UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT GREENEVILLE

IN RE:	SOUTHEASTERN MILK ANTITRUST LITIGATION	Master File No. 2:08-MD-1000
THIS DOCUMENT RELATES TO:	)	
Food Lion, LLC	)	Greer/Inman
et al. v. Dean Foods Company, et al.,	)	
No. 2:07-CV-188	)	

O R D E R
REGARDING DOCUMENT 1084

Defendants have moved that the court exclude the expert testimony of Ronald Cotterill, one of the Retailer Plaintiffs' experts. (Doc. 1084).

Dr. Cotterill is a Professor of Agricultural and Resource Economics at the University of Connecticut. He holds a joint Ph.D. in Agricultural Economics and Economics. He was hired by the Retailer Plaintiffs "to calculate overcharges and damages to the proposed class members as a result of what he describes as the defendants' anticompetitive business practices." He concludes that the class members sustained 982.2 Million Dollars in damages.

The defendants attack Dr. Cotterill's testimony in five ways:

I. PROFESSOR COTTERILL'S DAMAGE MODEL DOES NOT FIT THE FACTS OR THEORY OF PLAINTIFFS' CASE.

The defendants first argue that Cotterill's testimony should be excluded because he failed to initially analyze the basic question regarding whether the plaintiffs' were injured by the defendants' alleged anticompetitive conduct. Rather, so defendants argue, Cotterill

merely measured whether prices paid by the plaintiffs for fresh white milk were higher as a result of the merger between Suiza Foods and "old" Dean Foods, which is irrelevant as far as this case is concerned. In other words, defendants argue that Cotterill did not establish a causal link between the anticompetitive conduct *alleged in this case* and the damages he subsequently calculated.

This court carefully read the plaintiffs' response and – more importantly – Cotterill's report. The court does not draw the same conclusions from Cotterill's report as do the defendants. Although Cotterill began his analysis as of the time of the Suiza/Dean merger, what he ultimately purported to measure was the result of the subsequent anticompetitive actions that were facilitated or enabled by the preceding merger.

Defendants next argue that Cotterill's model did not distinguish between price increases that were the result of the conspiracy and increases that resulted from the unilateral exercise of market power. In other words, since this court already has dismissed all claims arising from unilateral conduct; and since Cotterill's model does not distinguish between conspiracy-driven price increases and increases attributable to unilateral conduct, his testimony should be excluded.

Contrary to defendants' argument, Cotterill's damages model separately computes damages for the unilateral monopolization counts, and the conspiracy counts. Plaintiffs' counsel can – and shall – insure that Cotterill confines his testimony to the conspiracy claims; if they or Cotterill fail to do so, at the very least they risk compromising Cotterill's entire testimony.

As a last point in support of defendants' argument that Cotterill failed to establish any causal link between damages and the alleged anticompetitive conduct, defendants say that Cotterill's alternative model did not differentiate between lawful and conspiratorial plant closings.

Cotterill did report that four of the eight plant closings in fact may have benefitted the class members. But, even if so, that is a matter for cross examination and the presentation of contrary evidence, and ultimately for argument to the jury; it is hardly reason to exclude Cotterill's testimony.

II. PROFESSOR COTTERILL'S OPINION THAT CAPTIVE PLANTS ARE NOT PART OF THE MARKET IS NOT BASED ON ANY ANALYSIS OF THE FACTS OF THIS CASE, AND IS INCONSISTENT WITH GENERALLY ACCEPTED PRINCIPLES.

Cotterill excluded from his analysis "captive bottlers" -- those plants that supply milk primarily to the entities that own them (e.g., Kroger, Ingles, *et al.*) -- on the basis that captive bottlers are an insignificant source of competition for the defendants. Defendants argue that Cotterill's premise – *viz*., that captive bottlers do not compete with defendants – is not supported by any evidence in the record and Cotterill failed to conduct any independent investigation himself.

Contrary to defendant's argument, Cotterill did rely on evidence in the record to support his opinion that captive bottlers do not significantly compete with the defendants; *see*, ¶ 30, Cotterill's Report. Defendants obviously disagree with Cotterill's data (facts), but this court cannot blithely conclude that his data is insufficient for purposes of Rule 702, and

neither can this court find that Cotterill used unreliable methodology to arrive at his conclusions. To be sure, the jury may find his analysis to be inadequate, but therein is the answer – it is a matter for cross examination.

III. PROFESSOR COTTERILL'S OPINION THAT THERE IS A MARKET ALLOCATION SCHEME IS UNSUPPORTED BY ANY RELIABLE ECONOMIC ANALYSIS OR METHOD.

Next, defendants assert that Cotterill's opinion that there is a "market allocation scheme" is unsupported by any reliable economic analysis or method, and therefore should be excluded.

Cotterill apparently proposes to testify that each defendant relocated some of its plants in the southeastern United States by moving those plants away from those of the other defendants, thereby lessening competition between and among them. Defendants argue that Cotterill's conclusion is based on nothing more than "eyeballing" a map.

Defendants' paraphrase of Cotterill's opinion leaves, intentionally or unintentionally, a false impression of what he said.[1] He merely noted that between 2000 and 2008, the number of non-captive bottling plants in the southeast decreased from forty-nine to forty-one, and that the average distance between a Dean plant and a non-Dean plant increased from forty-three miles to one hundred three miles. He concludes that the changes resulted in less competition.

If Cotterill misread his map, or if he miscounted the non-captive plants, then

[1] *See*, ¶ 64, Cotterill's Report.

defendants' attorney surely will take him to task on cross examination, thereby calling into question the accuracy of this opinion and perhaps others. But there is nothing wrong with his data or his methodology as far as Rule 702 is concerned.

IV. PROFESSOR COTTERILL'S OPINIONS REGARDING MILK DOMINANCE OR POWER SHOULD BE EXCLUDED.

Next, defendants assail Cotterill's opinion that DFA had an economic incentive to conspire with Dean to lessen competition by weakening NDH. Defendants argue that a "key element" in this particular opinion of Cotterill is DFA's dominance in raw milk sales, and that Cotterill failed to do any analysis of whether DFA had gained monopoly power.

Defendants' argument is vanishingly thin. It is *defendants* who suggest that DFA must have had monopoly power to have had any motive or incentive to aid Dean; Cotterill never so stated. And, in fact, one would not necessarily have to believe that DFA had actually achieved a monopoly before rationally concluding that DFA had a financial motive to aid Dean in limiting competition.

Like most of the other *Daubert* motions, it is a matter for cross examination and the presentation of contrary proof.

V. PROFESSOR COTTERILL'S OPINIONS ABOUT WHETHER DEFENDANTS ACTED CONSISTENTLY WITH THEIR SELF-INTERESTS SHOULD BE EXCLUDED.

Lastly, defendants seek to exclude Cotterill's opinions regarding whether defendants acted inconsistently with their unilateral self-interests on the basis that (1) he did no economic analysis, and (2) he undertook to interpret information or data supplied to him by

subordinates or assistants, the accuracy of which he cannot personally confirm.

Defendants' argument that Cotterill should have personally read tens of thousands of documents, rather than relying upon assistants to read and paraphrase them for him, is unrealistic; at the most, it is a matter for cross examination and ultimately a question of the weight to be given his opinion.

As for the alleged lack of economic analysis, defendants' argument is well-taken. In paragraphs 85-88 of his report, Cotterill discusses his conclusions regarding the data and circumstances set out in most of the preceding 84 paragraphs. There is nothing improper relying upon facts which he assumes to be true in formulating his opinion. But, that opinion must be both relevant and admissible. The court is not unmindful that an expert's opinion is not objectionable because it embraces an ultimate issue to be decided by the jury, but Professor Cotterill is not expressing an opinion that embraces the ultimate issue. As can be seen by paragraphs 47-49 of his report, he summarizes hotly-contested underlying factual issues which will do nothing to help the jury to understand the evidence or to determine those facts. In short, as defendants suggest in this particular regard, Professor Cotterill is doing nothing more than summarizing evidence as the *alter ego* of the plaintiffs' lawyers. Stated another way, this aspect of Cotterill's report is not "opinion" at all, and he should not be allowed to testify thereto.

CONCLUSION

Defendants' motion, (Doc. 1084), is denied, with the exception that Professor Cotterill should not be allowed to merely recite factual conclusions as described immediately above.

SO ORDERED:

s/ Dennis H. Inman
United States Magistrate Judge