

UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

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IN RE: PINEAPPLE ANTITRUST LITIGATION :

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

This document relates to:

All Actions:

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**DEL MONTE'S MEMORANDUM IN SUPPORT OF SUMMARY JUDGMENT  
AND EXCLUSION OF EXPERT EVIDENCE**

August 8, 2008

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## INTRODUCTION

Plaintiffs contend that for over a decade – with the active participation of different sets of owners, several generations of executives and other employees, and multiple outside law firms – Del Monte schemed to monopolize the market in its revolutionary, extra-sweet hybrid pineapple, the MD-2. The heart of that plot, according to plaintiffs, was Del Monte’s procurement, through fraud on the Patent and Trademark Office (“PTO”), of a patent on the CO-2, another hybrid pineapple, by using a misleading and inaccurate description that covered the non-patentable MD-2 as well. In plaintiffs’ words, “Del Monte implemented a scheme to confuse the trade into believing the CO-2 patent covered the MD-2 pineapple.”<sup>1</sup>

In denying plaintiffs’ “crime-fraud” motion after carefully reviewing the same evidence upon which the instant motion is made, Magistrate Judge Dolinger, in a finding adopted by this Court, flatly rejected plaintiffs’ alleged “scheme”: “[T]he record does not demonstrate a meaningful basis to view Del Monte as having embarked on a corporate strategy of falsely suggesting to the industry that it had patent protection for the MD-2. Quite the contrary, [Del Monte] seemed to be sending a message to the highest levels of its competitors and to the financial community that it had a competitive edge because it had been first in the market for the extra-sweet pineapple, an emphasis that plainly belied the implication that it had legal protection [*i.e.*, a patent] against direct competition.” Memorandum & Order, *In re Fresh Del Monte Pineapple Antitrust Litigation*, 2007 WL 64189 at \*9-10 (S.D.N.Y. January 4, 2007) (hereafter “C-F Mem.”)

Having persisted in their claim of fraud on the PTO for over four years (and losing a crime-fraud motion on the issue 19 months ago and an appeal 8 months ago), plaintiffs have now

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<sup>1</sup> Plaintiffs’ February 3, 2006 Memorandum In Support Of Their Motion To Compel The Production Of Privileged Documents Pursuant To The Crime-Fraud Exception, at 1.

finally abandoned this lynchpin of their claims altogether. In doing so, plaintiffs have effectively conceded that Del Monte did not defraud the PTO when it obtained the CO-2 patent. Yet plaintiffs' "scheme" could not reasonably have been accomplished unless Del Monte had a patent that lent itself to fraud by misdescribing the variety actually patented. Thus, by dropping the PTO fraud claim, plaintiffs have rung the death knell for a lawsuit that was already unsupported by the evidence and riddled with implausibility.

For example, it is now utterly untenable for plaintiffs to claim that Del Monte misled competitors by referring to the CO-2 patent in five letters that it sent in 1995 to Costa Rican laboratories that were propagating stolen MD-2 plant material. If the patent properly described the CO-2 variety – as presumed by the law, as Magistrate Judge Dolinger found, and as plaintiffs now effectively concede – the letters could not possibly have impeded competition because competitors, including sophisticated multinational corporations such as Dole, had access to the accurate, public description in the patent. Nor did the letters in fact impede competition, as demonstrated by the admission of Dole's chief pineapple scientist that he readily determined that the CO-2 patent did not cover the MD-2.

In short, plaintiffs' claim that Del Monte misled the competitive marketplace by claiming that the MD-2 was patented is "little more than speculation supported by snippets of unreliable testimony and undermined by the contextual evidence reflecting the corporate behavior of Del Monte." C-F Mem. at 15. Rather, as Del Monte's competitors acknowledged, Del Monte succeeded with the MD-2 not by anticompetitive conduct, but by taking a successful "risk" with the MD-2, as a result of which Del Monte "got there first," despite being "cautioned" that it was moving too quickly.<sup>2</sup> Of course, the antitrust laws intend to promote, not punish, precisely such

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<sup>2</sup> See Del Monte Statement of Material Facts in Support of Motion for Summary Judgment ("SMF") filed herewith at ¶¶ 109, 126.

entrepreneurial risk-taking. This is surely the singular antitrust case in which a defendant accused of exclusionary conduct was, in fact, warned by competitors against taking the very risks at issue. Del Monte is entitled to summary judgment for these and the following reasons.

First, the record taken as a whole fails to establish anticompetitive conduct. The fraudulent conduct that plaintiffs have asserted to establish the merits of their section 2 claims involves the exact same acts that plaintiffs precisely alleged in support of their “crime-fraud” motion. In denying that motion, Magistrate Judge Dolinger considered extensive briefing and argument and in a lengthy, detailed and persuasive Memorandum & Order, rejected plaintiffs’ contention that Del Monte had sought to impede competition by portraying the MD-2 as patented.

Plaintiffs appealed to this Court and submitted comprehensive objections, which the Court denied. The Court “adopt[ed] the Discovery Order [C-F Mem.] in its entirety” and “incorporated ... by reference” the “facts as set forth in the Discovery Order”. Order of Nov. 9, 2007 (hereafter “C-F Aff.”) at 3. The Court further denied plaintiffs’ motion for certification of interlocutory appeal. *See* Order of Nov. 29, 2007. Although the crime-fraud ruling “in the context of a discovery dispute should ‘neither anticipate nor foreshadow any rulings that the District Court might make with respect to the merits of plaintiffs’ claims,’” *id.* at 2-3, the evidentiary record now before the Court on summary judgment is essentially the same as that upon which the crime-fraud ruling was made. Consequently, Del Monte respectfully submits that even if the crime-fraud ruling is not legally binding, consideration of virtually the identical record should lead to the same result.

Second,

**REDACTED**

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Because this is legally and economically irrational, plaintiffs' expert report is inadmissible and without it, plaintiffs have no evidence of a relevant product market.

Third, there is no credible and admissible evidence that Del Monte's alleged wrongful conduct had any actual effect on pineapple production by competitors, let alone more than a *de minimis* effect on competition. Absent that missing link, plaintiffs have failed to prove why Del Monte's pricing is not the appropriate reward for developing an innovative and highly desirable new product.

Fourth, plaintiffs' expert opinion on damages is methodologically flawed and utterly unfounded. Because it should be excluded, plaintiffs have no admissible evidence of damages – which provides an additional, independent basis for summary judgment.

## STATEMENT OF FACTS

The facts relevant to this motion have been discussed at length in the parties' submissions in connection with the plaintiffs' crime-fraud motion and the opinions denying that motion, to which Del Monte respectfully refers. Those facts and others concerning expert evidence are set forth in Del Monte's Statement of Material Facts ("SMF") filed herewith.

## ARGUMENT

### **I. PLAINTIFFS MUST PRESENT "SIGNIFICANT PROBATIVE EVIDENCE" TO AVOID SUMMARY JUDGMENT**

The Supreme Court has long recognized the importance of granting summary judgment in antitrust cases where there is an absence of "significant probative evidence tending to support

the complaint.” *First Nat’l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 290 (1968).<sup>3</sup> In antitrust cases in the Second Circuit, summary judgment is “particularly favored,” *Pepsico, Inc. v. Coca-Cola Co.*, 315 F.3d 101, 104 (2d Cir. 2002), and “serves a vital function ... [b]y avoiding wasteful trials.” *Tops Mkts., Inc. v. Quality Mkts., Inc.*, 142 F.3d 90, 95 (2d Cir. 1998).

“In moving for summary judgment against a party who will bear the ultimate burden of proof at trial, the movant may satisfy [its] burden by pointing to an absence of evidence to support an essential element of the nonmoving party’s claim.” *Vann v. City of New York*, 72 F.3d 1040, 1048 (2d Cir. 1995) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986)). Faced with such evidence, “[a]n antitrust plaintiff ... must come forward with *specific facts* showing that there is a genuine issue for trial.” *Reading Int’l Inc. v. Oaktree Capital Mgmt.*, 2007 WL 39301, at \*5 (S.D.N.Y. Jan. 8, 2007). As the Supreme Court has made clear, in antitrust cases “[w]here *the record taken as a whole* could not lead a rational trier of fact to find for the non-moving party, there is no ‘genuine issue for trial.’” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).<sup>4</sup>

## II. PLAINTIFFS LACK SIGNIFICANT PROBATIVE EVIDENCE OF ANTICOMPETITIVE CONDUCT BY DEL MONTE

Proof of wrongful conduct – conduct that is anticompetitive – is the *sine qua non* of an antitrust action. See *Northeastern Tel. Co. v. American Tel. and Telegraph Co.*, 651 F.2d 76, 84-85 (2d Cir. 1981); *Dresses for Less, Inc. v. CIT Group/Commercial Services, Inc.*, 2002 WL 31164482, at \*12 (S.D.N.Y. Sept. 30, 2002) (“Both monopolization and attempted

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<sup>3</sup> All internal quotations and citations are omitted from case quotes and citations herein, and all emphasis is added unless the contrary is stated.

<sup>4</sup> Moreover, plaintiffs here face a higher burden of proof – that of clear and convincing evidence – for their claims based on bad faith enforcement of a patent, *Handgards, Inc. v. Ethicon, Inc.*, 601 F.2d 986, 993 (9th Cir. 1979); and sham litigation involving patents, *Golan v. Pingel Enterp., Inc.*, 310 F.3d 1360, 1371 (Fed. Cir. 2002), or trade secrets, *CVD Inc. v. Raytheon Co.*, 769 F.2d 842, 850 (1st Cir. 1995).



monopolization claims require anticompetitive behavior by the defendant.”) Attaining or keeping a monopoly is not unlawful unless it is acquired or maintained by wrongful anticompetitive conduct. *See Verizon Communications Inc. v. Law Offices of Curtis v. Trinko, LLP*, 540 U.S. 398, 407 (2004); *Tops Mkts.*, 142 F.3d at 97.

Here, plaintiffs make assertions of anticompetitive conduct in two areas: (i) Del Monte wrongly sought to confuse competitors such as Dole that the MD-2 pineapple was patented; and (ii) Del Monte pursued sham litigation against Dole and Maui with the intent of deterring their lawful competition with respect to the MD-2.<sup>5</sup> After careful consideration of an extensive evidentiary record, the court found “little more than speculation” to support these claims when presented as a basis for plaintiffs’ crime-fraud motion. C-F Mem. at 15. The same lack of evidence now requires summary judgment for Del Monte.

**A. The March 1995 Letters Were Not Wrongful, Exclusionary Conduct**

Plaintiffs assert that, to exclude competitors from the market, in 1995 Del Monte sent five “false, misleading, and threatening letters” to Costa Rican laboratories involved in the propagation of MD-2 pineapple seedlings.<sup>6</sup> As demonstrated below, *see infra* at 8-10, the letters, which vary slightly, were sent to deter the theft of Del Monte’s MD-2 plant material. Most state that Del Monte has “learned of an organized effort to steal this plant material from Del Monte’s plantation” and “is aware your company has acquired pineapple plant material and is researching the growth and production of pineapple plants.” (SMF ¶¶ 35-38.) The letters then say that Del

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<sup>5</sup> As discussed above, for four years (until the week before this motion was filed), plaintiffs maintained that Del Monte began its alleged “scheme” to squelch competition by fraudulently obtaining a patent on the MD-2. Plaintiffs have now withdrawn that “springboard” for their remaining claims.

<sup>6</sup> Plaintiffs’ [Corrected] Consolidated Direct Purchaser and Indirect Purchaser Class Action Complaint (“Compl.”) at ¶ 7. There is no evidence supporting plaintiffs’ allegation that Del Monte sent the letters to Dole (*Id.*), or that Del Monte sought to mislead competitors through these letters. *See* C-F Mem. at \*15.

Monte “intends to protect its interest as necessary,” reference the CO-2 patent, and conclude, “Please govern yourself accordingly.” (*Id.*) Although the letters are literally accurate, plaintiffs allege that the reference to the CO-2 patent is misleading in the context of a letter aimed at deterring theft of MD-2 plant material.<sup>7</sup> Even assuming that allegation were true, however, the letters did not constitute wrongful anticompetitive conduct. “[T]he evidence suggests only that [Del Monte] was seeking to deter the laboratories suspected of obtaining stolen seedlings from using those seedlings.” C-F Mem. at \*14. Of course, “Del Monte was entitled to demand that those entities refrain from using purloined seedlings,” *id.*, and there is no evidence that the letters were sent to improperly exclude others from the market.<sup>8</sup>

The Sherman Act’s prohibition against monopolization or attempts to monopolize is directed “against conduct which *unfairly* tends to destroy competition itself.” *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 458 (1993). Thus, “[t]he usual section 2 [Sherman Act] claim requires ... a *wrongful exclusionary act* designed to enhance such power in that market or to achieve an improper advantage in another market.” *Town of Norwood v. New England Power Co.*, 202 F.3d 408, 420-21 (1st Cir. 2000). “The key factor courts have analyzed in order to

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<sup>7</sup> The letters advised the laboratories that Del Monte’s MD-2 plant material was being stolen, that Del Monte developed the MD-2 variety, and that Del Monte also held the patent numbered 8,863 on the CO-2 — all of which are indisputably true. While the patent on the CO-2 did not protect the MD-2, reference to the patent was reasonable to show that Del Monte, and not any other pineapple grower in Costa Rica, had developed the sibling MD-2. (SMF ¶ 53). When viewed against the backdrop of the theft of plant material taking place, showing the lineage or provenance of the variety and Del Monte’s involvement in its development was not misleading. For purposes of this motion only, however, Del Monte assumes that the letters were misleading.

<sup>8</sup> Because plaintiffs allege that Del Monte’s March 1995 letters constitute “threats” to institute patent litigation, plaintiffs must prove that such litigation would have been “objectively baseless” and “conceal[ed] an attempt to interfere directly with the business relationships of a competitor,” *Prof’l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 60-61 (1993), and they must make that showing by “clear and convincing evidence.” *Golan*, 310 F.3d at 1371. The sham litigation test applies to the letters because “[c]ourts have extended *Noerr-Pennington* to encompass concerted efforts incident to litigation, such as prelitigation ‘threat letters.’” *Primetime 24 Joint Venture v. Nat’l Broad. Co.*, 219 F.3d 92, 100 (2d Cir. 2000) (citing cases); *see also Glass Equip. Dev., Inc. v. Besten, Inc.*, 174 F.3d 1337, 1343-44 (Fed. Cir. 1999) (immunity applies to threats of patent litigation).

determine whether challenged conduct is or is not competition on the merits is the proffered business justification for the act.” *Taylor Publishing Co. v. Jostens, Inc.*, 216 F.3d 465, 475 (5th Cir. 2000). *See also Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 608 (1985) (conduct exclusionary where defendant failed to offer “any efficiency justification whatever”). “Generally, a finding of exclusionary conduct requires some sign that the monopolist engaged in behavior that – examined without reference to its effects on competitors – is *economically irrational*.” *Stearns Airport Equip. Co., Inc. v. FMC Corp.*, 170 F.3d 518, 523 (5th Cir. 1999); *accord Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1062 (8th Cir. 2000).<sup>9</sup>

Actions taken by a defendant to “protect its own property from direct injury” resulting from improper behavior are not anticompetitive. *Homefinders of Am., Inc. v. Providence Journal Co.*, 621 F.2d 441, 442 (1st Cir. 1980) (no liability because misleading nature of advertisements justified antitrust defendant’s selective refusal to run them). Indeed, the Second Circuit has expressly recognized that protecting property from thievery is a valid business justification. In *Trans Sport, Inc. v. Starter Sportswear, Inc.*, 964 F.2d 186, 190-91 (2d Cir. 1992) (Marshall, Assoc. Justice, retired), the defendant refused to sell to certain dealers, but court found that the “conduct is further justified by [defendant’s] legitimate interest in combating counterfeiting.... That a company takes reasonable steps to preserve its business interests cannot, without more, raise a genuine issue of material fact under § 2.”

Here, Del Monte indisputably had a legitimate business interest in protecting against the propagation of stolen plant material and “was entitled to demand that those entities refrain from

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<sup>9</sup> Valid business justifications include any reason that makes economic sense for reasons unrelated to harming competition, including protecting one’s property, *see Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 281-82 (2d Cir. 1979) (“a firm may normally keep its innovations secret from its rivals as long as it wishes”), as well as “merely trying to make more money.” *Drinkwine v. Federated Publ’ns, Inc.*, 780 F.2d 735, 740 (9th Cir. 1985) (“Even that motive is consistent with competition”).

using purloined seedlings.” C-F Mem. at \*14. The theft of Del Monte’s MD-2 pineapples at the time the letters were sent is undisputed (SMF ¶¶ 39-48), while plaintiffs’ attack on the genuineness of Del Monte’s concern is “makeweight.” C-F Mem. at \*14. For example, Del Monte’s head of its Costa Rican pineapple operations testified to the thefts and that newly-planted pineapple plants were being pulled out of the ground at night. (SMF ¶ 39.) The letters were signed by Daniel Funk, then a Del Monte vice-president. After Mr. Funk left Del Monte, he was sued by the company. (SMF ¶ 50.) Although presumably not a friendly witness, Mr. Funk testified that “[t]he Del Monte people in Costa Rica believed that the laboratories which were propagating the MD-2 were doing it with stolen plant material” (SMF ¶ 52), which they reported as an ongoing basis to Del Monte’s headquarters in Florida. (SMF ¶ 41.) He further testified that the letters were sent because of “the fact that [the MD-2 plants] were being stolen and presumably planted, they might reach a major competitor like Dole and it was very important to us to try to stop them from leaving the plantation, stop people from growing them, propagating them.” (SMF ¶ 51.)<sup>10</sup>

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<sup>10</sup> Del Monte hired guard patrols and prosecuted individuals caught in the act of sealing plant material (SMF ¶ 40), but did not succeed in stopping the thefts. (SMF ¶ 40.)

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The text of the “threat” letters further demonstrates the non-exclusionary reason they were sent. The purpose is readily seen in the first paragraph, where Del Monte states – truthfully – that the recipient had acquired plant material and was propagating it, and advised the recipient – also truthfully – that Del Monte had learned of efforts to steal the plant material for purposes of propagating it:

Del Monte is aware that your company has acquired pineapple plant material and is researching the growth and production of pineapple plants. Del Monte has also learned of an organized effort to steal this planting material from the Del Monte plantation for propagation purposes.

(SMF ¶ 38.)

The evidence also shows that Del Monte sent the letters only to laboratories suspected of propagating stolen plant material, and not to firms engaged in lawful competition. C-F Mem. at \*14. No one at Del Monte “believe[d] that these labs were propagating plant material that had been legally acquired.” (SMF ¶ 36.) Del Monte scientist Calvin Oda testified that the purpose of the letters “would be to stop what I would consider personally illegal activity.” (SMF ¶ 49; *see*

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also SMF ¶ 47.) There is simply no evidence that Del Monte sent the letters so as to impair lawful competition.

1. **Del Monte did not mislead competitors and the market**

The undisputed record establishes that “prior to, during and subsequent to this time period [when the letters were sent,] Del Monte ... made clear that the patent covered only the CO-2 variant and that it did not cover the MD-2 plant.” C-F Mem. at \*14. For example:

- Del Monte informed Maui in advance that it intended to apply for a patent on the 73-50 variety (which Del Monte later named the CO-2), and once that patent was approved, it advised Maui’s president of the PTO’s approval of the patent on the “[pineapple] hybrid 73-50 (named CO-2).” (SMF ¶¶ 127-134; 196-202.)

**REDACTED**

- In September 1995, six months after the letters, Del Monte’s president and chairman met with Dole’s president and chairman to discuss a possible acquisition of Del Monte by Dole. (SMF ¶¶ 58-60; 110.) Again, Del Monte made no statement indicating the MD-2 was patented. (SMF ¶ 58.) Instead, Del Monte asserted its advantage over Dole because Del Monte “had a significant amount [of its pineapple fields] already converted [to MD-2 and] it would take [Dole] quite a bit of time to catch up”. (SMF ¶ 59.) Such discussion makes no sense if there had been a scheme to deceive competitors that the MD-2 was patented, since in that case Dole would have been told it could not grow the MD-2 at all. (SMF ¶ 60.)
- In 1995, Del Monte provided potential purchasers, including Dole and Chiquita, with an offering memorandum. Although this was intended to excite buyers’ interest, it did not state that the MD-2 was patented. (SMF ¶ 61.) Nor did Del Monte tell either Dole or Chiquita – during due diligence for their bids on Del Monte – that the MD-2 was patented. (SMF ¶ 62.)
- After Del Monte went public in 1997 (SMF ¶ 63.), its chairman regularly engaged in conference calls with stock analysts. During one call, he stated

that Dole was working hard but it would take “a couple of years –three years at least – you know, to catch up with us,” (SMF ¶ 64), again belying the notion of a patent.

- In 1998, the Del Monte chairman stated that Dole was developing MD-2 plants in Honduras, but Del Monte believes “we have a lead of at least two to three years over the competition in any type of development.” (SMF ¶ 65.) Of course, these statements would make no sense if Del Monte were trying to claim patent rights, which would have precluded the competitors altogether, not just for two to three years.
- In 2000, Del Monte further advised Maui that the MD-2 was not patented and that Maui could grow it if it acquired it legitimately. (SMF ¶¶ 66, 137.)

In sum, in repeated circumstances over several years, Del Monte’s conduct toward its competitors and the trade – from advising Maui it was patenting the CO-2 to failing to claim the MD-2 was patented when Del Monte was up for sale to telling analysts it had only a couple of years’ headstart over Dole – was inconsistent with plaintiffs’ alleged “scheme.”<sup>12</sup> Accordingly, “the ultimate premise on which plaintiffs rest their arguments about the threat letters seems implausible,” C-F Mem. at 16, and “the record taken as a whole could not lead a national trier of fact to find for” plaintiffs. *Matsushita*, 475 U.S. at 587.

#### **B. Record Evidence Establishes that the Dole and Maui Litigations Were Not a Sham**

Plaintiffs allege that Del Monte pursued “sham patent litigation” against Dole and Maui “in order to prevent them from entering ... the market.” (Compl. ¶ 9.) These claims are insupportable.<sup>13</sup> The test for sham litigation is two-fold: “First, the lawsuit must be objectively

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<sup>12</sup> Moreover, it is undisputed that Del Monte never indicated on its pineapple hang tags that MD-2 pineapples were patented (SMF ¶ 12.) The absence of such a marking is a significant indication to the trade that there is no patent, because it sharply limits a patent holder’s ability to recover damages for infringement. *See* 35 U.S.C. §287(a).

<sup>13</sup> In addition, plaintiffs lack standing to seek damages for Del Monte’s alleged “sham litigation.” Decisions in the Second Circuit have limited standing to bring claims for sham patent enforcement to competitors or potential competitors of the alleged monopolist – *i.e.*, plaintiffs who have faced actual or threatened enforcement of the patent. *See In re DDAVP Direct Purchaser Antitrust Litig.*, 2006 U.S.

baseless in the sense that no reasonable litigant could realistically expect success on the merits. ... [Second,] the court should focus on whether the baseless lawsuit conceals an attempt to interfere directly with the business relationships of a competitor.” *Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 49, 51, 61 (1993) (“PRE”). “Only if challenged litigation is objectively meritless may a court examine a litigant’s subjective motivation.” *Id.* at 60-61. Plaintiffs’ evidence here falls far short of creating a genuine issue of material fact under any standard, let alone the applicable “clear and convincing” standard. *See Golan*, 310 F.3d at 1371 (patent prosecution); *Callman* at § 14:38 (trade secret prosecution).

1. **Del Monte’s litigation against Dole was not a sham**

Plaintiffs falsely allege that Del Monte sued Dole for patent infringement. (Compl. at ¶¶ 9, 78, 117(e), 121-122.) In fact, as Del Monte’s pleadings show, Del Monte sued because Dole had acquired stolen MD-2 pineapples to grow its own stock and then falsely marketed those pineapples as a “new variety”. (See SMF ¶¶ 68, 70.) In the course of the litigation, the district court upheld Del Monte’s trade secret claim as a matter of law, and discovery showed that Dole had, in fact, knowingly acquired and used stolen plant material. (See SMF ¶¶ 72-73.)

The lawsuit was settled when Dole **REDACTED** and agreed to change its marketing claims. Specifically, Dole agreed that it would never again, anywhere in the world, market its so-called MG3 pineapple (which was grown from MD-2 plant material) as a “new

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Dist. LEXIS 96201 (S.D.N.Y. Nov. 2, 2006); *In re Ciprofloxacin Hydrochloride Antitrust Litig.*, 363 F. Supp.2d 514, 541 (E.D.N.Y. 2005); *Indium Corp. of America v. Semi-Alloys, Inc.*, 566 F. Supp. 1344, 1352-53 (N.D.N.Y. 1983); *see also Oetiker v. Jurid Weke GmbH*, 671 F.2d 596, 599 (D.C. Cir. 1982); *Asahi Glass Co. v. Pentech Pharm., Inc.*, 289 F. Supp.2d 986, 995 (N.D. Ill. 2003) (Posner, J., sitting by designation). Accordingly, as customers not competitors of Del Monte, plaintiffs here lack standing. Moreover, because the same rationale of balancing the policies of antitrust law on the one hand, and encouraging innovation by protecting investors on the other, applies to state trade secret law as to patents, *see CVD Inc.*, 769 F.2d at 850, standing should be similarly limited to allow only competitors to bring claims alleging sham trade secret litigation.



variety” (SMF ¶ 74), which was a significant alteration of its marketing practices.<sup>14</sup> Under this settlement, Del Monte prevailed in substantial part on both its reverse palming-off claim under the Lanham Act and its claim under Florida’s deceptive trade practices statute. *See PRE*, 508 U.S. at 60 n.5 (a successful lawsuit generally is not a sham); *Movers & Warehousemen’s Ass’n of Greater New York v. Long Island Moving & Storage Ass’n*, 1999 WL 1243054, at \*6 (E.D.N.Y. Dec. 16, 1999) (“resolution [by settlement] does not lend itself well to the label objectively baseless”); C-F Mem. at 19.

Plaintiffs now contend that Del Monte’s trade secret claim against Dole was a sham because the alleged secret was the pineapple’s genetic code, which entered the public domain when the fruit was sold. The Florida court, however, found that Del Monte’s position was well-supported. *See Del Monte Fresh Produce Co. v. Dole Food Co.*, 136 F. Supp. 2d 1271, 1292 (S.D. Fla. 2000) (“at least one federal circuit has squarely recognized that plant material can constitute a trade secret, even if it is readily available to the public”), citing *Pioneer Hi-Bred International v. Holden*, 35 F.3d 1226 (8th Cir. 1994). *See Organon, Inc. v. Mylan Pharm., Inc.*, 293 F. Supp. 2d 453, 461 (D.N.J. 2003) (no sham litigation where, at time of filing suit, existing precedent supported plaintiff’s legal theory). (*See also* SMF ¶ 75.)

In any event, Del Monte’s trade secret claim was legitimate, even if Dole theoretically could have acquired plant material lawfully by purchasing the pineapple over the counter before its formal launch. “Many courts have held that the fact that one ‘could’ have obtained a trade secret lawfully is not a defense if one does not actually use proper means to acquire the information.” *Pioneer*, 35 F.3d at 1237. The evidence developed in the Dole litigation showed exactly that – Dole had acquired plant material in Costa Rica which it knew or should have

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known was stolen from Del Monte or was propagated from purloined seedlings. (See SMF ¶¶ 42, 46, 48, 72.)

Plaintiffs have also claimed that because Del Monte learned in 1995 that Dole had the MD-2 pineapple, the trade secret claim was a sham because it was time-barred. Plaintiffs are wrong. Although a three-year statute of limitations applies, plaintiffs ignore that the limitations period does not begin to run until “the *misappropriation* is discovered” or should have been discovered. Fla. Stat. § 688.01 (2000). Thus, the question is not when Del Monte learned that Dole had MD-2 pineapples, but when Del Monte learned it was acquired by *misappropriation*. See *Del Monte*, 136 F. Supp. 2d at 1294. There is no evidence that Del Monte learned that Dole’s pineapples were the progeny of stolen seedlings earlier than three years before it sued Dole. (See SMF ¶¶ 76-77.)

Del Monte also acted in good faith because its misappropriation claim was based on a second, independent ground, namely Dole’s misappropriation of Del Monte’s “agronomy and agricultural protocols for growing the MD-2 variety” (Amended Complaint, ¶ 23(b), Ex. 40.) This claim also was supported by the evidence. (SMF ¶ 73.)

## 2. The Maui litigation was not a sham

Plaintiffs contend that Del Monte’s counterclaim against Maui based on the CO-2 patent was a sham because Del Monte allegedly knew the patent was unenforceable. Yet that counterclaim was made only after Maui sued Del Monte for a license under the CO-2 patent, (SMF ¶¶ 83-89), which Del Monte had obtained with Maui’s express authorization. (SMF ¶¶ 127-134; 196-202.)<sup>15</sup> The record shows that there is “no basis for inferring that Del Monte knew, when it sued Maui for infringement, that its patent was unenforceable” (C-F Mem. at 53),

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<sup>15</sup> Indeed, in its initial complaint against Del Monte, Maui admitted it had authorized Del Monte to patent the pineapple in Del Monte’s name alone. (See SMF ¶ 202; C-F Mem. at \* 11.)

and plaintiffs’ “articulated scenario is entirely unconvincing” (*id.* at 20) and “deficient” (*id.* at 55.)

Plaintiffs’ argument rests entirely on a “one-time representation” (C-F Mem. at \*19; SMF ¶ 81) in a 1996 memorandum from Maui scientist Herve Fleisch to Del Monte scientist Calvin Oda, in which Fleisch – in the midst of heated negotiations between the two companies over a license for the CO-2 patent – questioned the validity of the patent “since Maui Pineapple has been commercializing the 73-50 and other hybrids to the West Maui Hotels and other customer for many years before 1993.” (Compl. ¶ 63(c); SMF ¶ 80.) Both Oda and his then-boss, Brian Nishida, testified that they did not believe Fleisch, and there is no contrary evidence. (*See* SMF ¶ 82.) Indeed, there is no evidence that Maui ever mentioned the issue again until after Del Monte sued Maui for infringement. (SMF ¶ 81.)

Maui’s actions in seeking a license under the CO-2 patent provided Del Monte with ample reason to believe the patent was valid. Only two months after Fleisch’s memorandum, Maui proposed a license agreement that was explicitly premised on the validity of the CO-2 patent.<sup>16</sup> In 1999, Maui sent the same draft licensing agreement a second time. (SMF ¶ 84.) Negotiations continued until 2001, when Maui sued Del Monte in Hawaii state court, seeking a declaratory judgment that “Del Monte must prepare legal papers assigning Maui Pineapple the exclusive license for variety 73-50 [the CO-2]” (SMF ¶ 86.)<sup>17</sup> In light of Maui’s actions, including suing for a license, Del Monte was fully justified in believing the patent was valid. *See Q-Pharm, Inc. v. Andrew Jergens Co.*, 360 F.3d 1295, 1303 (Fed. Cir. 2004).

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<sup>16</sup> Maui’s draft license stated that Del Monte would convey to Maui the rights that Del Monte “holds under the United States Patent (Patent Number Plant 8,863 for the ‘Pineapple Plant Named CO-2.’” (SMF ¶ 83.)

<sup>17</sup> Maui represented to the Hawaii court that it was not seeking to invalidate the patent (which would have required an action in federal court under exclusive patent jurisdiction), but was merely seeking a declaration of its rights under the patent. (SMF ¶ 87.)

Moreover, it was Maui that first sued Del Monte, which defended itself through a counterclaim. (SMF ¶¶ 86-89.) It is absurd to argue, as plaintiffs do, that Del Monte would raise a sham patent claim as a defensive tactic against the one company that would know the patent was invalid due to prior sales. *Cf. Boston Scientific Corp. v. Schneider (Europe) AG*, 983 F. Supp. 245, 272 (D. Mass. 1997). And when Maui claimed in litigation but without providing support that it had made prior sales, (SMF ¶ 91), Del Monte sought expeditiously to determine whether Maui had in fact sold the CO-2 pineapple more than a year before the patent was sought (*see* SMF ¶ 90), thus showing Del Monte's subjective good faith. Finally, when Del Monte did seek to dismiss the infringement claim after learning of Maui's pre-patent sales, (SMF ¶ 92), Maui sought attorneys' fees for alleged bad faith, but District Judge Charles Breyer denied the motion. (SMF ¶ 93.)

In any event, under plaintiffs' present definition of the relevant product market – which purportedly includes solely the MD-2 pineapple – the Maui litigation involving only the CO-2 pineapple is wholly irrelevant. That is, litigation over the CO-2 patent cannot possibly constitute “sham litigation” intended to impede competition in a market that excludes the CO-2. *See, e.g., Berlyn, Inc. v. Gazette Newspapers, Inc.*, 223 F. Supp.2d 718, 733-737 (D. Md. 2002) (“plaintiffs' direct evidence of predatory pricing ... is not relevant (as it does not relate to the markets alleged)"); *United Magazine Co. v. Murdoch Magazines Distribution, Inc.*, 146 F. Supp.2d 385 (S.D.N.Y. 2001) (monopoly power in “a separate market ... has no legal significance”).

**C. Evidence from Plaintiffs' Purported Patent Expert Does Not Create a Triable Issue on Anticompetitive Conduct**

The report of plaintiffs' proposed patent expert, George M. Gould, should be excluded in its entirety and Mr. Gould should be precluded from testifying because his opinions are

inadmissible under Fed. R. Evid. 702 and *Daubert*. First, most of Mr. Gould's report deals with fraud on the PTO, a claim which plaintiffs have dropped. All such testimony should be excluded as irrelevant.<sup>18</sup>

Second, Mr. Gould improperly purports to opine on the law. For instance, he declares,

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He makes numerous similar assertions.<sup>20</sup> Such testimony usurps the role of the court to instruct the jury on the law and runs the risk of jury confusion. *See United States v. Duncan*, 42 F.3d 97, 101 (2d Cir. 1994); *United States v. Bilzerian*, 926 F.2d 1285, 1294 (2d Cir. 1991).

Third, Mr. Gould repeatedly offers ultimate legal conclusions based on the facts.

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Rpt. at 16.<sup>21</sup> While an expert may offer an opinion that "embraces an

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<sup>18</sup> In addition, Mr. Gould's PTO testimony rests on an erroneous view of the law. \_\_\_\_\_, but this Court has held as a matter of law that "in the plant patent field, even if one plant is quite similar to another that is proposed for patent protection, the first plant is not automatically deemed to be material prior art unless it can be altered to mimic the new plant by obvious man-made means, such as irradiation," and for that reason "it is not standard practice in preparing plant patent applications to disclose siblings for purposes of demonstrating a lack of obviousness." (C-F Order at 3, *aff'ing* C-F Mem. at \*9.)

(See Tab 6 at 308-309.)

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<sup>19</sup> References to "Tab" are to the tabs accompanying the Declaration of Carl E. Goldfarb.

<sup>20</sup> *E.g.*, Tab

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ultimate issue to be decided by the trier of fact,” *see* Fed. R. Evid. 704(a), an expert “may not give testimony stating ultimate legal conclusions based on those facts.” *Bilzerian*, 926 F.2d at 1294 (expert may not “usurp” “the role of the jury in applying the law to the facts before it”); *Duncan*, 42 F.3d at 101 (“When an expert undertakes to tell the jury what result to reach, this does not *aid* the jury in making a decision, but rather attempts to substitute the expert’s judgment for the jury’s”).

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<sup>22</sup> *See, e.g., United States v. Scop*, 846 F.2d 135, *modified*, 856 F.2d 5 (2d Cir. 1988) (reversible error to permit SEC investigator with no personal knowledge of the facts to characterize defendant’s conduct as “fraudulent” in language that tracked the governing statute); *Hygh*, 961 F.2d at 364; *Andrews v. Metro North Commuter R.R. Co.*, 882 F.2d 705, 708 (2d Cir. 1989).

Fourth, Mr. Gould’s testimony is inadmissible because much of his report (at pp. 6-16) purports to describe Del Monte’s actions, about which Mr. Gould has no personal knowledge, with a running pro-plaintiff commentary. Such testimony is not proper for an expert and should be introduced, if at all, through documents and percipient witnesses with direct knowledge of the facts. *See, e.g., Highlands Capital Management, L.P. v. Schneider*, 379 F. Supp.2d 461, 468-69 (S.D.N.Y. 2005) (citing cases); *In re Rezulin Products Liab. Litig.*, 309 F. Supp. 2d 531, 551 (S.D.N.Y. 2004); *LinkCo, Inc. v. Fujitsu Ltd.*, 2002 WL 1585551, at \*1-\*2 (S.D.N.Y. July 16, 2002). Mr. Gould also repeatedly draws inferences regarding Del Monte’s intent based on his

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review of the record.<sup>23</sup> “None of this speculation is admissible. .... Whatever expertise [Gould] may possess, no expert, may supplant ... the role of the jury [in] interpreting the evidence.”

*Highlands Capital*, 379 F. Supp.2d at 469; *Rezulin*, 309 F. Supp.2d at 541 (“[i]nferences about the intent or motives of the parties or others lie outside the bounds of expert testimony”).

### **III. PLAINTIFFS’ PURPORTED MARKET, LIMITED ONLY TO THE MD-2 PINEAPPLE, IS NOT SUPPORTED BY COMPETENT, ADMISSIBLE EVIDENCE**

#### **A. Summary Judgment Must Be Granted where Plaintiffs Fail to Provide Evidentiary Proof of a Relevant Product Market**

Plaintiffs must establish a relevant product market in order to show that Del Monte exercised monopoly power or had a dangerous probability of achieving monopoly power. *See Heerwagen v. Clear Channel Communications*, 435 F.3d 219, 226-27 (2d Cir. 2006). The relevant market consists of “products that have reasonable interchangeability for the purposes for which they are produced-price, use and qualities considered.” *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 404 (1956). “The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it.” *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962).

“Like any other issue, market definition is subject to summary judgment if the plaintiffs fail to provide sufficient evidence from which a jury could reasonably find in their favor.” *Bathke v. Casey’s Gen. Stores, Inc.*, 64 F.3d 340, 345 (8th Cir. 1995); *see also AD/SAT, a Div. of Skylight, Inc. v. Associated Press*, 920 F. Supp. 1287, 1296 n.5 (S.D.N.Y. 1996); *Bailey v.*

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<sup>23</sup>

**REDACTED**

*Allgas, Inc.*, 284 F.3d 1237, 1247 (11th Cir. 2002) (plaintiffs' expert made only "a cursory assessment of reasonable substitutes" and did not determine the cross-elasticity of demand for potential substitutes); *Levine v. Central Florida Medical Affiliates, Inc.*, 72 F.3d 1538 (11th Cir. 1996) (plaintiffs' expert failed to provide basis for excluding potential substitute products); *Gulfstream Park Racing Ass'n v. Tampa Bay Downs, Inc.*, 294 F. Supp. 2d 1291, 1308-1310 (M.D. Fla. 2003) (expert's product market testimony was "conclusory," was not based "upon a measure of supply or demand elasticity or some other survey or any other detailed economic analysis" and lacked an explanation for the exclusion of several apparently reasonable substitute products).

B.

**REDACTED**

Plaintiffs' evidence on the issue of product market definition consists of the expert report of Dr. Ronald Cotterill, who concludes

**REDACTED**

(Tab 2 at 167.)

**REDACTED**

As demonstrated below, Dr. Cotterill's failure to use a standard, accepted methodology for defining a product market compels exclusion of his expert opinion as unreliable. *See, e.g., Lantec, Inc. v. Novell, Inc.*, 306 F.3d 1003, 1025 (10th Cir. 2002) (affirming exclusion of expert who "did not employ in the courtroom the same level of intellectual rigor that characterizes an expert in the field of economics and industrial organization"). For similar reasons, Dr. Cotterill's testimony has been rejected by other courts when he advocated narrow, ad-hoc, pro-

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<sup>24</sup> For purposes of summary judgment, Del Monte does not address whether the Champaka pineapple also should be included in the relevant product market, but reserves that issue for trial.



plaintiff product market definitions. See *Delco LLC v. Giant of Maryland, LLC*, 2007 WL 3307018 at \*16 (D.N.J Nov. 8, 2007.) (rejecting Dr. Cotterill’s opinion that a product market was composed only of supermarket sales, and finding that Dr. Cotterill offered “an insufficient basis to exclude from the product market [ ] potential competitors” such as Save-A-Lot and Wal-Mart); *State v. Kraft General Foods, Inc.*, 926 F. Supp. 321, 329 (S.D.N.Y. 1995) (rejecting Dr. Cotterill’s opinion that market was limited to adult cereal brands and not all ready-to-eat cereal generally; “Professor Cotterill’s econometric analysis ... is too flawed to be reliable”).

1.

**REDACTED**

**REDACTED**

REDACTED

*See, e.g., Rebel Oil Co., Inc. v.*

*Atlantic Richfield Co.*, 51 F.3d 1421, 1443 (9th Cir. 1995) (no market power where there was “no genuine issue regarding the ability of ... existing competitors to increase their output”).

2. **Dr. Cotterill unjustifiably excluded the CO-2 pineapple from the product market**

REDACTED

REDACTED

*See Brooks v. Outboard Marine Corp.*, 234 F.3d 89, 92 (2d Cir. 2000)

(affirming exclusion of expert witness who failed to review several pieces of available and relevant evidence); *MTX Communications Corp. v. LDDS/Worldcom, Inc.*, 132 F. Supp.2d 289, 292 (S.D.N.Y. 2001) (proposed expert testimony on damages neither reliable nor relevant because the witness ignored key evidence); *Johnson Elec. N. Am., Inc. v. Mabuchi Motor Am. Corp.*, 103 F. Supp.2d 268, 282-83 (S.D.N.Y. 2000) (excluding economist’s testimony partly because he ignored key evidence in econometric analysis).

3. **Additional flaws in Dr. Cotterill's methodology**

A number of other methodological errors compel the exclusion of Dr. Cotterill's testimony not only on market definition, but also on market power.

a.

**REDACTED**

“Cross-elasticity of demand exists if consumers would respond to a slight increase in the price of one product by switching to another product.” *AD/SAT*, 181 F.3d at 227. Economists typically measure cross-elasticity to determine whether products are in the same market by applying the test set forth in the U.S. Department of Justice 1992 Horizontal Merger Guidelines (“Guidelines”). That test (known as the SSNIP test) requires determining whether a small but significant and non-transitory increase in price, usually of 5%, would lead a significant number of consumers to switch to a competing product.<sup>25</sup> If such a price increase causes enough buyers to shift to other products so that the price increase is unprofitable for the hypothetical monopolist, the analysis is expanded to include the closest substitutes for the initial product and repeated until a group of products is identified for which the price increase would be profitable for the hypothetical monopolist because the buyers would not switch to an alternative product after the price increase. The smallest group of such products constitutes the relevant product market under the Guidelines. *See, e.g., United States v. Visa USA Inc.*, 163 F. Supp. 2d 322, 335 (S.D.N.Y. 2001), *aff'd*, 344 F.3d 229 (2d Cir. 2003). Products need not be fungible to be in the same market. *Du Pont*, 351 U.S. at 394; *PepsiCo, Inc. v. Coca-Cola Co.*, 315 F.3d 101, 105 (2d Cir. 2002).

**REDACTED**

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<sup>25</sup> *See* U.S. Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines § 1.1 (revised Apr. 8, 1997), available at [www.usdoj.gov/atr/public/guidelines/horiz\\_book/hmg1.html](http://www.usdoj.gov/atr/public/guidelines/horiz_book/hmg1.html).

such a test (*id.* at 12 and Appendix A.)

**REDACTED**

**REDACTED**

**REDACTED**

**REDACTED**

An economist's failure to analyze cross-elasticity, or failure to do so properly, compels exclusion of his testimony. *See, e.g., Lantec, Inc. v. Novell, Inc.*, 306 F.3d 1003, 1025 (10th Cir. 2002) (affirming exclusion of expert who "did not calculate the cross-elasticity of demand to determine which products were substitutes"); *Kentucky Speedway, LLC v. National Association of Stock Car Auto Racing Inc., a/k/a NASCAR and International Speedway Corp.*, 2008 WL 113987 (E.D. Ky. Jan. 7, 2008) (excluding proposed product market testimony because expert did not properly apply SSNIP test); *McLaughlin Equipment Co., Inc. v. Servaas*, 2004 WL 1629603, \*7 (S.D. Ind. Feb. 18, 2004) (excluding testimony because there was no indication expert "considered any reasonably interchangeable products, and she testified she did no statistical analysis of the cross-elasticity of price, demand, or supply"); *Worldwide Basketball and Sports Tours, Inc. v. National Collegiate Athletic Ass'n*, 388 F.3d 955, 962 (6th Cir. 2004) (relevant market not established where expert failed to perform cross-elasticity study).

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**REDACTED**

b. Dr. Cotterill makes numerous erroneous factual assumptions

REDACTED

REDACTED

REDACTED

Expert testimony that ignores or contradicts the clear factual evidence in a case, as does Dr. Cotterill's here, should be excluded under *Daubert*. See, e.g., *U.S. v. Rushing*, 388 F.3d 1153, 1156 (8th Cir. 2004) ("Expert testimony should not be admitted when ... the facts of the case contradict or otherwise render the opinion unreasonable."); *Casas Office Mach., Inc v. Mita Copystar Am., Inc.*, 42 F.3d 668 (1st Cir. 1994) ("court may exclude expert testimony where it finds that the testimony ... rests on obviously incorrect assumptions"); *Quinones-Pacheco v. American Airlines, Inc.*, 979 F.2d 1, 6 (1st Cir. 1992) (excluding expert opinion based on flawed assumptions); *Greenwell v. Boatwright*, 184 F.3d 492, 497 (6th Cir. 1999) ("Expert testimony ... is inadmissible when the facts upon which the expert bases his testimony contradict the evidence"); *Lava Trading, Inc. v. Hartford Fire Ins. Co.*, No. 03 Civ. 7037(PKC), 2005 WL 4684238, at \*20-\*21 (S.D.N.Y. Apr. 11, 2005) (excluding expert testimony where "analysis is premised on a number of crucial factual assumptions that are dramatically belied by the record").

C.

REDACTED

In *Brown Shoe Co.*, the Supreme Court set forth certain "practical indicia" for determining the boundaries of product markets: "industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors." *Brown Shoe Co.*, 370 U.S. at 325. While these factors can prove "illuminating," *Coniglio v. Highwood Services, Inc.*, 495 F.2d 1286, 1292 (2d Cir. 1974), they were "never intended to exclude economic analysis altogether ... including the cross-price elasticity of demand." They are not a substitute for the conducting of a proper economic study, which Dr. Cotterill has failed to do.

**REDACTED**

*See Geneva Pharms. Tech. Corp. v.*

*Barr Laboratories Inc.*, 386 F.3d 485, 496 (2d Cir. 2004) (“The emphasis always is on the actual dynamics of the market rather than rote application of any formula.”); *Alcatel USA, Inc. v. DGI Technologies, Inc.*, 166 F.3d 772, 782 n.20 (5th Cir. 1999) (“One means utilized to determine the relevant product market is to analyze how the competitors themselves view the market”). Dr. Cotterill’s opinion fares no better under the other *Brown Shoe* factors.

**REDACTED**

Summary judgment is

warranted on this basis alone.

**IV. PLAINTIFFS HAVE FAILED TO PROVE THAT DEL MONTE’S ACTIONS HAD ANY ANTICOMPETITIVE EFFECT**

A monopolization claim “requires proof of exclusionary or anticompetitive intent *as well as effect.*” *Clorox Co. v. Winthrop*, 836 F. Supp. 983, 993 (E.D.N.Y. 1993) (citing *U.S. Football League v. Nat’l Football League*, 842 F.2d 1335, 1358-60 (2d Cir. 1988) (§ 2 requires “that both



intent *and* effect be proven”) (emphasis original)); *Tower Air, Inc. v. Federal Express Corp.*, 956 F. Supp. 270, 286 (E.D.N.Y. 1996). Failure of proof as to anticompetitive effect is fatal at the summary judgment stage, even if plaintiffs can show – which they cannot here – that the defendant possesses monopoly power in the relevant market. *See Trans Sport, Inc.*, 964 F.2d at 190-91). The absence of anticompetitive effect also precludes showing a dangerous probability of success in achieving monopoly power on plaintiffs’ attempted monopolization claim. *See Int’l Distr. Ctrs., Inc. v. Walsh Trucking Co., Inc.*, 812 F.2d 786, 792 (2d Cir. 1987); *Barr Laboratories, Inc. v. Abbott Laboratories*, 978 F.2d 98, 113 (3d Cir. 1992) (affirming summary judgment where “the continued entry of competition, albeit with small initial market share shown on this record, indicates that [defendant’s] position is subject to significant potential erosion. It thus tends to show that [defendant] has no reasonable probability of success in any attempt to monopolize.”); *United States v. Empire Gas Corp.*, 537 F.2d 296, 305 (8th Cir. 1976) (“no instance in which competitors in these areas were susceptible to [defendant] Empire’s intimidation.”); *Datagate, Inc. v. Hewlett-Packard Co.*, 672 F. Supp. 1288 (N.D. Cal. 1987) (“plaintiff must show that defendant’s conduct actually caused potential entrants to refrain from competing in the relevant market”).

Since antitrust laws protect competition, not competitors, demonstrating an anticompetitive effect requires showing more than an impact on one particular company. “[T]he adverse impact must be on competition, not on any individual competitor or plaintiff’s business.” *Reazin v. Blue Cross and Blue Shield of Kansas, Inc.*, 899 F.2d 951, 960 (10th Cir. 1990). Plaintiffs must prove “the existence of actual anticompetitive effects, such as reduction of output, increase in price, or deterioration in quality of goods and services.” *Orson, Inc. v. Miramax Film Corp.*, 79 F.3d 1358, 1367 (3d Cir. 1996). “[T]he test [under section 2] is ... whether the

challenged practices bar a substantial number of rivals or severely restrict the market's ambit."

*United States v. Dentsply Int'l, Inc.*, 399 F.3d 181, 191 (3d Cir. 2005); *International Distribution Centers, Inc. v. Walsh Trucking Co., Inc.*, 812 F.2d 786, 791 (2d Cir. 1987) ("an actual effect on some small part of a market does not amount to monopolization of the market").

Here, the undisputed evidence shows that Del Monte's conduct did not significantly preclude other companies from competing to produce extra-sweet pineapples for sale. Nor is there credible admissible evidence showing that the alleged wrongful acts had any material economic impact. As Magistrate Judge Dolinger found, there is "no meaningful" and "no persuasive evidence" that Del Monte's conduct (i) "led the competitor companies to abandon plans, if they had any, to compete with Del Monte" (C-F Mem. at \*16); (ii) "deterred the propagators of competing seedlings from pursuing their agronomic activities" (*id.* at \*6); or (iii) caused "any competitor of Del Monte [to] slow[ ] or stop[ ] any plan to enter the market." (*Id.*)<sup>27</sup>

**A. Del Monte's Competitors Were Not Deterred**

**1. Dole.**

**REDACTED**

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<sup>27</sup> Nor is there evidence that competition was substantially affected by any reasonable reliance on Del Monte's alleged misrepresentations in the March 1995 letters or elsewhere. See *Santana Products, Inc. v. Bobrick Washroom Equip., Inc.*, 249 F. Supp.2d 463, 517 n. 47 (M.D. Pa. 2003), *aff'd in part, vacated in part on other grnds*, 401 F.3d 123 (3d Cir. 2005) (evidence failed to satisfy "effects" test articulated by the Second Circuit in *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 288 n.41 (2d Cir. 1979): plaintiff must show that "the representations were [1] clearly false, [2] clearly material, [3] clearly likely to induce reasonable reliance, [4] made to buyers without knowledge of the subject matter, [5] continued for prolonged periods, and [6] not readily susceptible of neutralization or other offset by rivals"). See also *Nat'l Ass'n of Pharmaceutical Manufacturers v. Ayerst Labs*, 850 F.2d 904, 916 (2d Cir. 1988) (applying *Berkey* effects test to misleading letters to competitors' pharmacists/distributors).

REDACTED

REDACTED

2. Maui. Plaintiffs' claims concerning the effect of Del Monte's actions on Maui are equally insupportable. Maui was well aware that the patent did not cover the MD-2 because Del Monte told them it covered the CO-2. *See, e.g.*, C-F Mem. at \*10 (Del Monte "ensured Maui would know which variety was [patented] and that it was not the MD-2."); (SMF ¶¶ 127-134.)

REDACTED

REDACTED

3. Chiquita.

REDACTED

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REDACTED

REDACTED

REDACTED

4. **No Impact on MD-2 Production.** Although plaintiffs make much of the 1995 anti-theft letters, they have no evidence whatever that the letters had any effect on pineapple cultivation in Latin America.

REDACTED

Uncontradicted evidence shows that independent Costa Rican growers continued to propagate the MD-2 and the amount of their plant material increased steadily from at least 1994 onward.

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REDACTED

REDACTED

In short, “[t]here is also no meaningful evidence that any potential competitor of Del Monte slowed or stopped any plans to enter the market as a result of threat letters.” C-F Mem. at \*6.<sup>30</sup>

**5. No Rational Competitor Could Be Deterred.** Finally, as discussed *supra* pp. 10-12, Del Monte’s conduct in the market concerning the nature of its rights in the MD-2 was wholly inconsistent with any notion that the MD-2 was patented. (SMF ¶¶ 12, 56, 58-66, 68, 137, 162.) Accordingly, plaintiffs’ “scenario is particularly difficult to credit since the competitors were free to examine the patent and to compare the plants to ensure themselves as to the scope of coverage. And, indeed, it appears that this was done, at least by Dole’s top pineapple scientist” who in 1996 (the first year that Dole was interested in commercializing the

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<sup>30</sup> A May 2, 1995 memorandum from Jack DeMent, a former Dole executive then working as a consultant, is not to the contrary. (SMF ¶ 98.) DeMent reported to Klink, a Dole scientist, on an alleged phone conversation he had with Mr. Funk of Del Monte. According to DeMent’s memorandum, Funk reminded DeMent that Dole has “a patent” without specifying what the patent covered, and said Del Monte intended to enforce it the first time anyone “shipped the product.” (SMF ¶ 99.) The memo is double hearsay because it is stating what DeMent (who was not deposed), claims Funk allegedly told him.

REDACTED

In any event, DeMent questioned in the memo whether the patent was enforceable, and there is no indication that anyone at Dole ever referred to, let alone relied on, DeMent’s memorandum, as is confirmed by the fact that it did not even appear in Dole’s document production, but was produced by Klink personally when he was deposed in 2005. (SMF ¶ 102.)

MD-2 (SMF ¶ 115)) “had no difficulty in distinguishing between [the MD-2 and the CO-2] and determining it was the CO-2 that was covered by Del Monte’s patent.” C-F Mem. \*16.<sup>31</sup>

In light of the undisputed evidence that a simple comparison between the publicly-filed patent and the MD-2 made clear that MD-2 was not covered by the patent, and the undisputed evidence that the conduct of Del Monte’s competitors was driven by their own internal business considerations and external factors having nothing to do with Del Monte, plaintiffs cannot prove that the Del Monte’s conduct had any effect on the purported market for the MD-2, let alone an effect on competition that was more than *de minimis*.

**B. Plaintiffs Have No Admissible Expert Testimony on Anticompetitive Effects**

REDACTED

REDACTED

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<sup>31</sup> As a result of plaintiffs’ decision to drop their claim of fraud on the PTO, plaintiffs’ theory is even more far-fetched because Del Monte is entitled to the statutory presumption that its patent was valid and the description of the patented pineapple was “as complete as reasonably possible,” 35 U.S.C. §162, notwithstanding that Del Monte later learned that pre-patent sales by Maui made the patent nonviable.

REDACTED

As such, it must be excluded. *See, e.g., Champagne Metals v. Ken-Mac Metals, Inc.*, 458 F.3d 1073, 1080 n. 4 (10th Cir.2006) (“generally, an economist’s role in an antitrust case is not to prove facts, but to opine on economic theory”; excluding economist’s report because his opinions were based on one-sided view of the facts). Dr. Cotterill also improperly invades the jury’s role as finder of fact. *See, e.g., Highlands Capital Management. L.P. v. Schneider*, 379 F. Supp. 2d 461 (S.D.N.Y. 2005) (“no expert may ‘supplant ... role of the jury [in] interpreting the evidence’”) (quoting *Primavera Familienstiftung v. Askin*, 130 F. Supp.2d 450, 529 (S.D.N.Y. 2001); *Dibella v. Hopkins*, 2002 WL 31427362 at \*4 (S.D.N.Y. Oct. 30, 2002) (“credibility of witnesses is ... not a proper subject for expert testimony;” excluding expert testimony that “seeks to draw conclusions as to the ultimate factual conclusions in the case-what actually happened, what the parties said, and what they thought”). Accordingly, Dr. Cotterill should be precluded from testifying concerning any alleged impact of Del Monte’s actions on its competitors.<sup>32</sup>

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REDACTED



“[T]he ultimate premise upon which plaintiffs rest their arguments ... seems implausible.” C-F Mem. at \*16. At bottom, there simply is no meaningful evidence that Del Monte’s actions caused a single grower or competitor not to grow the MD-2 and Del Monte is entitled to summary judgment. *See Oetiker v. Jurid Weke GmbH*, 671 F.2d 596, 601 (D.C. Cir. 1982) (threatening letters that holder of fraudulently procured patent sent to manufacturer could not form basis for antitrust liability where manufacturer “simply ignored the letters”).

**V. PLAINTIFFS’ EXPERT TESTIMONY ON DAMAGES MUST BE EXCLUDED AS METHODOLOGICALLY FLAWED AND UNRELIABLE, LEAVING PLAINTIFFS WITH NO COMPETENT EVIDENCE OF DAMAGES**

Dr. Cotterill’s damage methodology suffers from several flaws, which are independent of the grounds previously discussed for excluding his testimony. Because Dr. Cotterill fails to apply accepted economic principles, these deficiencies require exclusion of his testimony on damages. *See DSU Medical Corp. v. JMS Co., Ltd.*, 471 F.3d 1293 (Fed. Cir. 2006) (affirming exclusion of testimony on lost profits where expert “did not ground his ‘accelerated market entry’ theory in sound economic principle.... While damages analysis invariably involves hypothetical reconstruction of a ‘but for’ marketplace, that reconstruction must include some footing in economic principle”).

**A. Dr. Cotterill Uses an Ad Hoc, Unproven Damages Methodology**

**REDACTED**

**REDACTED**

*e.g., In re Rezulin Products Liab. Litig.*, 309 F. Supp. 2d 531, 551 (S.D.N.Y. 2004); *LinkCo, Inc. v. Fujitsu Ltd.*, 2002 WL 1585551, at \*1-\*2 (S.D.N.Y. July 16, 2002). *See,*

**REDACTED**

**REDACTED**

**REDACTED**

REDACTED

(*Id.*). Courts “have been suspicious of methodologies created for the purpose of litigation.” *Mike’s Train House v. Lionel, LLC*, 472 F.3d 398, 408 (6th Cir. 2006) (“That this methodology was created for the purposes of litigation further supports our conclusion that [the expert’s] testimony was not reliable under *Daubert*.”); *Daubert v. Merrell Dow Pharms, Inc.*, 43 F.3d 1311, 1317 (9th Cir. 1995) (whether methodology was created for litigation is a “very significant fact to be considered”); *Salazar v. United States*, 2003 WL 25695854 at \*3 (S.D.W.Va. Feb. 18, 2003) (finding expert’s method unreliable where it was “created directly for use in this litigation” and “to advance a specific litigation strategy”).<sup>35</sup>

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REDACTED

**B. Dr. Cotterill's Analysis Is Driven by *Ad Hoc*, Unjustified Assumptions**

In addition to his failure to use an accepted or peer-reviewed methodology for damages, Dr. Cotterill apparently could not get his novel technique to produce rational, acceptable results, so he further arbitrarily modified his methodology by applying two *ad hoc* and unjustified adjustments.

REDACTED

REDACTED

REDACTED

REDACTED

These deficiencies require exclusion of Dr. Cotterill's damage testimony. *See Hudgens v. Bell Helicopters/Textron*, 328 F.3d 1329, 1344 (11th Cir. 2003) ("an expert's failure to explain the basis for an important inference mandates exclusion of his or her opinion").

Dr. Cotterill's damage model also forced him to make a second unjustified *ad hoc* assumption.

REDACTED

The fact that Dr. Cotterill had to make *ad hoc* adjustments to avoid establishing irrational “but for” prices, and his inability to explain those adjustments, underscore the arbitrary and unreliable nature of his damage methodology and requires exclusion of his opinions.<sup>36</sup>

**C. Exclusion of Dr. Cotterill’s Testimony Requires Summary Judgment Because Plaintiffs Cannot Establish Damages**

In order for an antitrust plaintiff to recover treble damages, the plaintiff must first prove some “element of actual damages caused by the defendant’s violation of the antitrust laws.” *Eleven Line, Inc. v. North Texas State Soccer Ass’n, Inc.*, 213 F.3d 198, 206 (5th Cir. 2000); *Drug Mart Pharmacy Corp. v. American Home Products Corp.*, 472 F. Supp.2d 385, 423-24 (E.D.N.Y. 2007). Although “exactitude” is not required, *Temple v. Circuit City Stores, Inc.*, 2007 WL 2790154 at \* 6 (E.D.N.Y. Sept. 25, 2007), “damages may not be determined by mere speculation or guess,” and plaintiffs must present sufficient evidence to “show the extent of the damages as a matter of just and reasonable inference.” *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 563 (1931).<sup>37</sup>

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<sup>36</sup> See, e.g., *Group Health Plan, Inc. v. Philip Morris USA, Inc.*, 344 F.3d 753, 760 (8th Cir. 2003) (economist’s damage estimate excluded as relying on “inspired guesses at best”); *Elcock v. Kmart Corp.*, 233 F.3d 734, 756 n.13 (3d Cir. 2000) (“an expert should not depend on fictional or random data when rendering an opinion about the quantum of economic harm in a particular plaintiff’s case”); *Pierce v. Chicago Rail Link, LLC*, 2005 WL 599980 at \*5 (N.D. Ill. March 15, 2005) (“If there is a methodology, as opposed to an ad hoc set of unexamined assumptions, then [the expert] failed to explain it or show that his analysis is testable or generally accepted in his field”); *Lippe v. Bairnco Corp.*, 288 B.R. 678 (S.D.N.Y. 2003) (excluding testimony where expert was “unable to provide any concrete basis for his decision to apply a control premium in each of the valuations in question, nor was he able to provide any basis for the amount of the control premium he applied”); *In re Med Diversified*, 334 B.R. 89 (E.D.N.Y. 1995) (excluding testimony where damages expert failed to explain satisfactorily his assumption of a 25% discount rate, and where, without this ad hoc assumption, he would have “reached a wildly variant conclusion”).

<sup>37</sup> See, e.g., *New York v. Julius Nasso Concrete Corp.*, 202 F.3d 82, 88-89 (2d Cir. 2000) (invoking “just and reasonable inference” standard). Plaintiffs “must provide evidence such that the jury is not left to ‘speculation or guesswork’ in determining the amount of damages to award.” *Dolphin Tours, Inc. v. Pacifico Creative Serv., Inc.*, 773 F.2d 1506, 1509 (9th Cir. 1985); see *Chrysler Credit Corp. v. J. Truett Payne Co., Inc.*, 670 F.2d 575, 582 (5th Cir. 1982) (“the plaintiff is still required to put forth substantial relevant evidence”).

Here, the testimony of plaintiffs' damage expert, Dr. Cotterill, should be excluded because his opinions rest on a fundamentally flawed, *ad hoc*, and unreliable methodology. Once his opinion is excluded, Del Monte should be granted summary judgment because plaintiffs cannot establish damages.

**VI. DEL MONTE IS ENTITLED TO SUMMARY JUDGMENT ON CLAIMS BY INDIRECT PURCHASERS**

With class certification denied, Del Monte is entitled to summary judgment against the individual indirect purchaser plaintiffs for the reasons set forth in Points I, II and IV above. The indirect purchasers' proposed expert economist, Dr. Frank D. Tinari, said

**REDACTED**

With this exclusion, Del Monte is also entitled to summary judgment for failure to establish injury or demonstrate damages. *See Point V.*<sup>38</sup>

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<sup>38</sup> Del Monte also is entitled to summary judgment insofar as all plaintiffs seek injunctive relief because they have failed to demonstrate a "significant threat of injury from an impending violation of the antitrust laws or from a contemporary violation likely to continue or recur." *Bender v. Southland Corp.*, 749 F.2d 1205, 1214 (6th Cir. 1984).

**REDACTED**

**CONCLUSION**

For the foregoing reasons, Del Monte's Motion In Support of Summary Judgment and Exclusion of Expert Evidence should be granted.

Dated: August 8, 2008

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

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