY PROVISIONS AND RULES

15 U.S.C. § 1

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. * * *

15 U.S.C. § 15

(a) Amount of recovery; prejudgment interest

* * * any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. * * *

* * *

Fed. R. Civ. P. 56[*]

(a) Motion for Summary Judgment or Partial Summary Judgment. A party may move for summary judgment, identifying each claim or defense—or the part of each claim or defense—on which summary

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* [While petitioners' supplemental motion for summary judgment was pending before the district court, Rule 56 was amended, effective December 1, 2010. "The standard for granting summary judgment remains unchanged" by those amendments. Fed. R. Civ. P. 56 advisory committee's note to 2010 amendments.]

judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. * * *

* * *