UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF TENNESSEE
AT GREENEVILLE

FOOD LION, LLC, FIDEL BRETO, d/b/a FAMILY FOODS, ON BEHALF OF THEMSELVES AND THE CLASS OF ALL OTHERS SIMILARLY SITUATED,	)	
Plaintiffs,	)	
v.	)	No. 2:07-CV-188
DEAN FOODS COMPANY, DAIRY FARMERS OF AMERICA, INC., and NATIONAL DAIRY HOLDINGS, LP,	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

This matter is before the Court on the motion of plaintiffs to exclude the opinions of Dr. Joseph P. Kalt, regarding common impact, [Doc. 760]. Defendants have responded, [Doc. 774], and and plaintiffs have replied, [Doc. 777]. Plaintiffs seek to exclude Dr. Kalt's opinions pursuant to *Daubert v. Merrill Pharmaceuticals, Inc*., 509 U.S. 579 (1963) and Federal Rule of Evidence 702. For the reasons which follow, the motion is DENIED.

I.

Before addressing the specific issue raised by the motion, the Court will make two general observations about plaintiffs' pleadings, both the motion itself and the reply. First, lawyers and judges live and work in a time in which Americans distrust lawyers and the judicial profession, including the courts, to a greater degree than ever before. Indeed, the public has generally more negative than positive views of class action lawsuits and the lawyers who handle them. Chief Justice Roberts, in his year-end report, refers to a federal litigation system that has

grown "too expensive, time-consuming, and contentious," and one where lawyers "have an obligation to their clients, and the justice system, to avoid antagonistic tactics, wasteful procedural maneuvers, and teetering brinksmanship."

Lawyers have never been particularly well-liked, largely because of the very nature of an adversarial system. Almost everyone is familiar with the line from William Shakespeare's Henry VI: "The first thing we do, let's kill all the lawyers," which may actually have been, contrary to its apparent facial meaning, a reference to corrupt, unethical lawyers, not that that matters to the public perception; or Thomas Jefferson's complaint about a Congress composed of 150 lawyers "whose trade it is to question everything, yield nothing, and [talk or write] by the hour;" or maybe Oliver Wendell Holmes, Jr.'s quip that "lawyers spend a great deal of their time shoveling smoke." In some quarters, lawyer bashing has become quite fashionable. Against this backdrop, lawyers should fastidiously avoid doing or saying anything to bring public scorn upon the profession, while at the same time zealously representing their clients.

The lawyers in this case are experienced and well-qualified and have conducted themselves before this Court in a professional manner. They are members of nationally known and reputable law firms. That said, the tone and content of plaintiffs' pleadings on the issues before the Court are all the more surprising. Legal pleadings are no place for demeaning and derogatory comments, personal insults, or dilatory tactics. They bring public scorn on the legal profession and the judicial system. Unfortunately, that is the nature of plaintiffs' pleadings here. Plaintiffs' motion is personally insulting to Dr. Kalt, contains demeaning language, appears to mischaracterize and misrepresent the record of the case, and probably should be denied for that reason alone.[1] Dr. Kalt was an economics professor at Harvard for more than 30 years and was

[1] These pleadings are written in a tone that suggests a lack of respect for the courts as well. Plaintiffs seem to think the Court can be swayed by insults, sarcasm, and name calling of their opponents, and that the Court will not read or

the Ford Foundation Professor Of International Political Economy at the John F. Kennedy School of Government. He was educated at Stanford University and UCLA; he holds a Ph.D. in economics.

Plaintiffs refer to Dr. Kalt and his work as "unprofessional," his opinions as "canned," "cut-and-paste," and "invent[ed] out of thin air," his approach as "unscientific, results-oriented," and plaintiffs accuse Dr. Kalt of "attempting to mislead the Court," of being "biased," of using "statistical slight of hand," and "illusions," and of being "[un]qualified." While describing Dr. Kalt as "a professional expert witness who has reaped millions of dollars[2] by offering the same canned opinions against class certification on behalf of defendants in courts throughout the country," plaintiffs describe their own retained expert, Dr. Ronald W. Cotterill, as giving "unrebutted testimony . . . regarding the realities of how pricing actually works in the industry based on his own unique and specialized expertise as a dairy farmer,[3] milk price regulator,[4] and accomplished milk industry academic and consultant." Plaintiffs have used demeaning language to describe defendants' expert witness and glowing language to describe their own likely equally well-paid expert. Plaintiffs appear to have engaged a procedure apparently popular in presidential politics today: rather than address the issues in a straightforward manner on the merits, they have chosen to resort to name calling, personal attacks, and insults in an attempt to

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review the underlying record. Because of this, this Court has spent many unnecessary hours looking at documents and transcripts to check the representations in these pleadings. This Court would much prefer that pleadings address the issues in a straightforward manner without misstating or mischaracterizing testimony; in other words, with candor. Not only does this Court prefer that approach, The Rules of Professional Conduct require it.

[2] There is no citation to the record for this claim by the plaintiffs and the Court cannot find such information in the record. Perhaps this is just hyperbolic over-the-top language employed by plaintiffs in the heat of battle.

[3] Dr. Cotterill testified that he was born and raised on a dairy farm and that his family had been in the dairy business since the "settling of upstate New York." Dr. Cotterill no doubt worked on his parents' farm as a young man, but was admitted early at Cornell during his senior year of high school.

[4] Dr. Cotterill has worked as an economic consultant to the Office of Milk Industry Regulation for the Commonwealth of Puerto Rico and developed an economic framework for analyzing the supply and demand of fresh milk. Using that framework, Dr. Cotterill set prices for retail, wholesale, and raw fresh milk, under the supervision of the federal district court.

obfuscate the issues, likely because of their own doubts about the merits of their position. The only thing missing at this point is a threat by plaintiffs to sue Dr. Kalt because of his opinions. In other words, plaintiffs have spent "a great deal of their time shoveling smoke." These tactics are not conducive to the peaceful and orderly resolution of disputes; rather they promote contentiousness in litigation, consume their opponents' time, as well as the Court's, needlessly, and increase the expense of litigation. They subject the legal profession to reproach and they detract from the merits of their clients' claims. The Court is not impressed.

Second, plaintiffs, throughout their motion papers, attempt to superimpose upon this case the opinions of two other federal district court judges in different cases, under different circumstances, about Dr. Kalt's work in those specific cases, without showing that Dr. Kalt's opinions are the same in this case or that the issues were the same in the other cases. While this Court does not personally know either Judge Cote or Judge Reiss, it is certain that both are fine federal judges. This Court will not second-guess either on good faith decisions made on the basis of the unique facts of the particular cases assigned to them nor will it even remotely re-litigate issues peculiar to those cases. The Court does note that most federal trial judges, including the undersigned, are "generalists," with a wide range of backgrounds and experiences, who lack specialized training on most of the matters expert witnesses testify upon, including economics. The Court also notes that it is certainly possible, maybe even likely, that two judges assigned to different cases, in different circuits and under different circumstances, may, in the exercise of discretion, reasonably come to different conclusions. Such is the nature of judging. Where it is shown by plaintiffs that the relevant opinions of Dr. Kalt and the relevant circumstances are the same, the Court will consider, but is not bound by, the decisions of these other district court judges, who of course sit in different districts and different circuits. In

addition, throughout their reply, plaintiffs have repeatedly accused defendants of "ignor[ing] Judge Cote's decision on this very issue" without making an attempt to explain why Judge Cote's reasoning applies to the issues in this case. In reality, plaintiffs have it backwards and improperly attempt to shift the burden to defendants. It is plaintiffs' burden to show ***why*** Judge Cote's reasoning ***does*** apply by reference to specific testimony and record evidence in ***this*** case, not the reverse. Without this, the decisions or criticism of another judge are simply that and have no relevance to this case.

II.

The admissibility of expert testimony is governed by Federal Rule of Evidence 702 and informed by *Daubert v. Merrill Dow Pharmaceuticals, Inc*., 509 U.S. 579 (1993), and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999). The trial court is entrusted with insuring that expert testimony is "not only relevant, but reliable," *Kumho Tire*, 526 U.S. at 147, and must ensure that the testimony has a "basis in the knowledge and expertise of" the expert's discipline and that the expert exhibits "the same level of intellectual rigor" expected of an expert outside the courtroom. *Id.* at 149, 152. This requirement is generally referred to as the court's "gatekeeping" responsibility. *Daubert*, 509 U.S. at 597.

Rule 702 requires an expert witness to satisfy four conditions before being allowed to offer an opinion: (1) The expert's scientific, technical, or other specialized knowledge must help the trier of fact understand the evidence or to determine a fact in issue; (2) the testimony must be based on sufficient facts or data; (3) the testimony must be the product of reliable principles and methods; and (4) the expert must reliably apply the principles and methods to the facts. Fed. R. Evid. 702.

III.

1. Is Dr. Kalt's "common impact" opinion legally irrelevant?

Plaintiffs make several arguments that Dr. Kalt's opinions are legally irrelevant: (1) That the Sixth Circuit's determination that Professor Cotterill's model was sufficient to get the case to the jury on the question of impact for the named plaintiffs "applies with equal force to the rest of the class" (in other words, that the question of common impact for class certification purposes has already been decided) and that Dr. Kalt has made an "end-run" around the Sixth Circuit's opinion; and (2) that Professor Kalt's opinion on common impact is predicated on a misunderstanding of the proper legal standard.

In In re *Se. Milk Antitrust Litig*., 739 F.3d 262 (6th Cir. 2014), the Sixth Circuit reviewed this Court's prior grant of summary judgment on the issue of antitrust injury/impact, reversed, and found that Professor Cotterill's model provided sufficient evidence of injury to create a genuine issue of material fact and submit the case to the jury, stating:

> 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 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.... This is precisely the kind of injury that the Sherman Act was designed to prevent . . . .

Id. at 285-286 (citations omitted). Accordingly, the Sixth Circuit found that summary judgment was not warranted in the case. What the Sixth Circuit most assuredly did not decide, however, is whether Professor Cotterill's methodology can also be used to establish that other class members were similarly impacted, i.e., to show common impact, for class certification purposes. In fact, although reluctant to do so, counsel for plaintiffs acknowledged during oral argument that while,

on the question of class-wide injury, the Sixth Circuit's decision "goes a way to get us there," he could not suggest that the Sixth Circuit had already answered the question.

As for plaintiffs' claim that Dr. Kalt does not understand the appropriate legal standard of common impact and that his "failure to offer an opinion that fits with the appropriate standard of common impact renders his opinion irrelevant to the question at hand at best and outright misleading at worst," plaintiffs have mischaracterized Dr. Kalt's deposition testimony and ignore the limitations contained in the questions asked by plaintiffs' counsel. The Court can find nothing in that deposition testimony or the record of the case to suggest that Dr. Kalt has employed the wrong standard. Setting aside the inflammatory language used by plaintiffs here, their argument fails for a more basic reason. The essence of their plaintiffs' is that the testimony of Dr. Kalt should be excluded because Dr. Cotterill has opined that 99.9% of class members were impacted. This is an improper invitation to the Court to believe one expert's opinion over another and exclude the opinion with which it disagrees. The Court agrees with Magistrate Judge Inman's previous observation that "plaintiffs fault Professor Kalt for not agreeing with their experts." [Doc. 623 at 3]. *See In re Scrap Metal Antitrust Litig.*, 527 F.3d 517, 529 (6th Cir. 2008) (The court may not exclude an "expert's testimony on the ground that the court believes one version of the facts and not the other.") (quoting Federal Rule of Evidence 702 advisory committee's note, 2000 amend.).

Finally, plaintiffs' claim that Dr. Kalt analyzed impact at the transaction level rather than the customer level is difficult to understand. Dr. Kalt used the same data and the same model used by Professor Cotterill to conduct his testing, analyzing data at the "customer-product-facility level in each zip code" because that is the way Professor Cotterill constructed his model. In other words, Dr. Kalt does not analyze the data using any different methodology from that

employed by Professor Cotterill; he simply comes to a different conclusion, i.e. that Professor Cotterill's model is not capable of measuring classwide impact. While the Court is certain that plaintiffs would like to limit any criticism of Professor Cotterill's model or his conclusions, Dr. Kalt's attack on each is quite relevant.

2. Dr. Kalt's Pricing Structure Opinions

Plaintiffs note that the existence of a pricing structure in an industry is often used to establish common impact but that "[t]hroughout his career, a key feature of Dr. Kalt's 'playbook' has been to claim[5] that no pricing structure exists in any of the industries he has studied because they are all characterized by substantial price dispersion and churning." [Doc. 761 at 14]. Plaintiffs point to Judge Cote's "thorough review of Dr. Kalt's standard" and Judge Cote's criticism that Dr. Kalt's methodology creates a false '"impression of a disordered market place with so much churning and dispersion that no model . . . can be relied upon to calculate the damages attributable to the conspiracy."' [*Id*. (quoting *In re Electronic Books Antitrust Litig.* 2014 WL 1282298, at * 8 (S.D.N.Y., Mar. 28, 2014)]. Except for a conclusory claim that "Dr. Kalt relied on the same flawed methodology, including many of the same type of charts that were excluded in *eBooks*,"[*id*. at 15], plaintiffs do not make any attempt to establish that the methodology used by Dr. Kalt is in fact the same as was used in *eBooks* or that the circumstances in which he gave his opinion are the very same. As a result, as set forth above, the Court does not find Judge Cote's comments to be helpful here.

Plaintiffs do make some more specific criticisms of Dr. Kalt's opinions. First, they argue that his opinions are based on a "perfect correlation" standard no court has ever adopted; second, that Dr. Kalt employs a "blinders" approach to the realities of the milk industry and the evidence in the record; third, that Dr. Kalt designed his analysis to give the appearance of churning where

[5] Plaintiffs do not cite to the record in this case for this claim.

none exists; and fourth, that Dr. Kalt's correlation analyses are biased and flawed. The Court will address each of these in turn.[6]

Plaintiffs claim that "Dr. Kalt *typically* presents charts in support of his standard pricing structure analysis that are premised on the notion that a pricing structure can only exist when prices move together on each and every transaction at the customer-product-facility level," [Doc. 761 at 15] (emphasis added), and "is attempting to mislead the court in this case by imposing the same faulty standard of perfect correlation" criticized by Judge Cote in *eBooks*. Citing figures 7-12 of Dr. Kalt's presentation, all of which "purport to summarize prices at the customer-product-facility level and suggest that the presence of some prices moving in opposite directions or that do not move perfectly in lockstep," [*id*. at 15-16], plaintiffs argue that Dr. Kalt uses a flawed methodology to infer that a pricing structure does not exist and his testimony should be excluded as irrelevant and misleading.

Defendants respond that Dr. Kalt's opinions are not based on a perfect correlation standard. Dr. Kalt discusses figures 7-12 in paragraphs 30-39 of his April 16, 2015 report. Dr. Kalt concludes that "testing of Professor Cotterill's data finds large numbers of negative, no, or not statistically significant positive correlations among the numerous prices paid by individual class members for purchases of the individual milk products from the plants that serve them." [Doc. 719-1 at ¶ 36]. He concludes from his examination of Professor Cotterill's data that these "results are markedly inconsistent with Plaintiffs' asserted order 5 & 7-wide, class-wide 'ripple effect.'" [*Id*. at ¶¶ 36, 39]. Defendants are correct that Dr. Kalt does not appear to employ a "perfect correlation" standard anywhere in his report. Plaintiffs may of course examine Dr. Kalt

[6] Once again, when all the attempts to superimpose Judge Cote's findings from the *eBooks* case are stripped away, there is little of substance to plaintiffs' arguments.

about these and other matters but this goes to the weight to be given to his opinions, not their admissibility. His opinions are neither misleading nor irrelevant.[7]

Plaintiffs' second criticism of Dr. Kalt's testing is that he adopts a "blinders" approach to the realities of milk industry pricing and ignores record evidence. Once again plaintiffs, without appropriate citation or reference to the record in this case, seek to impermissibly import the decisions of Judge Cote and Judge Reiss into the unique circumstances of this case and make the conclusory allegation that Dr. Kalt "adopts the exact same 'blinders' approach here." Essentially, plaintiffs argue that Dr. Kalt ignored two types of testimony—the testimony of a senior Dean executive that a "pricing structure" existed in the milk industry and Dr. Cotterill's testimony regarding the "realities of how pricing actually works in the industry based on his own unique and specialized expertise as a dairy farmer, milk price regulator, and accomplished milk industry academic and consultant." [Doc. 761 at 18].

As noted above, the Court may not exclude an expert's opinion just because the Court finds an opposing expert to be more credible. And, there certainly is no basis for excluding an expert's opinion just because its opponent believes the testimony of its expert to be more credible. Dr. Kalt's opinion is just that, an opinion which a trier of fact will be free to accept or reject. His expert credentials are only one factor the jury may consider in deciding how credible the testimony is and again goes to its weight, not its admissibility. Nor does Dr. Kalt's lack of experience as a dairy farmer or milk price regulator make him unqualified to give his opinion. This is a classic battle of experts and neither *Daubert* nor any of the thousands of cases applying it provide any support for plaintiffs' apparent position that the Court should exclude the testimony of an expert witness because another's opinions are more credible.

[7] This is another example of plaintiffs' use of over-the-top language. Indeed, it is plaintiffs who have mischaracterized Dr. Kalt's opinions by their improper reference to the *eBooks* case and it is plaintiffs who have attempted to mislead the Court.

Likewise, the testimony of Rick Fehr, to the extent not considered or unimportant to Dr. Kalt, simply goes to the weight of Dr. Kalt's testimony. Plaintiffs are free to cross-examine Dr. Kalt vigorously on his apparent lack of consideration of the Fehr testimony. Most importantly, however, the testimony of Fehr does not necessarily provide a basis for the conclusion plaintiffs have drawn from it.[8] Defendants claim that plaintiffs have taken Fehr's testimony out of context and mischaracterized it and assert that Fehr, responding to a question about the impact of lowering the price to a national Dean customer, "simply made the common-sense and the unremarkable point that a pricing concession given to a national account would likely lead other customers to demand similar concessions." [*See* Doc. 721 at 11-12]. Whether the testimony provides a basis for a finding of impact/injury is a factual one to be made by a factfinder after considering the competing inferences that may be drawn from the testimony.

Plaintiffs' next criticism of Dr. Kalt's opinions is that "Dr. Kalt's churning analyses are specifically designed to create the appearance of churning where no churning exists." Once again, plaintiffs point to figures 7-9 from Dr. Kalt's report and allege that Dr. Kalt's churning analysis is a "standard tool" used by him "to create the illusion of a chaotic and disordered marketplace."[9] In an argument heavy with references to Judge Cote's *eBooks*'s opinion, plaintiffs argue, once again in conclusory fashion, that "Dr. Kalt's churning analysis in the case suffers from a very ***similar*** defect," [Doc. 761 at 20] (emphasis added), in that he "uses a monthly cut-off for his churning analysis, but he once again makes no attempt to account for the date and timing of price changes in the real world or to consider how potential lag effects may affect his analysis." [*Id.*]. Citing only Dr. Cotterill's rebuttal report for support, plaintiffs' argument contains no other citation to the record.

[8] Plaintiffs refer to Fehr's testimony as "unequivocal and unrebutted." The Court does not agree with that characterization.

[9] Once again, plaintiffs have not cited to specific parts of the record in support of this allegation.

Although plaintiffs do not further develop their argument about Dr. Kalt's analysis, it appears to the Court that the argument made about Dr. Kalt's monthly cut-off in prices is not unique to Dr. Kalt's methodology but is precisely what Professor Cotterill does as well. The Court agrees with defendants that plaintiffs' criticism in this respect again goes to the weight to be given to Dr. Kalt's opinion, not its admissibility. Plaintiffs simply seek through this motion to have the Court accept Professor Cotterill's opinion to the exclusion of Dr. Kalt's. The vast differences in pricing shown by Dr. Kalt's testing of Dr. Cotterill's own monthly data is relevant and admissible on the reliability of the model itself.

Professor Cotterill uses a hypothetical in his rebuttal report to illustrate plaintiffs' objection to Dr. Kalt's calculations. In the hypothetical, two customers purchase the same product on the first and last day of each month. They each pay $10 for each of their January purchases and the first purchase in February but the price increases to $20 and the increase goes into effect on the last day of February for the first customer and the first day of March for the second. The average price paid by the first customer in January is $10 and $15 in February. The average price for the second customer is $10 in both January and February because his price increase took place one day later than that of the first customer. Dr. Kalt's calculations find a positive price change for the first customer and a negative price change for the second. [Doc. 772-1 at ¶ 55]. Professor Cotterill's hypothetical, however, does not indicate that this accounts for the finding of Dr. Kalt that up to one-half of the prices in any given month were moving in the opposite direction from the rest of the prices in that month. The illustration, however, does suggest why the criticism goes to weight, not admissibility, and provides an opportunity for both sides to test through vigorous cross-examination or rebuttal testimony the opinion of both these hired experts.

Plaintiffs next argue that Dr. Kalt's analysis is "biased and deeply flawed." At least with this argument, plaintiffs cite Dr. Kalt's deposition testimony in the record in support of their claim that he used the same method of correlation analysis as in the *eBooks* case which Judge Cote found to "bias" the results. The argument otherwise is not developed. In any event, the deposition testimony cited does not clearly support plaintiffs' assertion and certainly does not support plaintiffs' over-the-top claim that Dr. Kalt uses artificial prices that he "invents out of thin air." Plaintiffs also criticize Dr. Kalt's use of the national PPI[10] "to yield an artificial value that never existed in the real world." [Doc. 761 at 22-23]. This Court agrees with the previous observation of Magistrate Judge Inman that the issue raises a topic for cross-examination, not for exclusion of Dr. Kalt's testimony.[11] The Court found the oral testimony of both Professors Kalt and Cotterill less than convincing on some aspects of the basis for using or not using the national PPI in the analysis, underscoring the conclusion that plaintiffs' criticism of Dr. Kalt's opinions do not warrant exclusion but provide potentially fertile areas for all parties in cross-examination.

3. Is Dr. Kalt's Opinion That Professor Cotterill's Model Assumes Common Impact Demonstratively Fallt?

Plaintiffs describe Professor Cotterill's damages model as an "extremely robust multiple regression analysis," incorporating more than 13 different supply, demand, and competition variables, 7,783 fixed effects, and nearly 7,000,000 actual prices to analyze the conspiracy to "successfully explain 88% of the variance in pricing due to the conspiracy." They argue that Dr. Kalt "reaches into his bag of statistical tricks and pulls out his standard canard that Plaintiffs' model 'assumes common impact'" in criticizing Professor Cotterill's model. Without citations to the record, plaintiffs accuse Dr. Kalt of making "this exact same accusation in almost every case

[10] Producer Index Price

[11] This issue was raised by plaintiffs in their original motion to exclude the opinion of Dr. Kalt, [Doc. 559], and is the basis for their appeal, [Doc. 637], of the Magistrate Judge's order denying the motion, [Doc. 623]. By separate order, the Court has overruled plaintiffs' objection and affirmed Magistrate Judge Inman's order.

where he has testified on common impact in recent years."[12] Plaintiffs then once again super-impose inapposite language used by Judge Cote in another case without relating that language to the present case.

Plaintiffs conveniently ignore Professor Cotterill's own testimony about whether his model assumes common impact. Professor Cotterill's deposition testimony was that his "damages model was not designed . . . to prove common impact. The damages model was designed . . . on the predicate that common impact had been prove[n]." [Doc. 774 (exhibit B) at 25:15-20]. His rebuttal report contains the following: "My econometric model was designed to estimate class-wide damages after I had already established common impact." [Cotterill Rebuttal Declaration at ¶ 60]. Plaintiffs can hardly suggest that Professor Cotterill cannot be cross-examined by his own statements about impact nor can they reasonably argue that the same type of evidence cannot be offered by Dr. Kalt. All of this simply illustrates how the criticism of plaintiffs goes to the weight, not the admissibility, of Dr. Kalt's testimony.

4. Is Dr. Kalt's Opinion Regarding Nationwide Trends Affecting Milk Prices Inherently Reliable And Prejudicial?

Plaintiffs finally argue that Dr. Kalt has pulled from his "bag of statistical tricks [ ] to claim that the multiple regression model advocated by plaintiffs is missing a supposedly critical but conveniently amorphous variable." They then quote not from his report in this case but from his report in the *eBooks* case, and Judge Cote's opinion in that case. As set forth above, this is of little value to the Court. Plaintiffs do however, specifically criticize Dr. Kalt's opinions that Professor Cotterill omitted from his model a variable for "nationwide factors affecting milk prices," something that can be measured by the national PPI for milk. Yet, they say, Dr. Kalt has

[12] For this allegation, plaintiffs cite the declaration filed by Dr. Kalt in some of the cases where he reached the same conclusion but do not make an attempt to show that the circumstances in those cases were the same as those in this case.

not "analyzed or tested" any of these factors "as required by Rule 702." They argue instead that he simply relied on a *Google* search to identify these factors, a source insufficiently reliable to be admissible. Furthermore, they claim Dr. Kalt has not considered whether Professor Cotterill's model may already account for these variables and that he relies "on speculation as a substitute for analysis to reach a pre-determined result." They acknowledge that defendants may cross-examine Professor Cotterill on any of these subjects but they "do not need Kalt in order to do so."

The Court agrees with the defendants that plaintiffs apparently misunderstand that Dr. Kalt's opinion is that the PPI itself is the variable for which Professor Cotterill failed to account in his model. Defendants argue that Dr. Kalt did in fact test Professor Cotterill's model and found that accounting for the national PPI eliminates the "overcharges" found by Professor Cotterill. Professor Cotterill has acknowledged as much with his own testing. The Court disagrees with plaintiffs and finds that Dr. Kalt's testimony comports with the requirements of Rule 702. Once again, plaintiffs' objections go to the weight, not the admissibility, of the testimony. Both sides may extensively cross-examine the other on these matters.

5. Does Dr. Kalt Misidentify Transactions As "False Positives"?

Once again, when plaintiffs' argument here is stripped of all its irrelevant references to the *eBooks* case, it is relatively straightforward. The primary "false positive" is the allegation that Food Lion could not have suffered any injury because most of its purchases of processed milk were pursuant to a negotiated formula[13] -- a proposition, according to plaintiffs, adopted by Dr. Kalt without any empirical work himself. Plaintiffs cite Judge Cote's holding that Dr. Kalt was "required to perform some economic analysis" to comply with Rule 702. Plaintiffs, however, mischaracterize once again Dr. Kalt's deposition testimony on the subject and the

[13] The Court will discuss this issue more fully in its order on plaintiffs' class certification motion.

record establishes that, according to Dr. Kalt, he did in fact do some economic analysis. Once again, plaintiffs ask the Court to credit their expert and reject defendants' expert. The Court declines to do so. That is a matter for the jury.

III.

For the reasons set forth herein, plaintiffs' motion to exclude the opinions of Dr. Joseph P. Kalt regarding common impact, [Doc. 760], is DENIED.

So ordered.

ENTER:

s/J. RONNIE GREER
UNITED STATES DISTRICT JUDGE